ARTICLE VI
SUPREME LAW

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ARTICLE VI—SUPREME LAW

ArtVI.1 Overview of Article VI, Supreme Law

Article VI establishes that the Constitution, U.S. laws, and treaties made under the authority of the United States are the Nation's supreme law and are binding on state judges notwithstanding any state constitution or law. Article VI also expressly provides that the new U.S. government established under the Constitution remained bound by the obligations of the predecessor governments established under the Articles of Confederation and Continental Congresses. In addition, Article VI provides that federal and state executive and judicial officers as well as members of federal and state legislatures shall take an oath to support the Constitution. Finally, Article VI expressly bars using religious tests as a qualification to hold "any Office or public Trust under the United States." [1]

Clause 1—Obligations of New Federal Government

ArtVI.C1.1 Debts and Engagements Clause

Article VI, Clause 1:

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

This provision, variously called the "Debts Clause," "Engagements Clause," or "Debts and Engagements Clause,"[1] provides that the United States will recognize the debts and engagements of its predecessor governments—namely, the Continental Congresses and the federal government under the Articles of Confederation.[2] This "declaratory proposition" served to assure the United States' foreign creditors, in particular, that the adoption of the Constitution did not have "the magical effect of dissolving [the United States'] moral obligations."[3]

To finance the American Revolutionary War, the Continental Congress borrowed money from foreign and domestic sources.[4] To assure creditors that the new government would honor these obligations, the Articles of Confederation provided:

> All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the

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[1] U.S. Const. art. VI.

[1] *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 1066 n.282 (2010) (referring to this provision as the "Debts Clause"); Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 Notre Dame L. Rev. 35, 51 (2002) (referring to this provision as the "Engagements Clause"); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1827 (2012) (referring to this provision as the "Debts and Engagements Clause").

[2] U.S. Const. art. VI, cl. 1.

[3] The Federalist No. 43 (James Madison); *accord* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1826–28 (1833); The Federalist No. 84 (Alexander Hamilton); Lunaas v. United States, 936 F.2d 1277, 1278 (Fed. Cir. 1991) ("[Through the Debts and Engagements Clause] the nation undertook to assure creditors that the adoption of the Constitution would not erase existing obligations recognized under the Articles of Confederation.").

[4] *See generally* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. Chi. L. Rev. 775, 802 (1994) ("The Revolution had been fought in substantial part on credit, and many creditors had not been paid.").

present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.[5]

The question of whether the new constitution should include a similar provision arose at the Constitutional Convention. As originally proposed, the Debts Clause provided that "The Legislature of the U.S. shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the U.S.: as the debts incurred by the several States during the late war, for the common defence and general welfare."[6] There followed some debate over whether the Debts Clause should provide that the new Congress "*shall* discharge the debts," or merely that it has the power to do so.[7]

Eventually, Edmund Randolph proposed a version stating prior debts "shall be as valid against the United States under this constitution as under the Confederation," which the Convention approved.[8] The second part of the original proposal, concerning Congress's power to *pay* debts, was separated from the Debts Clause and became part of Congress's Article I spending power.[9] Both of these provisions were quickly put to use by the First Congress, which in 1790 enacted Secretary of the Treasury Alexander Hamilton's plan to settle the Confederation's debts (and, more controversially, those of the states).[10]

After the federal government satisfied the financial obligations inherited from the Confederation, the Debts and Engagements Clause has rarely been a topic of debate.[11] The few Supreme Court cases that discuss the Clause concern the question of whether the Northwest Ordinance of 1787—particulary its prohibition on slavery in what was then the Northwest Territory—was among the "engagements entered into" by the Articles of Confederation, which the new federal government was obliged to respect.[12]

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[5] Articles of Confederation of 1781, art. XII.

[6] 2 The Records of the Federal Convention of 1787, at 355–56 (Max Farrand ed., 1911).

[7] *See id.* at 377 (Gouverneur Morris introduces version stating the legislature "*shall* discharge the debts"), 412 (objection of George Mason to the "shall" language as "too strong").

[8] *Id.* at 414. Randolph's version is substantially the same as the final constitutional clause, save that the Committee of Style changed the description of the debts as contracted "by or under the authority of Congress" to "before the adoption of this Constitution." *Compare id.* at 414, *with id.* at 693 (Committee of Style draft).

[9] *See id.* at 497; U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[10] *See* Act of Aug. 4, 1790, 1 Stat. 138.

[11] *See* Jeffrey Sikkenga, *Debt Assumption*, *in* The Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/6/essays/132/debt-assumption ("After some political struggles in the early 1790s, the new federal government made good on the bond obligations inherited from the Articles of Confederation, thus vitiating the possibility for serious constitutional controversy.").

[12] *Compare* Strader v. Graham, 51 U.S. 82, 97 (1850) (Chief Justice Roger Taney) (expressing view that the Northwest Ordinance "ceased to be in force upon the adoption of the Constitution"), *with* Pollard's Heirs v. Kibbe, 39 U.S. 353, 417 (1840) (Baldwin, J., concurring) (relying on the Engagements Clause to argue that the Northwest Ordinance, "the most solemn of all engagements, has become a part of the Constitution, and [remains] valid"), *and Strader*, 51 U.S. at 98 (Catron, J., dissenting) (similar). *See generally* Downes v. Bidwell, 182 U.S. 244, 320–21 (1901) (White, J., concurring) (summarizing this debate).

Chief Justice Roger Taney's view prevailed for a time, infamously, in *Dred Scott v. Sanford,* 60 U.S. 393, 438 (1857) (holding that the Northwest Ordinance "had become inoperative and a nullity upon the adoption of the Constitution"), *superseded by constitutional amendment*, U.S. Const. amend XIV. This issue was rendered moot by the passage of the Thirteenth Amendment, whose language parallels the Ordinance and prohibits slavery throughout the United States. *Compare* Ordinance of 1787 art. VI ("There shall be neither slavery nor involuntary servitude in the said [Northwest] territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted . . . .") *with* U.S. Const. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See generally* Amdt13.1 Overview of Thirteenth Amendment, Abolition of Slavery.

