Chapter 1

FEDERAL PREEMPTION OF STATE AND LOCAL LAW

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Federal preemption of state and local law spans a wide variety of legal fields, and while its causes are numerous, its effect is rather straightforward: A state, and a local governmental body that derives its power from the state, is stripped of its power to regulate certain activities that it would otherwise have the power to regulate by a preemptive federal regime. Preemption can only occur when there is concurrent state and federal power. For example, it would not make sense to describe a state's inability to declare war as an issue of preemption: the war-making power is the exclusive privilege of Congress.[1] The same would be true for the power to establish post offices[2] or to issue patents.[3] But where exclusivity is not clearly established by the Constitution, like the fields of nuclear power[4] or aviation,[5] the federal government may, in the interest of an effective, uniform regulatory regime, preempt the states from regulating activities that would otherwise be within their general police power to regulate.

There is no specific "preemption" clause in the Constitution. Rather, conventional wisdom holds that the power of Congress to preempt state law derives from the Supremacy Clause, the Commerce Clause, or sometimes from the Dormant Commerce Clause. Perhaps the simplest, but most controversial, account places the locus of the preemption power in the Necessary and Proper Clause.[6] Whatever its doctrinal source, the contemporary preemption analysis typically begins and ends with the intent of Congress.[7] Thus, while it is helpful to have a working familiarity with the constitutional history, practical questions of preemption are often resolved by statutory interpretation.

This chapter will begin with enough constitutional history of the preemption power so that the uninitiated will be able to spot and therefore better navigate the obstacles that come up when analyzing a preemption issue. The most challenging aspect of a preemption analysis is distinguishing the various flavors of preemption. Preemption in the narrowest sense really means Congress's power to elbow out the states in a particular regulatory field. When Congress acts—or sometimes chooses *not* to act—the states' ability to act in that field is limited. Sometimes it is expressly limited by Congress, and sometimes the courts imply limits to state regulatory power in order to achieve a workable and uniform regulatory apparatus.

Various constitutional principles operate to achieve this end, and the chapter will describe the most significant developments. The chapter will

cover, in historical context, the basic principles derived from the Supremacy Clause and Commerce Clause. It then will survey the constitutional analogs to preemption and detail the limits to federal power to interfere with state governance. It will then describe the basic mechanics of preemption, specifically how, for example, partial preemption differs from total preemption, or how the analysis changes when congressional intent is express or implied. The chapter will conclude with a survey of specific examples of preemption in action, briefly summarizing the operative facts of some illustrative cases, and extracting general principles.

I. HISTORY OF THE PREEMPTION POWER

A. The Supremacy Clause, the Commerce Clause, and the Necessary and Proper Clause

Many commentators consider *Gibbons v. Ogden*[8] the seminal preemption case, but tension regarding the federal government's power to preempt state authority is inherent in our federal system of government. The need for a uniform federal government with at least some ability to fund itself and enforce its decisions was clear after only a few years under the Articles of Confederation.[9] The necessity of retaining the independent sovereignty of the several states was equally obvious[10] (if for no other reason than to make the new Constitution palatable enough to the states for them to ratify it). The federal government's powers are limited to those enumerated in the Constitution, and though it is considered a truism, the Tenth Amendment reserves all other powers for the states.[11] *Gibbons* is the natural starting point for our history of preemption, as it directly addresses the relevant federalism issues of dual sovereignty, concurrent powers, and the necessity of a uniform, national regulatory regime. It also discusses all three of the constitutional sources of the preemption doctrine: the Supremacy Clause, Commerce Clause, and Necessary and Proper Clause.

Some powers are exclusive to the federal government, and some exclusive to the states. In clear-cut exercises of exclusive power, preemption simply doesn't come up. Preemption is often at issue, however, when states and the federal government have concurrent powers. Preemption, then, must be considered against the backdrop of the federalist compromise. Justice Marshall, delivering the opinion of the Court in *Gibbons*, acknowledged a fundamental anxiety over the balance struck by the framers:

> It has been said that [the states] were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their

> league into a government, when they converted their Congress of Ambassadors . . . into a Legislature, empowered to enact laws . . . , the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.[12]

Justice Marshall then rejected the contention that that instrument of change, the U.S. Constitution, should be considered "strictly," though he acknowledged that words must be assigned their "natural and obvious import."[13] The Constitution provides the enumerated powers of the federal government, but "in the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose."[14] The Necessary and Proper Clause counsels against placing rigid limits on how Congress might achieve the tasks given to it in the Constitution.

The controversy before the Court in *Gibbons v. Ogden* was whether the New York legislature had the power to grant a steamboat monopoly to all waters within the state, which had the effect of barring all others from operating interstate lines to New York. The original monopoly was granted to Robert Fulton, who assigned the rights to operate a line between Elizabethtown, New Jersey, and New York City to Ogden. Gibbons owned two steamships that operated the same line, and his ships were licensed under an act of Congress.[15] Ogden won an injunction against Gibbons, effectively neutralizing the federal license, and it was upheld on appeal. The Supreme Court ultimately reversed the decision of the New York courts. After adopting a reading of the word "commerce" broad enough to include not just transporting goods across state lines but also navigating from one state to the next, the Court addressed the scope of the commerce power.

The Court noted that by simply granting Congress a power, the Constitution did not necessarily take it away from the states. To determine whether Congress's power over interstate commerce deprived the states of the same power, "[t]he sole question is can a State regulate commerce . . . among the States while Congress is regulating it?"[16] Unlike the taxing power, which can be exercised concurrently,[17] the regulation of nationally significant aspects of interstate commerce must be exclusive.[18] What Congress decides to leave untouched can be as important to the effective operation of a "uniform whole" as that which Congress affirmatively regulates.[19] A state regulation of steamship traffic within that state's borders would not contravene an explicit constitutional provision, but inconsistent state regulations in the field would undermine Congress's ability to effectively exercise its power

over interstate commerce.[20] And the Court noted that "the framers of our Constitution foresaw this state of things, and provided for it by declaring the Supremacy not only of [the Constitution] itself, but of the laws made in pursuance of it."[21] Consequently, any state law that would interfere with the orderly operation of a federal law made pursuant to an explicit constitutional power must give way—even if the federal law doesn't address the precise activity the state law addresses.

The holding from *Gibbons* rested primarily on the Commerce Clause, but the range of issues that were raised in the case set the stage for most of the preemption jurisprudence that followed. Here is a summary: The dual sovereignty on which the balance of federalism rests begets tension. While the federal government's powers are limited to those enumerated, one of the enumerated powers is to make laws "necessary and proper" to carry out the powers explicitly mentioned in the Constitution. At the very least, the Necessary and Proper Clause buys Congress a bit of operational leeway when its powers rub up against the concurrent powers of the states. There are primarily two types of concurrent powers: those that can generally be exercised by more than one sovereign without much conflict, and those that cannot. The power to tax is the former type, and "it is not subject to preemption unless [the states use it] to discriminate against a group or to place undue burden on interstate commerce."[22] Preemption is much more common in the latter group. If Congress has an explicit grant of power, like the power to regulate interstate commerce, it is plenary, meaning that it has no specific conditions or limitations. But unless it is clearly an exclusive power (such as the war-making power), the states generally have the right to exercise the power concurrently. Whenever there is a conflict between a state law and a federal law, the Supremacy Clause nullifies the conflict in favor of the federal law. However, even when there is not a direct conflict between a state law and an affirmatively enacted federal law, a state law can still be invalidated under these preemption principles if the state law impermissibly interferes with Congress's ability to create a "uniform whole."[23]

B. Dormant Commerce Clause

These latter cases—when a state or local law is invalid though not in overt conflict with a particular federal law—arise under the Dormant Commerce Clause. The phrase is taken from a line from *Gibbons*, when Justice Marshall noted that the regulation of interstate commerce must either be wielded by Congress, or it must "lie dormant."[24] In other words, state and local governments must respect Congress's prerogative *not* to regulate. After

Gibbons, the first major case to address the dormant commerce power was *Cooley v. Board of Wardens*.[25] That case dealt with Pennsylvania's authority to require any ship entering or leaving the Port of Philadelphia to hire local pilots. In upholding the Pennsylvania law, the Court drew a distinction between areas of interstate commerce of such national importance that Congress's power must be exclusive and those of local concern that remained within the general police power of the individual states.

