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THE BREADTH VERSUS THE DEPTH OF CONGRESS'S COMMERCE POWER

by

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The Breadth versus the Depth of Congress's Commerce Power

Stephen Gardbaum*

Introduction

The *Lochner* era that lasted from roughly 1887 to 1937 is widely known for two related constitutional doctrines. First, the Supreme Court constitutionalized the free market and expressed a general hostility to government regulation of the economy.[1] Second, the Court enforced limits on the scope of national power in the name of the reserved powers of the states.[2] The history of preemption during this period, however, casts serious doubt on the representational accuracy of a portrait of the *Lochner* Court painted only with these two broad brushes. For it reveals that, in relevant contexts, the Court favored not simply the market in the abstract but the *national* market. In essentially constitutionalizing the free movement of goods across state lines for the first time, the *Lochner* Court wielded the two doctrines of federal

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1 See Justice Oliver Wendell Holmes's famous statement in his Lochner dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics.*" See also, Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VIRGINIA L. REV. 187 (1984) (arguing that the Lochner Court constitutionalized the free market and its outcomes by creating a constitutional right to the protection of property's free market value).

2 Most famously in a series of commerce clause cases: E.C. Knight (in its early years), Hammer v. Dagenhart (in its middle period), Schechter Poultry and Carter Coal (final period).

preemption and the dormant Commerce Clause more aggressively against the states than any other Court, before or since. In other words, its belief in a single national market trumped both its laissez-faire and federalism commitments, for when the Court considered that economic union was at stake, it looked with favor on regulation at the national level and was keen to find that federal laws displaced state authority in situations where other Courts would not. In this sense, the *Lochner* Court was decidedly a proponent of economic nationalism. "It may be said," Justice Bradley proclaimed as early as 1887, "that, in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject."[3]

In embracing the vision of the United States as a single national market, the *Lochner* Court limited the states' regulatory powers in two complementary ways. First, it employed the dormant commerce clause to expand the scope of Congress's exclusive power over interstate commerce and so to reduce the possibility of state interference. Second, even where concurrent state authority was found to exist, the Court's preemption doctrine meant that it often failed to survive the exercise of federal power. This doctrine began with the clear establishment of the general constitutional principle of preemption for the first time. State laws that conflict with federal laws had always been viewed as void under the traditional principle of supremacy. Preemption, in contrast, entails that even state laws that do *not* conflict—and entire areas of concurrent state authority—may also be displaced when Congress exercises its enumerated

[3] Robbins v. Shelby County Taxing District, 120 U.S. 489, 494 (1887) (invalidating state tax on basis that interstate commerce cannot be taxed at all by a state, even though tax does not discriminate against it). Of course, the reference to Lochner in characterizing the era should underscore the fact that the Court nationalized contract and property rights that were previously (and subsequently) a matter of state authority. That is, in adopting the position of the Slaughter-House dissenters, the Lochner Court brought about the radical transformation in federal-state relations that the Slaughter-House opinion said had not been intended by those who framed and ratified the Fourteenth Amendment.

powers. This distinct principle of preemption was previously controversial and never clearly established or applied.

Not only did the *Lochner Court* clearly establish and vigorously apply the principle of preemption for the first time, but in two crucial respects the specific doctrine employed was significantly more restrictive of state power than its modern counterpart. First, the Court conceptualized preemption not as a discretionary exercise of congressional authority but as an automatic consequence of federal regulation in a given field. State regulatory authority in that same field was "permissive" only and was necessarily terminated once Congress acted. For the *Lochner* Court, Congress's commerce clause authority was latently exclusive, there was no genuinely concurrent state power. Accordingly, congressional intent and its interpretation played little role in the analysis. In contrast, modern preemption doctrine, premised on genuinely concurrent state power, turns on the centrality of congressional intent and the categories through which that intent is interpreted. Second, and in consequence, the *Lochner* Court had no equivalent of the modern presumption against preemption. To the contrary, the latent exclusivity of federal power created either an irrebuttable or strong presumption *for* preemption.

Undoubtedly, the *Lochner* Court held a limited view of the *breadth* of Congress's commerce clause power, a posture that contributed considerably to its laissez faire and pro-state reputation. However, the Court combined that construction with a relatively unlimited view of the *depth* of the commerce power – the impact on state authority of a valid exercise of this power. These twin positions were exactly reversed during the New Deal. Although the New Deal Court expanded the breadth of national powers under the commerce clause, it also reduced the depth of that power by moving from latent exclusivity to genuine concurrency, and from well-nigh automatic preemption to a presumption against preemption.

The Intellectual and Constitutional Frameworks

The first two-thirds of the *Lochner* Court during which its national market philosophy was established -- roughly 1887 to 1920 -- coincided initially with the Granger and Progressive movements at the state level and then increasingly (but not unconnectedly) with the first coordinated and systematic attempts by Congress to regulate interstate commerce. The Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, the Revenue Act of 1894, the Lottery Act of 1895, the Pure Food and Drugs Act of 1906, the two Federal Employer Liability Acts of 1906 and 1908, the Hepburn Act of 1906 (which substantially expanded the ratemaking and other regulatory powers of the Interstate Commerce Commission), and the Mann Act of 1910 all predated Woodrow Wilson's presidency as the major legislative fruits of, or reactions to, the Granger and Progressive movement at the national level.

The federalism implications of this first great burst of national legislation under the commerce clause were a major issue on the minds of contemporary politicians, lawyers, journalists, and academics. The arguments on both sides foreshadowed those to be made twenty-five years later in the wake of the Great Depression, although they were more evenly balanced first time around. On one side, a growing body of opinion, including most but not all Progressive thought, favored increased national control of society and the economy. This school of thought culminated in the remarkable success of Herbert Croly's *Promise of American Life*, published in 1909, which played a major role in Theodore Roosevelt's break with the Republican Party and his New Nationalism program of 1912.

