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One of the most troublesome complexities of a federal system is the necessity of deciding upon the separate competencies – and resolving conflicts between the separate competences – of the federal government and the separate component states. As Europe is on the verge of experimenting with federalism, it may profit from the experience of the United States.

1.

As you know, in the United States, the federal government derives all of its authority from a document, only a few pages long, written over 200 years ago. The powers possessed by the federal government are limited to those enumerated in that constitution. The founders vested the federal government with important powers, most of which are listed in Article I, § 8 of the Constitution. For example, the federal government has been given the power to collect taxes, to borrow money, and to coin money. One power vested in the federal government warrants particular notice for our purposes: the constitution confers upon the federal government the power to “regulate Commerce ... among the several States.” This provision, known as the “Commerce Clause,” has become the most important of the federal government’s domestic powers, justifying virtually all of its economic regulations, not to mention its criminal laws and civil rights laws. Moreover, the federal government’s power to regulate interstate commerce has been at

the centre of many controversies regarding the power-sharing arrangement between the federal government and the several states.

One of these controversies has been whether the constitution's conferral of a particular power upon the federal government means that the federal government holds that power exclusively, or, instead, that the several states exercise that power concurrently with the federal government. In some instances, the constitution clearly made the federally conferred power exclusive. For example, Article I, § 10 explicitly prohibited the several states from entering into treaties and from coining money. In other instances, however, the constitution neither explicitly prohibited the several states from exercising the same power it conferred upon the federal government, nor explicitly provided that the several states retained concurrent power. One of these instances is the Commerce Clause: the constitution says that the federal government can regulate interstate commerce, but does not say whether the states can continue to do so as well.

As I have written,¹ I do not believe that the constitution's intent to leave the states' concurrent power to regulate interstate commerce can reasonably be denied: the text and the history of the document show that it was not meant to exclude such regulation. For one thing, it would be strange to read a document that in some instances explicitly prohibits the states from acting concurrently, to prohibit as well the concurrent exercise of powers that were not so limited. Second, the founders considered a competing draft of the constitution that did confer the power to regulate interstate commerce exclusively upon the federal government, but they did not adopt this version.²

Despite the lack of evidence that the Commerce Clause was meant to strip states of their power to regulate interstate commerce, many argued in favour of that proposition from the very beginning. For example, in the First Congress, members supporting a bill to build lighthouses on the Eastern seaboard argued that, not only could Congress build lighthouses, but that only Congress could build them.³ Similarly, in the Fourth Congress, members supporting a bill to involve the federal government in the quarantining of foreign ships argued that only the federal government could enforce quarantine regulations.⁴

Perhaps even more surprising is the encouragement this view received from my Court. Through the first half of the nineteenth century, Supreme Court opinions expressed the view that only the federal government could pass laws regulating interstate commerce. As early as 1824, in the celebrated case of *Gibbons v. Ogden*, one Justice went on record in favour of voiding a state law because it regulated interstate commerce.⁵ The state law in question granted a monopoly to operate steamboats in the waters of New York to a single company. Although a majority of the Court did not vote to invalidate the state law because it regulated interstate commerce, the majority opinion, written by one of the most celebrated Chief Justices in the history of the United States, John Marshall, nonetheless endorsed this argument.⁶

For over two decades following *Gibbons*, many other Justices endorsed the view that the federal government held exclusive power to regulate interstate commerce, but never did we dispose of a case on that reasoning.⁷ It was not until the latter half of the nineteenth century that a majority began to coalesce around a resolution. In the celebrated case of *Cooley v. Board of Wardens*,⁸

we arrived at the novel conclusion that the Commerce Clause sometimes gave the federal government exclusive power to regulate commerce and sometimes did not. We said it all depended on the nature of the regulation: the federal government had exclusive power to regulate those things that, by their nature, demanded uniform regulation, and the states had concurrent power to regulate those things that did not.⁹ The regulation at issue in *Cooley* was a state law requiring ships entering or leaving state ports to engage a local pilot as a guide. We concluded that, the nature of piloting being what it is, this type of regulation did not demand uniformity, and, therefore, the state law was valid.

