Paved with Congressional Intentions: The Outer Reaches of the FAAAA's Preemption Provision

"Although as a topic, preemption has largely been ignored by constitutional law scholars, it is almost certainly the most frequently used doctrine of constitutional law in practice."[1]

I. INTRODUCTION

Americans are subject to the laws and regulations of two different governments: state and federal.[2] While these two governments usually work towards common goals and aim to complement each other, conflicts and overlaps may arise.[3] When they do or when the federal government seeks to avoid conflict in the first place, there are mechanisms—such as express preemption—to ensure that disputes are resolved.[4] One such statute utilizing express preemption is the Federal Aviation Administration Authorization Act (FAAAA), which prohibits states from enacting any statute or regulation that affects a motor carrier's "price, route, or service" as it relates to the transportation of property.[5] Since its enactment, the FAAAA's preemption provision has been used to preempt state law, but it also has been restricted in a number of other cases.[6]

1. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (footnotes omitted).

2. *See* U.S. CONST. art. VI, cl. 2 (recognizing dual governments implicitly by asserting federal law as "supreme Law of the Land"); *see also* U.S. CONST. amend. X (reserving powers not delegated to federal government for state governments).

3. *See* U.S. CONST. amend. X (clarifying relationship between federal and state governments); *see also, e.g.*, Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 504 (2012) (holding Oklahoma's law prohibiting arbitration in certain instance in conflict with Federal Arbitration Act); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (holding Kentucky law requiring display of Ten Commandments in schools in conflict with Establishment Clause); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186-87 (1824) (explaining conflict of New York's grant of monopoly to interstate ferry operator and Commerce Clause). *See generally* Gardbaum, *supra* note 1.

4. *See* U.S. CONST. art. VI, cl. 2 (stating federal law as "supreme Law of the Land"); *see also* 29 U.S.C. § 1144(a) (2014) (explaining federal law "supersede[s]" state laws relating to certain employee benefit plans); 49 U.S.C. § 14501(c)(1) (2014) (detailing preemption mechanism for Federal Aviation Administration Authorization Act of 1994 (FAAAA)); S. Ry. Co. v. Reid, 222 U.S. 424, 441-42 (1912) (explaining "possession of the field" preemption); *infra* note 14 and accompanying text (discussing express preemption).

5. § 14501(c)(1); *see also* Gardbaum, *supra* note 1, at 775-76 (explaining concept of express preemption).

6. *See* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 367 (2008) (holding federal law preempts two

In 1990, a Massachusetts law came into effect laying out the criteria employers must meet in order to classify a worker as an independent contractor.[7] In its most current form, the statute provides a high hurdle for employers to clear.[8] Whether or not this law is preempted by the FAAAA has been answered in two different ways by two different federal courts—the United States District Court for the District of Massachusetts and the United States District Court for the Eastern District of Virginia, applying Massachusetts law.[9] These preemption cases turn on the question of whether the Massachusetts statute relates to the movement of property in such a way as to affect motor carrier's price, route, or services.[10]

This Note will examine the history of preemption and its role in the FAAAA and the FAAAA's predecessor, the Airline Deregulation Act (ADA).[11] It will also discuss the history of independent contractors and the various historical justifications for the classification of employees, focusing on the relevant Massachusetts statute.[12] Finally this Note will focus on whether the Massachusetts statute should be preempted under current jurisprudence and concludes that preemption is the incorrect result.[13]

II. HISTORY

A. Preemption's Role in U.S. History

Preemption, in the modern sense, occurs when Congress shows an intent, either express or implied, to foreclose the possibility of states regulating a given area.[14] Preemption—when it was deemed to exist—has not always

provisions of Maine tobacco law related to transportation); *see also* Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1775 (2013) (holding New Hampshire state-law claims related to storage and disposal of car not preempted); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting) (explaining phrase "with respect to the transportation of property" in 49 U.S.C. § 14501(c)(1) "massively limits the scope of preemption.").

7. MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014).

8. *See* Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730, 741-42 (E.D. Va. 2013) (stating requirements of MASS. GEN. LAWS ANN. ch. 149, § 148B not met by certain categories of employers).