Clause 2—Supremacy Clause

ArtVI.C2.1 Overview of Supremacy Clause

Article VI, Clause 2:

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

The Supremacy Clause was a response to problems with the Articles of Confederation (the Articles), which governed the United States from 1781 to 1789. The Articles conspicuously lacked any similar provision declaring federal law to be superior to state law. As a result, during the Confederation era, federal statutes did not bind state courts in the absence of state legislation implementing them. To address this issue and related political difficulties, the Confederation Congress called for a convention in 1787 to revise the Articles. While the Supremacy Clause was not a source of major disagreement at the Constitutional Convention that followed, it generated intense controversy during debates over the Constitution's ratification. But advocates of federal supremacy prevailed. The Constitution was ratified in 1788 with the Supremacy Clause.[1]

The Supremacy Clause is among the Constitution's most significant structural provisions. In the late eighteenth and early nineteenth centuries, the Supreme Court relied on the Clause to establish a robust role for the federal government in managing the nation's affairs. In its early cases, the Court invoked the Clause to conclude that federal treaties and statutes superseded inconsistent state laws. These decisions enabled the young Republic to enforce the treaty ending the Revolutionary War, charter a central bank, and enact other legislation without interference from recalcitrant states.[2]

The Supreme Court continued to apply this foundational principle—that federal law prevailed over conflicting state law—throughout the latter half of the nineteenth century.[3] But other aspects of the Court's federalism jurisprudence limited the Supremacy Clause's role during that era. Throughout this period, the Court embraced what academics have called the doctrine of "dual federalism," under which the federal government and the states occupied largely distinct, non-overlapping zones of constitutional authority.[4] While federal supremacy persisted as a background principle during these years, the Court's bifurcation of federal and state authority minimized the instances in which the two could conflict.[5]

To the extent that the Supremacy Clause did play an explicit role in the federalism disputes of this era, the Supreme Court applied it in ways that reinforced dual federalism's sharp division of federal and state power. In a series of early-twentieth-century decisions, the Court developed a precursor to the doctrine of "field preemption"—the principle that some federal legislation implicitly prevents states from adopting any laws regulating the same

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[1] *See* ArtVI.C2.2.1 Articles of Confederation and Supremacy of Federal Law to ArtVI.C2.2.3 Debate and Ratification of Supremacy Clause.

[2] *See* Gibbons v. Ogden, 22 U.S. 1 (1824); McCulloch v. Maryland, 17 U.S. 316 (1819); Ware v. Hylton, 3 U.S. 199 (1796).

[3] *See* Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896).

[4] *See, e.g.*, Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950).

[5] *See* N.Y. Cent. & Hudson River R.R. Co. v. Tonsellito, 244 U.S. 360 (1917); Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597 (1915); Chi., Rock Island & Pac. Ry. v. Hardwick Farmers Elevator Co., 226 U.S. 426 (1913).

general subject. Some of the Court's early field-preemption decisions aggressively employed the new doctrine, concluding that *any* congressional action in certain fields *automatically* displaced all state laws in those fields.[6]

But the Supreme Court's initial foray into field preemption soon gave way to broader legal and political trends. During the New Deal era of the 1930s and 1940s, the Court acceded to demands for a more active national government by revising other elements of its federalism jurisprudence.[7] This about-face marked the demise of dual federalism, as the Court expanded the areas in which the federal government and the states possessed concurrent authority. To prevent the federal government's newly expanded powers from smothering state regulatory authority, the Court simultaneously *narrowed* the circumstances in which federal law displaced state law. Besides retreating from the "automatic" field preemption of the early twentieth century, the Court articulated a "presumption against preemption," under which federal law does not displace state law "unless that was the clear and manifest purpose of Congress."[8]

As the preceding discussion suggests, the Supreme Court has channeled contemporary Supremacy Clause doctrine into the language of "federal preemption." The Court's cases recognize several types of preemption. At the highest level of generality, federal law can preempt state law either *expressly* or *impliedly*. Federal law *expressly* preempts state law when it contains explicit language to that effect.[9] By contrast, federal law *impliedly* preempts state law when that intent is implicit in its structure and purpose.[10]

The Court has also identified different subcategories of implied preemption. As noted, *field preemption* occurs where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[11] In contrast, *conflict preemption* occurs where compliance with both federal and state law is impossible ("impossibility preemption") or where state law poses an obstacle to federal objectives ("obstacle preemption").[12]

Because preemption issues are primarily questions of statutory interpretation, the Supremacy Clause's role in contemporary legal doctrine differs from that of many other constitutional provisions. The basic principle enshrined in the Clause—federal supremacy—is now well-settled. Generally, litigants do not dispute the Clause's meaning or advance conflicting theories on its scope. Rather, preemption cases ordinarily turn on the same types of issues—like the textualist/purposivist divide and administrative deference—that recur in all manner of statutory litigation.[13]

This essay chronicles the Supremacy Clause's evolution from a deeply controversial repudiation of the Articles of Confederation to its contemporary role as an essential bedrock of the structural Constitution.

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[6] *See Chi., Rock Island & Pac. Ry.*, 226 U.S. at 435.

[7] Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[8] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[9] *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

[10] *See id.*

[11] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and citation omitted).

[12] *See id.*

[13] *See* ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause. For an overview of the textualist/purposivist debate in statutory interpretation, see Valerie C. Brannon, Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends (2018), https://crsreports.congress.gov/product/pdf/R/R45153. For an overview of administrative deference, see Valerie C. Brannon & Jared P. Cole, Cong. Rsch. Serv., LSB10204, Deference and its Discontents: Will the Supreme Court Overrule *Chevron*? (2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10204.

ArtVI.C2.2 Historical Background

ArtVI.C2.2.1 Articles of Confederation and Supremacy of Federal Law

Article VI, Clause 2:

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

The Supremacy Clause was a response to the political regime established under the Articles of Confederation (the Articles), which governed the United States from 1781 to 1789.[1] The Articles established a weak national government, providing that the states retained their "sovereignty, freedom, and independence, and every Power, Jurisdiction, and right" that was not "expressly delegated to the United States, in Congress assembled."[2] Under the Articles, the Confederation Congress—which performed both legislative and executive functions—had the power to wage war, coin money, establish post offices, and negotiate with Indian tribes.[3] But the Confederation Congress could not levy taxes or regulate interstate commerce. Moreover, the Articles did not make federal law supreme over state law. While Article XIII required states to "abide by the determinations of" the Confederation Congress,[4] the effect of that provision was limited. Indeed, under Article XIII, it was unclear whether federal law was binding in state courts without state legislation implementing it.[5] James Madison thus criticized the Articles as establishing "nothing more than a mere treaty" of "amity of commerce" and "alliance" in which federal law was merely "recommendatory" for the states.[6]

Article XIII's ambiguity on federal supremacy was particularly important vis-à-vis the Treaty of Paris, which ended the Revolutionary War between Britain and the United States in 1783.[7] Among other things, the treaty prohibited "impediment[s]" to the recovery of pre-war debts.[8] But the lack of clarity over federal supremacy—coupled with an absence of state legislation implementing the treaty—created uncertainties surrounding the enforcement of state laws impairing the rights of British creditors.[9] These types of uncertainties—and broader

[1] Articles of Confederation and Perpetual Union (1777); *but see* Vasan Kesavan, *When Did the Articles of Confederation Cease to be Law?*, 78 Notre Dame L. Rev. 35, 44 (2002) (discussing academic arguments over whether the Articles of Confederation "cease[d] to be law" when the Constitution was ratified in the early summer of 1788, or when a new Congress and President assumed office in the spring of 1789).

[2] Articles of Confederation and Perpetual Union art. II.

[3] *Id.* art. IX.

[4] *Id.* art. XIII.