Although introduced in 1852, the *Cooley* doctrine was not used to invalidate a state law until 1873.¹⁰ And, although the contours of the line between those things that, by their nature, demand uniform regulation and those that do not has shifted over the years since *Cooley*, the gist of the formulation is still with us today.¹¹

This doctrine that the constitution prohibits the states from regulating some forms of commerce has come to be known as the doctrine of the “negative Commerce Clause” or the “dormant Commerce Clause” – presumably because it rests upon a negative inference from the Commerce Clause, and constitutes a prohibition that does not actively appear, but rests dormant in the operative text.¹² I consider it to be the product of judicial invention rather than sound constitutional interpretation. And the proof of that proposition is the peculiar fact that my Court’s (supposedly) constitutional determinations under the negative Commerce Clause are the only constitutional determinations that we have held to be reversible by Congress. We have permitted Congress, for

example, to except the business of insurance from the negative-Commerce-Clause restrictions our decisions have imposed on other businesses, enabling the states to regulate that industry in a manner that discriminates against out-of-state insurers.¹³ But if the dictates of the negative Commerce Clause were really constitutional imperatives (the only legitimate basis for my Court's imposing them) how could Congress accord dispensations? (Congress has no power, of course, to suspend the constitution.) It seems clear, therefore, that the negative Commerce Clause is not a constitutional command, but a sort of judicial presumption regarding congressional intent, which can be overcome by an explicit congressional statement to the contrary. But "presuming" the existence of laws that have never been enacted is certainly an odd judicial activity.

The modern contours of the negative Commerce Clause lead to the invalidation of two types of state laws. First, my Court has held that state laws which discriminate on their face against out-of-state commerce are unconstitutional, virtually irrespective of any state interests proffered on their behalf.¹⁴ We have, for example, struck down state laws prohibiting the importation of out-of-state waste,¹⁵ and state laws taxing the storage of out-of-state waste at a higher rate than in-state waste.¹⁶ We have also repeatedly invalidated state laws requiring raw materials to be processed locally before they can be shipped out of state.¹⁷ We have even extended this doctrine to strike down facially discriminatory laws enacted by localities within a state.¹⁸

My Court has often justified this prohibition of discriminatory state economic regulation by invoking free market principles (condemning protectionism),¹⁹ and democratic theory (invoking the need to protect those who have no

political recourse against the laws of a neighbouring state).²⁰ I have no doubt that this “discriminatory state laws” branch of our negative Commerce Clause jurisprudence reaches a proper result, though I would prefer to rest it not upon such policy grounds (sound though they may be), but upon the provision in our constitution which prohibits states from discriminating against out-of-state citizens.²¹

The second type of state laws we have invalidated under the negative Commerce Clause are those that fail a complicated balancing test set forth in 1970 in the case of *Pike v. Bruce Church, Inc.*²² That opinion invalidated a state law because “the burden [it] imposed on [interstate] commerce [was] clearly excessive in relation to the putative local benefits.”²³ The state law in question was an Arizona law that required cantaloupes grown in the state to bear the state of origin on each package. It was not a law that discriminated against out-of-state companies; all exporters of cantaloupes from Arizona, whether Arizonans or New Yorkers, had to comply. We concluded, however, that “the State’s tenuous interest in having the company’s cantaloupes identified as originating in Arizona cannot constitutionally justify that the company build and operate an unneeded \$200,000 packing plant in the State.”²⁴ I am assuredly opposed to laws that generate more “costs” than they do “benefits.” But the notion that judges, rather than legislators, should decide whether Arizona’s interest in letting people know it is a great place to grow cantaloupes outweighs a company’s interest in avoiding construction of a \$200,000 processing plant strikes me as bizarre. I know nothing about how much it will benefit Arizona to have consumers nationwide know that the best-tasting cantaloupes come from there; and I know little about the commercial

burden of constructing a processing plant in Arizona rather than elsewhere. And even if I knew a lot about both subjects, it does not strike me as an exercise in legal reasoning to “balance” the one against the other. As I have written, “the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”²⁵ In short, it seems to me a political and economic question whether advertising the Arizona origin of cantaloupes is more important than avoiding the expense of an Arizona processing plant. Congress can decide such a question – and if it did, its affirmative power to regulate interstate commerce would enable it to prohibit such laws as Arizona’s. But that is not in my view – even apart from the text of the constitution – an appropriate question for a judge. In any event, my dissenting views notwithstanding, the *Bruce Church* “balancing test” is a continuing part of our negative Commerce Clause jurisprudence.

