THE CONSTITUTION AND THE AMERICAN FEDERAL SYSTEM: AN UPDATE

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I. INTRODUCTION

In 2009, I undertook a comprehensive analysis of the Constitution and the American federal system.[1] In that analysis, I explained the constitutional basis of the American federal system and discussed its four components: state sovereignty and constitutional limitations on state power, the powers of the federal government, the relationship between the federal government and the states, and the relationship between the states. I began by pointing out that the American federal system as we know it today was not planned. We did not adopt a Constitution at the time of Independence, or at any time thereafter, establishing the structure of a federal system and allocating power between the federal government and the states. As stated in this earlier Article,

> Rather the structure of the American federal system has evolved over a period of time as a result of the Supreme Court's interpretation of the provisions of the Constitution dealing with federal and state power and the Court's development of constitutional policy with respect to the nature and operation of the American federal system.[2]

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1. Robert A. Sedler, *The Constitution and the American Federal System*, 55 WAYNE L. REV. 1487 (2009) [hereinafter Sedler, *The American Federal System*].

2. *Id.* at 1487-88; *see also* the discussion in Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173 (2002).

In that article, I stated that my purpose was to explain the essential structure of the American federal system and to demonstrate that the essential structure of the American federal system, as it has evolved from many years of constitutional interpretation by the Supreme Court, was well-established and was not likely to change in any significant way in the foreseeable future.[3] I also noted that in the last decade or so preceding the article, there had been considerable academic debate on the subject of federal and state power, revolving around the contention that the Supreme Court should curtail the range of federal power and to that extent avoid possible interference with the exercise of state power.[4] I could have added that this debate has sometimes been reflected in the views of particular Justices and, on some occasions, in Court opinions, concurrences, and dissents.[5] In any event, I maintained that the debate on this subject was truly academic because it has not led to significant changes in constitutional doctrine applicable to the essential structure of the American federal system.

In the present Article, I will discuss the constitutional decisions of the Supreme Court with respect to the American federal system over the last six years, most particularly the highly controversial and widely-commented-on decision in *National Federation of Independent Business v. Sebelius*,[6] involving the constitutionality of the individual mandate and

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3. Sedler, *The American Federal System, supra* note 1, at 1492.

4. *Id.*

5. Writing for the Court in *United States v. Morrison*, 529 U.S. 598, 611 (2003), Chief Justice William Rehnquist observed that: "Were the Federal Government to take over regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Id.* (quoting United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J. concurring)). Similarly, Justice Clarence Thomas, concurring in *Morrison*, stated: "Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce." *Id.* at 627. And in *Nat'l Fed'n of Indep't Bus. v. Sebelius*, 132 S. Ct. 2566, 2587(2012), Chief Justice John Roberts stated:

> "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority . . . . Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and –under the Government's theory – empower Congress to make those decisions for him.

Id.

6. *Sebelius*, 132 S. Ct. at 2566. For a sampling of the extensive commentary, see Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat)?*, 65 FLA L. REV. 1331 (2013); Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of National Federation*

Medicaid expansion provisions of the Patient Protection and Affordable Care Act of 2010.[7] Indeed, my primary motivation in undertaking the present Article in a relatively short time period after the earlier article was to discuss and analyze the *Sebelius* decision. It is my submission, as I will develop subsequently, that the decision in *Sebelius* did not work a significant change in the Court's doctrine relating to the power of Congress over interstate commerce. However, that part of the *Sebelius* decision, holding that Congress violated the Tenth Amendment by threatening the states with a loss of all Medicaid funding unless they agreed to the Medicaid expansion, is a significant decision on the side of state sovereignty and limits Congress' use of the spending power to regulate the "states as states." This part of the *Sebelius* decision was buttressed by the Court's invalidation of the pre-clearance provision of the Voting Rights Act in *Shelby County v. Holder*[8] under the newly promulgated "equal sovereignty" doctrine. Nonetheless, I would maintain, and will demonstrate, that apart from state sovereignty, the Court's decisions in the last six years have not led to significant changes in the law applicable to the Constitution and the American federal system.

I will begin by reviewing the structure of the American federal system. I will next discuss the *Sebelius* decision, both as it regards the power of Congress to regulate interstate commerce and as it regards the state sovereignty limitations on the power of Congress to regulate the "states as states," as reflected in the Court's holding on the constitutionality of the Medicaid expansion. I will continue with those limitations as reflected in the holding on the pre-clearance provision of the Voting Rights Act [9] in *Shelby County v. Holder*.[10] Then I will discuss the Court's other decisions dealing with the Constitution and the American federal system. This will include a separate and extensive discussion of the Court's preemption decisions, since in this and past time frames, in terms of the number of cases reaching and decided by the Supreme Court, the most active area of constitutional law with respect to the American federal system involves federal preemption of state law. I

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of Independent Business v. Sebelius, 46 LOY. L. REV. 541 (2013); Dan T. Coenen, *The Commerce Power and Congressional Mandates*, 82 GEO. WASH. L. REV. 1052 (2014); David B. Rivkin, Lee A. Casey & Andrew W. Grossman, *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2012 CATO SUP. CT. REV. 31; Mark Tushnet, *The Dissent in National Federation of Independent Business v. Sebelius*, 127 HARV. L. REV. 481 (2013).

7. 26 U.S.C.A. § 5000A (West 2010); 14 U.S.C.A. § 1396 *et seq.* (West 2010).

8. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

9. 42 U.S.C.A. § 1973 transferred to 52 U.S.C.A. § 10301 (West 2015).

10. *Shelby County*, 133 S. Ct. at 2612.

will conclude with some observations on the present status of the Constitution and the American federal system.

II. THE STRUCTURE OF THE AMERICAN FEDERAL SYSTEM

The most salient feature of the American federal system, which differentiates it from other nations' federal systems, is the matter of state sovereignty. The American federal system, as it now exists, began with the states. In American constitutional theory, upon independence, the newly-formed states succeeded to the power over domestic matters formerly exercised by the British Crown, and as each state was admitted to the Union, it automatically became entitled to exercise this power.[11] Thus, state sovereignty is a "given" in the American federal system, and the states do not depend on the federal Constitution for the source of their power.[12] Each state has its own system of laws, its own courts, and possesses the general regulatory and taxation power.[13] The states exercise full sovereignty over domestic matters except to the extent that a particular exercise of such sovereignty is prohibited or restricted by the Constitution.[14] In the international sense, American states are "independent sovereigns" and cannot be considered "subdivisions" of the national state.[15]

We will subsequently discuss how the Constitution restricts state sovereignty over domestic matters. But for now, it is sufficient to note the significance of the fact that in the absence of these restrictions, the states exercise full sovereignty over domestic matters and do not depend on the federal Constitution for the source of their power. This contrasts sharply with the Canadian federal system, for example, where the Constitution allocates specific powers to the federal government and specific powers to the provinces, so that an exercise of provincial power,

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11. *See generally* Sedler, *The American Federal System*, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.* In American constitutional theory, the states did not succeed to that aspect of the sovereignty of the British Crown pertaining to foreign affairs. *Id.* That aspect of sovereignty devolved upon the "Union of States" that was waging the Revolutionary War and that eventually concluded the peace with Great Britain. *Id.* Sovereignty over foreign affairs was deemed to be in the federal government that was subsequently established by the Constitution, and the foreign affairs power is an inherent federal power. *See id.* at 1488 n.9.

15. The Supreme Court has stated that: "The Constitution, in all its provisions, looks to an indestructible union of indestructible states." Texas v. White, 74 U.S. 700, 725 (1869). Because this is so, the Court held that during the Civil War, the Confederate states were still a part of the Union, even though they were trying to secede from it. *Id.*

like an exercise of federal power, can be challenged as beyond the constitutional authority of the provinces.[16]

Moreover, a concern for state sovereignty is manifest in a number of constitutional provisions, federal laws, and constitutional doctrines established by the Supreme Court. When the Constitution established a federal government to exercise a comparable sovereignty, albeit that in theory it was a sovereignty based on enumerated powers, it was necessary that the Constitution deal specifically with the states and with the relationship between the federal government and the states. The first thing that the Constitution did was to confirm state sovereignty and to provide for the formation of new states. While Congress was given the authority to admit new states to the Union, it could not form a new state from the territory of any existing state, and it could not combine parts of two or more states to form a new state without the consent of the legislatures of all the involved states.[17] In this connection, the Court has promulgated the "equal footing" and the "equal sovereignty" doctrines. Under the "equal footing" doctrine, all states are admitted to the Union with the same attributes of sovereignty as were possessed by the original states.[18] This doctrine thus prevents the federal government from impairing any fundamental attributes of state sovereignty when it admits a new state.[19] The "equal sovereignty" doctrine embodies the principle that whenever Congress takes action with respect to the states, it must treat all states equally.[20]

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16. See the discussion of the Canadian federal system in Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1195-1203 (1984).