> The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects quite unlike in their nature, some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation.[26]

However, the Supreme Court provided almost no guidance to lower courts to determine specifically what kinds of activities were of national importance or which were sufficiently local to permit a state's concurrent exercise of the commerce power.

For about 75 years, the Supreme Court proceeded in a rather piecemeal fashion. A local law that targeted "peddlers" of out-of-state goods for additional taxes and licensure requirements violated the Dormant Commerce Clause because "transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation."[27] That language was quoted in *Wabash, St. Louis & Pacific Railway Co. v. Illinois* when the Court struck down an Illinois railroad regulation that charged higher rates when goods were being shipped *to* Illinois than when goods were shipped *from* Illinois. The legislation discriminated against out-of-state goods. However, states were allowed to require all engineers of railways operating within their borders to be licensed by a state board.[28] A city was allowed to set speed limits for trains traveling through it.[29]

Though a clear test did not truly emerge until well into the 20th century, the cases discussed above reveal a few animating principles. First, one of a state's most significant powers is the general police power to act for the health and welfare of its citizens. Second, the impact of a specific

regulation on interstate commerce is particularly relevant. The Court had consistently agreed that local regulations, when "indirectly affecting interstate commerce," were "within the power of the state until at least Congress shall take action in the matter."[30] This "direct regulation" test was only a step toward a more comprehensive balancing test, but it shows how the Court had attempted to fashion a rule that accounted for the severity of local impediments to interstate commerce. Finally, bare economic protectionism is almost never permitted.[31]

The test that we use today came from *Southern Pacific Co. v. Arizona*.[32] The Arizona Train Limit Act forbade operating passenger trains of more than 14 cars and freight trains of more than 70 cars. The Court noted that the relevant federal law, the Interstate Commerce Act, did not by its terms preempt the state regulation. Nonetheless, the Court found that the Arizona law unduly burdened interstate commerce and was therefore invalid.

> Hence, the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.[33]

This balancing test has received significant criticism, mainly regarding how to weigh a burden on interstate commerce against the significance of a local interest. Detractors argue that the values are simply incommensurate. Arguments against often promote simple discriminatory/nondiscriminatory test: if a local regulation discriminates against out-of-staters, it should be invalid; otherwise, it should stand.[34]

If a particular regulation has a discriminatory purpose or effect, it may mean the balancing test is not necessary. Bare economic protectionism, as noted previously, is simply not permissible. The Court declared in *City of Philadelphia v. New Jersey*:

> 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.[35]

In *Philadelphia v. New Jersey*, a New Jersey statute barred the importation of most solid or liquid waste that originated outside the state of New Jersey. The Court noted that New Jersey's landfill space was limited but was unsympathetic. Limited landfill space was a problem throughout the Northeast. "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[36] In addition to clarifying the rule against discriminatory state regulations, this case highlighted that federalism cuts both ways. Free-flowing interstate commerce is not just a mechanism to ensure that each state shares in the bounty of the national economy, it also ensures that each state assumes a share of national problems.

As a final point, it must be noted that Congress can lift the prohibition against discriminatory state or local regulations, but it must do so unambiguously. In *Wyoming v. Oklahoma*, the Court struck down an Oklahoma law requiring all coal-powered electric utilities to use at least 10 percent Oklahoma coal.[37] As a consequence, Oklahoma utilities bought less coal from Wyoming, and Wyoming's tax revenue from coal production decreased. Wyoming brought suit under the Supreme Court's original jurisdiction to adjudicate disputes between the states, and the Court rejected Oklahoma's argument that Congress had authorized the practice under the Federal Power Act.

Congress did, in fact, authorize states to implement otherwise discriminatory policies in the Low-Level Radioactive Waste Policy Amendments Act of 1985. The act allowed states, as an incentive to open their disposal sites to waste from other states, to impose a surcharge on the waste they accepted.[38]

Preemption, in its narrowest sense, occurs only when the states are deprived of their ability to act in a certain area because a federal regulatory regime is paramount.[39] Such issues are resolved with reference to the intent of Congress. Specific conflicts between otherwise valid state and federal exercises of concurrent powers, under this narrow view, are resolved by the Supremacy Clause. However, that distinction is more or less academic, and this chapter will take a more outcome-oriented view. Preemption, for our purposes, occurs whenever a state's exercise of power is voided either because federal action has left no room for state action on the subject, or because state action would frustrate an important federal purpose. This broader kind of preemption challenge could be based on the express or implied intent of Congress or on any of the constitutional provisions discussed previously.

II. MECHANICS OF STATUTORY PREEMPTION

The Court's modern preemption analysis was most explicitly stated in *Gade v. Solid Waste Management Association*.[40] The language from *Gade* appears in almost all subsequent preemption cases:

> Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, 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, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[41]

Express preemption is the most straightforward. When Congress explicitly preempts state law, there is a significant presumption that it intended to reach no further than the preemption clause itself:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing the issue, and when the provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusion alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.[42]

Implied preemption, however, requires significant judicial interpretation because the judge must fashion a preemption regime out of whole cloth. While Congress is often protective of its power—*viz* the judiciary—preemption is a curious exception. Often, in the legislative negotiations that have led many to agree with Otto Von Bismarck that laws are like sausages, preemption is left out because the issue is too contentious—or perhaps simply overlooked. Legislators are aware that courts can and will serve as administrators, using the power of implied preemption to keep the federal machine humming.

A. Express Preemption

Congress expressly preempts state law when it includes language like this in a statute: "No state shall adopt or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to [_____]."[43] If it is addressed in the statute itself, the preemption is *express*. In a perfect world, when Congress includes a preemption

clause in a statute, there would be nothing left to argue about. But for many reasons, some political and some practical, Congress will inadequately address the scope of preemption, and the courts will still have to deal with it. For example, despite an express preemption clause, the Supreme Court had to address whether and to what extent the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969, preempted state tort claims. Those claims related specifically to *representations*—for example, failure to warn—were preempted by the labeling law. Warranty-based claims, however, were not preempted.[44]

B. Implied Preemption

When Congress fails to address the relationship of a given law with the state laws it may bump up against, preemption may nonetheless be "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[45] Implied preemption has three primary forms: field preemption, where the federal government's involvement in a given field is so pervasive as to preclude state involvement of any kind; conflict preemption, where a state regulation is voided because it competes with a federal regulation; and obstacle preemption, where courts "seek to remove a barrier to the accomplishment of a federal objective."[46] When a court actually addresses a preemption issue, however, it rarely relies on only one strand of analysis.