On the other side were states' righters of various stripes, including Jeffersonian Democrats. Illustrative of this school and its deep suspicion of the newly dynamic federal government are two articles published in the *North American Review* in 1908, pleading for resistance to these growing trends: one by Woodrow Wilson, then still president of Princeton, the other by Henry Wade Rogers, dean of the Yale Law School. Dean Rogers expressed general concerns about constitutional centralization:

> We are threatened with a revival of Federalism – a Federalism that is more extreme and radical than the leaders of the old Federal party ever countenanced. The argument proceeds on the assumption that the States have failed to perform their duty properly, so that great evils have grown up which the States cannot or will not remedy, and from which we should have been free if only the Federal Government had possessed the authority and not the States.[4]

Wilson's concerns were more focused:

> Uniform regulation of the economic conditions of a vast territory and a various people like the United states would be mischievous, if not impossible….[T]he balance of powers between the States and the Federal Government now trembles at an unstable equilibrium and we hesitate into which scale to throw the weight of our purpose and preference with regard to the legislation by which we shall attempt to thread the maze of our present economic needs and perplexities. It may turn out that what our State governments need is not to be sapped of their powers and subordinated to Congress, but to be reorganized along simpler lines which will make them real organs of popular opinion.[5]

Wilson was, of course, successfully to oppose Roosevelt's New Nationalism with his own, somewhat vaguer but decidedly more pro-states' "New Freedom" platform in the 1912 election. Amidst these intellectual cross-currents, the *Lochner* Court's preemption jurisprudence took shape.

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[4] Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. AMER. REV. 321, 323-4 (1908).

[5] Woodrow Wilson, *The States and the Federal Government*, 187 N. AMER. REV. 684, 688, 697 (1908).

At the outset of the *Lochner* era, the constitutional framework for federalism issues consisted of the following two prongs. First, the Court would ask whether federal power (over interstate commerce or anything else) was exclusive or concurrent with the states. Second, to the extent federal power was *not* exclusive, concurrent federal and state powers were regulated only by the principle of the supremacy of federal law. Concurrent state power would be trumped under the Supremacy Clause only if, and only to the extent that, state law actually conflicted with federal law. Due to the relative dearth of congressional exercises of the commerce power during much of the nineteenth century, the contours between national and state power over commerce were hammered out primarily in the context of the scope of state power in the absence of federal regulation—in constitutional parlance, the parameters of the dormant commerce clause. This was to end when the *Lochner* Court was squarely faced with the issue of the implications for continuing state authority of the new exercises of federal power.

The question of whether Congress's power to regulate commerce among the several states was exclusive or concurrent with the states had been a deeply contested one since *Gibbons v. Ogden* (1824), if not before. The Court avoided a definitive answer until 1851 when, in *Cooley v. Board of Wardens*, it settled on what is commonly referred to as "selective exclusivity": Congress's commerce power is in part exclusive and part concurrent. The dividing line ran between subjects that are "in their nature national, or admit only of one uniform system, or plan of regulation"[6] (which "require exclusive legislation by Congress") and those that are not. In settling on this formula, *Cooley* also answered a broader underlying question that confronts all federal systems: should the conflict between the general economic benefits of a single uniform market and the sovereignty interests of the states in exercising traditional

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[6] Cooley, 53 U.S. 299, at 319.

regulatory powers be resolved in favor of a constitutional norm of free, unrestricted movement of goods across state borders—or in favor of sustained state authority? The *Cooley* Court compromised between the two conflicting values by affirming a limited constitutional norm of free movement that applied to some, but not all, of the subjects of interstate commerce.

By the time of the *Lochner* Court, the general principle of selective exclusivity had survived but the distinction between "inherently national" and "local" had been replaced by a distinction between "direct" and "indirect burdens" on interstate commerce. States have no concurrent power to regulate interstate commerce directly (which thus falls within the scope of Congress's exclusive power and so the dormant commerce clause), but where an exercise of their police powers has only indirect or incidental effects on interstate commerce, it is within their reserved powers and is at least concurrent with Congress.

The second prong of the pre-*Lochner* framework applied to such concurrent state powers. It had always been understood that the Supremacy Clause of Article VI operates to displace or trump state laws that conflict with valid federal laws.[7] What was open to doubt and not resolved until mid-way through the *Lochner* era was the question of whether state laws that do *not* conflict with valid federal law, and indeed all concurrent state authority, could also be displaced by Congress.

Throughout the nineteenth century up until the *Lochner* era, this issue – the issue of preemption -- was understood to be distinct from supremacy. It was also subject to differing opinions and left unresolved. Early in the century, for example, Justice Bushrod Washington had

[7] For example, in Gibbons, Chief Justice Marshall held that the New York statute granting Fulton and Livingston the exclusive right to operate steamships between New York and New Jersey was in conflict with, and trumped by, Congress's 1793 navigation statute. Similarly, in Sinnot v. Davenport, 63 U.S. (22 How) 227 (1859), the Court held that an Alabama statute requiring owners of steamboats navigating the state's waters to register under the penalty of a $500 fine was in conflict with an act of Congress providing for the enrollment and licensing of vessels engaged in the coastal trade and, therefore, inoperative.

been a forthright proponent of preemption; Justice Joseph Story, an equally forthright opponent in favor of supremacy alone.[8] Later, the issue was left open in *Cooley*, when the Court expressly declined to resolve "the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject."[9] Indeed, in establishing the criterion for exclusive federal power as subjects requiring uniform national regulation, *Cooley* indirectly but strongly suggested that Congress lacked the power to preempt the states. After all, preemption is an alternative to exclusive federal power as a way of creating national uniformity: Congress can simply pre-empt all concurrent state power. The fact that the *Cooley* Court made uniformity the rationale and criterion for exclusivity strongly suggests that it did not believe this alternative means of ensuring uniformity existed.

Beginning in the mid-1880s, however, both parts of the Cooley compromise—on the scope of exclusive federal power and silence regarding preemption—underwent a profound shift.

The Early *Lochner* Court: 1887 - 1912

The *Lochner* Court quickly rejected the *Cooley* balance and decisively broadened the constitutional norm of free interstate movement of goods, thereby limiting the regulatory powers of the states in the name of economic nationalism. It did so in cases involving the most salient political issues of the day in which the competing claims of free movement of goods and state authority clashed: railroads and alcohol. State railroad regulation, a particular focus of the Granger movement, came first. In *Wabash, St. Louis and Pacific Railway v. Illinois* (1886), the

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[8] See their conflicting opinions on this issue in Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), and my discussion of it in Gardbaum, *supra* note *, at 788-91.

[9] Cooley, at 320.