2.

I have thus far been discussing the question of when the states have concurrent authority with the federal government, with particular reference to the regulation of interstate commerce. I now turn to the question of how we have gone about reconciling concurrent state and federal authority when the exercise of that authority appears to conflict. Concisely put, if both the federal government and the state governments wish to enact laws regulating the same activities of their citizens, then whose laws prevail and when? The word usually applied to this question is “pre-emption” – as in “when does federal law pre-empt state law?”

The answer to the first question – whose laws prevail – is clearly provided by Article VI, clause 2 of the Constitution. This provision, known as the Supremacy Clause, states: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” So there you have it: when the federal government passes a law pursuant to one of the powers conferred upon it by the constitution, that prevails over any state law “to the contrary.” The original understanding of the Supremacy Clause is a bit less controversial than that of the negative Commerce Clause; pre-emption was applied by my Court to strike down a state law as early as the celebrated case of *Gibbons v. Ogden*, which I discussed earlier.²⁶

As I am sure you can imagine, the simplicity of the constitutional text “to the contrary” has not prevented my Court from developing a series of complex doctrines to answer the second question: when do federal laws pre-empt state laws? At their core, however, these doctrines all seek to answer the same enquiry: what did the federal law intend?²⁷ This is the central enquiry in pre-emption cases because, whenever Congress acts pursuant to one of its enumerated powers, it can pre-empt state law to whatever extent it likes.

Sometimes Congress makes the Court’s job easy by stating expressly in a statute whether and to what extent state law is pre-empted. This is known as “express pre-emption.” For example, in the 1992 case of *Morales v. Trans World Airlines, Inc.*, I wrote an opinion for the Court holding that several state regulations of airline advertising were expressly pre-empted by a federal statute that prohibited states from enacting or enforcing any law “relating to

rates, routes, or services” of any air carrier.²⁸ Because the state laws regulated airline price advertising, they “relat[ed] to rates,” and were pre-empted. In that case, Congress clearly set forth both that it intended the federal law to pre-empt state law, and which particular state laws it intended to pre-empt.

Rarely, however, is the task so easy, because rarely does Congress make both the fact and the extent of its intent to pre-empt explicit. My Court has, accordingly, developed several doctrines that recognise the implicit intent of Congress to pre-empt state law. First, and most understandable, is the doctrine that Congress implicitly intends to pre-empt those state laws that positively conflict with what it has decreed. The most obvious instance of so-called “conflict pre-emption” occurs when it is a “physical impossibility” to give simultaneous effect to both the federal and state laws.²⁹ In such circumstances, whether or not Congress was actually thinking about pre-emption of state law when it enacted the federal provision, the very effectiveness of the federal provision demands that state law be overridden. Because it is impossible to apply both laws at the same time, one must yield, and, under the Supremacy Clause, it is the state law. An example of this most basic form of conflict pre-emption is another case involving fruit – this time, oranges – called *Adams Fruit Co. v. Barrett*.³⁰ There migrant farmworkers, injured in an automobile accident while travelling to the orange grove in their employer’s van, sued for damages under the federal Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), which contained motor-vehicle safety requirements and provided a private cause of action for injuries resulting from failure to observe them. The employer claimed the protection of

the Florida workers' compensation law, which provided that the remedy to employees under that law would be exclusive. My Court had no difficulty concluding that, even if the Florida statute was intended to eliminate federal causes of action, it was pre-empted by the AWPAs.

