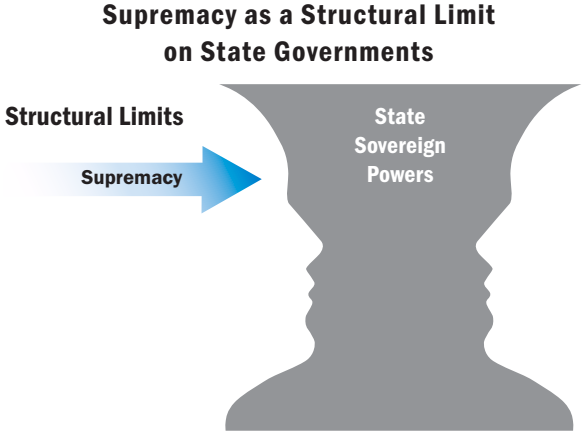
CHAPTER 13

Supremacy

The Supremacy Clause, Art. VI, § 2, declares that the US Constitution, the federal laws created through that Constitution, and US treaties with foreign nations "shall be the supreme law of the land," notwithstanding "any thing in the constitution or laws of any state to the contrary." The form the state law takes does not matter: a state statute, a state agency regulation, a state common law tradition, and even the state constitution are inferior to supreme federal law. When state and federal law conflict, federal law prevails. The tricky question is whether a conflict exists.



This chapter presents the two most frequently litigated topics involving the Supremacy Clause. *Preemption* occurs when state laws conflict with federal statutes. The *dormant commerce clause doctrine* relies on language in the Constitution to preempt state laws that impose undue burdens on interstate commerce, even in the absence of federal statutes.

flashback

Although they did not use the modern vocabulary, several cases from Part I involved federal supremacy.

In *McCulloch v. Maryland* (1819), the federal law creating the Bank of the United States preempted the Maryland statute seeking to impose a potentially crippling tax on that bank.

In *Gibbons v. Ogden* (1824), the federal statute through which Thomas Gibbons obtained a license for interstate passenger steamboats preempted the state law giving Aaron Ogden a monopoly over some of those routes. In dicta, the court's opinion considered whether the Constitution prohibits all state regulation of interstate commerce, a topic that is now analyzed under the dormant commerce clause doctrine.

In *Prigg v. Pennsylvania* (1842), the federal Fugitive Slave Act preempted inconsistent procedures from Pennsylvania's Personal Liberty Law.

A. Preemption

If Congress has enumerated power to legislate in an area, the positive law it enacts will preempt conflicting state laws. (To "preempt"—sometimes spelled with a hyphen, as in "pre-empt"—means to take the place of, override, or supersede.) State laws may conflict with federal ones in several ways, depending on the details of the relevant laws and the contexts in which they operate.

1. Kickstarter: Federal Preemption

DISCLAIMER: *This Kickstarter is a checklist to help identify relevant issues. It is not a list of elements. Nothing requires judges to write their opinions (or lawyers to write their briefs) in Kickstarter order.*

Federal Preemption kickstarter

USE WHEN: *A State law unduly conflicts with federal statutes or regulations.*

A. Express Preemption.

B. Implied Preemption.

1. Implied Conflict Preemption.

a. *Impossibility Preemption.*

b. *Obstacle Preemption.*

2. *Implied Field Preemption.*

KICKSTARTER USER'S GUIDE

The Supremacy Clause leaves no doubt that federal laws will outweigh inconsistent state laws. The challenge in preemption cases is to decide whether a state law is, in fact, inconsistent with a federal one. The Supreme Court has described several scenarios where this may occur, as summarized in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983):

> It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. [This is typically called *express preemption*.] Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it. . . . [This is typically called *implied field preemption*.] Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, [typically called *impossibility preemption* or sometimes *direct conflict preemption*], or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [typically called *obstacle preemption*].

Item A. *Express Preemption.* Whenever it legislates within its enumerated powers, Congress could choose to include a *preemption clause*—express language indicating how the federal statute will interact with state laws. For example, the Employee Retirement Income Security Act of 1974 (ERISA) expressly says, subject to some exceptions, that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Motor Carrier Act of 1980 expressly says, subject to some exceptions, that a state "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). These examples show that Congress may signal the intent to preempt state laws without using the magic word "preemption."

Congress may, if it wishes, express an intention *not* to preempt state laws. For example, the Federal Labor Standards Act of 1938 (the law upheld in *Darby*), creates a nationwide minimum wage. To remove any doubt about whether state or

local government had authority to set higher minimum wages, Congress included an express non-preemption clause (sometimes called a saving clause), which says that "no provision of this [Act] shall excuse noncompliance with any . . . state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this [Act]." 29 U.S.C. § 218(a).

As with any statutory language, a preemption or non-preemption clause might require case-by-case interpretation. For example, a large body of ERISA preemption cases consider whether particular state laws "relate to" an employee benefit plan. See, e.g., *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (state law terminating a spouse's entitlement to retirement benefits upon divorce is preempted), *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997) (state law requiring payment of prevailing wages by public contractors is not preempted); *Shaw v. Delta Air Lines,* 463 U.S. 85 (1983) (state law requiring employers to pay sick-leave to employees who miss work due to pregnancy is preempted in part and not preempted in part). If a preemption clause is not written clearly, it may result in confusion or split decisions. The Immigration Reform and Control Act of 1986, for example, expressly preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ" unauthorized aliens. 8 U.S.C. § 1324a(h)(2). Uncertainty over what counts as a law "similar" to a licensing law led to a 5–3 decision of the Supreme Court, where portions of the majority opinion were joined by only four justices. *Chamber of Commerce of US v. Whiting*, 563 U.S. 582 (2011).

Item B. *Implied Preemption.* When a state law is alleged to conflict with a federal statute in ways not resolved by an express preemption clause, a court must determine whether the statute, taken as a whole, implies that certain state laws should be preempted. This inquiry may involve the usual methods of reasoning: the statute's text and structure, any precedents interpreting it or similar statutes, the history leading to the enactment of the statute and the history of its earlier enforcement, the consequences of allowing the state law to operate, and the impact of the decision on important societal values.

Two matters of constitutional structure inevitably arise when a court decides an implied preemption case. First, preemption of state law by federal law reduces the autonomy of state government to pass the laws it prefers. At least while the federal statute remains on the books, the state's power is reduced, which may give rise to concerns about federalism. Second, implied preemption requires a court to decide a question that Congress has the authority to decide for itself. This may give rise to concerns about separation of powers. For these reasons, the Supreme Court has said that implied preemption should not be found lightly. "In preemption analysis, courts should assume that the historic police powers of the States are not

superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 567 U.S. 387, 400 (2012).

Express non-preemption clauses are enacted to ensure that Courts do not infer preemption where Congress did not mean to imply it. This can be seen in the language of the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011.

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Phrased another way, McCarran-Ferguson instructs courts considering state insurance laws to rule only on the basis of express preemption, not on any form of implied preemption.

Congress sometimes directs courts to use certain types of implied preemption and not others. For example, the preemption clause of the Controlled Substances Act of 1970, 21 U.S.C. § 903, says:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

In other words, Congress does not occupy the entire field of laws regulating drugs, but it wants courts to preempt state laws that create "a positive conflict," as arises in the implied preemption scenarios of impossibility preemption and obstacle preemption.

Item B.1. *Implied Conflict Preemption.* The two categories of implied conflict preemption serve two different goals.

- Impossibility preemption protects individuals. It would be unfair to place people in a situation where it is physically or legally impossible to follow both state law and federal law. In these cases, preempting the state law resolves the individual's impossible situation.
- Obstacle preemption protects the federal government. Even if a state law places no individual in an impossible situation, it may impede Congress's chosen policies. In these cases, preempting the state law protects the supreme federal power.

These categories are not mutually exclusive. A given state law might be unconstitutional as a result of impossibility preemption, obstacle preemption, or

both. The categories may also be relevant even in cases involving express preemption or field preemption. This would occur if a state law creates impossibility or obstacles in ways not predicted in advance by an express preemption clause or an earlier case defining an occupied field.

Item B.1.a. *Impossibility Preemption.* Impossibility preemption, sometimes called "direct conflict," occurs when it is physically or legally impossible for a person to obey both the federal and state statutes. Impossibility is uncommon, but it may arise in two scenarios.