17. U.S. CONST. art. IV, § 3.

18. *See* Minnesota V. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

19. *See id.* In this case, the Court held that recognition of Indian rights to hunt, fish and gather on state land, provided for under a treaty between an Indian tribe and the federal government, "was not irreconcilable with a state's sovereignty over natural resources in the state," and so the treaty was not abrogated upon admission of the state to the Union. *Id.* at 204. Under the "equal footing" doctrine, upon statehood, a state gains title within its borders of water then navigable. PPL Mont., LLC v. Mont., 132 S. Ct. 1215, 1228 (2012). The United States retains title vested in it before statehood to land beneath the waters not then navigable. *Id.* To be navigable for purposes of title under the "equal footing" doctrine, the rivers must be "navigable in fact," in that they are used or susceptible of being used as highways for commerce. *Id.* at 1219. To determine navigability, the Court considers the river on a segment by segment basis. *Id.* at 1220. The Court also held that three segments of rivers running through Montana were not navigable at the time of statehood. *Id.* at 1235.

20. See the discussion in *Shelby Cty.*, 133 S. Ct. at 2623-24. In this case, which will be discussed in more detail subsequently, the Court sharply limited the power of Congress to apply the Voting Rights Act of 1965 to nine southern states that had a long

A concern for state sovereignty is also expressed in the federalism provisions of Art. IV., which require that each state give full faith and credit to the "public Acts, Records, and judicial Proceedings" over every other state,[21] and provide for interstate rendition of persons charged with a crime in one state who have fled to another state.[22]

Likewise, the Eleventh Amendment, which prohibits the federal courts from entertaining damages actions by private persons against a state, has been interpreted broadly by the Supreme Court to prohibit Congress from abolishing state sovereign immunity in such actions.[23] There are also federalism-based limitations on federal court jurisdiction imposed both by Congress and by the Court itself that are designed to protect state judicial proceedings from federal court interference.[24]

Finally, there is the Tenth Amendment; which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[25] While the Tenth Amendment may be said to express a truism insofar as the existence of congressional power is concerned, and does not independently impose a limitation on congressional power, it is a very significant limitation on the power of Congress to regulate the "states as states." As will subsequently be discussed at length, the Supreme Court decisions limiting the power of Congress to regulate the "states as states" are the most important constitutional federalism decisions in the last six years. And in the few cases in which the Court has held that a law of Congress could not be sustained under the commerce power, the Court has emphasized the need to establish "some boundary" between federal and state power.[26]

In the American federal system, however, state sovereignty exists side by side with an expansive interpretation of federal power. While in

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history of engaging in voting racial discrimination against African-American citizens. *Id.* at 2631.

21. U.S. CONST. art. IV, § 1. Congress has imposed the same requirement of recognition of state court judgments on the federal courts. 28 U.S.C.A. § 1738 (West 2015). State courts must also recognize judgments of federal courts. Stoll v. Gottleib, 305 U.S. 165, 169 (1938).

22. U.S. CONST., art. IV, §. 2.

23. See the discussion of the Eleventh Amendment in Sedler, *The American Federal System, supra* note 1, at 1526-28. As the Court has stated: "[i]t follows that the States' immunity from suit is demarcated not by the text of the Amendment alone, but by fundamental postulates implicit in the constitutional design." Alden v. Maine, 527 U.S. 706, 729 (1994).

24. See the discussion of federalism-based limitation on federal court jurisdiction in Sedler, *The American Federal System, supra* note 1, at 1529-37.

25. U.S. CONST., amend. X.

26. *See* Morrison, *supra* note 5.

constitutional theory the powers of the federal power are only those enumerated in the Constitution, it is indisputably clear that the court construes those powers very broadly, particularly the power of Congress over interstate commerce, so that with few exceptions, virtually any activity is subject to congressional regulation. While the Supreme Court came up with another exception in *Sebelius*,[27] - that Congress cannot use the commerce power to compel people to engage in commerce - as I will demonstrate subsequently,[28] that exception is a very limited one and does not undercut the very broad interpretation that the Court has given to the scope of the commerce power. The Court's expansive interpretation of federal power interacts with state sovereignty, with the result that to a large extent, both the states and Congress have enormous regulatory power and both can usually regulate the same activity. Thus, it can be said that the dominant feature of the American federal system as regarding domestic matters is concurrent power.[29]

III. THE *SEBELIUS* DECISION

There were two constitutional challenges in *Sebelius*. The broadest challenge, designed to overturn the Affordable Care Act in its entirety, was to the individual mandate that requires most Americans to maintain "minimum essential" health insurance coverage.[30] While many individuals will receive the required coverage through their employer or from a government program such as Medicaid or Medicare, individuals who are not exempt and who do not receive health insurance through a third-party must purchase insurance from a private company.[31] Beginning in 2014, individuals who did not comply with the mandate had to make a "shared responsibility payment" to the federal government, which the Act described as a "penalty."[32] The Act provides that the penalty will be paid to the Internal Revenue Service along with the individual's taxes and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an

27. *Sebelius*, 132 S. Ct. at 2566.

28. See the discussion, *infra* notes 37-41 and accompanying text.

29. See the discussion in Sedler, *American Federal System, supra* note 1, at 1490-91. In the earlier article, I discussed state sovereignty and concurrent power in terms of basic propositions of the American federal system. The third proposition, which in the present article, I have discussed to some extent in connection with state sovereignty, is that the states form a national union.

30. *Sebelius*, 132 S. Ct. at 2580.

31. 26 U.S.C.A. § 5000A(f) (West 2015).

32. 26 U.S.C.A. §5000A(b)(1) (West 2015).

income tax refund.[33] The Act, however, bars the Internal Revenue Service from using several of its normal enforcement tools, such as criminal prosecutions and levies, to enforce the penalty provision.[34] Some individuals who are subject to the mandate are, nonetheless, exempt from the penalty, such as those with an income below a certain threshold and members of Indian tribes.[35]

The plaintiffs in *Sebelius*, twenty-six states, several businesses, and the National Federation of Independent Business, alleged that the individual mandate provisions of the Act were unconstitutional as beyond the power of Congress.[36] They also argued that the individual mandate provision could not be severed from the other provisions of the Act, so that the Act in its entirety was unconstitutional.[37] The federal District Court in Florida agreed with both arguments and held the Act unconstitutional in its entirety.[38] The Eleventh Circuit agreed that the individual mandate provision was unconstitutional, but also held that it could be severed from the other provisions of the Act.[39]

The second challenge was to the Medicaid expansion provision.[40] Medicaid, in which every state has chosen to participate, is a federal-state program under which the federal government provides federal funding to the states to assist pregnant women, children, needy families, and the disabled in obtaining medical care.[41] In order to receive that funding, states must comply with federal criteria governing matters such as who receives care and what services are covered.[42] The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals that the state must cover.[43] The Act requires the states to cover adults with incomes up to 133% of the federal poverty level, whereas many states now cover adults with children only if the income is considerably lower, and many states do not cover adults at all. The Act increases federal funding to cover the states' costs in expanding

33. 26 U.S.C.A. § 5000A(g)(1) (West 2015).
34. *Sebelius*, 132 S. Ct. at 2580.
35. *Id.* This summary of the individual mandate provision is taken from the Opinion of Chief Justice Roberts.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 2580-81.
40. *Id.* at 2581.
41. 42 U.S.C.A. §1396(a)(10) (West 2015).
42. *Sebelius*, 132 S. Ct. at 2581.
43. *Id.*

Medicaid coverage, although the states will bear a portion of the cost.[44] Most significantly, the Act provides that if the states do not participate in the Medicaid expansion, they lose all of their Medicaid funding, which no state realistically could afford to lose.[45] The state plaintiffs argued that the Medicaid expansion exceeded Congress' power under Art. I and that the threatened loss of all Medicaid funding for the states that rejected the Medicaid expansion violated state sovereignty under the Tenth Amendment by coercing them into complying with the Medicaid expansion.[46] These arguments were rejected by the Eleventh Circuit, which upheld the required Medicaid expansion in all respects.[47]

There were three constitutional holdings in *Sebelius*. The Court held 5-4 that the imposition of the individual mandate in the Affordable Care Act was unconstitutional as beyond the power of Congress under the Commerce Clause.[48] Chief Justice Roberts took this position in his separate opinion, and this was the position of Justices Scalia, Kennedy, Thomas, and Alito in a dissenting opinion.[49] For whatever reason, these four Justices did not join the Roberts opinion, although they agreed with the result and appeared to agree with the reasoning. Be that as it may, since five Justices agreed that the imposition of the individual mandate could not be sustained under the commerce power, the five Justice agreement on this issue constitutes a holding of the Court for constitutional purposes. Second, the Court held 5-4, in the Roberts opinion for the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, that the imposition of the individual mandate, although denominated in the statute as a "penalty" rather than as a "tax," could be sustained independently as a proper exercise of the taxing power.[50] Third, the Court held, 7-2, with Chief Justice Roberts, joined by Justices Breyer and Kagan in the Roberts opinion, and Justices Scalia, Kennedy, Thomas and Alito in their dissenting opinion, that the Medicaid

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44. Under the Act, the federal government provides funds to cover 100% of the cost for the first three years, and up to 90% of the cost thereafter. *See* 42 U.S.C.A. § 1396(a)(10); § 1396d(y)(1). (West 2015).

45. *See* 42 U.S.C.A. § 1396(c) (West 2015).