A more subtle and more difficult to identify form of conflict pre-emption occurs when, although applying both the state and federal commands is not impossible, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³¹ One Supreme Court opinion exemplifying this form of conflict pre-emption involved a state-law negligence claim (actually, District of Columbia law, but the principle is the same) against an automobile manufacturer, for its failure to provide a driver's side airbag in the vehicle in which the plaintiff was injured.³² The conflict arose because the Federal Motor Vehicle Safety Standard for the relevant model year (promulgated by the federal Department of Transportation pursuant to statutory authority) required manufacturers to equip only 10% of their vehicles with passive restraints, none of which had to be airbags. If the state law of negligence held the manufacturer to an obligation to provide airbags in all cars, the manufacturer could still technically comply with both state and federal prescriptions – 100% airbags complies with at least 10% passive-restraints. The purpose of the 10% passive-restraint provision, however, was to enable gradual introduction of the new restraints, thereby lowering costs, overcoming technical safety problems, and inducing ultimate consumer acceptance; and the purpose of not requiring airbags in particular was to encourage experimentation with various passive-restraint options. These

purposes, we held, would be frustrated by a state law requiring 100% airbags, and the state law was therefore pre-empted.

To provide another example of how conflict pre-emption works, I may progress from cantaloupes and oranges to avocados. In 1963, my Court considered a case involving the regulation of avocados, *Florida Lime & Avocado Growers, Inc. v. Paul*.³³ You may not know this, but, if picked prematurely, an avocado will not ripen properly, and will tend to decay or shrivel after purchase, becoming all but inedible. Obviously, a near national disaster would have befallen the country if people were allowed to go around prematurely picking avocados, and therefore more than one sovereign government decided to regulate the harvesting of that fruit. First, the avocado-state of California got into the act by prohibiting the sale of any avocado picked unless it had an oil content of 8% by weight. Not to be outdone, the federal government instructed a federal agency to establish “minimum standards of quality and maturity” for avocados, and the agency promulgated regulations prohibiting the picking of avocados before a certain date, or before they reached a certain size and weight. The difficult question presented is clear for all to see: what would happen if an avocado grower picked an avocado that complied with federal regulations on date, size, and weight, but that still did not contain an 8% oil content? Could California keep the avocado off the market? Or was the California law pre-empted by the federal erection of maturity standards?

My Court sided with California. We held, first of all, that it was physically possible for a grower to comply with both regulations. Applying our well known expertise in horticulture, we observed that all the grower had to do was

“leav[e] the fruit on the trees beyond the earliest picking date permitted by the federal regulations,” until the oil content met the California standard.³⁴ We next confronted the question whether the California regulation of avocado maturity obstructed the purposes of the federal regulation. After all, if the federal government had certified an avocado as mature, who was California to second-guess it? We sided again with California. The California law did not impede the purposes behind the federal statute, because that statute, by its terms, sought only to establish “*minimum standards*” of avocado maturity.³⁵ Thus, there was no reason to think “compliance with minimum federal standards immunize[d] the [federally]-licensed commerce from ... more demanding state regulations.”³⁶

Besides conflict pre-emption, the other type of implied pre-emption recognised in our cases is called “field pre-emption.” This occurs when the nature and scope of Congress’s regulation in a particular field is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”³⁷ Sadly, I have run out of examples involving fruit, so, for an example of field pre-emption, I will use immigration. In 1939, Pennsylvania enacted a law which required immigrant aliens to register with the state each year, to pay an annual registration fee, and to carry at all times an identification card. Unsurprisingly, the federal government also had enacted regulations, indeed numerous regulations, regarding immigrant aliens, including registration requirements of its own. None of the federal regulations conflicted with the Pennsylvania registration law – neither in the sense that it was impossible to comply with both nor in the sense that the state law frustrated the purpose of the federal one. Nonetheless, in a 1941 case entitled

Hines v. Davidowitz,³⁸ my Court held that the Pennsylvania law was pre-empted because the federal scheme regulating immigrant aliens, of which the federal registration requirements were only a small part, was so “broad and comprehensive” that it displayed an intent to occupy the field. We have applied field pre-emption in other rare circumstances, such as safety regulation of nuclear facilities.³⁹

In addition to applying these doctrines of conflict and field pre-emption, we of course seek to determine the pre-emptive or non pre-emptive intent of federal law (for that is the ultimate touch-stone) through the traditional tools of statutory interpretation – looking to the text, structure, and purpose of the federal statute.⁴⁰ In that exercise, we have applied the reasonable presumption that Congress does not ordinarily mean to pre-empt state laws in areas traditionally occupied by the states alone – as, for example, family law,⁴¹ or local utility regulation.⁴² In such areas, we have said, the evidence in favour of intent to pre-empt must be “clear and manifest.”⁴³

If there are lessons to be learned from the brief summary I have provided, they are perhaps the following:

- Where both the federal government and the component states have competence in the same fields, it is critically important for the federative document to say which competence is supreme. The task of my Court would be enormously more difficult if we had to decide, when there is overlapping regulation, not only whether there is pre-emption, but also by which sovereign. (By reason of the Supremacy Clause, the answer in our system is always the United States.)