First, a state law may require a person to do something that federal law forbids, or vice versa. Fortunately, it is hard to come up with real-life examples. Imagine that a state, facing a plague of locusts, required all citizens to carry a specific pesticide at all times and use it on any locusts they encountered—but federal law made that pesticide illegal. It is physically impossible to both carry the pesticide and not carry it. No matter what a person does, at least one law is being broken.

Second, both levels of government may regulate an activity that is otherwise lawful, but the details of the regulation create impossible demands on persons engaged in the activity. If a federal law required cigarette packages to contain warning labels, it would be impossible for a cigarette maker to obey a state law forbidding warning labels, and vice versa. It is physically impossible for the seller to both include and not include a warning label. Admittedly, a cigarette maker could avoid violating either law by not selling any cigarettes at all, but neither the state government nor the federal government intended to ban the product. To ensure that differences in the details of regulation do not create impossible situations for those pursuing otherwise lawful conduct, the state law will be preempted. *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 471 (2013) ("our preemption cases presume that a manufacturer's ability to stop selling does not turn impossibility into possibility.")

There is no impossibility if one law sets a minimum or maximum standard that differs from, but overlaps with, a different standard in the other law. For example, a federal law may make it illegal to discharge more than 100 gallons per week of a certain chemical into a river, while state law makes it illegal to discharge more than 50 gallons per week of that chemical. There is no impossibility, because a person or company that obeys the stricter state law will not violate the weaker federal law.

What if one level of government bans conduct but the other level does not? This is fairly common: Many things may violate state law but not federal law, or vice versa. There is no impossibility preemption in this situation. To begin with, every preemption theory requires both a federal law and a state law. If the state has no law, there is nothing to preempt; if the federal government has no law, there is nothing to do the preempting. Moreover, no one is placed in an impossible

situation when only one level of government bans conduct. A person who obeys the law banning the conduct does not violate the law of the other level, since that level does not require anyone to perform the banned activity. Using the language of impossibility preemption, it is physically possible to obey the law of one level without violating the law of the other, and no otherwise lawful conduct is made impossible as a result of conflicting regulatory details. See *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (there is no "impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit").

Item B.1.b. *Obstacle Preemption.* Obstacle preemption occurs when state law acts as an obstacle to, or undercuts the effect of, federal law. This theory dates at least to *McCulloch v. Maryland* (1819), which said "It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere." As a result, States could not "retard, impede, [or] burden" the ability of Congress to carry out its otherwise constitutional policy decisions. With that said, mere differences between state and federal law are not enough to establish obstacle preemption. The state law must differ from federal law in a substantial way that in practice will undermine federal goals.

To decide whether a state law creates an obstacle to federal law, a court must consider two questions, both of which involve subjective judgment.

First, the court must decide what Congress wished to accomplish by enacting the federal statute. This may be evident from the face of the statute, or it may require an evaluation of legislative history. Complicating this inquiry is the fact that a law may have more than one purpose. For example, the federal food stamp program has the twin goals of feeding indigent people and stabilizing prices for agricultural commodities by increasing demand.

Second, the court must decide whether the state law will, as a practical matter, undermine or impede the federal purpose(s). The state law must be a significant obstacle, not a mere difference in details.

As an example, consider whether the federal law requiring a health warning on cigarette packages would preempt a state law that required cigarette manufacturers to include a label reading: "Ignore the federal warning. Cigarettes are good for you." It would be physically possible to include both labels on a package, so this is not a case of impossibility preemption. Should there be obstacle preemption? The purpose of the federal law is to convince potential purchasers that cigarettes are dangerous. The state law significantly frustrates this purpose by interposing a contrary message at the point of purchase.

Obstacle preemption is the most common form of implied preemption. But since it requires judges to intuit Congressional purposes and predict how Congress

would react to (possibly unforeseen) state laws, the outcomes may be harder to predict than cases of impossibility preemption.

Item B.2. *Implied Field Preemption.* If Congress chooses to "occupy a field," there can be no state or local laws on the subject. The ERISA preemption statute, discussed in Item A above, is an express version of field preemption: if a state or local law "relates to" employee benefits, it is preempted even if it would pass the tests for impossibility and obstacle preemption. When Congress occupies a field, it wants to ensure national uniformity of regulation. Any local lawmaking within the occupied field—no matter how benign it may seem—violates the federal desire for uniformity. Case law uses a two-part method for implied field preemption.

First, the Court must decide if Congress has implied an intention to occupy the field. This may occur where "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the Act of Congress [touches] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Federal aviation statutes are an example of a system so pervasive and so important to national interests that it occupies the field. As explained in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944) (Jackson, J., concurring):

> Federal control [of aviation] is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

Second, the Court must decide whether the state law falls within the occupied field. A state law establishing an independent air traffic control system would obviously encroach upon the federally occupied field of aviation regulation. It may be less obvious whether a local noise ordinance falls within that field. But if the noise ordinance is used to control aircraft noise, it falls within the field and is preempted. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

Both steps of implied field preemption analysis involve some subjective judgment. This can be seen in cases involving the Atomic Energy Act of 1954. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190 (1983), the Supreme Court concluded, in light of the breadth and detail of the federal statute and the great importance control of nuclear power had for the nation, that the Act occupied a field. The Court described the field as "radiological safety aspects involved in the construction and operation of a nuclear plant." In a series of opinions, the Court then considered which state

laws fell within that field. See *Id.* (state law denying electric generating licenses for nuclear power plants without adequate waste disposal capacity was not within the occupied field, because it regulated the economics of the power plant and not its radiological safety); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (state tort action for negligence at a nuclear power plant was not within the occupied field); *English v. General Electric Co.*, 496 U.S. 72 (1990) (state tort action for firing nuclear plant worker who reported safety violations to federal government was not within the occupied field).

Given the vagaries of implied field preemption and its potentially sweeping effect on state law, modern courts are reluctant to say that a statute implies (without expressly saying so) that Congress occupies a field. Most of the decisions finding implied field preemption date from the mid-20th century, when the Supreme Court—dominated by New Deal and Warren Court appointees who were supportive of federal regulation—found that many new and detailed federal programs impliedly occupied various fields. Once a precedent holds that a statute occupies a field, courts will consider the field occupied until Congress says otherwise.

2. Preemption and Immigration: *Garcia v. Kansas*

Art. I, § 8, cl. 4 gives Congress the enumerated power to "establish an uniform rule of naturalization," and Congress has used this power to enact a lengthy and complex body of immigration statutes. However, no express preemption clause or earlier court decision says that these federal statutes occupy the entire field of laws that apply to non-citizens present within the United States. Some smaller sub-fields are occupied, however. *Hines v. Davidowitz*, 312 U.S. 52 (1940) held that the subject of "alien-registration requirements" was occupied by the federal government. Registering one's presence with the federal government, and having documents as proof of that fact, are part of a "single integrated and all-embracing system" that touches on foreign relations, a topic of national importance. The state law in *Hines* set up a parallel state system, and was therefore preempted because it fell within the occupied field.

The federal immigration system prohibits non-citizens from employment in the United States without a federal work permit. In recent decades, acting on a belief that the federal government is not adequately enforcing its immigration laws, some states have enacted their own laws about unauthorized presence and work by non-citizens. Many rounds of litigation have examined whether such laws are preempted.

Arizona. *Arizona v. United States*, 567 U.S. 387 (2012) considered several portions of a new Arizona law (known as S.B. 1070) against different types of preemption arguments.

■ WEBSITE

A fuller version of *Arizona v. United States* is available for download from this casebook's companion website, www.CaplanIntegratedConLaw.com.

One of the Arizona provisions outlawed "willful failure to complete or carry and alien registration document in violation of 8 U.S.C. §§ 1304(e) or 1306(a)." In effect, that provision added a new state-law penalty for violating the federal registration system. It would not be impossible for the non-citizen to comply simultaneously with both laws. And Arizona did not create an obstacle for the federal government, since both governments sought to achieve compliance. However, a majority of the US Supreme Court held that Arizona's law was preempted because it fell within the occupied field of alien registration requirements. The field was known to be occupied as a result of *Hines*, a precedent dating to the New Deal.