[5] *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 247–48 (2000) ("[Article XIII] did not necessarily mean that Congress's acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was supposed to pass laws implementing Congress's directives. If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's law, then Congress's acts might have no effect in the courts of that state.").

[6] James Madison, "Vices of the Political System of the United States," (Apr. 1787), *in* 9 The Papers of James Madison 345, 351–52 (Robert A. Rutland & William M.E. Rachal eds., 1975).

[7] Definitive Treaty of Peace Between the United States and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

[8] Articles of Confederation and Perpetual Union art. IV.

[9] Nelson, *supra* note 5, at 248.

dissatisfaction with the national government's weakness—prompted the Confederation Congress to call for a convention in 1787 to "revis[e]" the Articles.[10]

ArtVI.C2.2.2 Supremacy Clause and the Constitutional Convention

Article VI, Clause 2:

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

Despite the Constitutional Convention's limited mandate, its delegates began drafting an entirely new constitution shortly after convening. During the drafting process, the delegates considered several options for resolving conflicts between federal and state law. One proposal—the Virginia Plan—would have granted Congress the power to veto state laws and employ military force against states that disobeyed federal law.[1] Another option—the New Jersey Plan—also proposed giving Congress the power to use military force against recalcitrant states, and included a provision that one scholar has described as the "incubus" of what became the Supremacy Clause.[2] This provision read:

> Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding. . . .[3]

While the Convention ultimately rejected the New Jersey Plan and proceeded with consideration of the Virginia Plan, it dispensed with the latter's proposals for a congressional veto and the use of military force. Instead, the Convention unanimously approved a provision that closely tracked the New Jersey Plan's "supremacy clause."[4]

In July 1787, the Convention adjourned to allow the Committee of Detail to draw up a draft constitution.[5] The Committee of Detail's final report contained a "supremacy clause" that read:

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be

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[10] Resolution of Congress (Feb. 21, 1787), *in* The Documentary History of the Ratification of the Constitution 45 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

[1] 1 The Records of the Federal Convention of 1787 21 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[2] 2 John R. Vile, The Constitutional Convention of 1787: A Comprehensive encyclopedia of America's founding 773 (2005); *see also* Christopher R. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 16 (2004) (describing the provision as "the earliest version of what was to become the Supremacy Clause").

[3] 1 Farrand's Records, *supra* note 1, at 245.

[4] 2 Farrand's Records, *supra* note 1, at 22. The approved clause read: "Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding." 2 Farrand's Records, *supra* note 1, at 22.

[5] Drahozal, *supra* note 2, at 21.

> the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.[6]

This provision departed from the clause approved by the Convention as a whole by explicitly providing that federal law was supreme over state "Constitutions," in addition to state "laws."

When the Convention considered the Committee of Detail's report, it unanimously approved an amendment clarifying that the federal Constitution itself—in addition to federal statutes and treaties—was supreme over state law.[7] The Convention's Committee of Style ultimately placed the Supremacy Clause in Article VI, immediately before a provision requiring all judges to take an oath supporting the Constitution.[8] The final Supremacy Clause read:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9]

ArtVI.C2.2.3 Debate and Ratification of Supremacy Clause

Article VI, Clause 2:

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

The Supremacy Clause generated significant controversy during debates over the Constitution's ratification. Anti-Federalist opponents of the Constitution argued that the Clause would make the national government overly powerful and infringe on state sovereignty. The stridency of these criticisms varied.

One Anti-Federalist contended that the Clause would force the country into "one large system of lordly government."[1] Another critic similarly argued that the Constitution would effectuate "a complete consolidation of all of the states into one, however diverse the parts of it

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[6] 2 Farrand's Records, *supra* note 1, at 183.

[7] 2 Farrand's Records, *supra* note 1, at 389. The amendment replaced the phrase "The Acts of the Legislature of the United States made in pursuance of this Constitution" with the following language: "This Constitution & the laws of the U.S. made in pursuance thereof." 2 Farrand's Records, *supra* note 1, at 389.

[8] For a detailed summary of the Supremacy Clause's textual evolution, see Drahozal, *supra* note 2, at 68–70.

[9] 2 Farrand's Records, *supra* note 1, at 663. One commentator has argued that the phrase "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" is a "*non obstante* provision"—an eighteenth-century legal term of art instructing courts not to apply the general presumption against implied repeals. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 238–41 (2000). According to this theory, the Supremacy Clause's *non obstante* provision means "that courts should not automatically seek narrowing constructions of express preemption clauses" in federal statutes. *Id.* at 294. Other scholars have questioned this reading of the Supremacy Clause and argued that its adoption would be inconsistent with other aspects of contemporary federalism jurisprudence. *See* Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich. L. Rev. 1, 47–52 (2013); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 6 n.12 (2007).

[1] A Federal Republican, "A Review of the Constitution" (Nov. 28, 1787), *in* 14 Documentary History of the Ratification of the Constitution 255, 269 (John P. Kaminski et al. eds., 1983).

may be."[2] Some Anti-Federalists framed this criticism as a conceptual argument, asserting that two sovereigns could not exist within the same territory, and that one would "necessarily" destroy the other.[3] Along these lines, one opponent claimed that the Supremacy Clause would allow the federal government to prevent states from levying taxes and thereby "absorb" their powers.[4]

Other Anti-Federalists offered more limited criticisms. Some critics objected to making treaties supreme to state law. These commentators contended that this aspect of the Supremacy Clause would allow for the displacement of state law without the approval of both Houses of Congress, because the President and the Senate could make treaties without the approval of the House of Representatives.[5] Some opponents also argued that, without a federal bill of rights, the Supremacy Clause would allow the federal government to override state constitutional guarantees of individual liberties.[6]

Federalist supporters of the Constitution rejected these arguments. Some supporters dismissed concerns about the elimination of state governments, noting that the Constitution granted the federal government only limited powers.[7] Others minimized the Supremacy Clause's significance, characterizing it as a truism that "resulted by necessary and unavoidable implication from the very act of constituting a Federal Government[ ] and vesting it with certain specified powers."[8] In response to concerns about the treaty power, Federalists contended that the supremacy of treaties was essential to the federal government's credibility as a negotiator with foreign powers.[9] Others argued that, while the House of Representatives had no formal role in the ratification of treaties, it nevertheless operated as a "restraining influence" on that process because of its general legislative powers.[10] Finally, while a federal Bill of Rights was ultimately adopted after the Constitution's ratification, some Federalists

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[2] Agrippa X, Massachusetts Gazette (Jan. 1, 1788), *in* 5 Documentary History of the Ratification of the Constitution 576 (John P. Kaminski et al. eds., 1998).

[3] The Impartial Examiner I, Virginia Independent Chronicles (Feb. 20, 1787), *in* 8 Documentary History of the Ratification of the Constitution 387, 392 (John P. Kaminski et al. eds., 1988); *see also* George Mason, Debates of the Virginia Convention (June 19, 1788), *in* 10 Documentary History of the Ratification of the Constitution 1402 (John P. Kaminski et al. eds., 1993) (arguing that the Constitution would "destroy the State Governments, whatever may have been the intention."); Robert Whitehill, Debates of the Pennsylvania Convention (Dec. 8, 1787), *in* 2 Documentary History of the Ratification of the Constitution 526 (Merill Jensen et al. eds., 1976) (arguing that the Supremacy Clause was a "concluding clause[ ] that the state governments will be abolished").