Court extended the exclusive power of Congress over interstate commerce by holding that states lack the power to regulate the rate of even the purely intrastate leg of a railway trip extending beyond its borders. According to the Court, such state authority would directly interfere with interstate commerce. State regulation of intoxicating liquors was next and, if anything, more contentious. The *Lochner* Court's firm opposition to such laws as impediments to the nation's commerce ultimately brought it into conflict not only with the states but also with the express intent of a Congress that, under prohibitionist pressure, twice acted to overturn the Court's decisions and to bolster state power.[10]

In *Bowman v. Chicago and Northwestern Railway Co.* (1888), the Court held that states cannot ban imports of liquor, for such laws not only burden interstate commerce but also discriminate against it. Following this decision, Iowa enacted a statute prohibiting sale within the state of *all* intoxicating liquors, domestically produced as well as imported from other states. In *Leisy v. Hardin* (1890), the Court invalidated this statute under the dormant commerce clause. (In order to do so, it had to overrule a venerable Taney-era decision that had upheld an essentially identical, non-discriminatory state regulation.)[11] Chief Justice Fuller explained that Congress's exclusive power extends to all interstate movement of goods, including liquor. Moreover, in drawing the boundary between a valid exercise of the states' police power over purely intrastate affairs and a prohibited regulation of interstate commerce, Fuller stated that "the law of [a] State amounts essentially to a regulation of commerce…among the several states …when it inhibits, *directly or indirectly*, the receipt of an imported commodity…."[12] The notion

[10] These federal statutes were the Wilson Act, 26 Stat 313 (1890) and the Webb-Kenyon Act, 37 Stat 699 (1913).

[11] The License Cases, 46 U.S. (5 How.) 504 (1847).

[12] Leisy v. Hardin, 135 U.S. 100, 123 (1890) (emphasis added).

that a non-discriminatory state law aimed not at the protection of domestic industry but at the health, welfare, or morals of its citizens is constitutionally objectionable simply because it may or does restrict the flow of imports compared to the *ex ante* situation comes as close to a one-sided constitutionalization of the free movement of goods as is possible within a federal system. It is a concept that was, as we shall see, rejected during the New Deal -- and, more recently, called into question by the European Court of Justice as the appropriate balance for the newly completed single market in the European Union.[13]

In the narrow window left open by the dormant commerce clause for state regulatory authority, the Court's preemption doctrine further augmented the push for uniformity. During the first decade of the *Lochner* Court until his retirement in 1897, the (somewhat unlikely) champion of federal preemption was Justice Stephen J. Field.[14] In a series of opinions starting in the mid-1870s, Field stated his own answer to the "general question" of preemption consciously left open in *Cooley*. Thus, in an 1888 opinion for the Court, Field declared that

> [i]t is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employee's and others on railway trains engaged in that commerce; *and that such legislation will supersede any state action on the subject.* But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.[15]

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[13] See Joined Cases C-267 & 268/91, Keck and Mithouard, [1995] 1 CMLR 101, 124-25 (ECJ 1993). In Keck, the ECJ reconsidered and scaled back its definition of which member state laws constitute "measures having equivalent effect" to quantitative restrictions in violation of Article 30 of the Treaty of Rome. This definition, strikingly similar to the one in *Leisy*, was that "all trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions." Procureur du Roi v. Dassonville, [1974] E.C.R. 837, 852. The Keck re-definition was that member state laws restricting or prohibiting "certain selling arrangements" only violate the Treat of Rome if they have a discriminatory effect on the marketing of imported goods.

[14] "Somewhat unlikely" because during the Reconstruction era, Field had generally been a defender of states' rights, although he was also a very early proponent of substantive due process limits on the states as one of the two dissenters in The Slaughter-House Cases.

The difference between preemption and the ordinary operation of the Supremacy Clause is precisely that "any" state action on the subject will be superseded, not just conflicting state action. In this and in all other cases, however, Field's answer was dicta. Prior to 1912, a majority of the Court had no occasion to decide the preemption question directly either because (as here) there was no such federal legislation in place or, where there was, state law conflicted with it. It was to be nearly another quarter century before Field's position on preemption attained a general consensus on the Court and became official doctrine.

Rather than either entirely avoiding the issue or engaging in the sort of explicit and principled disagreements that sometimes occurred in the pre-*Cooley* era, however, the period before 1912 is generally characterized by confusion and ambivalence about supremacy versus preemption. For example, the Court declared "that whenever Congress shall undertake to provide…a general system of quarantine…all State laws on the subject will be abrogated, *at least as far as the two are inconsistent*. But, until this is done, the laws of the State on the subject are valid."[16] The same ambivalence characterizes Justice Harlan's opinion in *Reid v. Colorado* (1902), an important case discussed below: it appears to assert both positions in the space of two pages. "When the entire subject of the transportation of live stock from one state to another is taken under direct national supervision," Harlan avers, "*all* local or State regulations in respect of such matters and covering the same ground will cease to have any force…"[17] Soon, though, Harlan migrates from preemption to supremacy: "This Court has said – and the principle has been often reaffirmed – that 'in the application of this principle of supremacy of an act of

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[15] Nashville, Chattanooga & St. Louis R'wy v. Alabama, 128 U.S. 96, 99-100 (1888) (emphasis added).

[16] Morgan's Steamship Co. v. Louisiana Board of Health, 118U.S. 455, 464 (1886) (emphasis added).

[17] Reid v. Colorado, 187 U.S. 137, 146-7 (1902).

Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'"[18]

Only when the first sustained federal regulatory regimes such as the Interstate Commerce Act confronted the Court squarely and unavoidably with the issue of preemption did the justices finally, unequivocally, and unanimously hold that federal law could in principle displace all concurrent state regulatory power over an area, regardless of any conflicts between the two sets of regulations. Not surprisingly, this newly established principle also resulted in the first invalidations of state laws specifically on preemption grounds. In a series of railroad cases starting with *Southern Railway v. Reid* (1912) the Court invalidated numerous state laws even though the two sets of regulations, state and federal, did not conflict with each other. It did so because Congress had simply excluded *all* concurrent state authority, period.

Although the principle of preemption was thus universally established by the Court for the first time, two distinct conceptions of preemption -- a stronger and a weaker one — existed side by side, with individual justices generally adhering to one or the other.[19] The first conception, dominant between 1912 and 1933, viewed preemption as an automatic, necessary, and inherent consequence of federal action because of the nature of Congress's authority over interstate commerce as latently exclusive.[20] Concurrent state authority over a subject-matter exists only until Congress exercises its "plenary" or "paramount"authority over that field, at which point it is automatically and entirely preempted (except in the rare case of an express non-

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[18] Id., at 148 (quoting *Sinnott v. Davenport*, 63 U.S. 227, ___ (1859)).

[19] Although for a few justices subject-matter may have played a role in which conception to employ in particular cases. See the brief discussion below, p. ___.