46. *Sebelius*, 132 S. Ct. at 2582.

47. *Id.* at 2581-82.

48. *Id.* at 2587.

49. *Id.* at 2647-51.

50. *Id.* at 2593-01.The dissenting Justices agreed that the imposition of the individual mandate and the "shared responsibility payment" could have been sustained under the taxing power, but maintained that since Congress imposed the "shared responsibility payment" as a penalty and not as a tax, its doing so could not be sustained under the taxing power. *Id.* at 2650-55.

expansion provision exceeded Congress' authority under the spending clause.[51]

The end result of the *Sebelius* decision is that the individual mandate provision could not be sustained as a proper exercise of Congress' power under the Commerce Clause, but could be sustained as a proper exercise of Congress' power under the Taxing Clause, and the Medicaid expansion could not be sustained as a proper exercise of Congress' power under the Spending Clause.

From a political and ideological standpoint, the efforts of the opponents of the Affordable Care Act to have it overturned by way of a constitutional challenge failed completely. But the *Sebelius* decision was a victory for state sovereignty, and it protected the right of states opposed to the Medicaid expansion not to be coerced into supporting that expansion. The question for our purposes, however, is what effect does the *Sebelius* decision have on the constitutional doctrine relating to the American federal system? It is to that question to which we will now turn.

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51. *Id.* at 2601-07; *Id.* at 2657-68 (Scalia, J., dissenting). The Roberts opinion found that the unconstitutional imposition of the Medicaid expansion did not affect the validity of the rest of the Act, since Congress would have wanted to preserve the rest of the Act. *Id.* at 2607-08. The four dissenting Justices contended that since in their view both the individual mandate provision and the Medicaid expansion provision were unconstitutional, the Act should be invalidated in its entirety. *Id.* at 2675-2677 (Scalia, J., dissenting). Since Justices Ginsburg and Sotomayor took the position that the Medicaid expansion could be sustained under the spending power, the Medicaid expansion provision remains in effect, and the states, if they wish, can participate with the federal government in the Medicaid expansion. *Id.* at 2609 (Ginsburg, J., concurring in the judgment in part and dissenting in part). At the present time, thirty-one states and the District of Columbia have agreed to the Medicaid Expansion. KAISER FAM. FOUND., *Current Status of Medicaid Expansion Decision*, http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/ (last visited Jan. 29, 2016).The Department of Health and Human Services has been negotiating with states, particularly states in which there are Republican Governors, over modifications in the Affordable Care Act Medicaid provisions. In the agreement with Indiana, for example, the latest state to agree to the Medicaid expansion, Indiana was permitted to create different tiers of coverage for Medicaid recipients, to impose a small charge for better coverage, and to include co-pays for emergency room use. *See* Jordan Shapiro, *More governors embrace Medicaid expansion, but with changes remaking insurance program for the poor, ST. LOUIS POST-DISPATCH* (Feb. 2, 2015), http://www.stltoday.com/news/special-reports/mohealth/more-governors-embrace-medicaid-expansion-but-with-changes/article_fdd0511b-074e-5c02-a753-e30d08b1c843.html; Stephen Campbell, *CMS Approves Indiana Medicaid Expansion Proposal* (Feb. 2, 2015), phinational.org/blogs/cms-approves-indiana-medicaid-expansion-proposal. For the most up-to-date information, see KAISER FAM. FOUND., *Current Status of Medicaid Expansion Decision*, http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/ (last visited Jan. 29, 2016).

As it regards the power of Congress to regulate interstate commerce, the holding in *Sebelius* was that Congress could not use the commerce power to compel individuals to engage in interstate commerce. According to the opinion of Chief Justice Roberts, which sets forth the holding of the Court and the applicable constitutional doctrine on this issue, the power to regulate commerce "presupposes the existence of commercial activity to be regulated," and that, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes that there is already something to be regulated"[52] It was on this basis that Roberts was able to distinguish *Wickard v. Filburn*,[53] which he referred to as "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity,"[54] since in *Wickard*, the farmer "was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce."[55] The Chief Justice rejected the government's argument, which was emphasized by the dissenters, that all persons are engaged in the health care market, because, at some time, they will need health care.[56] If they are not in the market at the present time and do not wish to enter the market, the Chief Justice insisted that Congress lacked the power to compel them to do so.[57]

At the time of *Sebelius,* the only limit that the Court had imposed on the plenary power of Congress to regulate the national economy under the interstate movement, and affecting interstate commerce bases of the commerce power, was that Congress could not regulate purely local non-economic activity, such as the possession of firearms near a school,[58] or acts of domestic violence occurring within a single state.[59] As I stated in the earlier article:

> The situation where Congress attempts to use the commerce power to regulate purely local non-economic activity would

52. *Sebelius*, 132 S.Ct. at 2586.

53. Wickard v. Filburn, 317 U.S. 111 (1942).

54. *Sebelius*, 132 S. Ct. at 2588.

55. *Id.* I would also note that the "engaged in activity" rationale of the Roberts opinion would also distinguish *Gonzales v. Raich*, since the regulation in that case reached a person who had grown medical marijuana for her own use. Gonzales v. Raich, 545 U.S. 1, 7 (2005). Roberts distinguished this case on the ground that there, "Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption." *Id.* at 2592-93.

56. *Sebelius*, 132 S. Ct. at 2590.

57. *Id.* at 2590-91.

58. United States v. Lopez, 514 U.S. 549 (1995).

59. United States v. Morrison, 529 U.S. 598 (2000).

> seem to be fairly limited. Most laws enacted under the commerce power either regulate only economic activity or apply only to non-economic activity that has crossed state lines. This being so, any limitation on the power of Congress to regulate purely local non-economic activity under the affecting commerce basis of the commerce power would only operate on the commerce power at the periphery and would not alter significantly the sweeping nature of this power.[60]

Similarly, the limit imposed by *Sebelius* to the effect that Congress can only act on existing activity and cannot compel individuals to engage in interstate commerce would only operate on the commerce power at the periphery, and would not significantly alter the sweeping nature of this power. All that this limit on the commerce power requires is that when Congress acts under the commerce power, it must take care to be sure that the regulation is somehow related to existing economic activity, which ordinarily, it would not be difficult to do.

Moreover, as the second holding in *Sebelius* makes clear, all that Congress needs to do to compel individuals to engage in economic activity is to impose a tax (which can be denominated a penalty) on them if they do not do so. All nine Justices in *Sebelius* agreed that Congress could use the taxing power to impose the individual mandate, and the point of disagreement between the majority and the dissent was over whether Congress had to specifically invoke the taxing power in order to do so. It has long been settled that Congress has broad powers under the Taxing and Spending Clause, and may use the taxing and spending power to establish social welfare programs, such as Social Security,[61] and to accomplish regulatory objectives, such as enacting a comprehensive system of regulation of narcotic drugs.[62] The holding on this point in *Sebelius* may have operated to increase Congressional awareness of its broad powers under the Taxing and Spending Clauses.

It is the third holding in *Sebelius*, to the effect that Congress could not use the spending power to compel the states to agree to the Medicaid expansion under threat of losing all Medicaid funding if they did not do so, that has broken some new ground. Whenever the federal government seeks to regulate the states as states, there are questions of state sovereignty. The states have contended that the Constitution embodies a

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60. Sedler, *The American Federal System*, *supra* note 1, at 1510.

61. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

62. United States v. Doremus, 249 U.S. 86 (1919); *see also* the discussion in Sedler, *The American Federal System*, *supra* note 1, at 1511-12.

"state sovereignty" principle that limits the power of Congress to regulate the states as states. After going back and forth on this issue in the 1970's, including some "double overrulings," the Supreme Court has squarely held that Congress may use the commerce power to regulate the states as states, and so, for example, can impose federal wage and hour requirements on state and local governments.[63] However, the Court has imposed a significant limitation on the power of Congress to regulate the states as states by holding that Congress cannot compel the states to regulate an activity in a non-preemptible field in accordance with federal standards.[64] The Court concluded that in this circumstance, there is the danger that the states would be held accountable for what is a federal policy decision, with the result that Congress may not "commandeer state governments into the service of federal regulatory purposes."[65]

In his opinion for the Court on this issue, Roberts harked back to the "no commandeering principle." While Congress may use the spending power to influence a state's policy choices and may condition a grant of funds to the states on the states' taking certain actions that Congress could not require them to take,[66] Congress may not use the spending power, said Roberts, to "undermine the status of the States as independent sovereigns in our federal system."[67] Congress may impose reasonable conditions on the states' receipt of federal funds, but must give the states a realistic choice as to whether or not to accept the funds

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63. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In *Garcia*, the Court overruled Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), which had invalidated the application of those laws to state and local governments, and had overruled the earlier case of Maryland v. Wirtz, 392 U.S. 183 (1968), which had held to the contrary. The Court has also held that it is not a violation of state sovereignty for Congress to use the commerce power to regulate the states alone. *See* Reno v. Condon, 528 U.S. 141 (2000), upholding a federal law prohibiting the states from disclosing or selling information obtained from motor vehicle registration.