C. Field Preemption

Nuclear power is perhaps the paradigm example of the federal government's domination of a given field, but Congress expressly preempted local regulation of nuclear power in the Atomic Energy Act and its amendments.[47] Commentators have compared the federal domination of atomic energy to the federal domination of ocean fishing.[48] In *Southeastern Fisheries Association v. Chiles*, the Eleventh Circuit observed that Congress's establishment of Exclusive Economic Zones (formerly known as Fishing Conservation Zones) to regulate fishing outside a state's territorial waters "outlined a fairly complete and pervasive scheme."[49] Confronted with such a scheme, the Court noted in dicta that Congress "must have intended to occupy the field of fishery management within the [Exclusive Economic Zones]."[50]

The court based this conclusion on statutory provision in which "Congress claims for the United States 'sovereign rights and *exclusive* management authority over all fish [except highly migratory species] within the exclusive economic zone.'"[51] Further, Congress declared that its policy

was to "assure that the *national* program *involves* and is responsive to the affected states." The act set national standards for fishery management and established regional fishery councils, with the purpose that the councils "'*participate in*, and *advise on*, the establishment and administration' of the fishery management plans."[52] While Congress never expressly mentioned preemption, the language from the statute itself, including its statements of policy, indicated that Congress intended to occupy the field. The court found it especially important that Congress intended for the states to have input on the national scheme, but left ultimate authority with the federal government.

D. Conflict Preemption

If intent to occupy the field cannot be implied because the scheme did not "entirely displace" state regulation, state law is "nevertheless preempted when it actually conflicts with federal law."[53] In *Florida Lime & Avocado Growers v. Paul*, the Supreme Court upheld a California law that required avocados entering the state be more mature than the federal rules.[54] Federal rules forbade harvesting avocados until they reached at least 7 percent oil, while California would only accept avocados that had reached 8 percent. The Court first explained the rule: "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."[55] Here, it was possible to comply with both standards because the federal rule did not forbid harvesting *after* 7 percent. If it had, then Florida growers could not have complied with both standards simultaneously, and the California law would have failed. Finding no conflict other than the Florida growers' desire to harvest earlier than allowed in California, the Court upheld the law.

E. Obstacle Preemption

The other main form of implied preemption is commonly referred to as obstacle preemption, which the Court addressed in *Hines v. Davidowitz*.[56] When a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it will be preempted. In *Hines*, the Court considered the Pennsylvania Alien Registration Act, which, among other things, required adult aliens to register every year with the Department of Labor and Industry and carry an alien identification card at all times so they could furnish it at the demand of law enforcement. Before the preemption analysis, the Court first acknowledged that, while the

Constitution did not explicitly make the power to establish a uniform "Rule of Naturalization" exclusive to Congress, "[o]ur conclusion is that . . . the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law."[57] Note first that regulating immigrants is a power shared concurrently between the national and state governments. There is *some* room, though not much, for states to establish policies regarding the status of immigrants. Certain such policy issues are up for debate, and few more publicly than the issuance of driver's licenses to undocumented immigrants. Most states do not allow it but for a handful of states including Oregon, Washington, and California and the federal District of Columbia.

By contrast, when Congress exercises its authority to achieve a national, uniform system of documentation for immigrants, a state law, though not in explicit conflict (as it would be physically possible to comply with the federal law and the Pennsylvania Alien Registration Act), must give way. The Court held:

> The federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.[58]

The Pennsylvania law impeded Congress's efforts to create a uniform alien registry that was consistent with the United States' foreign-relations interests. It was an obstacle, though the Court's reasoning relied heavily on field preemption, as well.

Hines is one of the cases most frequently cited as the origin of obstacle preemption. The best case for illustrating the principle is *Nash v. Florida Industrial Commission*,[59] in which a Florida law obstructed the National Labor Relations Act (NLRA). Florida barred from unemployment insurance anyone who had filed an unfair labor practices grievance with the National Labor Relations Board. A key purpose of the NLRA was to encourage employees to file these grievances with the NLRB. The Florida law penalizing those who pursued their rights under the NLRA was an obstacle and therefore preempted.

F. Complete versus Partial Preemption

Whether preemption is express or implied is the first determination a court must make. Once preemption is found, a court must determine its scope. (In theory, though rarely in practice, a finding of express preemption should

render the question of scope moot due to the presumption that Congress means only what it says—and no more.) There is a continuum from absolute preemption, which completely strips a state of jurisdiction over covered matters, on one extreme, to rather permissive partial preemption regimes that allow states to adopt or exceed basic federal standards, on the other. On the permissive side are statutes like the Water Quality Act of 1965—the first partial preemption statute—which in its current form sets minimum standards but allows states to submit a plan that, if approved by the Environmental Protection Agency, effectively delegates regulatory authority to the state.[60] Similarly, Congress may set *maximum* regulatory standards that the states may not exceed.[61] The Employee Retirement Income Security Act, however, represents the opposite extreme. It completely preempts state regulation of employee benefit plans; it even goes so far as to claim exclusive federal jurisdiction over most claims arising under the statute.[62]

G. Savings Clauses

Congress sometimes does the opposite of preemption. Savings clauses preserve certain aspects (often tort claims) of state law, but these clauses do not get along well with preemption clauses when they appear side by side. The savings clause is usually a concession offered to congressional opponents of preemption. As they often come up late in the bargaining process, they are rarely well thought out. In *Geier v. American Honda Motor Co.*, the Court addressed a conflict between a clause in the National Traffic and Motor Vehicle Safety Act that appeared to "save" common-law tort claims from compliance-with-a-federal-standard defense, but in the case at bar, allowing the state claim to proceed would conflict with a Department of Transportation regulation. The Court "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."[63]

III. LIMITS ON THE FEDERAL PREEMPTION POWER

A. No Federal Police Power

Congress's power to regulate interstate commerce had progressively expanded until *United States v. Lopez*,[64] the first case since the New Deal era to strike down a federal law for exceeding the scope of the Commerce Clause. Prior to that case, the high-water mark was set by *Wickard v. Fillburn*,[65] which introduced the "aggregation" concept to Commerce Clause decisions: the federal government had the power to regulate ostensibly intrastate activity if the aggregate effect of that activity, considered on a national scale, had a substantial impact on interstate commerce. In *Lopez*, the Court now noted

that the Constitution "with[held] from Congress a plenary police power that would authorize enactment of every type of legislation."[66] The United States argued that the Gun-Free School Zone Act, which provided criminal penalties for firearm-possession in a school zone, was within the commerce power because gun violence in schools adversely affected educational outcomes on a national level. In the aggregate, the negative impact on student performance had a substantial relationship to interstate commerce. The Court declined to follow the government's lead: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[67]

The Act that the Court considered fatally lacked significant findings by Congress that guns in schools had a substantial impact on interstate commerce, nor did the act contain a jurisdictional statement that would limit its application to situations involving interstate commerce.[68] The law then was amended to include the following statement: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."[69] The amended act was challenged and upheld by the Eighth Circuit in 1999.[70]

In *United States v. Morrison*, the Supreme Court relied on *Lopez* to strike down the portion of the Violence against Women Act (VAWA) that provided a civil remedy in federal court to victims of gender-based violence—even if no criminal charges were filed.[71] Unlike the statute at issue in *Lopez*, the VAWA was accompanied by congressional findings supporting the link between gender-based violence and economic activity. But like *Lopez*, the VAWA sought to regulate noneconomic activity on the grounds that the aggregate impact substantially affected interstate commerce, and the act lacked a jurisdictional statement.