9. *See* Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509, at *9 (D. Mass. July 3, 2013) (concluding plaintiff's state-law employee misclassification claims not preempted by 49 U.S.C. § 14501(c)(1)); *Lasership, Inc.*, 937 F. Supp. 2d at 752-53 (holding similar claims preempted, as they affect carrier's routes).

10. *See* 49 U.S.C. § 14501(c)(1) (2014); *Schwann*, 2013 U.S. Dist. LEXIS 93509, at *7-8 (setting up preemption analysis); *Lasership, Inc.*, 937 F. Supp. 2d at 736 (stating preemption issue); *see also Dan's City Used Cars, Inc.*, 133 S. Ct. at 1774-75 (discussing issue in FAAAA preemption cases).

11. *See infra* Part II.A-B.

12. *See infra* Part II.C.

13. *See infra* Part III.

14. *See* Barnett Bank v. Nelson, 517 U.S. 25, 30 (1996) (explaining congressional intent central in modern preemption doctrine); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (underscoring courts must consider Congress's objectives when enacting statute to determine if state law survives); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947) (establishing

operated this way.[15] An examination of the origins and history of preemption reveals that the road the Supreme Court took to arrive at this modern, intent-based analysis was long and marked by confusion and differing opinions.[16] It also reveals that some of these debates are not settled.[17]

1. The Source of Preemption

The federal government is a government of enumerated powers, which means it can only exercise the powers granted to it by the Constitution.[18] Accordingly, Congress's power to preempt state laws must be found in the Constitution.[19] Unlike, for instance, the powers to coin money and declare war, the power to preempt is not explicitly stated in the Constitution; and thus, the source of this power must be determined in order for Congress to utilize it.[20]

presumption against preemption, which requires Congress's intent to preempt); Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (stating Congress's intent "must definitely and clearly appear" for express preemption of state law); *see also* David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 54-55 (1973) (explaining origin of intent in modern preemption analysis); Gardbaum, *supra* note 1, at 805-07 (detailing intent's role in modern preemption analysis).

15. *See* Mo. Pac. R.R. Co. v. Porter, 273 U.S. 341, 346 (1927) (stating once Congress exercises power in field state laws have "no application" in same field); Chi., Rock Island, & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913) (holding when congressional regulation "covers the whole field," states "impotent" to regulate field); S. Ry. Co. v. Reid, 222 U.S. 424, 436-37 (1912) (describing congressional "possession of the field" as barring states from action in such field); Engdahl, *supra* note 14, at 53-54. Professor Engdahl explains that in the early twentieth century state laws were automatically preempted once Congress was said to "occup[y] the field." *See* Engdahl, *supra* note 14, at 53-54; *see also* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49-50 (1820) (Story, J., dissenting). When state and federal laws conflict, Justice Story wrote that the state law must yield "so far, and so far only, as such incompatibility exists." *Houston*, 18 U.S. (5 Wheat.) at 49-50. This implies that it is inappropriate for federal law to cut off a state law absent a conflict; and such an anticipatory disabling of state law is, as the term implies, the very nature of preemption. *See id.*; Gardbaum, *supra* note 1, at 789-90; *see also* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250-52 (1829) (omitting preemption from analysis of when state law conflicting with federal law invalidated); Gardbaum, *supra* note 1, at 787 (explaining Supreme Court did not "unequivocally recognize" Congress's preemption power until early twentieth century); *infra* Parts II.A.2.a, b (detailing premodern history of preemption).

16. *See* Reid v. Colorado, 187 U.S. 137, 146-48 (1902) (using both preemption and supremacy analyses concurrently); Gardbaum, *supra* note 1, at 799-801. Professor Gardbaum explains that the Supreme Court in the late nineteenth century frequently used preemption and the Supremacy Clause almost interchangeably, which resulted in "confusion." *See* Gardbaum, *supra* note 1, at 795-801. *Compare Houston*, 18 U.S. (5 Wheat.) at 32 (supporting, by implication, power of preemption), *with Houston*, 18 U.S. (5 Wheat.) at 49-50 (Story, J., dissenting) (stating federal power supreme only in instances of conflict).

17. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 n.32 (2000) (acknowledging differing opinions among commentators regarding source of congressional preemption power).

18. *See* U.S. CONST. amend. X (reserving powers not delegated to federal government for states or people); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

19. *See McCulloch*, 17 U.S. (4 Wheat.) at 405 (stating federal government can "exercise only the powers granted to it"); Engdahl, *supra* note 14, at 56-57 (describing origin and operation of federal government's enumerated powers).

20. *See* U.S. CONST. art. I, § 8, cl. 5 (conferring on Congress power to coin money); U.S. CONST. art. I, § 8, cl. 11 (conferring on Congress power to declare war); *supra* notes 18-19 and accompanying text (showing Constitution must confer power to Congress for it to act).

a. The Supremacy Clause

The Supremacy Clause appears to provide the simplest explanation for the source of Congress's preemption power, and it is widely cited as such.[21] It may, however, be more proper to view the Supremacy Clause as a "tiebreaker" between state and federal laws; when state and federal law conflict, the Supremacy Clause operates to make the federal law the winner.[22] The Supremacy Clause does not explicitly state that the federal government may reserve exclusive spheres of governance for itself; rather such spheres are explicitly laid out in other parts of the Constitution.[23] The power to preempt, therefore, must be found elsewhere because, as previously noted, federal powers must be found within the Constitution.[24]

b. The Commerce Clause

Most often, Congress uses its power of preemption in relation to the Commerce Clause.[25] As a result, it may appear that this clause is the source of the power to preempt.[26] There are at least two problems with such an interpretation.[27] It goes against the commonly held notion that a general

21. *See* U.S. CONST. art. VI, cl. 2 (declaring federal law supreme); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (describing preemption as deriving from Supremacy Clause); Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) (stating preemption's roots lie in Supremacy Clause); Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (noting rationale for preemption lies in Supremacy Clause); Nelson, *supra* note 17, at 234 (declaring "virtually all commentators" acknowledge Supremacy Clause as source of preemption power). *But see* Gardbaum, *supra* note 1, at 781-83 (arguing source of preemption power lies elsewhere in Constitution); *infra* Part II.A.1.c (demonstrating preemption power's source rests outside of Supremacy Clause).

22. *See* U.S. CONST. art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824) (describing tiebreaker approach in Supremacy Clause analysis); *see also* Gardbaum, *supra* note 1, at 776-77 (arguing Supremacy Clause applies only in areas of preexisting conflict between state and federal laws).

23. *See* U.S. CONST. art. VI, cl. 2 (laying forth Supremacy Clause); *see also, e.g.*, U.S. CONST. art. I, § 8, cl. 5 (giving Congress power to coin money); U.S. CONST. art. I, § 8, cl. 7 (granting Congress power to establish post offices); U.S. CONST. art. I, § 8, cl. 11 (stating Congress has power to declare war); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (describing exclusivity of federal power in immigration); Briscoe v. Bank of Commonwealth, 36 U.S. (11 Pet.) 257, 316-17 (1837) (stating power to make currency is exclusive to federal government).

24. *See supra* notes 18-19 and accompanying text (showing requirement: federal powers granted by Constitution); *see also* Gardbaum, *supra* note 1, at 776-77. Professor Gardbaum points out that in many preemption cases the "conflict" is between the state law or regulation and the federal law that contains a preemption provision, not a contrary federal law. *See* Gardbaum, *supra* note 1, at 776-77. Thus, Gardbaum continues, the power to preempt "must preexist the conflict and cannot derive from it." *Id.* at 776.

25. *See* Engdahl, *supra* note 14, at 52 ("Preemption doctrine has developed chiefly in cases involving the commerce clause . . . ."); *see also, e.g.*, Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222-23 (1995) (using preemption in interstate airline analysis); S. Ry. Co. v. Reid, 222 U.S. 424, 434 (1912) (reasoning Interstate Commerce Act preempted state law); Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859) (applying preemption principles in steamboat registration case).