64. New York v. United States, 505 U.S. 144 (1992) (holding that regulation where states had failed to enact federally-prescribed regulations with respect to radioactive waste, the states were compelled to become the owners of the waste); Printz v. United States, 521 U.S. 898 (1997) (requirement that state and local law enforcement officers conduct background checks on prospective handgun purchasers as a part of a detailed federal scheme governing the distribution of handguns). Congress may encourage state regulation in a preemptible field by providing that state law would not be preempted if the state regulation complied with federal standards. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); South Carolina v. Butler, 485 U.S. 505 (1988).

65. *New York*, 505 U.S. at 175.

66. In South Dakota v. Dole, 483 U.S. 203, 211 (1987), the Court held that it was constitutionally permissible for Congress to withhold five percent of a state's highway funds if the state did not raise the drinking age to twenty-one.

67. Nat'l Fed'n of Indep't Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012).

with those conditions.[68] Denying the states all federal funding for Medicaid unless they agreed to adopt the Medicaid expansion did not give the states a realistic choice.[69] Rather, the financial inducement that Congress has chosen here is a "gun to the head" and leaves the "[s]tates with no real option but to acquiesce in the Medicaid expansion."[70] It would be permissible for Congress to require that the states that accepted Medicaid funding comply with conditions on their use, but as a matter of state sovereignty, the states had to be given the choice whether or not to accept the Medicaid expansion in the first place, and could not be threatened with the loss of all Medicaid funds if they failed to do so.[71]

The state sovereignty principle was further strengthened by the Court's 5-4 decision in *Shelby County v. Holder*,[72] where the Court expanded the principle to include an "equal sovereignty" component. The Court held that Congress had acted unconstitutionally when it applied the pre-clearance provisions of the Voting Rights Act[73] to the nine covered southern states pursuant to a coverage formula based on the situation as it had existed in 1965.[74] The "equal sovereignty" doctrine, as promulgated by the Court in *Shelby County,* requires that whenever Congress takes action with respect to the states, it must treat all states equally.[75] The pre-clearance provisions of the Voting Rights Act were a clear departure from the newly-promulgated "equal sovereignty" doctrine. These provisions required that six states that had a long history of voting discrimination against their African-American citizens, which was subsequently extended to three other states and several counties in six other states where there was evidence of discrimination against language minorities, obtain preclearance from the United States Attorney General or a three-judge federal court for any change in voting procedures.[76] The covered states and counties had to prove that the change had neither the purpose nor effect of denying the right to vote on account of race or color. In all the other states and counties, a change in voting procedures could go into effect unless the change was

68. *Id.*
69. *Id.*
70. *Id.* at 2604.
71. *Id.* at 2607.
72. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
73. 42 U.S.C.A. § 1973 *et. seq.* (West 2015).
74. *Shelby Cty.*, 133 S Ct. at 2630-31.
75. See the discussion of the "equal sovereignty" doctrine in *Shelby County*, 133 S. Ct. at 2623-24. The dissenting Justices in *Shelby County* maintained that the "principle of equal sovereignty "did not extend beyond the "equal footing" doctrine. *Id.* 248-50 (Ginsburg, J., dissenting). This was the position taken by the Court in South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966).
76. *Shelby Cty.*, 133 S. Ct. at 2624.

successfully challenged under Section 2 as "result[ing] in a denial or abridgment of the right to vote on account of race or color."[77]

In *South Carolina v. Katzenbach*,[78] the Court upheld the pre-clearance requirement as a necessary and proper exercise of Congressional power under the Fifteenth Amendment on the ground that Congress needed to address entrenched discrimination in voting that had been "perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[79] The Act was reauthorized by Congress in 1982 for twenty-five years and reauthorized again in 2006 for another twenty-five years, but Congress did not alter the Act's coverage formula. In *Shelby County*, the Court strongly emphasized that there had been many changes in voting practices in the years since 1965, and most particularly, that there had been a much higher level of voting by African-Americans in the covered jurisdictions.[80] It was conceded, by the government and by the dissenting Justices in that case, that much of the voting discrimination that the 1965 Voting Rights had ceased to exist, although the government and the dissenting Justices contended that there was still a need for the pre-clearance provisions.[81]

The Court majority, however, in an opinion by Chief Justice Roberts, took the position that the coverage formula contained in § 4 of the Act, which was based on conditions that were found to exist in 1965, could not constitutionally be applied to require pre-clearance in 2013.[82] Where Congress acted unconstitutionally, said Roberts, was in reauthorizing the Act in 2006 without making legislative findings that there was sufficient evidence of continuing racial discrimination in voting in these states to justify subjecting them to the pre-clearance provisions of § 5.[83] Congress reauthorization of the Act without making these legislative findings violated the "equal sovereignty" doctrine and so, was unconstitutional.[84]

The Court's holdings on the unconstitutionality of the Medicaid expansion in *Sebelius* and on the unconstitutionality of the use of the 1965 coverage formula to determine the applicability of the pre-

77. 42 U.S.C.A. § 1973(a) (West 2015).

78. *Katzenbach*, 303 U.S. 301.

79. *Id.* at 309.

80. *Shelby Cty.*, 133 S. Ct. at 2625-27.

81. *Id.* at 2634-36 (Ginsburg, J., dissenting).

82. *Id.* at 2629.

83. *Id.* at 2631.

84. *Id.* at 2630-2631. Expressing the contrary view in her dissent, Justice Ginsburg maintained that, "[t]he evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority rights and to prevent backsliding." *Id.* at 2651 (Ginsburg, J., dissenting).

clearance requirement in the 2006 reauthorization of the Voting Rights Act in *Shelby County,* strongly strengthened the state sovereignty principle. The Court's strengthening of the state sovereignty principle is the most significant development in the constitutional structure of the American federal system in the period since 2009.

IV. THE COURT'S OTHER DECISIONS ON THE CONSTITUTION AND THE AMERICAN FEDERAL SYSTEM

A. The Constitutional Decisions

During this time frame, there was one other case involving Congressional power, *United States v. Kebodeaux*,[85] where the Court dealt with the application of the registration provisions of the Sex Offender Registration and Notification Act (SORNA), which requires federal sex offenders to register in the state where they live.[86] The Court held that under the Military Regulation Clause,[87] and the Necessary and Proper Clause,[88] Congress could apply these provisions to a military sex offender who had already completed his sentence when SORNA became law, but who was subject to an earlier sex offender registration law, and who had moved within a state without making the SORNA-required sex offender registration changes.[89] The Breyer opinion for the Court harked back to *McCulloch v. Maryland*,[90] and emphasized the broad scope of the Necessary and Proper Clause and the discretion it gives to Congress in deciding how to exercise a given power.[91]

In another case, the Court clarified *Younger* abstention, which limits federal court intervention in pending state court proceedings.[92] The Court held that *Younger* abstention applied only in three "exceptional circumstances: specifically, "in ongoing criminal prosecutions," certain "civil enforcement proceedings," and "pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."[93] Thus, *Younger* abstention

85. State v. Kebodeaux, 133 S. Ct. 2496 (2013).
86. 42 U.S.C.A. § 16901 *et seq.* (West 2015).
87. U.S. CONST. art. 1, § 8, cl. 14.
88. U.S. CONST. art. 1, § 8, cl. 17.
89. *Kebodeaux,* 133 S. Ct. at 2499-500.
90. McCulloch v. Maryland, 17 U.S. 316 (1819).
91. *Kebodeaux,* 133 S. Ct at 2503-05.
92. See the discussion of *Younger* abstention (after Younger v. Harris, 401 U.S. 37 (1971)), in Sedler, *The American Federal System, supra* note 1 at, 1535-36.
93. Sprint Comm'n v. Jacobs, 134 S. Ct. 585, 591 (2013) (citing New Orleans Pub. Serv. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989)).

did not apply to a federal court suit against members of the Iowa Utilities Board seeking a declaration that a federal statute preempted the Board's decision to the effect that intrastate access fees applied to Voice-Over Internet Protocol calls.[94]

There were three cases involving constitutional restrictions on the exercise of state power. In one case,[95] the Court held that an ordinance of a port city imposing a personal property tax on the value of large ships traveling to and from the city violated the Tonnage Clause.[96] In another, the Court held that Virginia did not violate the Privileges and Immunities Clause[97] by limiting access to public information under the state's Freedom of Information Act[98] to state residents.[99] In the third case, a sharply divided Court held that a scheme of resident taxation violated the negative Commerce Clause.[100]

As discussed at length in the original article, the Supreme Court has long held that the affirmative grant of the commerce power to Congress has a negative or dormant implication, and imposes some important, but precisely-defined, limitations on the power of the states to regulate and tax interstate commerce.[101] The primary thrust of the limitations is to prevent "state protectionism" in the form of discrimination against

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94. *Id.* at 584. In Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124 (2015), the Court held that the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be held in the state courts did not apply to prevent a federal court from hearing a claim that a state law imposing "notice and reporting" requirements on out-of-state retailers that did not collect sales taxes on purchases by in-state residents violated the negative Commerce Clause.

95. Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009).