The Court referenced the three broad categories of activity that Congress can regulate under the Commerce Clause: the channels of interstate commerce, the instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce.[72] While the Court left "nominally undisturbed" the aggregation doctrine from *Wickard v. Fillburn*, the Court insisted, as it had in *Lopez*:

> [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce

> so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[73]

The decision in *Morrison* seemingly limits Congress's ability to aggregate activities that themselves are not economic in nature. However, five years later in *Gonzales v. Raich*, the Supreme Court bolstered the aggregation doctrine when it addressed medical marijuana. Citing *Wickard*, the Court held that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[74] Congress has undisputed authority to regulate the interstate market in marijuana, so private individuals growing marijuana for personal use fall under their Commerce Clause jurisdiction. However, the distinction between aggregating noneconomic activity, which the Court would not allow in *Morrison*, and aggregating noncommercial activity, which the Court allowed in *Raich*, is difficult to explain.

B. Congress Cannot Regulate the States as States

It has been argued that, as a bright-line rule, "the federal government cannot compel a state government to do anything."[75] While that may be a bit extreme, it is clear that the Tenth Amendment is not irrelevant to the scope of Congress's authority. The balance of federalism, as discussed previously, generates friction as the sovereignty of the national government and the sovereignty of the states grate against each other. Perhaps no other legal issue has generated as much grating as the back-and-forth over the Fair Labor Standards Act, which set a minimum-wage requirement for goods shipped in interstate commerce. In *United States v. Darby*, the Court upheld the law against a Tenth Amendment challenge, refusing to employ the Tenth Amendment to overturn a law passed pursuant to the Commerce Clause.[76] Thirty-five years later, the Court invalidated the portion of the Fair Labor Standards Act that required state and local governments to pay their employees the federal minimum wage, in *National League of Cities v. Usery*.[77] In an apparent about-face, the Court observed that "there are limits upon the power of Congress to override state sovereignty even when exercising its otherwise plenary power to tax or to regulate commerce."[78] According to *Usery*, Congress exceeds its authority when it impinges on traditional functions of state and local government. *Usery* then was expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.[79]

There are two main principles in *Garcia*. First, the "traditional state function" test was unworkable. State and local governments have evolved significantly since the birth of the nation, and the very existence of the San Antonio Metropolitan Transit Authority underscored that point. Public municipal transportation services were certainly not "traditional," "integral," or "necessary." Transportation was a traditionally private industry. Quoting Justice Black, the Court noted:

> There is not, and there cannot be, any unchanging line of demarcation between essential and nonessential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine, as conditions demand, what services and functions the public welfare requires.[80]

The traditional-function test rested on a static view of local government, and so it was abandoned. State governments are often the testing grounds for novel policies, and the case law needed to acknowledge, and support, local governmental innovation. The consequence is that, when providing commercial services, local governments will be regulated as businesses.[81]

The second principle to take away from *Garcia* is a bit more tenuous considering the decisions that followed. The majority held that state sovereignty is adequately protected by the structure of federalism. The Court noted that the San Antonio Metropolitan Transit Authority received a significant portion of its operating budget from federal grants under the Urban Mass Transportation Act (UMTA).[82] The states participated in the legislative process that created the UMTA and at that point were able to ensure their sovereign interests were protected. Admittedly, *Garcia* marks the low tide in Tenth Amendment jurisprudence, which has been on the rise in recent decades.

While states may no longer enjoy such a rigid protection of their traditional functions, they maintain significant autonomy. Congress may not compel a state to enact or enforce a regulatory regime, nor can they compel state officials to take specific actions. In *New York v. United States*, the Court considered the Low-Level Radioactive Waste Policy Amendments Act, which provided a variety of incentives to encourage state policy makers to adopt federal standards for nuclear waste disposal. The act provided financial incentives to the states, which the Court upheld. However, the act included a "take title" provision, which forced states to dispose of the waste generated within the state in accordance with federal standards or

take the waste from the generator and assume both ownership and liability for all damages suffered by the generator as a result of the state's failure to comply.[83]

Writing for the majority, Justice O'Connor initially noted that "under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation."[84] To ensure a workable, uniform waste regulation regime, Congress could have simply created one. Or it could have accomplished its purpose wholly using incentives (which will be discussed later in Section III.C), allowing the states to choose. But Congress cannot "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[85] The take-title provision was coercive in that both of the options available to the states risked incurring the ire of the voters, while letting federal lawmakers off the hook. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[86] Such an arrangement impermissibly interferes with local electoral politics, which violates the sovereignty of the individual states.

Preserving the integrity of local electoral politics is of fundamental importance in the balance of federalism. In *Garcia*, the Court considered the constitutional structure of our federal system of government an adequate safeguard for state sovereignty in issues arising under the Commerce Clause. In *United States v. Printz*, the Court again employed this structural analysis, but this time struck down a provision of federal law.[87] The Brady Handgun Violence Prevention Act, which amended the Gun Control Act,[88] required the U.S. attorney general to create an instant background-check system for handgun sales. The act contained a stopgap provision that directed the chief law enforcement officer (CLEO) in each local jurisdiction to conduct background checks (and, implicitly, accept completed applications) until the national system was up and running. If the CLEO found no reason to object to the application, he must destroy any records collected by his office in the process.[89] In striking down the stopgap provisions, the Court held that Congress's assertion of authority, if allowed, would disturb the balance between state and federal sovereignty.[90] Additionally, allowing the federal executive branch to coopt the executive branches of the states would violate the separation of powers among the federal government.[91] The Necessary and Proper Clause, which is typically invoked as a justification of congressional power, here limited Congress's ability to make laws that "improperly" infringed on the constitutional balance described above.[92] In support of this reasoning, the Court relied significantly on *New York v. United States*.[93]

Congress cannot commandeer state governments or government officials to effectuate its policies, even when the policy is squarely within the federal power to regulate Congress. In order to achieve uniformity, Congress must actually preempt state and local laws—any effort to compel states or municipalities to regulate according to scheme is unconstitutional (other than the soft coercion of conditional federal grants). Congress has quite a bit of latitude to shape state and local regulations by doling out federal money and attaching policy conditions to the receipt of those funds.

C. Limits on the Conditions Attached to Federal Grants

The two most important cases relating to the limits of congressional power to spend money for the general welfare are *Penhurst State School and Hospital v. Halderrnan*[94] and *South Dakota v. Dole*.[95] In *Halderrnan*, a developmentally challenged resident of the Penhurst State Hospital sued, alleging substandard conditions. Halderrnan argued that the Developmental Disabilities Assistance and Bill of Rights Act[96] created substantive rights to "appropriate treatment" in the "least restrictive environment." The Court found that the Act was a routine federal funding bill, and the policies announced in the bill of rights section of the bill did not create enforceable rights. The Court declined to imply a cause of action because Congress did not explicitly condition receipt of federal funds under the act on instituting any specific policies. Importantly, the Court noted that the act provided Pennsylvania a total of $1.6 million, a sum "woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting."[97] The holding was supported by a firm rule of statutory construction "that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."[98] That rule is especially important when the supposed obligations on the state are broad and largely indeterminate.