26. *See supra* note 25 (showing centrality of Commerce Clause to preemption).

27. *See infra* notes 28-29.

preemption power exists.[28] Additionally, such an argument presents a textual interpretation problem because other grants of power found in Article I, Section 8 would then logically have to be considered grants of preemption power.[29] Accordingly, the source of Congress's preemption power must lie somewhere else in the Constitution.[30]

c. The Necessary and Proper Clause

The Founding Fathers were no fools.[31] They knew once they decided the federal government should be one of enumerated powers it would be impossible for them to foresee every potential power Congress might require; and thus the Necessary and Proper Clause was inserted into the Constitution.[32] This all-important clause gives Congress the power to employ any appropriate means "plainly adapted" to a legitimate end authorized by the Constitution.[33] Professor Stephen Gardbaum effectively argues that it is this clause—not the Supremacy Clause nor the Commerce Clause—that gives Congress the power to preempt state law.[34] Gardbaum's argument largely rests on the practical consideration that the federal government must effectuate a uniform system of

28. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (discussing preemption in non-Commerce Clause case); Engdahl, *supra* note 14, at 52 (noting preemption applies outside of Commerce Clause); Nelson, *supra* note 17, at 226-27 (listing instances, including non-Commerce Clause instances, of applications of preemption).

29. *See* Gardbaum, *supra* note 1, at 779-80 (discussing textual issues with implying preemption power in Commerce Clause). *Compare* U.S. CONST. art. I, § 8, cl. 3 (listing regulating interstate commerce as congressional power with no grant of preemption power), *with* U.S. CONST. art. I, § 8, cl. 7 (granting Congress power to establish post offices with no grant of preemption power), U.S. CONST. art. I, § 8, cl. 8 (giving Congress power to grant patents and copyrights with no grant of power to preempt), *and* U.S. CONST. art. I, § 8, cl. 13 (bestowing power to provide Navy on Congress with no grant of preemption power).

30. *See supra* notes 18-19 and accompanying text (showing federal powers evidently found in Constitution).

31. *See* U.S. CONST. pmbl. (establishing guiding principles of United States of America); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231 (Henry Reeve trans., Phillips Bradley ed., Alfred A. Knopf 1980) (1835). De Tocqueville wrote about the self-control of American democracy: "The great privilege of the Americans does not simply consist in being more enlightened than other nations, but in their being able to repair the faults they may commit." *Id.*

32. *See* U.S. CONST. art. I, § 8, cl. 18. The clause reads: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*; *see also* Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1339-40 (1934) (explaining adoption of enumerated powers by Constitutional Convention).

33. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819) (describing extent of Congress's power under Necessary and Proper Clause); Engdahl, *supra* note 14, at 59 (indicating clause gives Congress additional power to handle matters outside of enumerated powers).

34. *See* Gardbaum, *supra* note 1, at 781-82 (arguing source of preemption lies in Necessary and Proper Clause); *see also* Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805, 813-14 (1998) (discussing Necessary and Proper Clause as source of preemption power); Engdahl, *supra* note 14, at 80 (acknowledging clause as source of preemption for "matters extraneous to the enumerated powers.").

regulations throughout the nation.[35]

2. Preemption Throughout U.S. History

a. The Early Years

Throughout much of the nineteenth and into the twentieth centuries, there was no acknowledgment of Congress's power to preempt state laws.[36] In resolving conflicts between state and federal laws, the early courts used two theories: exclusivity—the subject matter is inherently the sole domain of the federal government by virtue of constitutional grant of power; and concurrent powers with supremacy—both state and federal governments have power to regulate subject matter but when a conflict between the two arises federal trumps state.[37] So central were these two guiding theories that the Court established a test to distinguish them in *Cooley v. Board of Wardens*.[38] According to the test, "[w]hatever subjects of [the Commerce Clause] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[39] The opinion, however, left the question of

35. *See* Gardbaum, *supra* note 1, at 781-83. According to Professor Gardbaum, this explanation fits with the common understanding of the Necessary and Proper Clause. *See id.* Further, it avoids the textual difficulties found when arguing preemption lies in the Commerce Clause because the Necessary and Proper Clause is a "clear textual grant of power to Congress." *See id.* at 782.