96. U.S. CONST., art. 1, § 10, cl. 3. This provision provides that "No State shall, without the Consent of Congress, lay any Duty of Tonnage." *Id.* The purpose of this clause was to prevent the coastal states with "convenient ports" from placing other states at an economic disadvantage by taking advantage of their favorable geographic position to exact a price for the use of the ports from consumers dwelling in less advantageously situated parts of the country. The clause does not apply to the taxation of vessels as property in the same manner as personal property owned by a state's residents. *See Polar Tankers*, 557 U.S. at 6-9.

97. U.S. CONST. Art. IV, §. 2, cl.1.

98. VA. CODE ANN. § 2.2-3700 *et seq.* (West 2015).

99. McBurney v. Young, 133 S. Ct. 1709, 1715-16 (2013). (The Court emphasized that the limitation was non-protectionist and that the Freedom of Information Act was designed to enable the citizens of the state to obtain an accounting from the public officials that they had empowered to exercise the sovereignty of the state.).

100. There was one case involving the interpretation of an interstate compact, in which the Court interpreted a water compact between Texas and Oklahoma as not entitling Texas to take water that was located within Oklahoma without obtaining permission from Oklahoma. Comptroller of the Treasury of Md. v. Wayne, 135 S. Ct. 1787 (2915).

101. *See* Sedler, *The American Federal System, supra* note 1, at 1493-96.

interstate commerce or out-of-state interests in favor of local commerce or in-state interests. As the Court has stated, "[w]here simple economic protectionism is effected by state regulation, a virtual per se rule of invalidity has been erected."[102] The non-discrimination principle includes both laws that are discriminatory on their face and laws that have a discriminatory effect on interstate commerce. I have explained the results of the Court's decisions under the non-discrimination principle as follows: "where the essential effect of the regulation is to discriminate against interstate commerce or out-of-state interests in favor of local commerce or local interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the regulation is violative of the negative Commerce Clause."[103]

The negative Commerce Clause also contains an undue burden component. However, this component of the negative Commerce Clause has very limited application in practice. While some relatively older cases have invalidated particular non-discriminatory laws on "undue burden" grounds, in more recent years, the Court has generally rejected the "undue burden" challenge to truly non-discriminatory regulation affecting interstate commerce. The only exception to this practice has been with respect to state regulation found to have an "extraterritorial effect" in that it could control the conduct of entities engaged in interstate commerce in another state. The Court has held that this kind of regulation is unconstitutional as imposing an "undue burden" on interstate commerce."[104] The constraints of the negative Commerce Clause on state regulation of interstate commerce do not apply when the state is acting as a market participant.[105]

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102. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

103. Sedler, *The American Federal System, supra* note 1 at 1497. The "because of" part of this formulation is important. If the regulation affects local commerce and in-state interests in the same way that it affects interstate commerce and out-of-state interests, it does not have a "discriminatory effect" for negative Commerce Clause purposes. Similarly, the fact that the regulation benefits one kind of economic interest at the expense of a different kind of economic interest does not make it "discriminatory" for negative Commerce Clause purposes, even though the economic interest benefitted is primarily local while the economic interest disadvantaged is primarily intestate. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (holding that a regulation barring the use of plastic non-refillable milk containers was constitutional, although all the producers of plastic resin were from out-of-state, while pulpwood, which is the source of paperboard non-refillable milk containers, was a major in-state industry); see also the discussion of "because of" in Sedler, *The American Federal System, supra* note 1, at 1499.

104. See the discussion and review of cases in Sedler, *The American Federal System, supra* note 1, at 1500-01.

105. *See id.*

The non-discrimination principle applies in the same way to state taxation of interstate commerce, and the Court invalidated a number of state taxation schemes on this basis.[106] However, as with state regulation affecting interstate commerce, if the tax applies equally to in-state and out-of-state consumers, it is not discriminatory, although most of the product is shipped out-of-state.[107] On the other hand, where the tax is imposed on an industry, such as the dairy industry, but the proceeds of the tax are earmarked and used to provide a subsidy to local milk producers, the combination of earmarking and subsidization of local industry constitutes discrimination against interstate commerce and is unconstitutional.[108]

During this time frame, there were no cases decided by the Supreme Court involving the regulation component of the negative Commerce Clause, and only one case involving the taxation component. The absence of cases in an area that formerly was the subject of much litigation is a strong indication that the constitutional doctrine in this area is well-settled and will be applied as appropriate by the lower federal courts and the state courts in cases involving negative Commerce Clause challenges. The absence of cases involving challenges to state regulation may also be due to the Court's 2007 decision in *United Haulers Ass'n inc. v. Oneida-Herkimer*,[109] where the Court, albeit divided, held that a there was no violation of the negative Commerce Clause by a "flow control" law, requiring that all solid waste in a county be delivered to a facility owned and operated by a county waste management authority. There had been a number of negative Commerce Clause cases involving efforts by states and local governments to prevent out-of-state waste from coming into the state, and the Court had held that these efforts were unconstitutional as constituting discrimination against interstate

106. *See id., supra* note 1, at 1503 n. 78.

107. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (severance tax on all coal mined in the state, ninety percent of which was shipped out-of-state); Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005) (imposition of a flat annual fee on all trucks hauling goods between one point in Michigan and another as applied to trucking companies engaged in interstate commerce).

108. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994). (Constitutional limitations on the states' power to tax interstate and foreign commerce also derive from the Fourteenth Amendment's Due Process clause.). In addition, U.S. CONST. art 1, § 10, cl. 2, prohibits the states, without the consent of Congress, from taxing imports or exports and from laying any duty of tonnage. See the discussion and review of cases in Sedler, *The American Federal System, supra* note 1, at 1501-1502, and the discussion of *Polar Tankers, supra* notes 63-64 and accompanying text.

109. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).

commerce.[110] The decision in *United Haulers* gave the states a constitutionally permissible way of controlling waste disposal and limiting local landfill space to waste that was generated within the state.[111] Similarly, the absence of cases involving negative Commerce Clause challenges to state taxation affecting interstate commerce may have been influenced by the Court's recent decisions in this area, upholding state taxation provisions against constitutional challenge.[112]

However, in its latest decision on state taxation, a sharply divided Court held that a state income tax law favoring state-earned income by state residents over out-of-state income earned by state residents constituted discriminatory taxation, and so violated the negative Commerce Clause.[113] The Maryland personal income tax law consisted of both a "state" income tax and a "county" income tax.[114] Maryland residents who paid income tax in another state for income earned in that jurisdiction were allowed a Maryland income tax credit for the "state" portion of the tax, but not the "county" portion.[115] In a 5-4 decision, authored by Justice Alito, and joined in by Chief Justice Roberts, and Justices Kennedy, Breyer and Sotomayor, the Court held that the effect of the denial of a tax credit for the "county" portion of income earned out-of-state was to discriminate in favor of in-state commerce over interstate commerce, and created the risk of double taxation of the income earned in another state, thus violating the negative Commerce Clause.[116] Justice Ginsburg, joined by Justice Kagan and to an extent by Justice Scalia, contended that the state had the authority to tax a

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110. *See* Sedler, *The American Federal System, supra* note 1, at 1499-1500.

111. *See id.* at 1500.

112. *See Am. Trucking*, 545 U.S. at 429, 438 (holding that Michigan's imposition of a flat annual fee on all trucks hauling goods between one point in Michigan and another could constitutionally be applied to trucking companies engaged in interstate commerce); Dep't of Revenue v. Davis, 553 U.S. 328 (2008) (upholding a state taxation structure that exempted interest on bonds issued by the state and its subdivisions from the state income tax, while taxing interest income on bonds from other states and their subdivisions). These cases involved a claim of discrimination against interstate commerce. Under the Complete Auto Transit v. Brady, 430 U.S. 274 (1977) four-prong test for the constitutional permissibility of state taxation of interstate and foreign commerce, such taxation is permissible if four elements are satisfied: (1) the tax is applied to an activity having a substantial nexus with the taxing state; (2) the tax is fairly apportioned to that activity; (3) the tax does not discriminate against interstate or foreign commerce; and (4) the tax is fairly related to services provided by the state. *Id.* The other three elements of the test are due process elements. No cases involving the due process components of the *Complete Auto* test came before the Supreme Court during this time frame.

113. Comptroller of the Treasury of Md. v. Wayne, 135 S. Ct. 1787 (2015).

114. *Id.* at 1790.

115. *Id.*

116. *Id.* at 1794-1798.

resident's income from whatever source derived, so that there was no discrimination against interstate commerce for negative Commerce Clause purposes.[117]

The decision is a narrow one and fairly fact-specific. It arose from a constitutional challenge to what the Court referred to as "Maryland's unusual tax scheme,"[118] and the problem could be cured by a state's giving no credit for income taxes paid to another state, or conversely, giving an across the board-credit for out-of-state taxes. However, it does demonstrate that while constitutional doctrine in this area is fairly well-settled, there will be circumstances where a negative Commerce Clause challenge is potentially viable.