In *South Dakota v. Dole*, the Court confronted a federal transportation funding bill that required each state to set the legal drinking age at 21 years or lose 5 percent of its federal highway funds.[99] South Dakota allowed 19-year-olds to purchase beer containing up to 3.2 percent alcohol. It sued in federal court to obtain a declaratory judgment that the conditions attached to the funding exceeded Congress's power under the Taxing and Spending Clause. The Court upheld the law and outlined the five limitations on Congress broad spending power.[100] First, "the exercise of the spending power must be in pursuit of 'the general welfare.'"[101] There was no argument that setting a standard drinking age was not in pursuit of the general welfare, as ample data showed that "the differing drinking ages in the States created

particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution."[102] Second, when Congress desires to condition receipt of federal funds, it must do so unambiguously, and the Court noted that "[t]he conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress."[103] Third, the conditions must be related "to the federal interest in particular national projects or programs," and South Dakota never contended that was "unrelated to a national concern."[104] The Court then noted that South Dakota never seriously disputed these first three factors.

The controversy surrounded the fourth and fifth factors. The fourth factor states that the conditions must not be independently barred by the Constitution. Here, South Dakota argued that the drinking age violated the Twenty-First Amendment, specifically that the amendment effectively bars Congress from regulating alcohol. The Court rejected that argument and clarified that the limitations on Congress's power to indirectly regulate are "less exacting" than when Congress regulates directly. Ultimately, the fourth factor stands for the

> unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.[105]

The fifth and final factor is that the conditions may not be "coercive." The Court noted that, here "Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory, but in fact."[106]

The Court in *Dole* characterized Congress's use of federal grants as "relatively mild encouragement:" Raise the drinking age to 21, or lose 5 percent of federal transportation funds. The Court confronted a very different kind of encouragement in *National Federation of Independent Businesses v. Sebelius* when it reviewed two major provisions of the Affordable Care Act: the individual mandate and the Medicaid expansion.[107] Medicaid is a joint venture between the federal government and the states, and it is voluntary. If the states opt in, they receive at least half of their operating budgets in federal grants if they offer medical coverage meeting certain minimum federal standards to families with dependent children, the elderly, and people with disabilities. Every state has opted in. Under the Affordable Care Act, however, states were required to expand coverage to all adults

with incomes up to 133 percent of the federal poverty level. States were given the "choice" to comply with the expansion or forfeit the *entirety* of their federal Medicaid funding.[108] The Court called that not-mild encouragement but "a gun to the head."[109] Ultimately, the individual mandate was upheld, but the states were allowed to opt out and keep their original levels of funding.

IV. APPLICATION TO ISSUES OF STATE AND LOCAL CONCERN

A. Zoning

So far, this chapter has attempted to present a descriptive account of preemption, focused more on outcomes than on technical terms. Often, a given statute or regulation may not declare, on its face, an intent to preempt local authority, but the outcome is indistinguishable. For example, attaching policy conditions to the receipt of federal funds is not technically "preempting" any particular state law or local ordinance. Local governments still have authority to act in the given area but defer in order to benefit from federal largesse. Frequently, as noted regarding the Affordable Care Act, the states view the generosity of the federal government with suspicion, and the courts have crafted limits on the coercive power of conditional grants. But some pains have been taken to point out the differences among the various methods the federal government uses to achieve regulatory uniformity. Sometimes the analysis starts with a preemption clause, sometimes it does not. An awareness of this ambiguity is necessary when making sense of the federal government's involvement with local land-use decisions.

The Supreme Court has consistently recognized that the local interests at play in zoning decisions justify significant deference by the federal government. In *Village of Euclid v. Ambler Realty*, the Court noted that localized planning and zoning ordinances are justifiable exercises of the general police power reserved to the states in the Constitution.[110] There are limits, however, to the local government's authority to determine appropriate land use. These limits are established by a mishmash of statutes (which rarely admit their preemptive purpose and/or effect) and case law under the Dormant Commerce Clause.

B. Fair Housing Act

While the Justice Department maintains that the Fair Housing Act does not preempt local zoning laws,[111] the effect is largely the same. As discussed previously, preemption in the narrow sense occurs when one level of

government claims exclusive authority to act in a certain regulatory arena. The Fair Housing Act, instead, applies to local governments and municipalities and prohibits them from passing any zoning regulation or practice that excludes or discriminates against protected classes. Those protected classes include race, color, religion, sex, familial status, national origin, and disability. Local zoning ordinances have been struck down for violating the Act when the discrimination is obvious and intentional but also when a discriminatory intent is absent. Intentional discrimination includes zoning ordinances that treat uses such as affordable housing, supportive housing, or group homes for individuals with disabilities differently from other similar uses. The latter category of discrimination, which does not require explicit discriminatory intent, is usually proven using the "disparate impact" analysis.

Whether the Fair Housing Act preempts local law has significant jurisdictional implications. A claim arising exclusively under state laws against housing discrimination is not removable to federal court because there is no federal subject-matter jurisdiction.

1. Toledo Fair Housing Center v. Farmers Insurance [112]

In a case arising out of allegations of housing discrimination, the district court held that no federal subject-matter jurisdiction existed, and thus the defendant's removal to federal court was improper. The complaint alleged a violation of Ohio law regarding housing discrimination. Because the Fair Housing Act explicitly states that it does not preempt local law, the court held that federal law does not preempt Ohio law regarding housing discrimination except to the extent an Ohio law is itself a "discriminatory housing practice."

Local zoning ordinances often run afoul of the Fair Housing Act with respect to individuals with disabilities. That is because, beyond the substantive requirements of the Fair Housing Act itself, municipalities must also navigate the accommodation requirements of the Americans with Disabilities Act.

2. Dadian v. Village of Wilmette [113]

The Dadians were an elderly couple who lived in and had difficulty navigating their two-story house. They hired an architect to design a one-story house with hallways wide enough for wheelchairs and an attached front garage. The garage conflicted with a zoning ordinance, and their application for waiver was denied. The board was concerned that Mrs. Dadian, who had difficulty turning or twisting, could not safely back out of the driveway without posing a risk to small children. The Dadians brought their lawsuit in federal court, alleging claims of discrimination under the Americans with

Disabilities Act and the Fair Housing Amendments Act, and ultimately prevailed before a jury. The Village appealed. The Seventh Circuit held that a public entity must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, or services, when necessary. Because a reasonable jury could have found that the Village violated the Americans with Disabilities Act and the Fair Housing Amendments Act, the court of appeals affirmed the award for the Dadians.

To establish a violation of the Fair Housing Act, a plaintiff may either prove that the defendant acted with discriminatory intent or that a given rule or policy has a discriminatory effect disparately impacting persons in a protected group. To prove intentional discrimination, the plaintiff need only show that a decision to deny housing opportunities was motivated, at least in part, by the plaintiff's protected status.

3. Fowler v. Borough of Westville[114]

The plaintiffs in this case were recovering alcoholics and drug users who resided in a group home located in Westville, New Jersey. The home operated under the "Oxford House" model, in which residents were self-sufficient, house conflicts were resolved democratically, and any resident who relapsed was ejected from the house by the other residents. The plaintiffs alleged that the Borough attempted to drive them out of town by directing excessive police activity at the home's residents and excessive regulatory actions at the home's owners. The Borough moved for summary judgment, and the district court denied, holding that the plaintiffs made sufficient allegations that the Borough's administrator had made statements indicating that he did not want people in recovery residing in Westville—and that he was not going to let "those people" stay in his town. The court held that the plaintiffs had created a triable issue of fact as to whether the Borough administrator was motivated to target the home and its residents for heightened scrutiny based on their disability.

A plaintiff need not prove intentional discrimination to make out a claim under the Fair Housing Act. Recently, the disparate impact theory has become especially controversial. Twice in the last few years, the Supreme Court has agreed to hear a challenge to the validity of the disparate-impact rule. The most recent case involved an urban revitalization project in New Jersey.