36. *See supra* notes 15-16 and accompanying text (discussing denial, omission, and confusion of preemption throughout nineteenth century constitutional jurisprudence). *But see* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 24 (1820) (touching upon preemption). Writing for the majority, Justice Washington concluded that, at times, both the federal and state governments had concurrent power over the same subject matter. *See id.* Justice Washington stated, however, that when Congress wishes to devise this power elsewhere—that is, preempt the concurrent state power—it may properly do so. *See id.* at 32; *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 617-18 (1842) (acknowledging existence of preemption). Interestingly, Justice Story, who had earlier denied preemption's existence in *Houston v. Moore*, seemed to acknowledge the power's existence in the dicta of his majority opinion in *Prigg*. *See Prigg*, 41 U.S. (16 Pet.) at 617-18.

37. *See Prigg*, 41 U.S. (16 Pet.) at 625-26 (discussing conflict resolution between federal and state laws). At issue in this case was the constitutionality of a Pennsylvania law that made it a crime to return a slave who escaped into Pennsylvania. *See id.* at 608. Writing for the Court, Justice Story held that the statute was unconstitutional, as Congress had exclusive powers to regulate fugitive slaves who crossed state lines. *See id.* at 625-26; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824) (stating state must yield to federal law). Chief Justice Marshall decided *Ogden* on concurrency plus supremacy grounds. *See Ogden*, 22 U.S. (9 Wheat.) at 209-10. He reasoned that New York had the power to regulate ferry monopolies, but that the power was lost in this particular instance because of a conflict with federal laws. *See id.*; *see also* Gardbaum, *supra* note 1, at 794 (explaining reasoning in many early cases as based on either "concurrency plus supremacy" or exclusivity).

38. 53 U.S. (12 How.) 299, 319 (1851).

39. *Id.* at 319. Under the test, anything not deemed to be exclusive would give rise to concurrent state and federal powers, with the federal law trumping state law in cases of conflict. *See id.* This test was supplanted towards the end of the century by one devised by Justice Fields, which focused on whether laws and regulations had a direct (exclusive) or indirect (concurrent powers with supremacy) effect on interstate commerce. *See* Sherlock v. Alling, 93 U.S. (3 Otto) 99, 103 (1876) (announcing new test); Gardbaum, *supra* note 1, at 795 (noting Justice Fields's test).

preemption open.[40] About a quarter century after *Cooley*, Justice Stephen Fields purported to be applying its test when his slight tweaking of the rule cracked the door enough for preemption to sneak into Supreme Court jurisprudence.[41] Further, Fields responded to the preemption question the *Cooley* Court deliberately left unanswered: Congress had the power to preempt state laws and regulations, at least in his view.[42] Throughout the rest of the century, however, other justices on the Court remained skeptical of Fields's stance and often confused preemption with supremacy.[43]

b. Establishing Preemption: 1912-1933

Although it did not use the term preemption, the Supreme Court issued a coherent theory of the concept for the first time in 1912.[44] Under the contemporary view, when Congress acted within a certain sphere of regulation, state laws in that sphere automatically became invalid.[45] Even if the state law did not conflict with the federal law—indeed even if it *aided* the federal law—it would be preempted.[46] This new regime provided the federal government

40. *See Cooley*, 53 U.S. (12 How.) at 320. Justice Curtis explained that the opinion does not resolve the question of "how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject." *Id.*

41. *See* Welton v. Missouri, 91 U.S. (1 Otto) 275, 280 (1875) (applying test). When laying forth the *Cooley* test, Fields stated when something was local in character "the States may provide regulations until Congress acts with reference to them." *See id.* This statement of the rule only gives states the power to act up until the point that Congress acts in the same sphere, rather than give the state governments concurrent power with specific laws being trumped by supremacy when conflict occurs as the *Cooley* test originally did. *See id.*; *Cooley*, 53 U.S. (12 How.) at 319 (establishing test for concurrent powers with supremacy versus exclusivity); Gardbaum, *supra* note 1, at 796-97 (explaining effect of Fields's restatement of *Cooley* test); *supra* notes 39-40 and accompanying text (discussing *Cooley* test).