[20] See David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 53 (1973).

preemption clause). Latent exclusivity is a distinct jurisdictional category, lying in between exclusivity *ab initio* (which rules out state authority regardless of congressional action or inaction) and genuinely concurrent power (which asserts the possibility of two continuing sets of non-conflicting regulations).[21] Accordingly, under this dominant conception, Congress's commerce power is deep if not necessarily broad. While the Court enforced limits on the scope of this power in the name of the states, whatever falls within these limits was latently exclusive of state authority.

The second conception understood preemption as a discretionary power of Congress to end the otherwise genuinely concurrent power of the states. Exercise of this power required a manifestation of congressional intent, express or implied, in the particular federal law. This second conception was a distinctly minority position until 1933, but then quickly achieved what the automatic conception never had--a total monopoly. Henceforth, the centrality of congressional intent, bolstered by a new presumption against preemption, was deemed necessary in the face of the greatly enhanced scope and exercise of federal power.

The Dominant View

Southern Railway v. Reid and its companion case, decided in 1912, were the landmark decisions. In combination, the cases (1) clearly established the principle of preemption for the first time; (2) invalidated particular state laws on specifically preemption grounds for the first time; and (3) set out the distinctive and dominant conception of preemption that characterizes this entire period and distinguishes it from the period after 1933.

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[21] Latent exclusivity of federal power, together with the automatic preemption of state law that it entails, is an entirely plausible federalism option and is formally employed today in the Federal Republic of Germany under Article 72(1) of its Basic Law.: "In matters within the concurrent legislative power [of the Federation], the states shall have power to legislate so long as and to the extent that the Federation does not exercise its right to legislate."

Both cases arose over a North Carolina statute requiring railroads to receive freight for transportation whenever tendered and to forward it by a route selected by the owner, with a $50 a day fine plus damages for violations. The Supreme Court unanimously invalidated the North Carolina statute on the basis that "Congress has taken control of the subject of rate making and charging," so that the state no longer had concurrent power to regulate the subject. "It is well settled," Justice McKenna wrote, "that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised."[22]

In fact, this principle was far from "well settled." McKenna's opinion for the Court introduced much of what would become the standard terminology of preemption analysis, a terminology quite different from that employed under traditional supremacy analysis. Rather than the standard invocation of *Gibbons* or *Sinnot* and their language of conflicts, he spoke of "a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers," and of Congress imposing "affirmative duties upon the carriers which the State cannot even supplement."[23] The facts prove what the language strongly suggests—a notion of preemption that extends far beyond supremacy. In *Reid* itself, the issue was clouded by the fact that there was an actual conflict between state and federal law. The railroad agent had refused to receive the freight because no schedule of rates for the shipment had been filed and published with the Interstate Commerce Commission, as required under the federal Interstate Commerce Act of 1887. As the Court observed, what the federal regulations forbade the carrier to do, the state statute required him to do.[24] In *Reid*'s companion case, however, no such conflict

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[22] Southern Railway v. Reid, 222 U.S. 424, 435 (1912).

[23] Id., at 436.

[24] Id., at 443.

existed, because the required rates had already been filed. The only reason the railroad agent refused shipment, and so violated the state law, was that he negligently claimed not to know the destination.[25] The irrelevance of conflict under the new principle of preemption was expressed in his inimitable style by Justice Oliver Wendell Holmes in a case decided three years later: "[T]hat [the alleged absence of conflict] is immaterial. When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[26]

The Court in *Southern Railway* also strongly suggested that it viewed preemption as an automatic consequence of federal action in a given field rather than a matter of discretionary congressional power and intent to preempt. It clearly embraced the concept of the "latent exclusivity" of federal commerce power over commerce that essentially negates a role for either congressional intent or any genuinely concurrent state power:

> "[T]he power of the state over the general subject of commerce has been divided into three classes: "First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot act at all."[27]

Strikingly, this classification rules out any genuinely concurrent state power. Unless within an area of exclusive power, states can only ever act before the federal government enters the field.

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[25] See ALEXANDER M. BICKEL AND BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, 273-4 (1976).

[26] Charleston & Western Carolina R'wy v. Varnville, 237 U.S. 597, 604 (1915). See also Southern Railway Co. v. Railroad Commission of Indiana, 236 U.S. 439, 448 (1915) (Lamar, J.): "The test, however, is not whether the state regulation is in conflict with the details of the Federal law or supplement it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

[27] Southern Railway v. Reid, 222 U.S. 424, 435 (1912).

As soon as Congress does so in any capacity, the states are ejected from the entire area of regulation, regardless of whether that is what Congress intended.

Among the most influential preemption cases of the era is *Chicago, Rock Island & Pacific Railway Co. v. Hardwick Farmers Elevator Co.* (1913). Citing *Southern Railway* as the sole precedent for the governing principles of law, the Court in *Hardwick* overturned a Minnesota statute regulating the delivery of interstate cars as superseded by the Hepburn Act of 1906. Chief Justice White again stated the principle of automatic preemption as follows:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of [the Hepburn Act] 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. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the state impotent to deal with a subject over which it had no inherent, but only permissive, power. [citing *Southern Railway*] [28]

Congressional action automatically and necessarily "covers the whole field" and terminates state authority which is not "inherent but only permissive." In another railroad case decided that same year, Chief Justice White, made the point even more dramatically:

> The conception of the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce is *inconceivable*, since the exertion of the greater power necessarily takes possession of the field, and leaves

[28] *Chicago, Rock Island & Pacific Railway Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913).

> nothing upon which the lesser power may operate. To concede that the right of a state to regulate interstate ferriage exists 'only in the absence of Federal legislation,' and at the same time to assert that the state and Federal power over such subject is concurrent, is a contradiction in terms.[29]

Exercise of Congress's commerce power necessarily terminates that of the states. Far from being a matter of congressional intent which could go one way or the other, much less carry a presumption against preemption, continuing concurrent state power regulated only by the Supremacy Clause in case of conflicts is declared "inconceivable."

Particularly instructive of the *Lochner* Court's preemption doctrine is a series of cases dealing with the Federal Employer Liability Act (FELA), under which the federal government attempted to regulate the liability of private railroads for employment accidents. In 1908, by a five-four vote the Court struck down FELA's first version because although it regulated liability for employees engaged in interstate commerce, it also purported to regulate liability for employees engaged in purely intrastate commerce.[30] Congress responded by re-enacting the statute without the latter provisions. In 1912, a week after *Southern Railway*, the Court upheld this second statute in *Mondou v. New York*—and, moreover, held that the revised FELA preempted state laws on the same subject: "[N]ow that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."[31] Although employer liability was a field traditionally occupied by the states, congressional action in this field was deemed sufficient for preemption. There was no discussion of congressional intent, much less any suggestion of a presumption against preemption.