[4] Brutus I, New York Journal (Oct. 18, 1787), *in* 13 Documentary History of the Ratification of the Constitution 411, 415 (John P. Kaminski et al. eds., 1981); *see also* An Old Whig VI, Philadelphia Independent Gazette (Nov. 24, 1787), *in* 14 Documentary History of the Ratification of the Constitution 215–16 (John P. Kaminski et al. eds., 1983) (arguing that. under the Supremacy Clause, "no individual state can collect a penny, unless by the permission of Congress . . . Not a single source of revenue will remain to any state, which Congress may not stop at their [sic] sovereign will and pleasure").

[5] An Old Whig III, Philadelphia Independent Gazetteer (Oct. 20, 1787), *in* 13 Documentary History of the Ratification of the Constitution 425–26 (John P. Kaminski et al. eds., 1981); Federal Farmer IV, Letters to the Republican (Oct. 12, 1787), *in* 14 Documentary History of the Ratification of the Constitution 42–43 (John P. Kaminski et al. eds., 1983); George Mason, Objections to the Constitution (Oct. 7, 1787), *in* 8 Documentary History of the Ratification of the Constitution 40, 44–45 (John P. Kaminski et al. eds., 1988).

[6] *See* Patrick Henry, Debates of the Virginia Convention (June 19, 1788), *in* 10 Documentary History of the Ratification of the Constitution 1349 (John P. Kaminski et al. eds., 1993); Elbridge Gerry, Objections to Signing the National Constitution (Nov. 3, 1787), *in* 13 Documentary History of the Ratification of the Constitution 546, 548 (John P. Kaminski et al. eds., 1981); George Mason, Objections to the Constitution (Oct. 7, 1787), *in* 8 Documentary History of the Ratification of the Constitution 40, 43 (John P. Kaminski et al. eds., 1988).

[7] A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *in* 9 Documentary History of the Ratification of the Constitution 655, 692 (John P. Kaminski et al. eds., 1990).

[8] The Federalist No. 33 (Alexander Hamilton).

[9] The Federalist No. 64 (John Jay).

[10] James Wilson, Debates of the Pennsylvania Convention (Dec. 11, 1787), *in* 2 Documentary History of the Ratification of the Constitution 416 (Merrill Jensen et al. eds., 1976).

challenged the necessity of those amendments during the ratification debates.[11] These advocates contended that explicit rights guarantees were superfluous, because the federal government's limited powers would prevent it from infringing individual liberties.[12]

The Federalists prevailed. In June 1788, New Hampshire became the ninth state to ratify the Constitution, giving it effect in the ratifying states.[13] Federal law thus became the "supreme Law of the Land."[14]

ArtVI.C2.3 Doctrine

ArtVI.C2.3.1 Early Doctrine on Supremacy Clause

Article VI, Clause 2:

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

The balance of power between the federal government and the states continued to be a source of controversy after the Constitution's ratification.[1] But in a series of foundational decisions, the Supreme Court interpreted the Supremacy Clause as establishing a robust role for the national government in managing the nation's affairs. In 1796, the Court held that the Treaty of Paris—which, as noted, prohibited impediments to the recovery of pre-war debts—superseded a Virginia statute allowing debtors to satisfy any obligations to British subjects by payment to the state treasury.[2]

Slightly more than two decades later, the Court again invoked the Supremacy Clause to resolve another hotly contested political dispute. In 1819, the Court held in *McCulloch v. Maryland* that a state tax on notes issued by the Second Bank of the United States impermissibly conflicted with federal law.[3] The Bank had attracted criticism from skeptics of federal power, who challenged Congress's authority to charter it. In *McCulloch*, the Court sustained the federal government's power to charter the Bank under the Necessary and Proper Clause, while invalidating the state tax on the Bank's notes under the Supremacy Clause. Writing for the Court, Chief Justice John Marshall explained that "the power to tax involves the power to destroy," striking down the state tax because it unlawfully burdened the Bank's operations.[4]

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[11] James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 Documentary History of the Ratification of the Constitution 337, 339–340 (John P. Kaminski et al. eds., 1981).

[12] *Id.*

[13] Christopher R. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 34 (2004).

[14] U.S. Const. art. VI cl. 2.

[1] *See generally* William Nisbet Chambers, Political Parties in a New Nation: The American Experience, 1776–1809 (1963) (discussing the key political controversies of the early Republic, many of which involved the relative powers of the federal government and the states).

[2] *See* Ware v. Hylton, 3 U.S. 199, 235–39 (1796).

[3] 17 U.S. 316 (1819).

[4] *Id.* at 327. This principle—that states cannot interfere with or control the operations of the federal government—has evolved into what is often called the "intergovernmental immunity" doctrine. For many years, the Supreme Court applied this doctrine to condemn state laws that "increase[d] the cost to the Federal Government of performing its functions." United States v. Cnty. of Fresno, 429 U.S. 452, 460 (1977). But the Court later narrowed this rule. Today, a state law violates the intergovernmental immunity doctrine only if it regulates the federal government directly or discriminates against the federal government or those with whom the federal government deals. North

ArtVI.C2.3.1
Early Doctrine on Supremacy Clause

Five years after *McCulloch*, the Court employed similar reasoning in *Gibbons v. Ogden*, holding that federal coastal licenses displaced a state law conferring a monopoly on a steamboat company.[5] After concluding that Congress had the authority to issue the licenses under the Commerce Clause, Chief Justice John Marshall explained that the licenses superseded the relevant state law, which "interfere[d] with" federal policy.[6] The early Court thus gave shape to the basic principle underlying the Supremacy Clause: where federal and state law clashed, federal law was supreme.[7]

ArtVI.C2.3.2 Dual Federalism in Late Nineteenth and Early Twentieth Centuries

Article VI, Clause 2:

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

The Supreme Court continued to apply the basic principle of federal supremacy throughout the late nineteenth and early twentieth centuries. But the Supremacy Clause's role during that era was limited by other aspects of the Court's federalism jurisprudence. Throughout this period, the Court embraced what academics have called the doctrine of "dual federalism," under which the federal government and the states occupied largely distinct, non-overlapping zones of constitutional authority.[1] Applying this framework, the Court adopted a narrow interpretation of Congress's Commerce Clause authorities[2] and construed the Tenth Amendment as imposing strict additional limitations on federal power.[3] The Court also relied on the Dormant Commerce Clause to conclude that states lacked the power to regulate certain subjects of exclusive federal concern.[4] While federal supremacy thus persisted

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Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality op.); *id.* at 444 (Scalia, J., concurring in judgment) (noting that "[a]ll agree" with this aspect of the plurality opinion). In evaluating whether a state law discriminates against the federal government, courts assess whether the law singles out the federal government or its contractors or regulates them unfavorably on some basis related to their governmental status. *See* United States v. Washington, No. 21-404 (U.S. June 21, 2022).