4. Township of Mount Holly v. Mount Holly Gardens Citizens in Action[115]

The Township of Mount Holly determined that the subdivision known as Mount Holly Gardens was a blighted area and designated it for urban renewal. The area was home to primarily African American and Latino

residents. A group of residents banded together to oppose the program but were unsuccessful. The Township went ahead with its plan to purchase and demolish the homes in the designated area and to replace them with market-rate homes. Though the Township intended to provide relocation assistance to the residents, the vast majority of the residents—even with this assistance—would not be able to afford any housing anywhere in the Township of Mount Holly. The residents brought their suit first in state court, going all the way up to the New Jersey Supreme Court, and got no relief. Having exhausted their state court remedies, they brought suit in federal district court. The district court granted the Township's motion for summary judgment. The Third Circuit reversed, holding that the residents had made out a prima facie case of discrimination based on disparate impact. The Supreme Court accepted the case, but the residents and the Township settled before oral arguments.

The Third Circuit outlined the legal standard for disparate impact. Disparate impact claims do not require a showing of discriminatory intent. Rather, under this theory, the federal law is permitted to reach actions that are equally deleterious as purposefully discriminatory conduct. Courts look to see whether the action had a racially discriminatory effect—that is, whether it disproportionately burdened a particular racial group so as to cause disparate impact. This is the prima facie case: if a plaintiff makes out a prima facie case, the burden shifts to the defendant to prove a legitimate nondiscriminatory reason for its action. If it does, the defendant must also show that no alternative course of action could achieve the same end with less discriminatory impact. The plaintiff must then provide such an alternative. The court looked at the statistical evidence and found obvious disparate impact. The court then had no trouble believing that the defendant had legitimate, nondiscriminatory reasons—the problem was with the alternative course of action. The defendant failed to show that there was no way to alleviate the blight without effectively removing the residents from the area. The residents provided evidence that the blight could be addressed through rehabilitation of existing homes, as well as designating a substantial portion of the new homes as low-income housing.

The Department of Housing and Urban Development has recently promulgated a final rule clarifying when "disparate impact" should be applied to cases of housing discrimination:

> Under this test, the charging party or plaintiff first bears the burden of proving its prima facie case that a practice results in, or would predictably result in, a discriminatory effect on the basis of a protected characteristic. If the charging party or plaintiff proves a prima facie case, the burden of proof shifts to the respondent or defendant to prove that the challenged practice is necessary to

> achieve one or more of its substantial, legitimate, nondiscriminatory interests. If the respondent or defendant satisfies this burden, then the charging party or plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect.[116]

The test is substantially the same as the Third Circuit's.

C. Religious Land Use and Institutionalized Persons Act

With the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress brought back the strict-scrutiny standard for conflicts between land-use regulations and religious uses of land. After *Employment Division v. Smith* held in 1991 that laws of general applicability—laws that don't single out religious activity—are subject only to rational-basis review, Congress adopted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA broadly required strict scrutiny for government action that burdened an individual's free exercise of religion, but it was struck down as applied to the states in *City of Boerne v. Flores*. That case involved a San Antonio Catholic archbishop's efforts to enlarge his mission-style church in Boerne, Texas. The archbishop argued that the zoning board's denial of his building permit was a substantial burden on the free exercise of religion that lacked a compelling state interest, the standard set out in RFRA. That argument may have been consistent with RFRA, but it ultimately failed.

Congress reacted to the demise of RFRA by enacting RLUIPA, which is a much narrower law that protects religious land use and prisoners' exercise of religion. Much like the Fair Housing Act, RLUIPA contains an anti-preemption clause. And much like the Fair Housing Act, the effect of the law seems very much like preemption—it invalidates state and local laws that conflict with its provisions. The Act remains the law of the land; however, only the prisoner portion of the Act has been tested in the Supreme Court.[117]

The RLUIPA has a jurisdictional element, which has allowed it to escape the fate of the Gun-Free School Zones Act. The Act applies in three scenarios: (1) when the program imposing the substantial burden receives federal financial assistance, even when the result of a rule of general applicability; (2) the burden affects commerce with foreign nations, among the states, or with Indian tribes, even when the result of a rule of general applicability; or (3) when the burden results from the implementation of a land-use regulation that requires the government to make an individualized assessment of the proposed uses for the property—in other words, when it is not a zoning rule of general applicability.

1. Guru Nanak Sikh Society of Yuba City v. County of Sutter [118]

Guru Nanak Sikh Society is a nonprofit dedicated to education and fostering the teachings of the Sikh religion. Guru Nanak purchased a 1.89-acre plot of land in Yuba City and intended to build a temple there. The land was zoned for single-family residential homes, and Guru Nanak applied for a conditional-use permit (CUP). The county planning division recommended that the plans be approved, but after a town meeting in which residents expressed their concern about increased traffic and noise, the CUP application was denied. Guru Nanak then purchased a 28-acre parcel much farther away from residential uses in an area zoned for general agricultural use and applied for a CUP there. After agreeing to recommendations to ease the environmental impact, the planning division approved the application. Residents filed a timely appeal and voiced concerns about traffic and noise, and while the planning division recommended that the approval be sustained, the board of supervisors reversed the CUP application.

The Ninth Circuit held that the Act applied and was constitutional, that the burden was substantial, and that it was not justified by a compelling interest. The county argued that its land-use law was one of general applicability—that argument was quickly rejected, as the third applicability prong clearly contemplated zoning decisions made after considering the details of a specific proposed use. The wording of the zoning rule may not specify its relationship to religious land uses, but it clearly provided for the individual facts to be considered. The burden was substantial for two reasons: (1) the broad reasons for the "tandem denials" could easily apply to future applications, and (2) Guru Nanek agreed to each of the county's mitigation measures but was nonetheless rejected without explanation. It did not appear that Guru Nanek could build a temple anywhere in Sutter County. Finally, the court found that RLUIPA was a valid exercise of Congress's enforcement power pursuant to Section 5 of the Fourteenth Amendment.

RLUIPA has survived challenges to its constitutionality as a valid exercise of Congress's power under the Commerce Clause.

2. Westchester Day School v. Village of Mamaroneck [119]

The Westchester Day School is a Jewish private school located in Westchester County, New York. It provides a dual curriculum in Judaic and general studies, and even general studies courses are taught such that Judaic concepts are reinforced. It is impossible to distinguish between Judaic studies and general studies curriculum. The school had been built in piecemeal

fashion over 60 years. The original building was a farmhouse and stable built in the late 19th century. The day school bought those structures and a 25-acre parcel in 1948 and converted the buildings into a school; more buildings followed. Those buildings, however, were inadequate to the school's needs, and they proposed a significant renovation that would add 12 classrooms. Initially, the zoning board issued a "negative declaration" that the $12 million expansion project would have no significant adverse environmental impact, and the project proceeded. However, a small but vocal group in the community opposed the project, and eight months later, the board rescinded the negative declaration, the result of which was that the project would be required to prepare and submit a full environmental impact statement. Instead, the day school brought suit under the RLUIPA.