Another provision of S.B. 1070 made it a crime for a non-citizen without a federal work permit "to knowingly apply for work . . . or perform work" in Arizona. This section was not part of the occupied field of alien registration. Nonetheless, it was preempted because it was found to pose an obstacle to other Congressional goals. The Supreme Court surveyed the language, structure, and history of the relevant federal statutes governing work permits, noting that they imposed penalties solely on employers, not employees. From this, the majority concluded that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." State-level criminal penalties on the workers posed an obstacle to this federal policy, and thus were preempted.

Kansas. In *Kansas v. Garcia* (2020), the Supreme Court considered prosecutions of non-citizens for submitting false documents to procure employment. Unlike Arizona's S.B. 1090, which on its face applied only to non-citizens, the Kansas laws against fraud and identity theft applied on their face to all persons. The defendants argued that as applied to them in this setting, the Kansas laws were similarly preempted, because they amounted to a state penalty on employees for working without a permit.

ITEMS TO CONSIDER WHILE READING *KANSAS v. GARCIA*:

A. *Work through the various categories of preemption in the Kickstarter. Which categories, if any, do the Kansas statutes violate?*

B. *Is implied preemption possible under a federal law that contains an express preemption clause that does not reach the allegedly preempted state statute?*

C. *Is* Garcia *consistent with* Arizona*?*

Kansas v. Garcia,

140 S.Ct. 791 (2020)

Justice Alito delivered the opinion of the Court [joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh].

Kansas law makes it a crime to commit "identity theft" or engage in fraud to obtain a benefit. Respondents [Ramiro Garcia, Donaldo Morales, and Guadalupe Ochoa-Lara]—three aliens who are not authorized to work in this country—were convicted under these provisions for fraudulently using another person's Social Security number on state and federal tax-withholding forms that they submitted when they obtained employment. The Supreme Court of Kansas held that a provision of the [federal] Immigration Reform and Control Act of 1986 (IRCA) expressly preempts the Kansas statutes at issue insofar as they provide a basis for these prosecutions. We reject this reading of the provision in question, as well as respondents' alternative arguments based on implied preemption. We therefore reverse.

I

A

The foundation of our laws on immigration and naturalization is the Immigration and Nationality Act (INA), which sets out the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. As initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field. See *De Canas v. Bica*, 424 U.S. 351 (1976).

With the enactment of IRCA [in 1986], Congress took a different approach. IRCA made it unlawful to hire an alien knowing that he or she is unauthorized to work in the United States. 8 U.S.C. §§ 1324a(a)(1)(A), (h)(3). To enforce this prohibition, IRCA requires employers to comply with a federal employment verification system. Using a federal work-authorization form (I-9), employers must attest that they have verified that an employee is not an unauthorized alien by examining approved documents such as a United States passport or alien registration card. This requirement applies to the hiring of any individual regardless of citizenship or nationality. Employers who fail to comply may face civil and criminal sanctions. . . .

IRCA concomitantly imposes duties on all employees, regardless of citizenship. No later than their first day of employment, all employees must complete an I-9 and attest that they fall into a category of persons who are authorized to work in the United States. In addition, under penalty of perjury, every employee must provide certain personal information—specifically: name, residence address, birth date, Social Security number, e-mail address, and telephone number. It is a federal

crime for an employee to provide false information on an I-9 or to use fraudulent documents to show authorization to work. See 18 U.S.C. §§ 1028, 1546. Federal law does not make it a crime for an alien to work without authorization, and this Court has held that state laws criminalizing such conduct are preempted. *Arizona v. United States* (2012). But if an alien works illegally, the alien's immigration status may be adversely affected.

While IRCA imposes these requirements on employers and employees, it also limits the use of I-9 forms. A provision entitled "Limitation on use of attestation form," § 1324a(b)(5), provides that I-9 forms and "any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of" the INA or other specified provisions of federal law, including those prohibiting the making of a false statement in a federal matter (18 U.S.C. § 1001), identity theft (§ 1028), immigration-document fraud (§ 1546), and perjury (§ 1621). In addition, 8 U.S.C. § 1324a(d)(2)(F) prohibits use of "the employment verification system" "for law enforcement purposes," apart from the enforcement of the aforementioned federal statutes.

Although IRCA expressly regulates the use of I-9's and documents appended to that form, no provision of IRCA directly addresses the use of other documents, such as federal and state tax-withholding forms, that an employee may complete upon beginning a new job. [The federal withholding form is known as a W-4, and its Kansas counterpart is the K-4. It is a federal crime for an employee to submit a fraudulent W-4. 26 U.S.C. § 7205.] . . .

B

Like other States, Kansas has laws against fraud, forgeries, and identity theft. These statutes apply to citizens and aliens alike and are not limited to conduct that occurs in connection with employment. The Kansas identity-theft statute criminalizes the "using" of any "personal identifying information" belonging to another person with the intent to "defraud that person, or anyone else, in order to receive any benefit." Kan. Stat. Ann. § 21–6107(a)(1). . . . Kansas courts have interpreted the statute to cover the use of another person's Social Security number to receive the benefits of employment.

Kansas's false-information statute criminalizes, among other things, "making, generating, distributing or drawing" a "written instrument" with knowledge that it "falsely states or represents some material matter" and "with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." Kan. Stat. Ann. § 21–5824.

The respondents in the three cases now before us are aliens who are not authorized to work in this country but nevertheless secured employment by using the identity of other persons on the I-9 forms that they completed when they applied for work. They also used these same false identities when they completed their W-4's

Kansas v. Garcia

and K-4's. All three respondents were convicted under one or both of the Kansas laws just mentioned for fraudulently using another person's Social Security number on tax-withholding forms. . . .

C and D [Omitted]

II

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land." Art. VI, cl. 2. . . . In some cases, a federal statute may expressly preempt state law. But it has long been established that preemption may also occur by virtue of restrictions or rights that are inferred from statutory law. And recent cases have often held state laws to be impliedly preempted.

In these [three] cases, respondents do not contend that the Kansas statutes under which they were convicted are preempted in their entirety. Instead, they argue that these laws must yield only insofar as they apply to an unauthorized alien's use of false documents on forms submitted for the purpose of securing employment. In making this argument, respondents invoke all three categories of preemption identified in our cases. They defend the Kansas Supreme Court's holding that provisions of IRCA expressly bar their prosecutions. And they also argue that the decision below is supported by "field" or "conflict" preemption or some combination of the two. We consider these arguments in turn.

III

We begin with the argument that the state criminal statutes under which respondents were convicted are expressly preempted. . . .

The Kansas Supreme Court [based] its holding on . . . § 1324a(b)(5), which is far more than a preemption provision. This provision broadly restricts any use of an I-9, information contained in an I-9, and any documents appended to an I-9. Thus, unlike a typical preemption provision, it applies not just to the States but also to the Federal Government and all private actors.

The Kansas Supreme Court thought that the prosecutions in these cases ran afoul of this provision because the charges were based on respondents' use in their W-4's and K-4's of the same false Social Security numbers that they also inserted on their I-9's. Taken at face value, this theory would mean that no information placed on an I-9—including an employee's name, residence address, date of birth, telephone number, and e-mail address—could ever be used by any entity or person for any reason [because it would be use of information "contained in" an I-9 for purposes other than enforcement of specified federal statutes].

This interpretation is flatly contrary to standard English usage. A tangible object can be "contained in" only one place at any point in time, but an item of information

is different. It may be "contained in" many different places, and it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source.

Consider a person's e-mail address, one of the bits of information that is called for on an I-9. A person's e-mail address may be "contained in" a great many places. . . . Suppose that John used his e-mail address five years ago to purchase a pair of shoes and that the vendor has that address in its files. Suppose that John now sends an e-mail to Mary and that Mary sends an e-mail reply. No one would say that Mary has used information contained in the files of the shoe vendor. . . . Accordingly, the mere fact that an I-9 contains an item of information, such as a name or address, does not mean that information "contained in" the I-9 is used whenever that name or address is later employed. . . .

For all these reasons, there is no express preemption in these cases.

IV

We therefore proceed to consider respondents' alternative argument that the Kansas laws, as applied, are preempted by implication. This argument, like all preemption arguments, must be grounded in the text and structure of the statute at issue.