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[29] New York Central & Hudson River Railroad Co. v. Board of Chosen Freeholders of the County of Hudson, 227 U.S. 248, 264 (1913).

[30] Howard v. Illinois Cent. R. Co., 207 U.S. 463 (1908).

[31] *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1, 55 (1912).

Another five years later, in the important case of *New York Central v. Winfield* (1917), the Court held FELA also preempted state laws that did not require proof of negligence for liability. While the statute was (like the others already considered) completely silent on whether its scheme was exclusive, Justice Van Devanter opined that

> It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject all state laws covering the same field are *necessarily* superseded by reason of the supremacy of the national authority.[32]

Once again, the "necessarily" negates any notion that preemption is a matter of discretionary congressional intent. *Winfield* drew a long, strong dissent from Justice Brandeis, discussed below. The majority opinion, however, was of a piece with a now-established preemption doctrine that would continue to hold sway until 1933. Taken together, the Court's treatment of the two versions of FELA provides a good example of the proposition that although the *Lochner* Court enforced limits on the breadth of Congress's commerce power (striking down the first version), it held an expansive view of that power's depth: what is inside the limits is "plenary" and latently exclusive of state authority..

As late as 1925, Justice Butler, who eight years later was to write the landmark opinion in *Mintz* that ended its dominance, continued to embrace this conception: "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme *and exclusive*."[33] Of course, "supreme" and "exclusive"

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[32] *New York Central v. Winfield*, 244 U.S. 147, at 148 (1917) (emphasis added).

[33] *Missouri Pacific RR Co. v. Stroud*, 267 U.S. 404, at 408 (1925) (emphasis added).

are quite different qualities of federal law: while the former regulates conflicts with state law, the latter renders conflicts redundant by removing all state authority.

The notion of the latent exclusivity underlying automatic preemption was understood to reflect the particular nature of Congress's power over interstate commerce, described variously as "plenary," "paramount," "primary," or "all embracing." As the earlier quotes from *Mondou*, *Hardwick*, and *Winfield* show, however, the Court also suggested that latent exclusivity was a necessary consequence of the general supremacy of federal law. This is quite false. "The supremacy of the national authority" means only that where there is a conflict between state and federal laws on the same subject, the federal trumps. It does not mean that all state law in the same area is displaced. Moreover, even where there is express or implied congressional intent to displace all state law in area, which would also conflict with and so similarly trump continuing state authority, this does *not* mean that such trumping is an automatic or necessary consequence of any federal regulation in a given area. It would take nearly another decade, however, before the Supreme Court, and Justice Butler in particular, would arrive at that insight.

The Minority View

A coherent alternative to the dominant conception of preemption as automatic and as reflecting the latent exclusivity of federal authority evolved only gradually. Developed by justices who were more conscious of preserving the states' police powers, it began as a series of seemingly *ad hoc* reasons for not finding preemption and tended to employ three different techniques: (1) acceptance of the automatic conception of preemption but denial of its application in a particular case, on the ground that state and federal laws did not cover the same field; (2) reliance on the principle of supremacy alone; and (3) moving congressional intent to center stage. At first, all three techniques were employed in essentially gunshot style to resist preemption findings. Only gradually did a coherent alternative conception emerge based on the third technique--that is, the notion that preemption is a discretionary congressional power, exercise of which requires manifesting an intent to end the otherwise genuinely concurrent power of the states.

Just as the dominant conception typically relied on and cited a mere handful of recent precedents – primarily *Southern Railway* and *Hardwick* – so, too, proponents of the competing conception relied almost exclusively on two cases: *Reid v. Colorado* (1902), and *Savage v. Jones* (1912). The major proponents of this alternative, less pro-preemption position were Charles Evans Hughes and Louis Brandeis.

Reid v. Colorado, the original case routinely cited by proponents of the alternative conception, upheld an 1885 Colorado statute preventing the importation into the state of cattle or horses with an infectious or contagious disease against a challenge based on Congress's Animal Industry Act of the previous year. The Court's conclusion was "that the statute of Colorado as here enacted does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act…"[34] Although seemingly a decision based on supremacy and conflict principles, it is the following statement, unsupported by authorities, for which *Reid* was subsequently cited as the original source: "[i]t should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."[35] This statement (a) acknowledges the principle of preemption (as distinct from supremacy), (b) implies that

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[34] Reid v. Colorado, 187 U.S. 137, 150 (1912).

[35] Id., at 148

preemption is a discretionary power of Congress rather than an automatic consequence of its action ("even when it may do so"), and (c) conditions exercise of this power on a clear manifestation of congressional intent. As noted earlier, however, Justice Harlan's opinion for the Court was still marred by traces of the confusion between preemption and supremacy that it is the hallmark of the pre-1912 position. Despite this confusion and the unsupported status of the statement about intent, *Reid* was to have a long and illustrious career, first as the minority position and, after 1933, as the sole position.

Savage v. Jones was the other major anti-preemption authority to coexist with *Southern Railway* and *Hardwick* throughout the *Lochner* era. Also like *Reid*, it was still cited after *Southern Railway* and its progeny were completely airbrushed out of the preemption picture when the Court in the 1930s and 1940s decisively switched from one conception to the other. *Savage* concerned the federal Pure Food and Drugs Act of 1906, one of the major national legislative achievements of the Progressive movement.[36] Specifically, it involved the impact of the federal law on an Indiana statute requiring a label disclosing the ingredients of commercial animal food. The opinion, written by Justice Hughes, employed all three anti-preemptive tools without developing a clear and coherent alternative to the automatic conception. After rejecting a dormant commerce clause challenge to the state statute, Hughes initially framed the preemption issue in traditional supremacy terms:

> The question remains whether the statute of Indiana is in conflict with the act of Congress known as the food and drugs acts of June 30, 1906. For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation.[37]

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[36] The constitutionality of the Act itself under the Commerce Clause had been narrowly upheld the year before in Hipolite Egg Co. v. U.S., 220 U.S. 45 (1911).