- As the example of the negative Commerce Clause illustrates, it is of great consequence which court – state or federal – gets to make the pre-emption decisions. It is a 100% certainty that judges appointed by the federal legislature or executive will, in the long run, resolve ambiguities (and perhaps even ignore some textual certainties) in favour of the power of the central government. Not only because they feel themselves to have a special attachment to the federal government, but also because judges who refuse to affirm federal power will tend to be replaced by judges who are eager to do so. (Those familiar with American legal history will recall that the Supreme Court's narrow interpretation of the federal government's commerce-clause powers was changed overnight to an expansive interpretation, after Franklin Roosevelt threatened to increase the size of the 9-member Court so that he could appoint new Justices who would make a majority to affirm federal power. Adapting the old English adage that "a stitch in time saves nine," legal wags have called this sudden conversion the switch in time that saved nine.)
- There is no substitute for clarity, both in the constitutional provisions pertaining to the separate competences (and the pre-emptive powers) of the state and federal sovereigns, and in the legislative provisions that deal with an area where pre-emption is a possibility. Leaving the outcome of conflicting rules to be decided by the speculations of a court regarding constitutional and statutory intent is – no matter how faithfully and expertly those speculations are conducted – not ideal.

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- ¹ *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part).
- ² Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 434 (1941).
- ³ David P. Currie, 1997. *The Constitution In Congress: The Federalist Period, 1789-1801*, 70 n.117.
- ⁴ *Id.* at 227 & n.179.
- ⁵ 22 U.S. (9 Wheat.) 1, 226-29 (1824) (Johnson, J., concurring).
- ⁶ *Gibbons*, 22 U.S. at 209.
- ⁷ David P. Currie, 1985. *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, 222-230.
- ⁸ 53 U.S. (12 How.) 299 (1852).
- ⁹ *Id.* at 319.
- ¹⁰ *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-80 (1873).
- ¹¹ Lawrence Tribe, 2000. *American Constitutional Law* 1048 (3rd ed.).
- ¹² *Compare Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995) *with id.*, at 200-01 (Scalia, J., concurring in the judgment).
- ¹³ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (interpreting the McCarran-Ferguson Act, 15 U.S.C. §1011, *et. seq.*).
- ¹⁴ *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). But see *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986).
- ¹⁵ *Philadelphia*, 437 U.S. at 629.
- ¹⁶ *E.g., Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 108 (1994).
- ¹⁷ *E.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Toomer v. Witsell*, 334 U.S. 385 (1948).
- ¹⁸ *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).
- ¹⁹ *E.g., Philadelphia*, 437 U.S., at 623-24.
- ²⁰ *E.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945).
- ²¹ *Tyler Pipe*, 483 U.S., at 265 (Scalia, J., concurring in part and dissenting in part) (citing the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, cl. 1).
- ²² 397 U.S. 137 (1970).
- ²³ *Id.* at 142.
- ²⁴ *Id.* at 145.
- ²⁵ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).
- ²⁶ *Gibbons*, 22 U.S. at 211-212.
- ²⁷ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("The question, at bottom, is one of statutory intent ...").
- ²⁸ *Id.* at 383.
- ²⁹ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

³⁰ 494 U.S. 638 (1990).

³¹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

³² *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

³³ 373 U.S. 132 (1963).

³⁴ *Id.* at 143.

³⁵ *Id.* at 148 (emphasis added).

³⁶ *Id.* at 141.

³⁷ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³⁸ 312 U.S. 52 (1941).

³⁹ *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

⁴⁰ *Morales*, 504 U.S. at 383.

⁴¹ See *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

⁴² See *Rice*, 331 U.S. 218.

⁴³ *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).