A

Respondents contend, first, that the Kansas statutes, as applied, fall into a field that is implicitly reserved exclusively for federal regulation. In rare cases, the Court has found that Congress legislated so comprehensively in a particular field that it left no room for supplementary state legislation, but that is certainly not the situation here.

In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred. In their merits brief in this Court, respondents' primary submission is that IRCA preempts "the field of fraud on the federal employment verification system," but this argument fails because . . . the submission of tax withholding forms is not part of that system.

At some points in their brief, respondents define the supposedly preempted field more broadly as the "field relating to the federal employment verification system," but this formulation does not rescue the argument. The submission of tax withholding forms is fundamentally unrelated to the federal employment verification system because, as explained, those forms serve entirely different functions. The employment verification system is designed to prevent the employment of unauthorized aliens, whereas tax withholding forms help to enforce income tax laws. And using another person's Social Security number on tax forms threatens harm that has no connection with immigration law. . . .

Kansas v. Garcia

It is true that employees generally complete their W-4's and K-4's at roughly the same time as their I-9's, but IRCA plainly does not foreclose all state regulation of information that must be supplied as a precondition of employment. New employees may be required by law to provide all sorts of information that has nothing to do with authorization to work in the United States, such as information about age (for jobs with a minimum age requirement), educational degrees, licensing, criminal records, drug use, and personal information needed for a background check. IRCA surely does not preclude States from requiring and regulating the submission of all such information. . . .

Contrary to respondents' suggestion, IRCA certainly does not bar all state regulation regarding the "use of false documents when an unauthorized alien seeks employment." Nor does IRCA exclude a State from the entire "field of employment verification." For example, IRCA certainly does not prohibit a public school system from requiring applicants for teaching positions to furnish legitimate teaching certificates. And it does not prevent a police department from verifying that a prospective officer does not have a record of abusive behavior.

Respondents argue that field preemption in these cases follows directly from our decision in Arizona, but that is not so. In *Arizona*, relying on our prior decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941), we held that federal immigration law occupied the field of alien registration. "Federal law," we observed, "makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." But federal law does not create a comprehensive and unified system regarding the information that a State may require employees to provide.

In sum, there is no basis for finding field preemption in these cases.

B

We likewise see no ground for holding that the Kansas statutes at issue [impliedly] conflict with federal law. It is certainly possible to comply with both IRCA and the Kansas statutes, and respondents do not suggest otherwise. They instead maintain that the Kansas statutes, as applied in their prosecutions, stand as an obstacle to the accomplishment and execution of the full purposes of IRCA—one of which is purportedly that the initiation of any legal action against an unauthorized alien for using a false identity in applying for employment should rest exclusively within the prosecutorial discretion of federal authorities. Allowing Kansas to bring prosecutions like these, according to respondents, would risk upsetting federal enforcement priorities and frustrating federal objectives, such as obtaining the cooperation of unauthorized aliens in making bigger cases.

Respondents analogize these cases to our holding in *Arizona*—that a state law making it a crime for an unauthorized alien to obtain employment conflicted with IRCA, which does not criminalize that conduct—but respondents' analogy is

unsound. In *Arizona*, the Court inferred that Congress had made a considered decision that it was inadvisable to criminalize the conduct in question. In effect, the Court concluded that IRCA implicitly conferred a right to be free of criminal (as opposed to civil) penalties for working illegally, and thus a state law making it a crime to engage in that conduct conflicted with this federal right.

Nothing similar is involved here. In enacting IRCA, Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution. On the contrary, federal law makes it a crime to use fraudulent information on a W-4.

The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today. In recent times, the reach of federal criminal law has expanded, and there are now many instances in which a prosecution for a particular course of conduct could be brought by either federal or state prosecutors. Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap. Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.

In the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests. . . . The Federal Government fully supports Kansas's position in this Court. In the end, however, the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to "the Laws of the United States," not the criminal law enforcement priorities or preferences of federal officers. Art. VI, cl. 2. . . .

[CONCLUSION]

For these reasons, the judgments of the Supreme Court of Kansas are reversed, and these cases are remanded for further proceedings not inconsistent with this opinion.

Justice Thomas, with whom Justice Gorsuch joins, concurring. [Omitted.]

Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan join, concurring in part and dissenting in part.

I agree with the majority that nothing in the Immigration Reform and Control Act of 1986 (IRCA), expressly preempts Kansas' criminal laws as they were applied in the prosecutions at issue here. But I do not agree with the majority's conclusion about implied preemption.

Kansas v. Garcia

When we confront a question of implied preemption, the words of the statute are especially unlikely to determine the answer by themselves. Nonetheless, in my view, IRCA's text, together with its structure, context, and purpose, make it clear and manifest that Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization. That is to say, the Act reserves to the Federal Government—and thus takes from the States—the power to prosecute people for misrepresenting material information in an effort to convince their employer that they are authorized to work in this country.

The Act creates . . . a comprehensive scheme to combat the employment of illegal aliens. To that end, the statute's text sets forth highly detailed requirements [for employers and employees]. . . .

Congress, we explained [in *Arizona*], made a deliberate choice not to impose criminal penalties on aliens who merely seek, or engage in, unauthorized employment. . . . We ultimately held in *Arizona* that the States thus may not make criminal what Congress did not, for any such state law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Given that obstacle to the regulatory system Congress chose, we concluded that the state law at issue conflicted with the federal Act and was therefore preempted.

State laws that police fraud committed to demonstrate federal work authorization are similarly preempted. . . . The Act makes clear that only the Federal Government may prosecute people for misrepresenting their federal work-authorization status. . . . The Act takes from the States the most direct means of policing work-authorization fraud. It prohibits States from using for that purpose both the I-9 and the federal employment verification system more generally. Those . . . provisions strongly suggest that the Act occupies the field of policing fraud committed to demonstrate federal work authorization. Otherwise, their express prohibitions would not constrain the States in any meaningful way. States could evade the Act simply by creating their own work-authorization form with the same requirements as the I-9, requiring employees to submit that form at the same time as the I-9, and prosecuting employees who make misrepresentations on the state form. No one contends that the States may do that. . . .

For these reasons, I would hold that federal law impliedly preempted Kansas' criminal laws as they were applied in these cases. Because the majority takes a different view, with respect, I dissent.

B. The Dormant Commerce Clause Doctrine

The **dormant commerce clause doctrine** is an application of federal supremacy that invalidates state laws that unduly burden the free flow of goods and services in interstate commerce. The doctrine is a form of implied preemption—but the source of preemption is not one or more federal statutes, but the commerce-related portions of the Constitution itself.

■ TERMINOLOGY

DORMANT COMMERCE CLAUSE DOCTRINE: The phrase "dormant commerce clause" can be confusing for newcomers. It is derived from John Marshall's opinion in *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. 245 (1829), which suggested in dicta that Congress's power to regulate interstate commerce could override state laws even "in its dormant state." The power is "dormant" if Congress has not exercised it to enact statutes. This book avoids referring to a "Dormant Commerce Clause," because no such clause exists. Instead, it speaks of "the dormant commerce clause doctrine" (in lower case).

Under the Articles of Confederation, nothing prevented states from enacting laws to aid in-state businesses against out-of-state competitors. In some states, tariffs, taxes, blockades, and other protectionist devices made out-of-state goods unavailable or uncompetitive. The protectionism sometimes led to retaliation and small-scale trade wars. See Ch. 3.A.3. In response, the US Constitution included many provisions designed to avoid trade wars and unfair economic competition between states, replacing them with something resembling a national free trade zone. Some provisions give the federal government authority over certain economic matters; others forbid harmful forms of economic regulation by both federal and state governments; and some require a level interstate playing field.

- Congress may regulate commerce among the states and with foreign nations and Indian tribes. Art I, § 8, cl. 3.
- Congress may coin money, Art I, § 8, cl. 5, but states may not coin money or issue paper money, Art. I, § 10, cl. 1.
- Federal laws may not give preferences for ports of one state over another, or impose duties on vessels traveling between states. Art. I, § 9, cl. 5.
- States may not impose imposts or duties on imports or exports except as absolutely necessary for executing their inspection laws, unless such imposts or duties receive Congressional approval and federal supervision. Art. I, § 10, cl. 2.
- States may not lay any "duty of tonnage" (a charge on ships entering ports) Art. I, § 10, cl. 3.
- States must give non-state citizens the same "privileges and immunities" offered to state citizens. Art. IV, § 2.