[5] 22 U.S. 1, 82–87 (1824).

[6] *Id.* at 82.

[7] The Supremacy Clause also served as the foundation for a mid-nineteenth century decision that occupies an inglorious place in the Nation's constitutional history. In its 1842 decision in *Prigg v. Pennsylvania*, the Supreme Court held that the federal Fugitive Slave Act—which allowed slaveholders to recover escaped slaves—superseded a Pennsylvania law that prohibited the "remov[al]" of African-Americans from the state for the purpose of enslavement. 41 U.S. 539 (1842).

[1] *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950) (defining "Dual Federalism" as involving the following "postulates": "1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration.").

[2] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303–04 (1936) (holding that the Bituminous Coal Conservation Act of 1935 exceeded the scope of Congress's Commerce Clause authority); ALA Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that a "code of fair competition" adopted under the National Industrial Recovery Act exceeded the scope of the Commerce Power); United States v. E.C. Knight, 156 U.S. 1, 12 (1895) (holding that the Sherman Antitrust Act's application to acquisitions in the sugar refining industry exceeded the scope of the Commerce Power).

[3] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 273–74 (1918) (holding that a federal law prohibiting the interstate shipment of goods produced using child labor violated the Tenth Amendment).

[4] *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 575 (1886) (holding that a state law regulating railroad rates violated the Dormant Commerce Clause); Welton v. Missouri, 91 U.S. 275, 281 (1876) (holding that a

as a background principle during the late nineteenth and early twentieth centuries, the Court's bifurcation of federal and state authority minimized the instances in which the two could conflict.[5]

To the extent that the Supremacy Clause played an explicit role in the federalism disputes of this era, the Court applied it in ways that reinforced the sharp division of federal and state power. In a series of early-twentieth-century decisions, the Court developed a precursor to the doctrine of "field preemption"—the principle that some federal legislation implicitly prevents states from adopting any laws regulating the same general subject. For example, in *Southern Railway v. Reid*, the Court held that the Interstate Commerce Act (ICA)—which regulated railroad rates—superseded a state law requiring railroads to transport tendered freight.[6] The Court reasoned that Congress had "taken possession of the field" of railroad rate regulation with the ICA, thereby precluding even supplementary state regulations.[7] In another decision, the Court held that a different federal law requiring railroads to secure the safe transportation of property upon reasonable terms displaced a state law compelling railroads to settle certain claims within forty days.[8] In his opinion for the Court, Justice Oliver Wendell Holmes rejected the argument that the state law did not conflict with the federal law, explaining that the absence of such a conflict was "immaterial," because "coincidence is as ineffective as opposition" when "Congress has taken [a] particular subject-matter in hand."[9] In yet another field-preemption case, the Court held that a federal law involving railroads' liability for employee injuries superseded state common law claims based on such injuries.[10]

While the Supreme Court's reasoning in these cases varied, one commentator has noted the readiness with which the Court concluded that federal law preempted the relevant fields.[11] For example, in one decision, the Court appeared to suggest that *any* federal legislation in certain fields precluded states from adopting even supplementary regulations of the same subject.[12] Under this theory of "automatic" preemption, Congress's authority over certain subjects was one of "latent exclusivity," meaning "the power of the states ended as soon as Congress chose to exercise its regulatory power" in those fields.[13] However, this view of federal power—which was related to notions of dual federalism—would soon give way to broader legal and political trends.

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state law requiring peddlers of out-of-state merchandise to pay a tax and obtain a license violated the Dormant Commerce Clause because it regulated a subject "of national importance"); *see also* Cooley v. Bd. of Wardens, 53 U.S. 299, 319–20 (1851) (distinguishing between subjects of the Commerce Power that were "in their nature national," and therefore subject to exclusive federal regulation, and those that were subject to concurrent federal and state regulation).

[5] *But see* Davis v. Elmira Sav. Bank, 161 U.S. 275, 284 (1896) (holding that the National Bank Act superseded a state law regarding the distribution of an insolvent national bank's assets).

[6] 222 U.S. 424, 438 (1912).

[7] *Id.* at 442.

[8] Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 603–04 (1915).

[9] *Id.* at 604.

[10] N.Y. Cent. & Hudson River R.R. v. Tonsellito, 244 U.S. 360, 362 (1917).

[11] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 49 Cornell L. Rev. 767, 783 (1994).

[12] *See* Chi., Rock Island & Pac. Ry. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913) ("[I]t must follow in consequence of the action of Congress . . . that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme.").

[13] Gardbaum, *supra* note 11, at 783.

ArtVI.C2.3.3 New Deal and Presumption Against Preemption

Article VI, Clause 2:

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

The Supreme Court abandoned dual federalism during the New Deal era of the 1930s and 1940s. In those years, the Court acceded to demands for a more active national government by revising its Commerce Clause and Tenth Amendment jurisprudence.[1] The federal government thereby gained vast new powers to regulate the economy, which it deployed in new and creative ways.[2] But this expansion of federal authority threatened sweeping consequences when paired with the Court's aggressive application of the Supremacy Clause. Specifically, if field preemption automatically followed from many types of federal legislation, Congress's enhanced powers would displace large swathes of state regulation—even in cases when state regulation did not conflict with federal law. To avoid this outcome, the New Deal Court retreated from dual federalist notions of "latent exclusivity," clarifying that federal law displaced state law only if Congress's intention to do so was clear.

In *Mintz v. Baldwin*, for example, the Court rejected the argument that a federal law regulating the inspection and transportation of cattle superseded a state order compelling certain breeders to remove uncertified cattle from the state.[3] In rejecting this argument, the Court explained that "[t]he purpose of Congress to supersede or exclude state action against the ravages of disease is not lightly to be inferred," and that "[t]he intention so to do must definitely and clearly appear."[4] The Court endorsed a similar principle in *Rice v. Santa Fe Elevator Corp.*, where it held that the federal Warehouse Act superseded some—but not all—state law claims against grain-warehouse operators.[5] The Court explained that, in evaluating whether federal law displaces state law, it "start[ed] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."[6] The Court continues to apply this "presumption against preemption" to this day-albeit in limited circumstances.[7]

ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause

Article VI, Clause 2:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United*

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[1] *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that Congress's Commerce Clause authority extends to intrastate activities that in the aggregate "exert[ ] a substantial economic effect on interstate commerce"); United States v. Darby, 312 U.S. 100, 119–24 (1941) (upholding the Fair Labor Standards Act as a permissible exercise of the Commerce Power that did not violate the Tenth Amendment); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (upholding the National Labor Relations Act as a permissible exercise of the Commerce Power).

[2] *See, e.g.*, 2 Bruce Ackerman, We the People: Transformations 281–311 (1998).