The Court then implicitly rejected a finding of automatic preemption by noting that Congress had not covered "the entire ground."[38] While the federal statute prohibited false or misleading statements concerning the ingredients of an article, it did not address failure to disclose the ingredients in the first place—which was what the state statute covered. The Court then proceeded to ask whether Congress had, nonetheless, exercised its power of preemption. Finding that it had not done so expressly, the Court turned to the possibility of implied preemption:

> The *intent to supersede* the exercise by the state of its police power as to *matters not covered* by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in *actual conflict* with the law of the state.[39]

Here, the opinion touches all three anti-preemption bases: "intent to supersede," "matters not covered by the Federal legislation," and the need for "actual conflict." A few sentences later, Hughes quotes the "clear manifestation of intent" statement from *Reid v. Colorado*. Finally, switching back to the supremacy focus with which it began, the Court concludes that

> No ground appears to exist for denying validity to the statute of Indiana….[Its] requirements are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority.[40]

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[37] Savage v. Jones 225 U.S. 501, at 529 (1912).

[38] Id., at 532.

[39] Id., at 533 (emphases added).

[40] Id., at 539.

The only significant dissent in any of the foundational preemption cases between 1912 and 1920 came in *Winfield*, the case holding that FELA preempted state laws imposing strict liability for injuries on employers. Indeed, *Winfield* is the single major case in which the two competing conceptions of preemption were employed in opposition to each other and applied to the same law and facts. The dissent was written by Justice Brandeis -- along with Hughes, the main opponent of automatic preemption. At nearly twice the length of Justice Van Devanter's opinion for the Court, Brandeis' dissent presented a more focused and coherent alternative conception that either *Reid* or *Savage*.

As noted, Justice Devanter's opinion declared it settled that once Congress had acted upon the subject of employers' liability for employees' injury, all state laws covering the same field were necessarily superseded. By contrast, Brandeis framed the preemption issue as whether Congress has exercised a discretionary power:

> The majority of the Court now holds that [by enacting FELA] Congress manifested its will to cover the whole field of compensation for relief for injuries suffered by railroad employees engaged in interstate commerce;…and that it thereby withdrew the subject wholly from the domain of state action….That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?[41]

Brandeis then claimed to re-state the "definitely formulated…rules" for federal preemption of states' police power. According to him, these rules are: (1) under the dormant commerce clause, states can exercise their police powers even though this might indirectly affect interstate commerce; (2) "But the intent to supersede the exercise by the state of its police power…is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict

[41] *New York Central v. Winfield*, 244 U.S. 147**,** 154 (Brandeis, J., dissenting).

with the law of the state" (quoting from *Savage*); and (3) a state statute '"is not to be regarded as inconsistent with an act of Congress…unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."'[42] This is obviously a highly selective restatement, ignoring the entire line of recent automatic preemption cases.

Brandeis continued: "Guided by these rules…we endeavor to determine whether Congress, in enacting the Employers' Liability Act, intended to prevent states from entering the specific field of compensation for injuries to employees arising without fault on the railroad's part, for which Congress made no provision."[43] The rest of his opinion was a lengthy examination of congressional will as manifested in (a) express legislative words (none to cover liability for all accidents), (b) whether Congress's specific action "necessarily excludes" the state law, and (c) the origin, purpose, and scope of FELA as disclosed in its legislative history. Brandeis concluded that the will of Congress to leave room for state action was far less clear in several other cases where state power had been upheld than it was in *Winfield*, and he insisted that "[t]he field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents."[44] Notwithstanding some passing references to conflict as the only basis for preemption, at least when Congress has not expressly covered the relevant field, and also to the only automatic preemption issue of what is the field covered by Congress's regulation and so subject to latent exclusivity, Brandeis's preemption analysis focused overwhelmingly on congressional intent.

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[42] Id., at 155.

[43] Id. at 155-56 (emphasis deleted).

[44] Id. at 169.

The paucity of dissents and of direct confrontations between the two conceptions of preemption is a little surprising on a Court notable for its divisions in other areas, such as the breadth of the commerce clause and substantive due process. Possibly, prior to Justice Brandeis' nomination to the Court the year before *Winfield*, many justices did not consider preemption cases important enough or otherwise appropriate occasions for dissents. Typically, the opinions are brief. Alternatively, it may have had to do with subject-matter. All the foundational cases for the stronger, latent exclusivity doctrine of preemption involved railroad regulation. In contrast, *Reid v. Colorado* and *Savage v. Jones,* which would become the foundation of the modern, more restrained preemption doctrine, involved health and safety matters. It is possible that for certain justices, the regulatory context made a difference. Although there is no overt suggestion of this in the cases, some justices may implicitly have employed the stronger conception in areas more purely about interstate commerce and the weaker one in areas of more traditional state concern. On the whole, however, the Court's habit of deriving the dominant conception from very general statements about the nature of the commerce power belies the notion that this conception was developed as a special case, limited to railroad or network regulation cases. More likely perhaps, given the contemporary political and economic importance of the railroads and the frequency with which Congress exercised its commerce power in this area, is that the Court developed a general theory of preemption based on this model of regulation.

The New Preemption Paradigm

The strongly nationalist conception of the dormant commerce clause as mandating a single market was, like so many other constitutional restrictions on the states,[45] rejected by the New Deal Court. Initially, starting with *Barnwell* in 1938, the Court scaled back dormant commerce clause review to invalidate only discrimination against out-of-state goods, a substantial enhancement of state power that does not prevent diversity of even-handed regulatory regimes.[46] Then, in 1945, it retreated a little towards the *Lochner* era view by adding second prong to its analysis: the modern balancing test. The fairly strong presumption of constitutionality that it carries, however, as well as the explicit recognition of legitimate state interests even at the cost of free movement, make clear that there is now more constitutional space for state regulatory activity under the dormant commerce clause than during the *Lochner* era.

Likewise, the dominant conception of automatic preemption was abandoned. Beginning with *Mintz v. Baldwin* (1933), the standard preemption test was in essence the principle originating in *Reid v. Colorado*: states would be preempted if and only if Congress clearly and affirmatively manifested its intent to do so. The *Southern Railway/Hardwick* strand premising preemption analysis on the latent exclusivity of federal authority over interstate commerce disappeared entirely from view.