From the early 19th century onwards, the Supreme Court has held that protectionism by the states is incompatible with the overall structure of the Constitution. The Supreme Court described the idea behind the doctrine in *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The dormant commerce clause doctrine presumes that this vision of national free trade may be effectuated not only by Congress through legislation, but by the federal courts through decisions on the validity of state laws. As recently explained in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018):

> Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. But this Court has observed that in general Congress has left it to the courts to formulate the rules to preserve the free flow of interstate commerce.

flashback

Hints of what became the dormant commerce clause doctrine were seen in *Gibbons v. Ogden* (1824). Gibbons (the steamboat operator with the federal license) argued in part that New York had no power to pass any laws that had the effect of regulating interstate commerce. Congress's power to regulate interstate commerce must be exclusive, the argument went, because only one government may be a "regulator" of that commerce. Justice Marshall's opinion in *Gibbons* hinted that "there is great force in this argument," but that it was not necessary to go so far: "The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?" In other words, *Gibbons* was decided as a matter of statutory preemption. Justice Johnson's concurrence adopted Gibbons' argument: he would hold unconstitutional any state statute having the effect of regulating interstate commerce.

If the dormant commerce clause doctrine is a form of implied preemption at the constitutional level, what is its scope: conflict or field? One can find language, especially in 19th century opinions, that could be read to suggest that the federal government occupies the field of interstate commerce. As it exists today, the dormant commerce clause doctrine most closely resembles obstacle preemption. State laws with effects on interstate commerce are not per se forbidden—but they will be unconstitutional if they impose significant obstacles to the implied national policy in favor of free interstate trade. (If Congress wishes, it may adopt a different national policy by enacting statutes expressly authorizing states to regulate. Such statutes might resemble the McCarran-Ferguson Act of 1945, described in Ch. 12.A.1. In the absence of such statutes, courts will presume that Congress wants to follow a constitutional baseline of freely flowing interstate commerce.)

1. Kickstarter: The Dormant Commerce Clause Doctrine

DISCLAIMER: *This Kickstarter is a checklist to help identify relevant issues. It is not a list of elements. Nothing requires judges to write their opinions (or lawyers to write their briefs) in Kickstarter order.*

The Dormant Commerce Clause Doctrine kickstarter

USE WHEN: *A state law that is neither preempted nor expressly authorized by federal statute unduly burdens interstate commerce.*

A. *Does a state law burden interstate commerce?*

B. *Is the state entitled to enact the law because it is a participant in the relevant market?*

C. *Does the state law on its face discriminate against interstate commerce?*

   1. *If yes, the law is unconstitutional unless it is the least discriminatory way to achieve a legitimate purpose.*

   2. *If no, the law is constitutional unless it was enacted with discriminatory purpose or its burden on commerce clearly exceeds any legitimate purpose.*

KICKSTARTER USER'S GUIDE

Taken together, the cases involving the dormant commerce clause doctrine are not fully consistent with each other. There is no universally agreed-upon formula that would explain every case, so the items in this Kickstarter may well differ from those found in other casebooks or treatises. With that said, the following items

are likely to lead you to ask the right questions, even though some cases exist that seem to diverge from this pattern.

Item A. *Burdens on Interstate Commerce.* As seen in the post-1937 cases interpreting Congress's power under the Commerce Clause, most economic transactions will (when they are considered in the aggregate) have some effect on the flow of goods and services in interstate commerce. Viewed through that lens, a huge variety of state laws will also have effects on interstate commerce. But the mere fact that a state law has some effect on interstate commerce is not enough to trigger the dormant commerce clause doctrine. Instead, the state law must burden interstate commerce, somehow making cross-border transactions more difficult.

Quite often, state laws burdening interstate commerce will benefit in-state residents over out-of-state residents. But that is not the defining issue for this threshold question. Instead, the doctrine will be triggered if the state law is bad for interstate commerce itself, not for particular people who might be engaged in it. Burdens on interstate commerce will arise from laws that make it impossible or infeasible for out-of-state vendors to sell goods or services in a state, or for in-state vendors to sell goods or services out of state. Burdens may also arise if a state makes its infrastructure unavailable or unattractive for interstate commerce. For example, a state law banning trucks over 55 feet long when all surrounding states set a maximum of 65 feet could make trucking through the state infeasible. See *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662 (1981).

Item B. *The Market Participant Exception.* State governments impose regulations, but they are also buyers and sellers of goods and services. As some of the largest buyers and sellers in the economy, state governments will affect interstate commerce simply through their large economic influence. Is it forbidden protectionism for a state to buy only from in-state vendors (as when a state government prefers to buy locally-made goods), or to offer a discount to in-state purchasers (as when a state university charges less for in-state tuition)? The Supreme Court has decided that a state does not violate the dormant commerce clause doctrine when it acts as a participant in the market—that is, when it buys or sells. According to *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the basic distinction "between States as market participants and States as market regulators makes good sense and sound law. [The dormant commerce clause doctrine] responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. [The Constitution does not] limit the ability of the States themselves to operate freely in the free market."

The market participant exception to the dormant commerce clause doctrine can be illustrated by a state law directing all state agencies to buy their furniture from in-state manufacturers. The "buy local" rule would give an economic advantage to in-state manufacturers and reduce the volume of cross border transactions,

but it would not be a regulation of commerce. If instead a state law required the state's private businesses to buy locally produced furniture, the state would be regulating commerce rather than participating in it. For examples of states acting as market participants, *see, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (state-owned cement plant is allowed to sell to only in-state customers); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (city is allowed to prefer contractors whose employees live in the city).

Item C. *Facial v. Non-Facial Burdens.* If the threshold questions in Items A and B are met, the dormant commerce clause doctrine is triggered. The Supreme Court has announced two different approaches to judicial review under the doctrine. Just as the Equal Protection Clause considers some kinds of discrimination to be more constitutionally troubling than others, the dormant commerce clause doctrine distinguishes between different types of commerce-burdening laws. State laws that burden interstate commerce explicitly, through facial discrimination against interstate transactions, will be judged strictly. State laws that do not target interstate commerce on their face, but nonetheless have a burdensome effect on interstate commerce, are judged more deferentially.

Item C.1. *Facial Discrimination Against Interstate Commerce.* A state law that on its face treats out-of-state businesses differently from in-state businesses, or that otherwise expressly prevents interstate commerce, will almost always violate the dormant commerce clause doctrine. For example, *Crutcher v. Kentucky*, 141 U.S. 47 (1891), invalidated a state law that would issue business licenses to out-of-state companies only if they had $150,000 in capital, when no similar requirement existed for in-state companies. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), invalidated a law that banned the out-of-state transport or sale of minnows captured within the state. A state may not hinder interstate commerce by hoarding resources for its own citizens.

Laws that facially discriminate against interstate commerce will be unconstitutional unless the state can demonstrate that no less discriminatory alternative would achieve the state's legitimate local interests. Of the few situations where such laws are upheld, most involve quarantines for health and safety reasons. For example, *Maine v. Taylor*, 477 U.S. 131 (1986), upheld a state law banning importation of out-of-state minnows. Minnows from other states were known to carry parasites that had not yet invaded Maine, so the burden on interstate commerce was justified, even though it was intentional.

Item C.2. *Facially Neutral Statutes with Discriminatory Effects.* A state law that does not discriminate against interstate commerce on its face will ordinarily be constitutional even if it has the effect of preventing some interstate transactions. For example, a state may decide to ban fireworks for public safety reasons, even

though the law prevents potential cross-border sales of fireworks. Such laws are ordinary uses of the police power and do not contravene the dormant commerce clause doctrine.

A facially nondiscriminatory law will violate the dormant commerce clause doctrine in two situations. First, if it was enacted for the purpose of hindering interstate commerce: protectionism in disguise. Second, if the burdens on interstate commerce clearly exceed any legitimate local benefits. For example, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), Illinois required all trucks on the state's roads to use a certain type of mud flap not required anywhere else. The law burdened interstate commerce because it would be awkward, expensive, and time-consuming for trucks to stop at the border to reconfigure their mud flaps. The statute did not discriminate against interstate commerce on its face; it applied to all trucks regardless of their place of origin. Still, the US Supreme Court struck it down, because the modest benefits of the mud flap were clearly outweighed by the burden the law would place on interstate commerce.