The Second Circuit found that the day school was a religious exercise and that the zoning board decision was a substantial burden because it was final in the eyes of the board.[120] Finally, the action was not the least restrictive means of advancing a compelling interest. The board stated that its compelling interest was ensuring the residents' safety through traffic regulation; however, the district court found that the board's interest was not truly a public health and safety concern, but "undue deference to the opposition of a small group of neighbors." And the action was not the least restrictive, as the board could have approved the application subject to limitations but refused to consider doing so. Ultimately, the Second Circuit upheld the law as a valid exercise of Congress's power under the Commerce Clause. The Supreme Court has made plain that the satisfaction of a jurisdictional element that requires a case-by-case analysis of the impact on interstate commerce is sufficient to validate the exercise of power. The Second Circuit looked to the district court findings that the significant project would bring significant business into the area and also noted that commercial building construction is, consistent with prior precedent, activity affecting interstate commerce.

It is important to note the significance of the pervasive religious element to the educational mission of the school. In another case, the Eastern District of Virginia held that a church's proposed use was not a religious activity.[121] Calvary Christian Church intended to allow a third party to operate a day school for children with disabilities on its premises. Calvary argued that it had a biblical calling to reach out to disadvantaged groups in the community for service. Bringing the school for children with disabilities was consistent with its ministry. However, the district court noted that Calvary had not pleaded sufficient facts to support the conclusion that the school was anything other than secular. Consequently, it did not qualify as religious activity, and so there was no claim under the RLUIPA.

D. Anti-Big-Box Zoning

In order to address the needs of growing communities, municipalities have enacted various "smart growth" ordinances, including comprehensive plans to control the "rate, amount, type, location, and quality of growth."[122] These comprehensive plans are costly and difficult to implement. Other means to combat "urban sprawl" have directly attacked its most visible symbol: big-box retail stores like Wal-Mart.[123] Anti-big-box zoning has recently been subject to scrutiny under the Dormant Commerce Clause. Anti-big-box zoning is often justified based on urban-density concerns such as congestion and environmental impact. Zoning regimes tailored to these concerns are generally free from controversy. Frequently, though, these concerns either accompany or mask fears that large national chains will drive local businesses out.

Municipalities may be in trouble if it appears that local economic protectionism is really behind a zoning ordinance.[124] As noted previously, an ordinance that is driven by a protectionist or discriminatory purpose, is subject to strict scrutiny and almost always invalid. If an "ordinance 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."[125] Zoning ordinances aimed at congestion and environmental impact stand a good chance of satisfying the "legitimate local public interest." Zoning ordinances that reveal an intent to protect local business against national competition, however, may be found to have a discriminatory purpose or effect, in which case, a much higher standard will apply.

1. Cachia v. Islamorada[126] *and Island Silver and Spice, Inc. v. Islamorada*[127]

Islamorada, Florida, enacted zoning ordinances that subjected "formula," or chain, retail stores and restaurants to different zoning requirements than locally owned retail stores and restaurants. The ordinance determined that a business was "formula" if it had standardized interior or exterior designs or provided standardized services, products, or menu items. Formula businesses were capped at 2,000 square feet of storefront, while non-formula businesses were allotted 12,000. In these two cases, the Eleventh Circuit applied a two-tier Dormant Commerce Clause. First, the court noted that the Dormant Commerce Clause prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. If a regulation directly regulates or discriminates against interstate

commerce—that is, if it has a discriminatory purpose on its face—or if it has the effect of favoring in-state economic interests, the regulation must be shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. If it regulates even-handedly and has only indirect effects on interstate commerce, the test is lighter: the regulation will survive unless it is shown that the burden on interstate commerce clearly exceeds the local benefits. In *Cachia*, the Eleventh Circuit reversed the district court's dismissal and remanded consideration of the facts; in *Island Spice*, the Eleventh Circuit affirmed the district court's determination that the ordinance violated the Dormant Commerce Clause.

E. Communications Tower Siting

When Congress expressly preempted state and local governments' authority to regulate commercial mobile wireless services, it specifically preserved—subject to conditions of course—the local zoning authority.[128] Those conditions are that (1) the regulation shall not unreasonably discriminate among providers of functionally equivalent services and (2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services (PWS). Additionally, the statute requires state and local governments to respond within a reasonable time to any request for authorization in writing, based on a factual record, and supported by substantial evidence. While the local government may regulate placement of the tower, Congress completely preempted the regulation of the environmental effects of frequency emission, as those are already regulated by the Federal Communications Commission. It is the second condition listed above that most often leads to conflict.

Whether or not a local regulation has *the effect* of prohibiting the provision of PWS is not limited to outright prohibitions, moratoriums, bans, or other expressly hostile limitations on siting.[129] Rather:

> [L]ocal zoning policies and decisions have the effect of prohibiting wireless communication services if they result in "significant gaps" in the availability of wireless services, [and there is] a "gap" in personal wireless services when a remote user of those services is unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted connection.[130]

Mountaintop PWS towers are especially contentious because they are prime locations from both perspectives—local governments want to preserve

their scenic resources, but PWS providers often cannot reach mountainous areas any other way. A local government does not violate the Telecommunications Act when it allows reasonable, though more costly, alternative means for a PWS provider to achieve consistent service.[131] In other words, the PWS provider is not entitled to its preference.

V. CONCLUSION

The framers of the Constitution granted states—and through the states' sovereignty, local governments—a broad police power that the framers denied to Congress. Yet Congress can nevertheless limit or entirely foreclose a state's exercise of that police power by the various methods of "preemption" discussed in this chapter. And while Congress's ability to intrude on states' regulatory domain has its limits, those limits are not particularly well defined. The specific examples of preemption in the courts that comprise the second half of this chapter demonstrate how individuals and organizations frequently raise preemption as a defense to state regulatory action. In other words, preemption is a concern both in the drafting of state law and municipal regulations, as well as in the enforcement. While this is only a chapter on preemption, and not a treatise, its aim is to provide a basic familiarity with the field sufficient to help the practitioner recognize potential preemption issues as—and hopefully before—they arise.

ENDNOTES

1. U.S. Const. art. I, § 8, cl. 11.
2. *Id.* at cl. 7.
3. *Id.* at cl. 8.
4. Atomic Energy Act, 42 U.S.C. § 2011.
5. Federal Aviation Administration Enabling Act, 49 U.S.C. § 106.
6. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767 (1994).
7. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
8. 22 U.S. (9 Wheat.) 1 (1824).
9. *See* Alexander Hamilton, The Federalist No. 22.
10. *See* Alexander Hamilton, The Federalist No. 32.
11. "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." United States v. Darby Lumber, 312 U.S. 100, 124 (1941).

12. *Gibbons*, 22 U.S. (9 Wheat.) at 187.
13. *Id.*
14. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 18).
15. *Id.* at 2 (reporter's summary of oral arguments). Specifically, Gibbons was authorized to practice the "coasting trade."
16. *Id.* at 200.
17. "The power of taxation . . . is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time." *Id.* at 199.
18. Later Commerce Clause jurisprudence specified that Congress's authority under the Commerce Clause included regulating the channels of interstate commerce, Heart of Atl. Motel, Inc. v. United States, 379 U.S. 241, 357 (1964), instrumentalities of interstate commerce, Shreveport Rate Cases, 234 U.S. 342 (1914), and those activities having a substantial impact on interstate commerce, United States v. Lopez, 514 U.S. 549, 558–59 (1995).
19. *Gibbons*, 22 U.S. (9 Wheat.) at 209.
20. *Id.* at 211.
21. *Id.*
22. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES 11 (Sept. 1992).
23. *Gibbons*, 22 U.S. (9 Wheat.) at 209.
24. *Id.* at 189.
25. 53 U.S. (12 How.) 299 (1851).
26. *Id.* at 275, 319.
27. Welton v. Missouri, 91 U.S. 275, 281 (1876); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 437–38 (2011).
28. *See* Smith v. Alabama, 124 U.S. 465 (1888).
29. *See* Erb v. Morasch, 177 U.S. 584 (1900).
30. *Id.* at 585.
31. *Welton*, 91 U.S. at 281.
32. 325 U.S. 761 (1945).
33. *Id.* at 770–71.
34. *See* CHEMERINSKY, *supra* note 27, at 440–41.
35. City of Phila. v. New Jersey, 437 U.S. 617, 623–24 (1978).
36. *Id.* at 628.
37. 502 U.S. 437 (1992).
38. Pub. L. No. 99–240, 99 Stat. 1842, 42 U.S.C. §§ 2021b. Although the Court upheld the incentives, it struck down the "take title" provision in New York v. United States, 505 U.S. 144 (1992). *See* text accompanying note 83, *infra*.
39. *See* Gardbaum, *supra* note 6, at 771.
40. 505 U.S. 88 (1992).
41. *Id.* at 98.
42. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992).
43. *See* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION 53 (2006) (discussing the Airline