42. *See Welton*, 91 U.S. (1 Otto) at 280; Gardbaum, *supra* note 1, at 796-97 (explaining emergence of preemption power in Fields's *Welton* opinion); *see also* Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama, 128 U.S. 96, 99-100 (1888) (stating states may regulate railroad employees "until" Congress legislates on subject).

43. *See* Gardbaum, *supra* note 1, at 798-801 (noting skepticism); *supra* note 16 and accompanying text (discussing confusion in late nineteenth-century preemption jurisprudence).

44. *See* S. Ry. Co. v. Reid, 222 U.S. 424, 442 (1912). In *Southern Railway Co.*, the Court struck down a North Carolina law that required rail operators to accept any freight presented to them in certain circumstances. *See id.* at 431, 441. It did so on the grounds that Congress had "taken possession of the field" of regulating railroad rates through the Interstate Commerce Act. *See id.* at 442. Professor Gardbaum notes that this is the first case where a state law was invalidated on preemption grounds, in contrast to all prior cases that came within the realm of preemption. *See* Gardbaum, *supra* note 1, at 798-99, 803.

45. *See* Chi., Rock Island, & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913). Chief Justice White expressed the absolute automatic nature of this era's conception of preemption when he stated, "the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject." *Id.* There was not even a need to see if the two laws conflicted. *See id.*; *see also S. Ry. Co.*, 222 U.S. at 436 (stating state laws preempted when Congress exercises power).

46. *See* Mo. Pac. R.R. Co. v. Porter, 273 U.S. 341, 346 (1927) (stating state laws invalid even if "complementary" to "federal enactments" in "field of regulation"); Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915). Justice Holmes held: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be

with more power than simple supremacy, as the federal government could "occup[y] the field," but less power than exclusivity because Congress had to act before state power was cut off.[47]

c. Modern Preemption: 1933 to Present

In the 1930s, modern preemption began to take shape with the centrality of Congress's intent to preempt coming to the fore.[48] One major reason for the shift to the modern, intent-based preemption doctrine was practical: It would be virtually impossible for Congress to directly regulate every action that has some effect on interstate commerce.[49] Congress's intent to preempt may be implied or express—the latter of which plays the leading role in the forthcoming analysis.[50]

B. Preemption in the FAAAA

1. Background of the FAAAA

In 1978, Congress enacted the ADA to increase competition among airlines by, in part, decreasing regulation.[51] One of the key mechanisms used by Congress to accomplish this end was to include express preemption language

declared a help because it attempts to go farther than Congress has seen fit to go." *Id.*

47. *See* Gardbaum, *supra* note 1, at 801-02 (explaining difference between exclusivity and automatic preemption). *Compare supra* notes 37-39 and accompanying text (detailing supremacy versus exclusivity), *with supra* notes 44-46 and accompanying text (explaining automatic preemption).

48. *See supra* note 14 and accompanying text (discussing modern preemption). While references to congressional intent appeared in cases in the previous era, these references referred to Congress's intent to take "possession of the field" of regulation rather than intent to preempt. *See Mo. Pac. R.R. Co.*, 273 U.S. at 346 (using intent in enter field of regulation sense); *S. Ry. Co.*, 222 U.S. at 437.

49. *See* Gardbaum, *supra* note 1, at 806-07 (explaining reasons for emergence of modern preemption doctrine). According to Professor Gardbaum, the expansion of federal power under the New Deal helped spur the need for modification of the preemption doctrine. *See id.* States would have been rendered powerless to regulate local matters that touched on interstate commerce had the old regime stayed in place. *See id.* By requiring congressional intent to preempt, state laws and regulations could fill gaps left by federal enactments. *See* Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (stating intent to preempt must exist for preemption to occur); Gardbaum, *supra* note 1, at 806-07 (describing need for Congress's manifested intent); *see also supra* note 14 and accompanying text (discussing presumption against preemption).