[3] 289 U.S. 346, 350 (1933).

[4] *Id.* at 350.

[5] 331 U.S. 218, 230–37 (1947).

[6] *Id.* at 230.

[7] *See* ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause.

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Since the mid-twentieth century, the Supreme Court has channeled its Supremacy Clause jurisprudence into the language of "federal preemption."[1] The Court's cases identify several types of preemption. At the highest level of generality, federal law can preempt state law either *expressly* or *impliedly*. Federal law *expressly* preempts state law when it contains explicit language to that effect.[2] By contrast, federal law *impliedly* preempts state law when that intent is implicit in its structure and purpose.[3]

The Court has also distinguished between different forms of implied preemption. As noted, *field preemption* occurs where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[4] In contrast, *conflict preemption* occurs where compliance with federal and state law is impossible ("impossibility preemption") or where state law poses an obstacle to federal objectives ("obstacle preemption").[5]

In all preemption cases, "the purpose of Congress is the ultimate touchstone" of the Court's statutory analysis.[6] In analyzing congressional purpose, the Court continues to invoke the presumption against preemption from *Mintz* and *Rice*—albeit in limited circumstances. While the Court regularly employed this presumption in the 1980s and 1990s,[7] it has invoked it less consistently in recent years.[8] Moreover, in a 2016 decision, the Court departed from prior case law[9] when it explained that the presumption does not apply in express-preemption cases.[10] The Court has also acknowledged exceptions to the presumption in cases involving subjects that the states have not traditionally regulated,[11] and cases involving subjects in which the

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[1] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 49 Cornell L. Rev. 767, 789 n.65 (1994) (noting that the term "preemption" first appeared in the U.S. Reports in 1917, but was not generally used until the 1940s).

[2] *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

[3] *See id.*

[4] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and citation omitted).

[5] *See id.*

[6] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks and citation omitted).

[7] *See, e.g.*, De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); Bldg. & Const. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218, 224 (1993); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 116 (1992); Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 740 (1985); Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985); Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

[8] *See, e.g.*, Mutual Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466 (2013) (holding that federal law preempted state law without mentioning the presumption against preemption); Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625 (2012) (similar); PLIVA, Inc. v. Mensing, 564 U.S. 604, 622 (2011) (similar); Bruesewitz v. Wyeth LLC, 562 U.S. 223 (2011) (similar); Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008) (similar); Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000) (similar).

[9] *See, e.g.*, CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2188–89 (2014) ("When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.") (internal quotation marks and citations omitted); Wyeth v. Levine, 555 U.S. 555, 565 (2009) (explaining that the presumption against preemption applies "[i]n all preemption cases"); Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (explaining that the Court "begin[s its] analysis" with a presumption against preemption "[w]hen addressing questions of *express or implied* pre-emption") (emphasis added); Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 449 (2005) ("Even if [the defendant] had offered us a plausible alternative reading of [the relevant preemption clause]—indeed, even if its alternative were just as plausible as our reading of the text—we would nevertheless have a duty to accept the reading that disfavors preemption."); Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 151 (2001) (invoking the presumption against preemption in interpreting ERISA's preemption clause); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (explaining that the presumption against preemption applies "[i]n all preemption cases"); De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997) (invoking the presumption against

federal government has historically had a significant regulatory presence.[12] Accordingly, while the presumption remains relevant in certain implied-preemption disputes,[13] the Court has narrowed the circumstances in which it applies.

As the federal government's regulatory role has expanded, preemption has become a ubiquitous feature of the modern administrative state. Preemptive federal statutes now shape the regulatory environment for most major industries, including pharmaceutical drugs, securities, nuclear safety, medical devices, air transportation, banking, automobiles, and telecommunications.[14] While preemption is thus a pervasive feature of the contemporary legal landscape, the Supremacy Clause's role in modern legal doctrine differs from that of many other constitutional provisions. Preemption cases are primarily exercises in *statutory* interpretation—not *constitutional* analysis. Generally, litigants do not dispute the Supremacy Clause's meaning or advance conflicting theories on its scope. The basic principle enshrined in the Clause—federal supremacy—is now well-settled. As a result, the Supremacy Clause does not play a central role in modern debates over federalism; those battles are instead typically fought on the terrain of the Commerce Clause, the Spending Clause, and the Fourteenth Amendment.[15] Today, preemption cases ordinarily turn on the same types of issues—like the textualist/purposivist divide and administrative deference—that recur in all manner of statutory litigation.[16] But the Supremacy Clause's modern role as a background principle hardly negates its importance. Federal supremacy remains a foundational doctrine of constitutional law that undergirds much of the modern regulatory state.

Clause 3—Oaths of Office

ArtVI.C3.1 Oaths of Office Generally

Article VI, Clause 3:

> *The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the*

preemption in interpreting ERISA's preemption clause); *Travelers*, 514 U.S. at 654 (same); *Cipollone*, 505 U.S. at 518 (invoking the presumption against preemption in interpreting the Federal Cigarette Labeling and Advertising Act's preemption clause).

[10] Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (explaining that in express-preemption cases, the Court "do[es] not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress's pre-emptive intent").

[11] *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001).

[12] *See* United States v. Locke, 529 U.S. 89, 108 (2000).

[13] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[14] *See generally* Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer (2019), https://crsreports.congress.gov/product/pdf/R/R45825.

[15] That the Supremacy Clause is not the locus for most modern federalism disputes is attributable to its basic function in the structural Constitution. Unlike the Commerce Clause, the Spending Clause, and the Fourteenth Amendment, the Supremacy Clause is not an independent source of federal authority. Instead, the Supreme Court has explained that the Supremacy Clause is a "rule of decision" for resolving conflicts between federal and state law. Murphy v. NCAA, 138 S. Ct. 1461, 1479 (2018). Because the basic principle underlying this "rule of decision" is now well-established, contemporary federalism cases typically hinge on disagreements over the scope of provisions granting the federal government various powers.

[16] *See, e.g.*, Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1906 (2019) (Gorsuch, J., lead op.) (rejecting a field-preemption argument on textualist grounds); *id.* at 1909 (Ginsburg, J., concurring in the judgment) (concurring with Justice Gorsuch's conclusion, but declining to join his "discussion of the perils of inquiring into legislative motive"); *id.* at 1917 (Roberts, J., dissenting) (arguing that a state law fell within a federally preempted field because of its purpose); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2004) (reviewing the case law on judicial deference to agency determinations that federal law preempts state law).

several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.[1] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an ex post facto law,[2] and the same rule holds in the case of the states.[3]

Commenting in the *Federalist Papers* on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Alexander Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws."[4] The younger Charles Cotesworth Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the states] are the instruments upon which the Union must frequently depend for the support and execution of their powers. . . ."[5] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[6] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[7] not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also any justice of the peace or other magistrates of any of the states were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[8] Pursuant to the same idea of treating state governmental organs as available to the national government for administrative purposes, the Act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one state to another exclusively to the state executives.[9]

With the rise of the doctrine of states' rights and of the equal sovereignty of the states with the National Government, the availability of the former as instruments of the latter in the

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

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

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

[4] The Federalist No. 27 (Alexander Hamilton). *See also*, *id.* No. 45 (James Madison).