Deregulation Act of 1978, former 49 U.S.C. § 1305, *repealed*, Pub. L. No. 103-272, 108 Stat. 1379 (1994)).

44. *See generally Cipollone*, 505 US 504.
45. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).
46. *See* O'REILLY, *supra* note 43.
47. That did not, however, put to rest all preemption issues, as *Silkwood v. Kerr-McGee Corp.* indicated. 464 U.S. 238 (1984). This case will be discussed again later.
48. *See* O'REILLY, *supra* note 43, at 71.
49. 979 F.2d 1504 (1992).
50. *Id.* at 1509.
51. *Id.* (alteration and emphasis in the opinion) (discussing § 1811(a) of the Magnuson Act).
52. *Id*.
53. *Id.*
54. 373 U.S. 132 (1963).
55. *Id.* at 142.
56. 312 U.S. 52 (1941).
57. *Id.* at 68.
58. *Id.*
59. 389 U.S. 235 (1967).
60. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 22, at 16.
61. *E.g.*, Gramm-Leach-Biley Act, Pub. L. No. 106–102, 113 Stat. 1338 (codified in scattered sections of 12 and 15 U.S.C.).
62. Section 502(e)(1) of ERISA states: "Except for actions under (a)(1)(b) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor] or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(e)(1).
63. Geier v. Am. Honda Motor Co., 529 U.S. 861, 870 (2000) (alteration in original).
64. United States v. Lopez, 514 U.S. 549, 558–59 (1995).
65. 317 U.S. 111 (1942).
66. 514 U.S. at 566.
67. *Id.* at 567.
68. *Id.* at 561.
69. 18 U.S.C. § 922(q)(2)(A) (2006).
70. *See* United States v. Danks, 221 F.3d 1037 (1999).
71. 529 U.S. 598, 606 (2000) (quoting 42 U.S.C. § 13981(d)(2)).
72. *Id.* at 608–09.
73. *Id.* at 608.
74. 545 U.S. 1, 18 (2005).
75. Mario Loyola, *Trojan Horse: Federal Manipulation of State Governments and the Supreme Court's Emerging Doctrine of Federalism*, 16 TEX. REV. L. & POL. 113, 133 (2011).
76. 312 U.S. 100 (1941). It is worth noting that the provisions of the act at this time did not apply to state and local employees.

77. 426 U.S. 833 (1976).
78. *Id.* at 842.
79. 469 U.S. 528 (1985).
80. *Id.* at 546 (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (concurring opinion)).
81. While the regulations apply to local governments and businesses alike, government actors still enjoy sovereign immunity. In *Alden v. Maine*, the Supreme Court decided that individuals could not sue state and local government employers—either in state or federal court—to enforce their rights under the Fair Labor Standards Act. 527 U.S. 706 (1999).
82. Pub. L. No. 88-365, 78 Stat. 302, *as amended*, 49 U.S.C. § 1601.
83. New York v. United States, 505 U.S. 144, 154 (1992).
84. *Id.* at 160.
85. *Id.*
86. *Id.* at 169.
87. 521 U.S. 898 (1997).
88. Pub. L. No. 103-159, *as amended*, Pub. L. No. 103–322, 103 Stat. 2074 (note following 18 U.S.C. § 922).
89. United States v. Printz, 521 U.S. at 902–03 (discussing § 922(s) of the Act).
90. *Id.* at 918–20.
91. *Id.* at 921.
92. *Id.* at 923–25.
93. *Id.* at 926.
94. 451 U.S. 1 (1981).
95. 483 U.S. 203 (1987).
96. 42 U.S.C. § 6010(1).
97. *Halderrnan*, 451 U.S. at 24.
98. *Id.*
99. 483 U.S. 203 (1987).
100. *Id.* at 207–208.
101. *Id.* at 207.
102. *Id.* at 208.
103. *Id.*
104. *Id.* at 208.
105. *Id.* at 210–11.
106. *Id.* at 211.
107. 132 S. Ct. 2566 (2012).
108. 42 U.S.C. § 1396d(a).
109. 132 S. Ct. at 2604.
110. 272 U.S. 365 (1926).
111. The department's definition of preemption is relatively narrow: "'Pre-emption' is a legal term meaning that one level of government has taken over a field and left no room for government at any other level to pass laws or exercise authority in that area." Joint Statement of the Department of Justice and the Department of Housing and Urban Development, *Group Homes, Local Land Use, and the Fair Housing Act*, DEP'T JUSTICE (Aug. 18, 1999), http://www.justice.gov/crt/about/hce/final8_1.php.

112. 61 F. Supp. 2d. 681 (N.D. Ohio 1999).
113. 269 F.3d 831 (7th Cir. 2001).
114. 97 F. Supp. 2d 602 (D.N.J. 2000).
115. 658 F.3d 375 (3d Cir. 2011).
116. 78 Fed. Reg. 11,460 (Feb. 15, 2013).
117. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).
118. 456 F.3d 978 (9th Cir. 2006).
119. 504 F.3d 338 (2d Cir. 2007).
120. After denial, all board members discarded their files on the project, and to submit the full impact statement, the day school would have to begin the application process anew. Finally, the district court did not find the board members credible when they testified that they would give the day school a fair reconsideration.
121. Calvary Christian Church v. City of Fredericksburg, 832 F. Supp. 2d 635 (E.D. Va. 2011).
122. Daniel L. Mandelker, *Managing Space to Manage Growth*, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 801, 804 (1999).
123. *See* Brannon Denning & Rachel Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 Urb. Law. 907, 910 (2005).
124. Courts will look to the text and context of the statute or ordinance at issue, as well as legislative history, to determine the legislative purpose behind the regulation. *See* Mark Bobrowski, *The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine*, 44 Urb. Law. 227, 257–58 (2012). The Fourth and Eighth Circuits will also look to public statements made by individual legislators to determine intent. *Id.*
125. Pike v. Brice Church, 397 U.S. 137, 142 (1970).
126. 542 F.3d 839 (2008).
127. 542 F.3d 844 (2008).
128. Telecommunications Act of 1996, 47 U.S.C. § 332.
129. Va. Metronet, Inc. v. Bd. of Supervisors, 984 F. Supp. 966 (E.D. Va. 1998).
130. Cellular Tel. Co. v. Zoning Bd. of Adjustments of Borough of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999).
131. 360 Degree Commc'ns v. Bd. of Supervisors of Albermale Cnty., 211 F.3d 79 (4th Cir. 2000).