Although *Savage* is the case primarily cited as authority for the change between 1933 and 1937, in reality it was the broader anti-preemption implications of *Reid* that established the

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[45] On the full range of preexisting constitutional limitations on the states that were lifted or reduced by the New Deal Court, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

[46] *South Carolina Highway Dep't. v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938).

foundation of the modern framework. *Savage* stated that the focus on intent applied only once it had been determined that Congress had *not* covered a particular field (in that case, the required disclosure of ingredients). The more general statement in *Reid* (at least if taken in isolation) suggested that the search for congressional intent and the presumption against preemption was to apply *even if* Congress had regulated the relevant field. The modern test for preemption forged between 1933 and 1947 adopted that position, thus allowing genuinely concurrent and diverse regulations *of precisely the same subject* to continue in operation, as long as Congress has not manifested an intent to end state authority.[47] Indeed, from 1933 onwards, the Court bolstered the anti-preemptive implications of *Reid/Savage* by expressly acknowledging a presumption against preemption in areas of traditional state regulation for the first time.[48]

The reason for the replacement of conceptions was twofold. First, Hughes and Brandeis, the major proponents of intent analysis during the *Lochner* era, survived that era to continue arguing for it into the next. (Hughes retired to pursue his political ambitions in 1916 but returned as chief justice from 1930 to 1941. Brandeis served continuously from 1916 to 1939.) Second, by this later time, they were arguing in a far more propitious context because of the fundamental changes taking place in federal-state relations. Given the increased scope and exercise of federal power over interstate commerce, latent exclusivity threatened to eviscerate large areas of traditional state authority. Thus, the Court reached a new federalism balance: although the scope or breadth of the federal commerce power would increase, its depth would be diminished by holding that Congress's power is not latently exclusive but genuinely concurrent with the states.

[47] Hughes and Brandeis may have held this position during the *Lochner* era, but their respective opinions in *Savage* and *Winfield* do not compel this reading.

[48] The canonical statement appears in the later case of *Rice v. Santa Fe Elevator Corp.* , 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")

Between 1933 and 1937, the final years of the *Lochner* Court, all major Supreme Court cases involving preemption upheld state authority. Several of the opinions in these cases were written by Brandeis and Hughes. In 1933, in one of his final preemption opinions for the Court, Brandeis applied his consistent framework to Congress's Grain Future's Act of 1922, which declared that "contracts for the future delivery of grain shall be unlawful unless the prescribed [federal] conditions are complied with."[49] A 1929 Missouri statute made all futures contracts in grain unlawful as illegal gambling. Even though both statutes regulated the same subject (grain futures), Brandeis held that Congress "evinced no intention to authorize all future trading if its regulations were complied with."[50] Since there was no actual conflict between the two, the state law was valid. Brandeis ended his opinion by citing *Savage* alone.

Chief Justice Hughes authored two significant preemption opinions in 1937 and another in April 1941, shortly before his retirement.[51] In each case, Hughes restated, cited, and applied his *Savage* framework to uphold state authority: where Congress chooses to cover or regulate only a limited field, intent to pre-empt state police power outside that field should not be implied unless, fairly interpreted, the federal law is in actual conflict with the state law. The essential redundancy of this final proviso is recognized in Hughes's final formulation of the test, which drops it: "According to familiar principles, Congress having occupied but a limited field, the authority of the states to protect its interest by additional or supplementary legislation otherwise valid is not impaired."[52]

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[49] *Dickson v. Uhlmann Grain CO.*, 288 U.S. 188, 198 (1933).

[50] Id., at 199.

[51] *Townsend v. Yeomans*, 301 U.S. 441 (1937); *Kelly v. State of Washington ex. Rel. Foss Co.*, 302 U.S. 1 (1937); *Skiriotes v. Florida,* 313 U.S. 69 (1941).

[52] *Skiriotes*, 313 U.S. 69, 75 (1941).

Somewhat ironically, the opinion that inaugurated this line of cases was written not by Brandeis or Hughes but by Justice Butler. *Mintz v. Baldwin* (1933) posed the question of whether Congress's 1903 Cattle Contagious Diseases Act preempted a state's authority to apply its own inspection laws. Notably departing from his 1925 statement of the "elementary and well settled" principles of automatic preemption, Butler succinctly framed the preemption inquiry: "The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention to do so must definitely and clearly appear."[53] Although Butler cited *Savage* as authority for this proposition, he should more accurately have cited *Reid*. His analysis of the statutory text led him to conclude that the federal statute "disclose[s] the intention of Congress that, subject to the limitations defined, state measures may be enforced."[54] *Mintz* ushered in a new era of preemption law, the essentials of which remain in place to this day. First, states have genuinely concurrent authority over subjects that Congress may regulate under its commerce power. Second, terminating this concurrent authority is a discretionary power of Congress, not an automatic consequence of federal action. Third, Congress is presumed not to have exercised this power. Fourth, rebutting this presumption requires clear and definite manifestation of congressional intent to preempt.

Although *Mintz* established the principle *that* Congress must clearly manifest its intent to preempt, the full details of this new approach were not filled in until the Court explained *how* Congress can do so in *Rice v. Santa Fe Elevator Corp.* (1947). On that crucial issue, the Court took a middle-of-the-road approach. Having rejected the *Lochner* Court's conception of preemption, it declined to endorse an even stronger anti-preemption position proposed by two

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[53] *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933).

[54] Id., at 352.

staunch New Dealers: Harlan Fiske Stone (who succeeded Hughes as Chief Justice in 1941) and Felix Frankfurter. Stone and Frankfurter both argued that the necessary manifestation of congressional intent to pre-empt should *never* be implied by the courts: express preemption or an actual conflict between state and federal law are the only methods of displacing concurrent state authority.[55] In establishing the modern doctrinal categories of implied preemption – field preemption and obstacle preemption -- *Rice* rejected that view.[56]

The most interesting case along the way is *Hines v. Davidowitz* (1941),[57] for three reasons. First, it is a rare case during the establishment of the new paradigm finding that state authority is pre-empted by a federal statute. Second, the special nature of the federal authority at issue in the case, which, for the majority, justifies the finding is deeply illuminating of this new paradigm. Third, Justice Stone's opinion, albeit a dissent, explicitly acknowledges the deep connection and interplay in the justices' minds between the need for expanding Congress's commerce power and reducing its preemption power.

Hines invalidated Pennsylvania's 1939 Alien Registration Act as pre-empted by Congress's 1940 statute of the same title. The state statute required aliens to register once each year and to carry an alien identification card, and it fined them for failure to do so. By contrast, the federal statute provided for a single, one-time registration of aliens, did not require them to carry a card, and criminalized only willful failures to register. As the two statutes were not in

[55] For my own defense of this view see Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPPERDINE L. REV. 39 (2005).