B. The Preemption Decisions

At any point in time, in terms of the number of cases reaching and decided by the Supreme Court, the most active area of constitutional law with respect to the American federal system involves federal preemption of state law. This area has attracted little interest among constitutional commentators and is almost completely absent from the otherwise extensive media interest in the work of the Supreme Court. This may be so for a number of reasons. First, while preemption analytically involves a conflict between federal and state power based on federal supremacy, preemption analysis itself is not based on constitutional doctrine. Rather, it is based on Congressional intent with respect to particular federal legislation: in enacting the law, was it the intent of Congress to preempt all or some state regulation with respect to the subject matter of the federal law? Moreover, only in a limited number of cases will preemption relate to an important political issue, and it has generally been assumed that "liberal-conservative" ideological divisions on the Court in constitutional cases will not surface in preemption cases. In any event, the preemption cases by far make up the largest number of "federalism-type" cases coming before the Supreme Court in any time frame. In the time frame covered by the Supreme Court's six Terms from 2009-2014, there were sixteen preemption cases coming before the Supreme Court.

In the earlier article, I observed that, "[i]n practice, it is the matter of federal preemption of state law that has the most potential for expanding

117. *Id.* at 1813-15 (Ginsburg, J. dissenting). Justices Scalia and Thomas contended that the negative Commerce Clause should not be a basis for a constitutional challenge to state regulation and taxation, *Id.* at 1807-11 (Scalia, J., dissenting); *Id.* at 1811-1813 (Thomas, J. dissenting).

118. *Maryland*, 135 S. Ct. at 1798.

federal power over state power and altering the concurrent power feature of the American federal system."[119] If Congress had wanted to use its extensive legislative powers to supplant state regulation over matters coming within the scope of federal legislation, it could easily have done so by including a broad preemption component in all of the laws it had enacted. So too, if the Court had wanted to promote federal regulatory power over state regulatory power, it could have construed federal legislation broadly to find a high degree of federal preemption. In the earlier article, I concluded that this was not the case. I stated as follows:

> Federal preemption necessarily involves the interaction between the principle of federal supremacy and the principle of state sovereignty. It is fair to say that both Congress, in specifically dealing with preemption in the laws it enacts, and the Court, when deciding questions of preemption, have tried to strike a balance between these principles, with the result that federal preemption has not substantially altered the concurrent power feature of the American federal system.[120]

The Court has stated that a basic premise of preemption doctrine is informed by "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."[121] In practice, in a number of cases, the Court has found congressional intent to preempt the particular state law or regulation in question, in a number of other cases, it has found against preemption. It is also fair to say that in most preemption cases, the Court's decisions do not appear to be ideologically-based. Many of the decisions are unanimous or near-unanimous decisions, and it would appear that the Justices are carefully applying preemption doctrine and precedent to the preemption issue in the particular case.

It is helpful to analyze the preemption cases in terms of three kinds of preemption: (1) express preemption; (2) implied direct conflict

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119. Sedler, *The American Federal System, supra* note 1, at 1514 (citing Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 177-78 (2002) (internal quotations omitted)). Early cases upholding the constitutionality of the exercise of Congressional power such as *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat, (1824), resulted in the preemption of existing state laws. As these cases indicate, a concern for preventing preemption and upholding "states' rights" permeated the arguments as to the lack of Congressional power over the matter in issue.

120. Sedler, *The American Federal System, supra* note 1, at 1514-15.

121. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

preemption; and (3) implied field preemption. First, as to express preemption, Congress often deals with the matter of preemption in the legislation itself. It may include a "savings clause," authorizing state regulation that does not conflict with federal law or authorizing the states to impose even more extensive regulation than has been provided under the federal law.[122] More typically, Congress establishes a standard of preemption in the legislation. When Congress has done so, the courts must apply that standard according to its terms in order to determine whether a particular state law that affects the area in which Congress has legislated has been preempted by the federal law. A large number of preemption cases that arise in practice involve application of the congressional standard of preemption to a particular state law. The Court's decisions in these cases demonstrate that the Court applies the congressional standard very carefully in an apparent effort to avoid preemption where it is possible to do so, but at the same time, the Court does not hesitate to find preemption where it is clearly called for under the congressional standard.[123]

Where Congress has not expressly dealt with the matter of preemption, analytically the question becomes whether Congress impliedly intended to preempt the state law in question. Congress is deemed to have impliedly intended to preempt state law whenever there is a direct conflict between federal and state law in the sense that compliance with both the state law and the federal law is a physical impossibility, or the state law stands as an obstacle to the implementation of the full purposes of the federal law.[124]

Where there is no direct conflict between state law and federal law, the question becomes one of "implied field preemption," that is, whether Congress intended to "occupy the field," so as to leave no room for state regulation at all, even if the state regulation is not inconsistent with and may actually supplement the federal regulation. It is here that the principle of state sovereignty comes into play most strongly. In order for the Court to find implied field preemption, there must be a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[125] This will occur only when the federal law reaches matters "in which the federal interest is so dominant that the federal system will be assumed to preclude

122. Sedler, *The American Federal System, supra* note 1, at 1515 n. 143.

123. *Id.* at 1515-20.

124. *Id.* at 1520-1522.

125. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 204 (1983).

enforcement of state laws on the same subject,"[126] or "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[127] As this formulation indicates, in the absence of a dominant federal interest, the Court is very reluctant to find implied field preemption.[128]

That said, in the one implied field preemption case coming before the Court during the time frame of this writing, *Kurns v. R.R.Friction Pro. Corp*, the Court did find implied field preemption.[129] But it did so by applying, as precedent, its decision in a much earlier case in which the Court appeared to take a broader view of implied field preemption than it had taken in subsequent cases. In *Kurns*,[130] the Court held that in the Locomotive Inspection Act (LIA),[131] Congress manifested its intention to occupy the entire field of regulating locomotive equipment. As a result, the Act was held to preempt design defect and failure to warn claims under Pennsylvania law, brought by a railroad employee who suffered malignant mesothelioma allegedly caused by his exposure to locomotive brakeshoes containing asbestos.[132] The LIA continued the language of its predecessor law, first enacted in 1911 and amended in 1915, which provides as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances (1) are in proper condition and safe to operate without any danger of personal injury, (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter, and (3) can withstand every test prescribed by the Secretary under this chapter.[133]

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126. *Id.* at 206. Examples of dominant federal interest include a federal law dealing with registration of aliens and against sedition. Hines v. Davidowitz, 312 U.S. 52 (1941); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

127. *Pac. Gas & Elec. Co.*, 461 U.S. at 206.

128. See the discussion and review of cases in Sedler, *The American Federal System, supra*, note 1 at 1523-1524.

129. Kurns v. R.R. Friction Prod. Corp., 132 S. Ct. 1261 (2012).

130. *Id.*

131. 49 U.S.C.A. § 20701 *et seq.* (West 2014).

132. *Kurns*, 132 S. Ct. at 1272-76 (Sotomayor, J., dissenting). (The Court unanimously held that the Act preempted the design defect claim, but Justices Sotomayor, Ginsburg and Breyer dissented from the holding with respect to the failure-to-warn claim, taking the position that the failure to warn claim did not impose any state law requirements with respect to "the equipment of locomotives," the field reserved for federal regulation.).

133. *Id.* at 1262 (citing 49 U.S.C.A. § 20701).

In *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926),[134] the Court held that the Act preempted two state laws requiring the railroads to equip the locomotives with certain prescribed devices. These devices were not required by the Interstate Commerce Commission.[135] The Court found implied field preemption on the ground that the federal law was a "general one" "[that] extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances."[136] In *Kurns,* the Court noted that the plaintiffs did not ask the Court to overrule *Napier,* and the Court went on to reject the plaintiffs "attempt to redefine the preempted field."[137] The intention of Congress, according to the Court in *Napier,* was to occupy the entire field of regulating locomotive equipment, and the plaintiffs' common law claims for defective design and failure to warn were aimed at the equipment of locomotives.[138] *Napier* controlled, and the claims were preempted by the LIA.[139]

Justice Kagan concurring, and Justice Sotomayor, concurring in part and dissenting in part, agreed that *Napier* controlled as a matter of *stare decisis*. But, as Justice Kagan contended, in *Napier*, the Court found Congressional intention to occupy the entire field of regulating locomotive equipment "on nothing more than a statute granting regulatory authority over that subject matter to a federal agency," and that "[u]nder our more recent cases, Congress must do much more to oust all of state law from a field."[140] According to Justice Kagan, "Viewed through the lens of modern preemption law, *Napier* is an anachronism,"[141] which does appear to be the case. This being so, *Kurns* stands out as a limited holding on the matter of implied field preemption, and is not likely to alter the Court's institutional reluctance to find implied field preemption whenever possible.

Of the remaining fifteen cases coming before the Court during this time frame, seven were express preemption, and eight were implied direct conflict preemption. In the express preemption cases, the Court found preemption in four cases and no preemption in three. Four of the decisions were unanimous, two were 7-2, and only one was 5-3, with one Justice not participating. The implied direct conflict preemption cases

134. Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605 (1926).
135. *Id.*
136. *Id.* at 611.
137. *Id.*
138. *Id.*
139. Kurns v. R.R. Friction Prod. Corp., 132 S. Ct. 1261, 1269-70 (2012).
140. *Id.* at 1270 (Kagan, J., concurring); *Id.*at 1272 (Sotomayor, J., concurring in part and dissenting in part).
141. *Id.* at 1270 (Kagan, J., concurring).

were more controversial to the Court. Only two of the decisions were unanimous, three were 6-3, and two related decisions, involving state tort law liability of generic pharmaceutical companies, were 5-4. Thus, in the sixteen preemption case during this time frame, the Court found preemption in eleven cases and found against preemption in only five. During this time frame then, preemption turned out to be a more formidable restraint on state regulation than it had appeared to be in the past, where the preemption decisions appeared to be more evenly divided between a finding of preemption and a finding of no preemption.