2. Facial Discrimination Against Interstate Commerce: *City of Philadelphia v. New Jersey*

The dormant commerce clause doctrine is most stringent when applied to a law that discriminates on its face between in-state and out-of-state commerce.

ITEMS TO CONSIDER WHILE READING *CITY OF PHILADELPHIA v. NEW JERSEY*

A. *Work through the items in the Kickstarter.*

B. *Why is New Jersey's ban on out-of-state garbage not constitutionally acceptable as a health and safety regulation?*

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978)

Justice Stewart delivered the opinion of the Court [joined by Justices Brennan, White, Marshall, Blackmun, Powell, and Stevens].

A New Jersey law prohibits the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State." In this case we are required to decide whether this statutory prohibition violates the Commerce Clause of the United States Constitution.

I

The statutory provision in question is ch. 363 of 1973 N.J. Laws, which took effect in early 1974. In pertinent part it provides:

> No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

As authorized by ch. 363, the Commissioner promulgated regulations permitting four categories of waste to enter the State. Apart from these narrow exceptions, however, New Jersey closed its borders to all waste from other States.

Immediately affected by these developments were the operators of private landfills in New Jersey, and several cities in other States [including Philadelphia] that had agreements with these operators for waste disposal. They brought suit against New Jersey and its Department of Environmental Protection in state court, attacking the statute and regulations on a number of state and federal grounds. In an oral opinion granting the plaintiffs' motion for summary judgment, the trial court declared the law unconstitutional because it discriminated against interstate commerce. The New Jersey Supreme Court consolidated this case with another reaching the same conclusion. It found that ch. 363 advanced vital health and environmental objectives with no economic discrimination against, and with little burden upon, interstate commerce, and that the law was therefore permissible under the Commerce Clause of the Constitution. The court also found no congressional intent to pre-empt ch. 363 by enacting [various environmental statutes]. . . .

The plaintiffs then appealed to this Court. . . . . We agree with the New Jersey court that the state law has not been pre-empted by federal legislation. The dispositive question, therefore, is whether the law is constitutionally permissible in light of the Commerce Clause of the Constitution.

II

Before it addressed the merits of the appellants' claim, the New Jersey Supreme Court questioned whether the interstate movement of those wastes banned by ch. 363 is "commerce" at all within the meaning of the Commerce Clause. Any doubts on that score should be laid to rest at the outset.

The state court expressed the view that there may be two definitions of "commerce" for constitutional purposes. When relied on to support some exertion of federal control or regulation, the Commerce Clause permits a "very sweeping

City of Philadelphia v. New Jersey

concept" of commerce. But when relied on to strike down or restrict state legislation, that Clause and the term "commerce" have a "much more confined reach." . . .

We think the state court misread our cases, and thus erred in assuming that they require a two-tiered definition of commerce. . . . All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement.

III

A

Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention because of their local character and their number and diversity. In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. . . . This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . One state in its dealings with another may not place itself in a position of economic isolation.

The opinions of the Court through the years have reflected an alertness to the evils of economic isolation and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach[.] Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The crucial inquiry, therefore, must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law

directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

B

The purpose of ch. 363 is set out in the statute itself as follows:

> The Legislature finds and determines that the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

The New Jersey Supreme Court accepted this statement of the state legislature's purpose. The state court additionally found that New Jersey's existing landfill sites will be exhausted within a few years; that to go on using these sites or to develop new ones will take a heavy environmental toll, both from pollution and from loss of scarce open lands; that new techniques to divert waste from landfills to other methods of disposal and resource recovery processes are under development, but that these changes will require time; and finally, that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Based on these findings, the court concluded that ch. 363 was designed to protect, not the State's economy, but its environment, and that its substantial benefits outweigh its slight burden on interstate commerce.

The appellants strenuously contend that ch. 363, while "outwardly cloaked in the currently fashionable garb of environmental protection, is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents." They cite passages of legislative history suggesting that the problem addressed by ch. 363 is primarily financial: Stemming the flow of out-of-state waste into certain landfill sites will extend their lives, thus delaying the day when New Jersey cities must transport their waste to more distant and expensive sites. . . .

This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for

City of Philadelphia v. New Jersey

we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination. . . .

The appellees argue that not all laws which facially discriminate against out-of-state commerce are forbidden protectionist regulations. In particular, they point to quarantine laws, which this Court has repeatedly upheld even though they appear to single out interstate commerce for special treatment. In the appellees' view, ch. 363 is analogous to such health-protective measures, since it reduces the exposure of New Jersey residents to the allegedly harmful effects of landfill sites.

It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

The New Jersey statute is not such a quarantine law. There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter. The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Justice Rehnquist, with whom Chief Justice Burger joins, dissenting.

. . . The question presented in this case is whether New Jersey must also [in addition to disposing of its own waste] continue to receive and dispose of solid waste from neighboring States, even though these will inexorably increase the health problems [associated with landfills]. The Court answers this question in the affirmative. New Jersey must either prohibit all landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State. Because past precedents establish that the Commerce Clause does not present appellees with such a Hobson's choice, I dissent.

The Court recognizes that States can prohibit the importation of items "which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed or otherwise, from their condition and quality, unfit for human use or consumption." *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888). As the Court points out, such "quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce."

In my opinion, these cases are dispositive of the present one. Under them, New Jersey may require germ-infected rags or diseased meat to be disposed of as best as possible within the State, but at the same time prohibit the importation of such items for disposal at the facilities that are set up within New Jersey for disposal of such material generated within the State. The physical fact of life that New Jersey must somehow dispose of its own noxious items does not mean that it must serve as a depository for those of every other State. Similarly, New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens. The fact that New Jersey continues to, and indeed must continue to, dispose of its own solid waste does not mean that New Jersey may not prohibit the importation of even more solid waste into the State. I simply see no way to distinguish solid waste, on the record of this case, from germ-infected rags, diseased meat, and other noxious items. . . .

3. Facially Neutral Statutes with Discriminatory Effects: *Hunt v. Washington State Apple Advertising Commission*

The most contentious and least predictable area within the dormant commerce clause doctrine involves state laws that do not on their face discriminate against interstate commerce, but have adverse effects on the flow of goods and services across borders. *Hunt* is a frequently cited case of this type.

Apple Grading Systems. The US Department of Agriculture grades the quality of produce. After government inspection, producers may use the grades (e.g., "USDA prime" or "USDA choice") in their marketing. However, some states or growers prefer to use other grading systems that they believe better communicate the quality of the goods. The state of Washington developed a grading system for apples that is more stringent than the federal counterpart. On a scale from highest to lowest quality, the rankings are as follows:

- Washington Extra Fancy
- US Extra Fancy
- Washington Fancy
- US Fancy
- US No. 1
- US No. 1 Hail (same as US No. 1, but with skin damage from hailstones)

In *Hunt*, a North Carolina law mandated that boxes of apples sold in or shipped into the state be marked with the USDA grades or none at all.

ITEMS TO CONSIDER WHILE READING *HUNT*:

A. *Work through the items in the Kickstarter.*

B. *Should the court have decided the case on the basis that North Carolina enacted its law with protectionist intent?*

C. *Do laws like North Carolina's pose a danger to the nation of constitutional proportions?*

Hunt v. Washington State Apple Advertising Commission,

432 U.S. 333 (1977)

Chief Justice Burger delivered the opinion of the Court [joined by Justices Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens].

In 1973, North Carolina enacted a statute which required all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard." In an action brought by the Washington

State Apple Advertising Commission [against North Carolina governor James B. Hunt and other defendants], a . . . Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce. . . .

I

Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. As might be expected, the production and sale of apples on this scale is a multimillion dollar enterprise which plays a significant role in Washington's economy. Because of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program, administered by the State's Department of Agriculture, which requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades, which have gained substantial acceptance in the trade, are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA). Compliance with the Washington inspection scheme costs the State's growers approximately $1 million each year. . . .