[5] 1 The Records of the Federal Convention of 1787, at 404 (Max Farrand ed., 1937).

[6] *See* U.S. Const. art. I, § 3, cl. 1; *id.* § 4, cl. 1; *id.* § 10; *id.* art. II, § 1, cl. 2; *id.* art. III, 2, cl. 2; *id.* art. IV, §§ 1 & 2; *id.* art. V; *id.* amends. 13–15, 17, 19, 25, & 26.

[7] 1 Stat. 73 (1789).

[8] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 Selected Essays on Constitutional Law 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 Ore. L. Rev. 267 (1928). *See also* J. Clark, The Rise of a New Federalism (1938); E. Corwin, Court Over Constitution 148–68 (1938).

[9] 1 Stat. 302 (1793).

execution of its power came to be questioned.[10] In *Prigg v. Pennsylvania*,[11] decided in 1842, the constitutionality of the provision of the Act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison* ,[12] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In *Prigg*, the Court, speaking by Justice Joseph Story, said that "while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."[13] Subsequent cases confirmed the point that Congress could authorize willing state officers to perform such federal duties.[14] Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected "as too wanting in merit to require further notice" the contention that the Act was invalid because of this delegation.[15] State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by "any prosecuting attorney of any State or any subdivision thereof."[16]

In *Dennison*, however, the Court held that, although Congress could delegate, it could not require performance of an obligation. The "duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Chief Justice Roger Taney wrote for the Court: "The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution."[17]

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[10] For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, *see* 1 J. Kent, Commentaries on American Law 396–404 (1826).

[11] 41 U.S. (16 Pet.) 539 (1842).

[12] 65 U.S. (24 How.) 66 (1861).

[13] 41 U.S. (16 Pet.) 539, 622 (1842). *See also* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861). The word "magistrates" in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the use of state courts to enforce federal law.

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

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

[16] 41 Stat. 314, § 22. In at least two states, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the Act, *see* Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 Va. L. Rev. 86 (1922).

[17] 65 U.S. (24 How.) 66, 107–08 (1861) .

Eighteen years later, in *Ex parte Siebold*,[18] the Court sustained the right of Congress, under Article I, section 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. Although the doctrine of the holding was expressly confined to cases in which the National Government and the states enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Joseph Bradley's opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned . . . ."[19] To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."[20]

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that prevailed. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the state itself was immune, through the fiction of *Ex Parte Young*,[21] under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the United States Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted.[22] Nonetheless, it was only recently that the Court squarely overruled *Dennison*. "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' . . . basic constitutional principles now point as clearly the other way."[23] That case is doubly important, because the Court spoke not only to the Extradition Clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the Clause.[24]

Even as the Court imposes new federalism limits upon Congress's powers to regulate the states as states, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. "[T]he

[18] 100 U.S. 371 (1880).

[19] 100 U.S. at 391.

[20] 100 U.S. at 392.

[21] 209 U.S. 123 (1908). *See also* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

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

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

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

Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply."[25]

No doubt, there is tension between the exercise of Congress's power to impose duties on state officials[26] and the developing doctrine under which the Court holds that Congress may not "commandeer" state legislative or administrative processes in the enforcement of federal programs.[27] However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent, indicates that coexistence of the two lines of principles will be maintained.

ArtVI.C3.2 Religious Test

ArtVI.C3.2.1 Historical Background on Religious Test for Government Offices

Article VI, Clause 3:

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

England historically required public officeholders not only to swear an oath of loyalty to the Crown, the head of the state-sponsored Church of England, but also to take communion in that church.[1] Religious test oaths were initially required in the colonies, as well, as part of the legal framework supporting state-established churches.[2] The *Constitution Annotated* discusses the features of historic state-sponsored religions, known as religious establishments, in the context of the Religion Clauses.[3] Looking specifically at religious tests, early Puritans and other colonists believed oaths requiring conformance to Christian values were necessary to ensure that officials were of good moral character.[4] These arguments held particular force

[25] New York v. United States, 505 U.S. 144, 179 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 761–65 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979); Illinois v. City of Milwaukee, 406 U.S. 91, 106–08 (1972).

[26] The practice continues. *See* Pub. L. No. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (authorizing state attorneys general to bring parens patriae antitrust actions in the name of the state to secure monetary relief for damages to the citizens of the state); Medical Waste Tracking Act of 1988, Pub. L. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (authorizing states to impose civil and possibly criminal penalties for violations of the Act); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536, 18 U.S.C. § 922s (imposing on chief law enforcement officer of each jurisdiction to ascertain whether prospective firearms purchaser has a disqualifying record).

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

[1] *See Test Act*, Encyclopedia Britannica, https://www.britannica.com/topic/test-act (last visited July 13, 2022); Leo Pfeffer, Church, State, and Freedom 252 (rev. ed. 1967). For more discussion of English test oaths, see Amdt1.2.2.2 England and Religious Freedom.

[2] *See* Amdt1.2.2.3 State-Established Religion in the Colonies. *Cf., e.g.*, Pfeffer, *supra* note 1, at 252–53 (noting that "for a short time Rhode Island was an exception" in not requiring religious tests and giving examples of the oaths required by early state constitutions).

[3] Amdt1.2.2.1 Introduction to the Historical Background on the Religion Clauses.

[4] *See, e.g.*, Frank Lambert, The Founding Fathers and the Place of Religion in America 250 (2003); John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 50 (4th ed. 2016).

for colonies seeking to establish religiously pure communities.[5] Religious minorities protested these oaths, some because of general religious objections to taking oaths, and others because the oaths elevated specific religious views.[6]

As the movement to disestablish state-sponsored religion gained traction in the years following the Revolution,[7] some Founders argued a person's religious beliefs should no longer disqualify them for public office.[8] At the federal constitutional convention, on August 20, 1787, Charles Pinckney introduced a prohibition on religious tests.[9] His proposal read: "No religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S."[10] Pinckney explained that this provision was expected in "a System founded on Republican Principles."[11] He stressed that the new democracy stemmed from the Enlightenment movement,[12] a philosophy that emphasized individual reasoning over central state dogmas and led to more religious toleration.[13] Opposing Pinckney's proposal, Roger Sherman believed the provision was unnecessary because the "prevailing liberality" towards religious beliefs would itself provide "sufficient security" against religious tests.[14] The convention voted to adopt the final version of Pinckney's proposal on August 30, 1787, with the journal recording the vote as unanimous, and James Madison's notes recording North Carolina as the only "no" vote on the Article as a whole.[15]

The constitutional prohibition on religious tests engendered some controversy during state ratification debates, particularly given that most states still retained some form of religious test for public officeholders.[16] Some delegates to state ratification conventions opposed the provision on the grounds that it would allow non-Christians to obtain public office.[17] One Massachusetts delegate claimed, for example, "that a person could not be a good man without being a good Christian."[18] Delegates favoring the provision believed it helped secure religious liberty by preventing government persecution of disfavored sects and government interference in matters of private conscience.[19] One delegate pointed out that requiring a religious test oath would not necessarily ensure officeholders would be of good morals, since "unprincipled and

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[5] *See, e.g.*, Lambert, *supra* note 4, at 236–37.