In the express preemption cases, the Court found preemption in three and no preemption in one. The Court held unanimously that the provision of the Airline Deregulation Act,[142] prohibiting states from enacting laws relating to an air carrier's "price, route or service," preempted a state common law claim brought by an airline customer alleging that the airline breached the implied covenant of good faith and fair dealing when it revoked his membership in the airline's frequent flier program.[143] The Court found that the frequent flier program was connected to the airline's "rates," because the program awarded mileage credits that could be redeemed for tickets or upgrades that could either reduce or eliminate the rate the customer paid, and was connected to "service," in that it affected access to flights and to higher service categories.[144] Similarly, in another unanimous decision, the Court held that the Federal Aviation Administration Act of 1994,[145] prohibiting the states from enacting any law or regulation having the force of law related to the "price, route or service of any motor carrier . . . with respect to the transportation of property," preempted a Port of Los Angeles requirement that trucking companies transporting cargo at the Port develop an off-street parking plan and display designated placards on their vehicles.[146] In a third unanimous decision, the Court held that the Federal Meat Inspection Act[147] preempted a California law regulating the treatment and slaughter of non-ambulatory animals.[148]

142. 49 U.S.C.A. § 41713(b)(1) (West 2015).

143. Nw. Inc. v. Ginsberg, 134 S. Ct. 1422 (2014).

144. *Id.* at 1430-1431. (The Court also found that under the applicable state law, the implied covenant was a state-imposed obligation rather than an obligation that the parties voluntarily undertook.).

145. 49 U.S.C.A. § 14501(c)(1) (West 2015).

146. Am. Trucking Ass'n v. City of L.A., 133 S. Ct. 2096 (2013).

147. 21 U.S.C.A. § 678 (West 2015).

148. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012). The Federal Act and implementing regulations regulated in detail the handling of animals at all stages of the slaughtering process and included specific provisions for the humane treatment of non-ambulatory animals. *Id.* It expressly prohibited the states from imposing requirements "in addition to, or different from those made under the Act." *Id.* at 969. The California law

The fourth case where the Court found express preemption did not involve federal and state business regulation, but instead involved Congress' power to regulate federal elections.[149] The National Voter Registration Act of 1993[150] requires the states to "accept and use" a uniform federal form. The uniform federal form developed by the Federal Election Assistance Commission requires only that an applicant aver, under penalty of perjury, that he or she is an American citizen. In 2004, Arizona voters adopted a ballot initiative, designed in part "to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day."[151] Under the law, county officials were directed to "reject any application for voter registration that is not accompanied by satisfactory evidence of United States citizenship."[152] In a challenge to the proof of citizenship requirement, Arizona argued that the federal Act only required that the state use the form as one element in the voter registration process and that the Act did not preclude the state from imposing additional requirements.[153] In a 7-2 decision, the Court rejected Arizona's argument and held that a state-imposed requirement of evidence of citizenship, which was not required by the federal form, was "inconsistent with" the Act's requirement that the states "accept and use" the federal form, and so was preempted.[154]

In the three cases where the Court did not find express preemption, two were relatively non-controversial. The Court unanimously held that the Federal Aviation Authorization Act of 1994,[155] which was the basis for preemption in the *American Trucking Association* case,[156] did not apply to preempt a state law claim against a towing company resulting from its storage and disposal of the vehicle.[157] It next held 7-2, that the

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prohibited the slaughter and required the humane euthanization of non-ambulatory pigs. *Id.* at 971. Since the requirements of California law imposed different requirements than the federal law dealing with the slaughter of non-ambulatory pigs, there was clearly a direct conflict between federal law and state law, so the state law was preempted. *Id.* at 975.

149. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013).

150. 42 U.S.C.A. § 1973gg-4(a)(1) (West 2015).

151. *Arizona*, 133 S. Ct. at 2252 (quoting Purcell v. Gonzales, 529 U.S. 1, 2 (2006)).

152. *Id.*at 2252 (citing ARIZ. REV. STATE. ANN. § 16-166(F) (2012) (West 2012)).

153. *Id.* at 2254.

154. *Id.* at 2257. Justices Thomas and Alito dissented, taking the position that the Act only required that the states use the federal form and did not preclude the state from requesting additional information to determine whether the voter met the qualifications for voting that the state had the constitutional authority to establish. *Id.* at 2261-69 (Thomas, J., dissenting); *Id.* at 2269-75 (Alito, J., dissenting).

155. 49 U.S.C.A. § 14501(c)(1) (West 2015).

156. Am. Trucking Ass'n v. City of L.A., 133 S. Ct. 2096 (2013).

157. Dan's City Used Cars v. Pelkey, 133 S. Ct. 1769 (2013).

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[158] which provides that state *statutes of limitation* shall apply to actions for personal injury or property damage caused by environmental pollution, did not preempt state *statutes of repose* that barred tort actions more than ten years from the last act or omission of the culpable defendant.[159] The basis for the holding was that statutes of repose and statutes of limitation serve different purposes, with statutes of repose reflecting a legislative judgment that after a period of time, a defendant should no longer be subjected to protracted liability, while statutes of limitation are designed to require a plaintiff to pursue a cause of action diligently.[160]

The case in which the Court was sharply divided along ideological lines was *Chamber of Commerce of the United States v. Whiting*,[161] which involved an interpretation of a "savings" clause in an otherwise preempting federal statute. Federal immigration law expressly preempts state and local laws imposing civil or criminal sanctions upon those who employ unauthorized aliens "other than through licensing and similar laws."[162] At issue in this case was an Arizona law providing that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked.[163] The law also required that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized.[164] The Court, in an opinion by Chief Justice Roberts, joined in by Justices Scalia, Kennedy, Thomas, and Alito, held that the licensing provisions "fall squarely within the federal statute's savings clause and that the Arizona regulation does not otherwise conflict with federal law," and so were not preempted.[165] And because the licensing provisions fell within the savings clause, the Court also rejected the contention that the *law* was impliedly preempted because of a direct conflict with federal law.[166] Justices Breyer and Ginsburg dissented on the ground that the state law went beyond the bounds of the federal licensing exception,[167] and Justice Sotomayor dissented on the ground that the Court's interpretation of the savings

158. 42 U.S.C.A. sec. 9601 *et. seq.* (West 2015).
159. CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014).
160. *Id.* at 2186-88.
161. Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011).
162. 8 U.S.C.A, § 1324a(h)(2) (West 2015).
163. *Whiting*, 131 S. Ct. at 1968.
164. *Id.* at 1973.
165. *Id.*
166. *Id.* at 1981.
167. *Id.* at 1987 (Breyer, J., dissenting).

clause could not be reconciled with the rest of the law's comprehensive regulatory scheme.[168]

Whiting is one of the three preemption cases involving Arizona's efforts to deal with the extensive presence of primarily Hispanic illegal aliens in the state. While the Court in *Inter Tribal Council of Arizona,* divided 5-4 along ideological lines in finding no preemption, the Court held 7-2 that Arizona's effort to require proof of citizenship as a condition to register to vote was preempted by federal voting law.[169] As we will see subsequently, the Court held 6-3 that Arizona's efforts to "stop and detain" suspected illegal aliens were preempted in large part by federal law.[170] With this pattern of results, it is difficult to conclude that as regards preemption, the ideological differences on the Court have resulted in support for Arizona's efforts to control illegal immigration.

We turn now to the implied preemption due to direct conflict cases. Here we see the Court more divided, sometimes but not always, on ideological lines. More significantly, we see the Court finding implied preemption in six of the eight cases that came before the Court during this time frame. The Court was unanimous in only two of these cases. The Court held unanimously that the Federal Employees Group Life Insurance Act,[171] establishing a life insurance program for federal employees under a scheme that gives the highest priority to an insured's designated beneficiary, preempts a state law that revokes a beneficiary designation in any contract that provides a death benefit to a former spouse and requires the former spouse to pay over the insurance benefits to a subsequent spouse.[172] Likewise, the Court held unanimously that federal regulations requiring motor vehicle manufacturers to install either lap belts or lap and shoulder belts on rear inner seats did not preempt state law tort suits based on the claim that manufacturers should have installed lap and shoulder belts on those seats.[173]

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168. *Id.* at 1998 (Sotomayor, J., dissenting). Justice Kagan did not participate.

169. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013).

170. *See infra* notes 138 -144 and accompanying text.

171. 5 U.S.C.A. sec. 8701 *et seq.* (West 2015).