In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or none at all. State grades were expressly prohibited. In addition to its obvious consequence prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina, the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed containers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety and grade. It is the industry's practice to purchase these containers preprinted with the various apple varieties and grades, prior to harvest. After these containers are filled with apples of the appropriate type and grade, a substantial portion of them are placed in cold-storage warehouses where the grade labels identify the product and facilitate its handling. These apples are then shipped as needed throughout the year; after February 1 of each year, they constitute approximately two-thirds of all apples sold in fresh markets in this country.

Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of

Hunt v. Washington State Apple Advertising Commission

the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.

With these problems confronting the industry, the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades. An administrative hearing was held on the question but no relief was granted. Indeed, North Carolina hardened its position shortly thereafter by enacting the regulation into law:

> All apples sold offered for sale, or shipped into this State in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U.S. grade or standard or the marking "unclassified," "not graded" or "grade not determined." . . .

Unsuccessful in its attempts to secure administrative relief, the Commission instituted this action challenging the constitutionality of the statute in the United States District Court for the Eastern District of North Carolina. . . . After a hearing, the District Court . . . held that the statute unconstitutionally discriminated against commerce, insofar as it affected the interstate shipment of Washington apples, and enjoined its application. This appeal followed[.]

II–III

[The Commission has standing to sue, and the Court has subject matter jurisdiction.]

IV

We turn finally to the appellants' claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants [the North Carolina defendants] do not really contest the District Court's determination that the challenged statute burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute's enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading systems which, while differing in their standards, used similar descriptive labels (e.g., fancy, extra fancy, etc.). This multiplicity of inconsistent state grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Moreover, it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. Nonetheless, appellants argue that the District Court gave "scant attention" to the obvious benefits flowing from the challenged legislation and to the long line of decisions from this Court holding that the States possess "broad powers" to protect local purchasers from fraud and deception in the marketing of foodstuffs.

As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. Although the Commerce Clause acts as a limitation upon state power even without congressional implementation, our opinions have long recognized that in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.

Moreover, as appellants correctly note, that "residuum" is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, would mean that the Commerce Clause of itself imposes no limitations on state action save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from the fact that North Carolina apple producers, unlike

Hunt v. Washington State Apple Advertising Commission

their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA, system because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, by prohibiting Washington growers and dealers from marketing apples under their State's grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-a-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statue's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed." Moreover, we find it somewhat suspect that North Carolina singled

out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any potential for confusion and deception created by the Washington grades was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only "deceive" or "confuse" a consumer to his benefit, hardly a harmful result.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's could not be demonstrated to be equal

or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for "confusion" might persist. However, it is the type of "confusion" that the national interest in the free flow of goods between the States demands be tolerated.

Justice Rehnquist took no part in the consideration or decision of the case.

4. Facial Discrimination, the Market Participant Exception, and Some Basic Questions: *Camps Newfound/Owatonna v. City of Harrison*

Although the dormant commerce clause doctrine originated in the early 19th century, its use steadily expanded in the late 20th century. The increase reflects the growing volume of interstate economic activity, and also the growing amount of state-imposed economic regulation. In the following case, the majority and the dissents grapple over the fundamentals of the doctrine: how much national uniformity should the Constitution be interpreted to require in the name of free trade?

ITEMS TO CONSIDER WHILE READING *CAMPS NEWFOUND/OWATONNA:*

A. *Work through the items in the Kickstarter.*

B. *In Part II, the majority says, "Congress unquestionably has the power to repudiate or substantially modify" the operation of the dormant commerce clause doctrine. How could Congress do this, given that the Supreme Court has final authority for interpreting the Constitution?*

C. *Justice Thomas's dissent argues that the dormant commerce clause doctrine should be abandoned. What would be the result for the nation if the Supreme Court were to do so?*

D. *The dormant commerce clause doctrine allows private commercial interests to invoke the US Constitution to invalidate unwanted state-level regulation. Is the doctrine a modern-day* Lochner*?*

Camps Newfound/Owatonna, Inc. v. Town of Harrison,

520 U.S. 564 (1997)

Justice Stevens delivered the opinion of the Court [joined by Justices O'Connor, Kennedy, Souter, and Breyer].

The question presented is whether an otherwise generally applicable state property tax violates the Commerce Clause of the United States Constitution, because its exemption for property owned by charitable institutions excludes organizations operated principally for the benefit of nonresidents.

I

Petitioner is a Maine nonprofit corporation that operates a summer camp for the benefit of children of the Christian Science faith. The regimen at the camp [a term that refers collectively to Camp Newfound for girls and Camp Owatonna for boys] includes supervised prayer, meditation, and church services designed to help the children grow spiritually and physically in accordance with the tenets of their religion. About 95 percent of the campers are not residents of Maine.

The camp is located in the town of Harrison (Town); it occupies 180 acres on the shores of a lake about 40 miles northwest of Portland. Petitioner's revenues include camper tuition averaging about $400 per week for each student, contributions from private donors, and income from a "modest endowment." In recent years, the camp has had an annual operating deficit of approximately $175,000. From 1989 to 1991, it paid over $20,000 in real estate and personal property taxes each year.

The Maine statute at issue provides a general exemption from real estate and personal property **taxes** for benevolent and charitable institutions incorporated in the State. With respect to institutions that are "in fact conducted or operated principally for the benefit of persons who are not residents of Maine," however, a charity may only qualify for a more limited tax benefit, and then only if the weekly charge for services provided does not exceed $30 per person. Because most of the campers come from out of State, petitioner could not qualify for a complete exemption. And, since the weekly tuition was roughly $400, petitioner was ineligible for any charitable tax exemption at all.

[The state trial court in Maine ruled in favor of the camp. The Maine Supreme court reversed, and the US Supreme Court granted review.] For the reasons that follow, we now reverse.

■ OBSERVATION

TAXES: Like other state laws, state taxes are subject to the dormant commerce clause doctrine. See *Quill, Inc. v. North Dakota*, 504 U.S. 198 (1992); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). Whether the tax unconstitutionally burdens interstate commerce will depend on the facts of the case.

Camps Newfound/ Owatonna, Inc. v. Town of Harrison

II

During the first years of our history as an independent confederation, the National Government [under the Articles of Confederation] lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents, what Justice Johnson characterized as a "conflict of commercial regulations, destructive to the harmony of the States", ensued. See *Gibbons v. Ogden* (1824) (opinion concurring in judgment). In his view, this "was the immediate cause that led to the forming of a [constitutional] convention." "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . Although Congress unquestionably has the power to repudiate or substantially modify that course of adjudication, it has not done so.

This case involves an issue that we have not previously addressed—the disparate real estate tax treatment of a nonprofit service provider based on the residence of the consumers that it serves. The Town argues that our dormant Commerce Clause jurisprudence is wholly inapplicable to this case, because interstate commerce is not implicated here and Congress has no power to enact a tax on real estate. We first reject these arguments, and then explain why we think our prior cases make it clear that if profit-making enterprises were at issue, Maine could not tax petitioner more heavily than other camp operators simply because its campers come principally from other States. We next address the novel question whether a different rule should apply to a discriminatory tax exemption for charitable and benevolent institutions. Finally, we reject the Town's argument that the exemption should either be viewed as a permissible subsidy or as a purchase of services by the State acting as a "market participant."

III

We are unpersuaded by the Town's argument that the dormant Commerce Clause is inapplicable here, either because campers are not "articles of commerce," or, more generally, because the camp's "product is delivered and 'consumed' entirely within Maine." Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, see *Katzenbach v. McClung* (1964), but also as a provider of goods and services. It markets those services,

together with an opportunity to enjoy the natural beauty of an inland lake in Maine, to campers who are attracted to its facility from all parts of the Nation. . . .

Summer camps are comparable to hotels that offer their guests goods and services that are consumed locally. In *Heart of Atlanta Motel, Inc. v. United States* (1964), we recognized that interstate commerce is substantially affected by the activities of a hotel that solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation. In that case, we held that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel. Official discrimination that limits the access of nonresidents to summer camps creates a similar impediment. Even when business activities are purely local, if "it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id*. . . .

The Town also argues that the dormant Commerce Clause is inapplicable because a real estate tax is at issue. We disagree. A tax on real estate, like any other tax, may impermissibly burden interstate commerce. We may assume as the Town argues (though the question is not before us) that Congress could not impose a national real estate tax. It does not follow that the States may impose real estate taxes in a manner that discriminates against interstate commerce. A State's power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against [interstate] commerce. . . .