[56] *In haec verba*: "Such a [clear and manifest] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it…Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject [citing *Hines*]. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute." Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947).

[57] *Hines v. Davidowitz*, 312 U.S. 52 (1941).

irreconcilable conflict, the issue was whether all state authority over the subject-matter was nonetheless displaced. Having noted that "[t]he basic subject of the state and federal laws is identical – registration of aliens as a distinct group," the Court averred that the answer to the preemption issue "depends upon an analysis of the respective powers of state and national governments in the regulation of aliens as such, and a determination of whether Congress has, by its action, foreclosed enforcement of Pennsylvania's registration law."[58] It concluded that the nature of Congress's power over immigration and the need for broad national authority in this area meant that even if Congress's power is not exclusive it is not merely concurrent either:

> Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as its power to tax…..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.[59]

In other words, federal power is "plenary" or "paramount." Substitute "interstate commerce power" for power over aliens here, and you have precisely the same conception of federal power that underlay automatic preemption during the *Lochner* era. After 1933, this conception of the nature of Congress's power over interstate commerce was untenable in a way that it was not during the *Lochner* era -- and was still not over immigration.

Equally illuminating is Justice Stone's dissent--not so much because he effectively argues that the new preemption paradigm should apply equally to Congress's power over immigration as well as its power over interstate commerce, but because his *explanation* of the new paradigm

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[58] Id., at 61-62 (1941).

[59] Id., at 68.

made explicit that the contours of the commerce and preemption powers are and should be linked:

> At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.[60]

This constitutional linkage is exactly the reverse of the old one. In place of the relatively constrained scope of federal powers combined with the automatic preemption of the states when these powers were validly exercised, the Court combined the enlargement of the permissible scope of congressional power with a presumption that state authority survives the exercise of these powers unless clearly ended by Congress.

This theme was similarly invoked the following year by Justice Felix Frankfurter. In an opinion for the Court (albeit in a case not involving preemption), he observed of the commerce clause:

> Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.[61]

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[60] Id., at 75 (Stone, J., dissenting).

[61] *Kirschbaum v. Walling*, 316 U.S. 517, 520 (1942).

A few years later, in dissent, Frankfurter elaborated on this "accommodation" in the area of preemption:

> Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.[62]

And finally, on the losing side of the debate that culminated in *Rice*, he was provoked to spell out the specifics:

> Due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered…So long as full scope can be given to [federal] legislation without undermining non-conflicting State laws, nothing but the clearest expression should persuade us that the federal Act wiped out State fixation of rates and other State requirements deeply rooted in their laws.[63]

Although Stone and Frankfurter lost the argument about how Congress can manifest its intent, all members of the New Deal Court were on the same side in the broader goal of recalibrating preemption in the face of the expanded scope of the federal commerce power.

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[62] *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J. dissenting).

[63] *Rice*, 331 U.S. 218, at 241, 245 (1947) (Frankfurter, J., dissenting).

Conclusion

Given the change from automatic to discretionary preemption that I have charted, one would expect to find either no, or far fewer, express preemption provisions in *Lochner* era statutes in comparison with statutes enacted under modern preemption principles. If preemption is not about congressional intent and its manifestation, but only about the boundaries and substantive content of congressional regulation, express statements of intent would be redundant. By contrast, when the Court is engaged in the task of discerning Congress's intent for surviving state authority, Congress has an incentive to make its intent clear, one way or the other.

By and large, that is what we find. I have not conducted a comprehensive survey, but I examined the language of sixteen major federal statutes from the Sherman Act of 1890 to the Fair Labor Standards Act of 1938. Not a single statute contains an express provision clearly pre-empting the states. Only one pre-New Deal statute, the Clayton Antitrust Act of 1914, contains explicit preemption language, and this is an explicit non-preemption provision.[64] Although in seeming tension with latent exclusivity, such a provision, like Congress's power to consent to state discrimination against interstate commerce, would rather have been seen as an exercise of its "plenary" or "paramount" commerce clause power. Under that power, Congress can expressly elect to limit or circumscribe the covered field.

By contrast, at least four major pieces of New Deal legislation contain express non-preemption provisions of various types. The Securities Act of 1933 and the Securities Exchange Act of the following year each contain reasonably straightforward non-preemption clauses. Thus

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[64] "[N]othing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts." Clayton Antitrust Act, 1914, Section 9. In addition, the Volstead Act of 1920, the federal statute implementing prohibition, followed the text of the XIX Amendment in expressly finding room for state authority.

the latter states: "Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located."[65] The Social Security Act of 1935 is perhaps the first modern statute to reject preemption in favor of "cooperative federalism"-- exercising the power of the purse rather than of regulation -- as virtually all of its substantive provisions contain federal standards that the states must meet if they wish to receive federal grant money. In each separate policy area, the Act lays out the terms for interaction on the issue between state and federal authorities. Finally, the Fair Labor Standards Act of 1938 contains express language permitting the states to legislate higher standards (of minimum wage, maximum hours, and child labor). In these four cases, Congress is arguably responding to the new preemption principles and attempting to make its intent clear.

Finally, my analysis suggests that federal statutes were more likely to be held by the courts to preempt state law during the *Lochner* era than during the New Deal era. In very general terms, this too is borne out by the facts, although, of course, the presence of anti-preemption provisions in many of the later statutes means that Congress was at least as responsible for this finding as the courts. Thus, apart from the Clayton Act with its unusual anti-preemption provision, only the Food and Drugs Act was held by the Court not to preempt *all* relevant state regulations, although those within the area covered by Congress were indeed preempted.[66] By contrast, no major pieces of New Deal legislation were held to preempt all state authority in the relevant area. The Securities Act, the Securities Exchange Act, the National Labor Relations Act,

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[65] Securities Exchange Act, 1934, Title I, Section 6 (c), as originally enacted on June 6, 1934.

[66] There appear to be no *Lochner* era precedents on the preemptive effects of the Sherman Act. The first case I was able to find was a 1937 case holding that the Sherman Act did not preempt Puerto Rico's relevant laws. Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

the Social Security Act, and the Fair Labor Standards Act were all held to preserve some concurrent state authority within the field regulated by Congress. Clearly, the climate was more hospitable for continuing state concurrent authority following a valid exercise of Congress's commerce power after 1933 than before. If this seems counterintuitive, perhaps the article should be subtitled, "The Curious History of Preemption."