172. Hillman v. Maretta, 133 S. Ct. 1943 (2013). (The federal statute allows payment to another person if a state court decree of divorce, annulment or legal separation, and the court decree is received by the federal Office of Personal Management before the employee's death.). The statute also directly preempts any state law that is inconsistent with the contractual provisions. Virginia tried to avoid the effect of direct preemption by requiring the designated beneficiary former spouse to pay over the benefits to a subsequent spouse. *Id.*at 1948.

173. Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011). The Court found that the fact that the manufacturer had a choice was not a significant regulatory objective, so that state law's denial of that choice did not stand as an obstacle to the accomplishment of the full purposes and objectives of federal law. *Id.* at 1140.

In two other cases, a divided Court found preemption. The Court held 6-3 that the federal Medicaid's anti-lien provision,[174] which prohibits states from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid by the state on the beneficiary's behalf, preempted a state law requiring that up to one-third of any damages recovered by a beneficiary for tortious injury be paid to the state to reimburse it for payments made for medical treatment on account of the injury. The Court found that this requirement was "incompatible" with the anti-lien provision.[175] The Court also held 5-4 that since the Federal Arbitration Act[176] is designed to promote arbitration of individual disputes, it preempted, as inconsistent with the purpose of the Act, a state rule denying enforcement to most collective-arbitration waivers in consumer contracts.[177]

There were three cases involving the question of whether federal drug regulations applicable to generic drug manufacturers preempted state law failure to warn claims. In the first case, involving a claim that the manufacturer had failed to provide an adequate warning about the significant risks of administering the drug by a certain method, the Court held 5-4 that the fact the drug's label had been approved by the Food and Drug Administration (FDA) did not preempt the failure to warn claim. This was because the FDA's approval of the drug's label would not have prevented the manufacturer from adding a stronger warning about the risks in administering the drug by this method. This being so, it was not impossible for the manufacturer to comply with both federal and state law requirements, so there was no conflict between federal and state law and thus no preemption.[178]

By the time the next case involving labeling of generic drugs reached the Court, the FDA had interpreted its regulations to require that the warning labels on a generic drug must *always* be the same as the warning labels of the brand-name drug of which the generic drug was a copy.[179] With the change in the FDA's interpretation of its regulations, the Court, now in a 5-4 decision, found that it was impossible for the manufacturer to comply with a different warning requirement under state law, so there was a direct conflict, and the state law was preempted.[180] In another 5-4 decision, the Court held that since federal law prohibited generic drug manufacturers from altering a drug's label after it had been approved by

174. 42 U.S.C.A. § 1396(a)(1) (West 2015).
175. Wos v. E.M.A., 133 S. Ct. 1391 (2013).
176. 9 U.S.C.A. § 2 (West 2015).
177. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
178. Wyeth v. Levine, 555 U.S. 555 (2009).
179. PLIVA v. Mensing, 131 S. Ct. 2567, 2574-75 (2011).
180. *Id.*

the FDA, federal law preempted a state law claim based on a manufacturer's duty to render a drug safer either by altering its composition or altering the labeling.[181]

The final implied preemption due to direct conflict case was the third case involving Arizona's efforts to deal with the extensive presence of primarily Hispanic illegal aliens in the state. Arizona had enacted Support Our Law Enforcement and Safe Neighborhood Act, which the stated purpose was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[182] The United States challenged four provisions of the statute as being preempted by federal law. The Court held 5-3, in an opinion by Justice Kennedy, joined in by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor, with Justice Kagan not participating, that three of the provisions were preempted and that the fourth provision should not have been enjoined before the state courts had an opportunity to construe it, and without a showing that its enforcement in fact conflicted with the objectives of federal immigration law.[183]

The provisions that were invalidated were found to "[s]tand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [184] These were the provisions that: (1) imposed stiffer penalties than federal law for an alien's failure to carry federal registration documents;[185] (2) made it a crime for illegal aliens to work when Congress had imposed criminal penalties on employers, but not employees;[186] and (3) gave broader authority to Arizona law enforcement personnel than federal law gave to federal officials to make warrantless arrests of suspected deportable aliens.[187] However, the Court did not, at

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181. Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013). (In both of these cases, the Court divided along ideological lines, with Justice Kennedy, who is often the "swing" Justice in ideologically divided cases, joining Chief Justice Roberts and Justices Scalia, Thomas and Alito to find preemption. Justices Ginsburg, Breyer, Sotomayor and Kagan dissented in both cases.).

182. Arizona v. United States 132 S. Ct. 2492 (2012).

183. *Id.*

184. *Id.* at 2501.

185. Based on its earlier decision in *Hines v. Davidowitz*, 312 U.S. 52, 2502 (1941), holding that a state law requiring alien registration was preempted by federal law, the Court found that the federal government has occupied the field of alien registration.

186. The Court found that while Congress imposed certain sanctions on aliens who engaged in unauthorized employment, Congress made a deliberate choice not to include criminal penalties among the sanctions, so that Arizona's law to the contrary was "an obstacle to the regulatory scheme Congress chose." *Id.* at 2505.

187. Since the state gave state officers greater authority to arrest aliens on the basis of possible removability, the state officers could act without any input on the part of the federal government, which could result in unnecessary harassment of some aliens whom

this time, find preemption of the challenged fourth provision that required state officers to make a reasonable attempt to determine the immigration status of a person that they stopped or arrested on some other legitimate basis before the person was released if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[188] There were certain limits built into this provision, which had not yet been interpreted by the state courts, and the Court concluded that it should not be assumed that the provision would be construed in a way that created a conflict with federal law.[189] The combined effect of the Court's preemption holdings on the challenged provisions in this case significantly limits Arizona's efforts to "discourage and deter" the unlawful entry of aliens into the state, and provides clear guidance on the constitutional limits of state efforts to "discourage and deter."[190]

We see then that during this time frame, the Court's decisions fell heavily on the side of preemption. But I think that this was more the result of the particular preemption issues that came before the Court rather than of any movement of the Court toward expanding federal preemption of state law. The Court has continued to show its respect for state sovereignty and has carefully applied preemption doctrine and precedent to the preemption issue in the particular case. The point that I would emphasize here is that at any point in time, as it regards the number of cases reaching and decided by the Supreme Court, the most active area of constitutional law with regard to the American federal system involves federal preemption of state law. And the result in these cases is likely to depend on the particular preemption issue before the Court.

V. CONCLUSION

The present article is an update of the comprehensive analysis of the Constitution and the American federal system that I undertook in 2009.[191] In that article I stated that my purpose was to explain the essential structure of the American federal system and to demonstrate that the essential structure of the American federal system, as it had evolved from many years of constitutional interpretation by the Supreme

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federal officials determine should not be removed. *Id.* at 2505. Again, by authorizing state and local officers to engage in these enforcement activities the state "creates an obstacle to the full purposes and objectives of Congress. *Id.* at 2507.

188. *Id.* at 2507.

189. *Id.* at 2510.

190. *Id.* at 2497.

191. Sedler, *The American Federal System, supra* note 1.

Court, was well-established and was not likely to change in any significant way in the foreseeable future. In the present Article, I have set out to update the earlier article with a discussion and analysis of the constitutional decisions of the Supreme Court with respect to the American federal system over the last six years. While this is a relatively short time in which to do an update, my primary motivation in doing so was to comment on, and assess, the significance of the highly controversial and widely-commented on decision in *National Federation of Independent Business v. Sebelius*,[192] involving the constitutionality of the individual mandate and Medicaid expansion provisions of the Patient Protection and Affordable Care Act of 2010.[193]While that part of the decision holding that Congress violated the Tenth Amendment by trying to compel the states to submit to the Medicaid expansion is a significant decision on the side of state sovereignty, as I have explained, that part of the decision holding that Congress did not have the power to impose the individual mandate under the commerce power did not work a significant change in the Court's doctrine relating to the power of Congress over interstate commerce. And apart from some expansion of state sovereignty as a limitation on Congress' power to regulate "the states as states," the Court's decisions in the last six years have not led to any significant changes in the law applicable to the Constitution and the American federal system.

In this connection, it is highly relevant that once we get beyond *Sebelius* and *Holder,* and leaving aside the preemption cases, there were only four other cases involving the Constitution and the American federal system: one case where the Court upheld congressional regulation under the Necessary and Proper Clause,[194] one case where the Court found *Younger* abstention inapplicable,[195] one case finding a violation of the Tonnage Clause,[196] and one case finding no violation of the Privileges and Immunities Clause.[197] That is it. There were no other cases involving the affirmative commerce power of Congress. There were no cases at all involving the negative Commerce Clause.[198] The paucity of these cases coming before the Court strongly supports the conclusion, as I have maintained in both the original article and the present one, that the essential structure of the American federal system,

192. *Nat'l Fed'n of Indep't Bus. v. Sebelius,* 132 S. Ct. 2566 (2012).

193. *Id.* at 2577.

194. State v. Kebodeaux, 133 S. Ct. 2496 (2013).

195. Sprint Comm'n v. Jacobs, 134 S. Ct. 585 (2013).

196. Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009).

197. McBurney v. Young, 133 S. Ct. 1709 (2013).

198. As to the reasons why this may have been so, see the discussion, *supra* notes 77-80 and accompanying text.

as it has evolved from many years of constitutional interpretation by the Supreme Court, is well-established and is not likely to change in any significant way in the foreseeable future.