We therefore turn to the question whether our prior cases preclude a State from imposing a higher tax on a camp that serves principally nonresidents than on one that limits its services primarily to residents.

IV

There is no question that were this statute targeted at profit-making entities, it would violate the dormant Commerce Clause. State laws discriminating against interstate commerce on their face are virtually per se invalid. It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce. The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business. As a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market.

If such a policy were implemented by a statutory prohibition against providing camp services to nonresidents, the statute would almost certainly be invalid. . . . Avoiding this sort of "economic Balkanization," and the retaliatory acts of other

Camps Newfound/ Owatonna, Inc. v. Town of Harrison

States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence. . . . By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent. . . .

V

The unresolved question presented by this case is whether a different rule should apply to tax exemptions for charitable and benevolent institutions. Though we have never had cause to address the issue directly, the applicability of the dormant Commerce Clause to the nonprofit sector of the economy follows from our prior decisions.

Our cases have frequently applied laws regulating commerce to not-for-profit institutions. . . . We have similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations. The nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce. . . . We see no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause. There are a number of lines of commerce in which both for-profit and nonprofit entities participate. Some educational institutions, some hospitals, some child care facilities, some research organizations, and some museums generate significant earnings; and some are operated by not-for-profit corporations. . . .

For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant. See *Wickard v. Filburn* (1942). . . .

VI

. . . Finally, the Town argues that its discriminatory tax exemption scheme falls within the "market-participant" exception. That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause.

In *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976), we concluded that the State of Maryland had, in effect, entered the market for abandoned automobile hulks as a purchaser because it was using state funds to provide bounties for their removal from Maryland streets and junkyards. In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the State of South Dakota similarly participated in the market for cement as a seller of the output of the cement plant that it had owned and

operated for many years. And in *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204 (1983), the city of Boston had participated in the construction industry by funding certain projects. These three cases stand for the proposition that, for purposes of analysis under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may favor its own citizens over others.

Maine's tax exemption statute cannot be characterized as a proprietary activity falling within the market-participant exception. . . . A tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine. . . .

VII

[T]he facts of this particular case, viewed in isolation, do not appear to pose any threat to the health of the national economy. Nevertheless, history, including the history of commercial conflict that preceded the Constitutional Convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our Federal Union. As Justice Cardozo recognized [in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)], to countenance discrimination of the sort that Maine's statute represents would invite significant inroads on our national solidarity: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Justice Scalia, with whom Chief Justice Rehnquist and Justices Thomas and Ginsburg join, dissenting.

The Court's negative Commerce Clause jurisprudence has drifted far from its moorings. Originally designed to create a national market for commercial activity, it is today invoked to prevent a State from giving a tax break to charities that benefit the State's inhabitants. In my view, Maine's tax exemption, which excuses from taxation only that property used to relieve the State of its burden of caring for its residents, survives even our most demanding Commerce Clause scrutiny.

I

We have often said that the purpose of our negative Commerce Clause jurisprudence is to create a national market. . . . In our zeal to advance this policy, however, we must take care not to overstep our mandate, for the Commerce Clause was not intended to cut the States off from legislating on all subjects relating to the

health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. . . .

Camps Newfound/ Owatonna, Inc. v. Town of Harrison

II [Omitted.]

III

. . . Facially discriminatory or not, [Maine's tax] exemption is no more an artifice of economic protectionism than any state law which dispenses public assistance only to the State's residents. Our cases have always recognized the legitimacy of limiting state-provided welfare benefits to bona fide residents. . . . States have restricted public assistance to their own bona fide residents since colonial times, and such self-interested behavior (or, put more benignly, application of the principle that charity begins at home) is inherent in the very structure of our federal system. We have therefore upheld against equal protection challenge continuing residency requirements for municipal employment, and bona fide residency requirements for free primary and secondary schooling. . . .

If a State that provides social services directly may limit its largesse to its own residents, I see no reason why a State that chooses to provide some of its social services indirectly—by compensating or subsidizing private charitable providers—cannot be similarly restrictive. . . .

Justice Thomas, with whom Justice Scalia joins, and with whom Chief Justice Rehnquist joins as to Part I, dissenting.

The tax at issue here is a tax on real estate, the quintessential asset that does not move in interstate commerce. Maine exempts from its otherwise generally applicable property tax, and thereby subsidizes, certain charitable organizations that provide the bulk of their charity to Maine's own residents. [The majority's invalidation of Maine's law] works a significant, unwarranted, and, in my view, improvident expansion in our "dormant," or "negative," Commerce Clause jurisprudence. For that reason, I join Justice Scalia's dissenting opinion.

I write separately, however, because I believe that the improper expansion undertaken today is possible only because our negative Commerce Clause jurisprudence, developed primarily to invalidate discriminatory state taxation of interstate commerce, was already both overbroad and unnecessary. . . .

I

The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application. . . .

To cover its exercise of judicial power in an area for which there is no textual basis, the Court has historically offered two different theories in support of its negative Commerce Clause jurisprudence. The first theory posited was that the

■ OBSERVATION

THE EXCLUSIVITY RATIONALE: Justice Thomas alludes to the theory from Justice Johnson's concurrence in *Gibbons v. Ogden*.

Commerce Clause itself constituted an exclusive grant of power to Congress. **The "exclusivity" rationale** was likely wrong from the outset, however. It was seriously questioned even in early cases. And, in any event, the Court has long since repudiated the notion that the Commerce Clause operates as an exclusive grant of power to Congress, and thereby forecloses state action respecting interstate commerce. . . .

The second theory offered to justify creation of a negative Commerce Clause is that Congress, by its silence, pre-empts state legislation. In other words, we presumed that congressional "inaction" was equivalent to a declaration that inter-State commerce shall be free and untrammeled. To the extent that the "pre-emption-by-silence" rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of the law. . . . Even where Congress has legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law. . . . To be sure, we have overcome our reluctance to preempt state law in two types of situations: (1) where a state law directly conflicts with a federal law; and (2) where Congress, through extensive legislation, can be said to have pre-empted the field. But those two forms of pre-emption provide little aid to defenders of the negative Commerce Clause. Conflict pre-emption only applies when there is a direct clash between an Act of Congress and a state statute, but the very premise of the negative Commerce Clause is the absence of congressional action. . . .

In sum, neither of the Court's proffered theoretical justifications—exclusivity or preemption-by-silence—currently supports our negative Commerce Clause jurisprudence, if either ever did. Despite the collapse of its theoretical foundation, I suspect we have nonetheless adhered to the negative Commerce Clause because we believed it necessary to check state measures contrary to the perceived spirit, if not the actual letter, of the Constitution. . . . Any test that requires us to assess (1) whether a particular statute serves a "legitimate" local public interest; (2) whether the effects of the statute on interstate commerce are merely "incidental" or "clearly excessive in relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce, and even then makes the question "one of degree," surely invites us, if not compels us, to function more as legislators than as judges. . . .

In my view, none of this policy-laden decisionmaking is proper. Rather, the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on

interstate commerce . . . and leaves to Congress the policy choices necessary for any further regulation of interstate commerce.

Camps Newfound/ Owatonna, Inc. v. Town of Harrison

II–III [Omitted.]

Chapter Recap

A. The Supremacy Clause ensures that federal law will override state law in cases of conflict. Preemption and the dormant commerce clause doctrine are two frequently litigated aspects of the Supremacy Clause.

B. Federal statutes will preempt state laws if they contain express preemption clauses, or if a preemptive effect is implied.

   1. Federal statutes will impliedly preempt conflicting state laws. State laws may conflict with federal statutes in two ways. (a) If they make it impossible for a person to simultaneously obey both state and federal law. (b) If they create obstacles to the achievement of federal policy.

   2. Federal statutes will impliedly preempt any state law that is enacted in a field that has been fully occupied by federal legislation.

C. The dormant commerce clause doctrine is a form of obstacle preemption arising directly from the US Constitution. If Congress has not legislated, the doctrine restricts the ability of states to enact laws hindering the free flow of goods or services in interstate commerce.