[6] *See, e.g.*, Witte & Nichols, *supra* note 4, at 50.

[7] *See* Amdt1.2.2.5 Virginia's Movement Towards Religious Freedom; Amdt1.2.2.8 Early Interpretations of the Religion Clauses.

[8] *See, e.g.*, Pfeffer, *supra* note 1, at 253; *see also, e.g.*, Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), https://founders.archives.gov/documents/Franklin/01-33-02-0330 (expressing his opposition to religious tests and his hope that states would move further away from them).

[9] 2 The Records of the Federal Convention of 1787, at 342 (Max Farrand ed., 1911).

[10] *Id.*

[11] 3 The Records of the Federal Convention of 1787, at 122 (Max Farrand ed., 1911).

[12] *Id.*

[13] *See generally, e.g.*, Shane J. Ralston, American Enlightenment Thought, Internet Encyclopedia of Philosophy, https://iep.utm.edu/american-enlightenment-thought/ (last visited Aug. 15, 2022).

[14] 2 The Records of the Federal Convention of 1787, at 468 (Max Farrand ed., 1911).

[15] *Id.* at 461, 468.

[16] *See, e.g.*, Pfeffer, *supra* note 1, at 254.

[17] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), (noting this view disapprovingly); *see also, e.g.*, XXX The Documentary History of the Ratification of the Constitution and the Adoption of the Bill of Rights 403 (eds. John P. Kaminski et al. 2009) (statement of Mr. Abbot) [hereinafter Documentary History of Ratification].

[18] VI Documentary History of Ratification, *supra* note 17, at 1377 (statement of Col. Jones).

[19] *See, e.g.*, VI Documentary History of Ratification, *supra* note 17, at 1421–22 (statement of Rev. Backus); X Documentary History of Ratification, *supra* note 17, at 1531 (statement of Mr. Johnson); XXX Documentary History of Ratification, *supra* note 17, at 404–05 (statement of Mr. Parsons). *Accord* A Landholder VII, *reprinted in* III Documentary History of Ratification, *supra* note 17, at 498–500.

dishonest men will not hesitate to subscribe to *any thing*" for their advancement.[20] That same delegate argued "that there are worthy characters among men of every other denomination . . . and even among those who have no other guide, in the way to virtue and heaven, than the dictates of natural religion."[21] Ultimately, not only did the states ratify the Constitution's "no religious test" clause, many states removed or loosened their own religious test oaths between 1789 and 1796.[22]

In the 1800 presidential contest between Thomas Jefferson and John Adams, a New York minister named William Linn published a pamphlet opposing Jefferson on the basis that he "reject[ed]" the "Christian Religion" and openly professed "Deism."[23] Acknowledging that the Constitution did not prevent non-Christians from serving, Linn nonetheless argued that Jefferson should "set his name to the first part of the apostle's creed" in order to prove his character.[24] Linn and like-minded ministers argued that voters should impose their own religious test—a voluntary restriction that would be all the more "striking" given the lack of a constitutional provision requiring Christianity.[25] Voters rejected these arguments and elected Jefferson president.[26] Adams attributed his electoral loss to popular opposition to a religious establishment, noting presumably false claims that Adams would have "introduce[d] an Establishment of Presbyterianism."[27] In his view, a number of voters "said Let Us have an Atheist or Deist or any Thing rather than an Establishment of Presbyterianism."[28]

ArtVI.C3.2.2 Interpretation of Religious Test Clause

Article VI, Clause 3:

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

In a 1787 article defending the necessity of the Constitution's bar on religious tests, Oliver Ellsworth, third Chief Justice of the Supreme Court, defined a religious test as "an act to be done, or profession to be made, relating to religion (such as partaking of the Sacrament according to certain rites and forms, or declaring one's belief of certain doctrines), for the purpose of determining whether his religious opinions are such that he is admissible to a public office."[1] In 1941, the Supreme Court recognized in dicta that the U.S. Constitution

[20] VI Documentary History of Ratification, *supra* note 17, at 1376 (statement of Rev. Shute).

[21] *Id.*

[22] Witte & Nichols, *supra* note 4, at 50–51.

[23] William Linn, Serious Considerations on the Election of a President 4 (1800).

[24] *Id.* at 32.

[25] *Id.* at 28; *see also* Lambert, *supra* note 4, at 276–78.

[26] Lambert, *supra* note 4, at 280–81.

[27] Letter from John Adams to Mercy Otis Warren (Aug. 8, 1807), https://founders.archives.gov/documents/Adams/99-02-02-5203.

[28] *Id.*

[1] A Landholder VII, *reprinted in* III The Documentary History of the Ratification of the Constitution and the Adoption of the Bill of Rights 499 (eds. John P. Kaminski et al. 2009).

prohibited "the religious test oath . . . prevalent in England."[2] Nonetheless, even at that time, a number of state constitutions required office holders to hold a general belief in God's existence.[3]

It was not until 1961 that the Supreme Court ruled that the U.S. Constitution barred religious tests for *state* office.[4] In *Torcaso v. Watkins*, the Court held that a Maryland provision requiring public officeholders to declare a "belief in the existence of God" violated the First Amendment's Establishment and Free Exercise Clauses.[5] The basis of the decision was the First Amendment's protections for "freedom of belief and religion."[6] However, the Court's opinion also relied on Article VI's prohibition on religious tests to support the idea that religious test oaths were contrary to American tradition.[7] Some other decisions have similarly suggested that the Religion Clauses prohibit laws that institute religious tests for participation in public life.[8]

The provision prohibiting religious tests does not prohibit other types of oaths for public officeholders,[9] although First Amendment protections for speech and association may sometimes limit the government's ability to require oaths that burden those rights.[10]

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[2] Bridges v. California, 314 U.S. 252, 265 (1941). *See also, e.g.*, Girouard v. United States, 328 U.S. 61, 65 (1946) (noting that a conscientious objector's "religious scruples would not disqualify him from becoming a member of Congress or holding other public offices," citing Article VI's religious tests bar).

[3] *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 468–70 (1892) (citing various state constitutional provisions to demonstrate their "recognition of religious obligations").

[4] Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

[5] *Id.* at 489 (quoting Md. Const. Declaration of Rights art. 37).

[6] *Id.* at 496.

[7] *Id.* at 491–92.

[8] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 702 (1994) (plurality opinion); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

[9] Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 414 (1950).

[10] Amdt1.7.9.1 Loyalty Oaths to Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech; Amdt1.8.2.3 Denial of Employment or Public Benefits.