50. *See* Campbell, *supra* note 34, at 814. Courts may properly imply an intent to preempt when the regulation of a given field is so complete that there is no room for additional state regulation or when there is a clear dominant federal interest. *See id*. Campbell notes that this latter standard is rarely used. *See id. But see* Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (implying intent to preempt because of dominant federal interest in foreign affairs). Express preemption is more straightforward, with Congress stating its intent to preempt state law on a given matter. *See supra* note 14 and accompanying text (providing example and explanation of express preemption).

51. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (emphasizing Act's purpose to create air transportation system relying on competitive market forces); Williams v. Midwest Airlines, Inc., 321 F. Supp. 2d 993, 994 (E.D. Wis. 2004) (stating ADA enacted to promote market competition); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 38-39 (1995) (detailing rationale behind enactment of ADA).

prohibiting states from regulating anything "related to a price, route, or service of an air carrier."[52] In 1991, the impact of this language was vastly expanded by a Ninth Circuit Court of Appeals ruling that extended the law's preemptive effect to include the regulation of the ground transportation operations of "hybrid" carriers that had both ground and air operations.[53] This ruling in effect gave carriers with both air and ground operations an advantage over solely ground-based carriers, and Congress passed the FAAAA in 1994 with similar preemption language to "level [the] playing field" between these two types of operators.[54]

2. History of the FAAAA

Due to the similarity of the language, courts interpreting the preemptive effect of the FAAAA have often looked to cases that have interpreted the ADA.[55] These cases have generally given broad preemptive effect to the ADA; state laws that have a connection to or mention rates, routes, or services or have a significant direct or indirect impact on rates, routes, or services are preempted.[56] The presumption against preemption, however, has preserved

52. 49 U.S.C. § 41713(b)(1) (2014); *see also* Stabile, *supra* note 51, at 40-41 (discussing use of preemption to accomplish law's purpose).

53. *See* Fed. Express Corp. v. Cal. Pub. Util. Comm'n, 936 F.2d 1075, 1078-79 (9th Cir. 1991). The Ninth Circuit reasoned that the ground transportation used by Federal Express—which was an "air carrier" protected from certain regulation by the ADA—was dependent on its air transportation. *See id.* at 1078. The court concluded that state regulation of Federal Express's ground transportation arm would impact its air transportation wing and thus should be preempted. *See id.* at 1078-79; *see also* 49 U.S.C. § 14501(b)(1) (2014) (prohibiting enactment or enforcement of laws relating to rates, routes, or services).

54. *See* H.R. REP. NO. 103-677, at 83 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 (explaining rationale behind inclusion of preemptive language in FAAAA); *see also* Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1187 (9th Cir. 1998) (describing preemption language of FAAAA and ADA as "identical"); Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730, 737 (E.D. Va. 2013) (declaring FAAAA and ADA "share[] an identical preemption provision"). *But see* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting). Justice Scalia noted in his dissent that the FAAAA's preemption provision contains the key words "with respect to the transportation of property" at the end. *Id.* According to Justice Scalia, this phrase "massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" *Id.* (quoting 49 U.S.C. § 14501(c)(1)). This point was not the focus of Justice Scalia's dissent and the Court later affirmed his interpretation of 49 U.S.C. § 14501(c)(1). *See* Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778-79 (2013) (acknowledging added language limits preemptive effect of FAAAA). *But see* Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 22-23 (1st Cir. 2014) (downplaying "massively limits" language of *Dan's City Used Cars, Inc.* and *Ours Garage & Wrecker Service, Inc.*).

55. *See Mendonca*, 152 F.3d at 1188-89 (using past interpretations of ADA and ERISA preemption language to inform FAAAA analysis); *Lasership, Inc.*, 937 F. Supp. 2d at 738 (stating Congress intended to incorporate ADA jurisprudence when enacting FAAAA). *But see Ours Garage & Wrecker Serv., Inc.*, 536 U.S. at 449 (Scalia, J., dissenting) (interpreting 49 U.S.C. § 14501(c)(1)); Mass. Delivery Ass'n v. Coakley, No. 10-11521-DJC, 2013 WL 5441726, at *5 (D. Mass. Sept. 26, 2013) (noting language difference between FAAAA and ADA), *rev'd*, 769 F.3d 11 (1st Cir. 2014).

56. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391 (1992) (holding state airline fare advertising guidelines preempted). *Morales* was one of the first cases to interpret preemption under the ADA. *See Lasership, Inc.*, 937 F. Supp. 2d at 738 (stating *Morales* Supreme Court's first encounter with ADA

certain areas upon which courts hold states may lawfully regulate, even under the broad preemption interpretation.[57] As courts interpreting the ADA followed ERISA jurisprudence, courts interpreting the FAAAA followed ADA jurisprudence.[58] Despite the reliance of many courts on ADA jurisprudence, the Supreme Court's 2013 decision in *Dan's City Used Cars, Inc. v. Pelkey* made it clear that the use of the words "with respect to the transportation of property" in the FAAAA preemption provision drastically alters the operation of that statute's preemption provision.[59]

preemption). In that case, the Court looked to the preemption jurisprudence of ERISA, which held that state laws with "a connection with, or reference to" an employee benefit plan were preempted. *See Morales*, 504 U.S. at 384; *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) (stating law's "relates to" language means connection or reference to subject matter). Accordingly, the *Morales* Court held that the state's airline advertising guidelines were preempted. *See Morales*, 504 U.S. at 391. Further, the Court stated that laws that only have an indirect effect on air carriers' "rates, routes, or services" are preempted, along with such laws that have a "significant impact" on those three areas. *See id.* at 386, 390. The Court, however, has always been clear that it would not strike down state laws whose effects are "too tenuous, remote, or peripheral" to be said they relate to the subject matter protected by the preemption provision of the law. *See* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008) (stating this principle for FAAAA preemption); *Morales*, 504 U.S. at 390 (affirming this idea for ADA preemption cases); *Shaw*, 463 U.S. at 100 n.21 (stating this principle for ERISA preemption cases); *see also* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324-25 (1997) (interpreting how state law "refer[s]" to federal law in preemption case); District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130-31 (1992) (explaining state law "refers" to federal law when premised on federal law's existence); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829-30 (1988) (holding state law "refer[s]" to federal law when it "single[s] out" federal law).

57. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating traditional police powers of state not preempted absent clear congressional intent); *see also Morales*, 504 U.S. at 390 (stating preemption of certain state actions "too tenuous" under ADA); California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (explaining requirement preemption of areas of traditional state regulation explicit); West v. Nw. Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1993) (preserving common law contract claim against preemption); *Fed. Express Corp.*, 936 F.2d at 1078 (implying presumption particularly strong when field of common law torts and contracts implicated). In *West*, the court held that the ADA's preemption provision did not preempt a ticketed passenger's state common-law claim for compensatory damages when an airline violated the implied contractual covenant of good faith and fair dealing by refusing to let him on an overbooked flight. *See West*, 995 F.2d at 151. The court, relying on *Morales*, held that the state contract laws under which the passenger sought relief were "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id. But see* Nw., Inc. v. Ginsberg, 134 S. Ct. 1422, 1430 (2014) (holding common law claims based in contract preempted by FAAAA).

58. *See Rowe*, 552 U.S. at 370-72 (holding Maine tobacco transportation law preempted due to indirect, significant impact); *Lasership, Inc.*, 937 F. Supp. 2d at 738-39 (affirming use of ADA jurisprudence for FAAAA cases).

59. *See* 133 S. Ct. at 1778-79 (holding respondent's state-law claims not preempted by FAAAA). In *Dan's City Used Cars, Inc.*, a New Hampshire man sued a towing and storage company for improperly auctioning his car. *See id.* at 1777. The Supreme Court affirmed the decision of the New Hampshire Supreme Court because the man's claims were not "'related to'" the service of a motor carrier "'with respect to the transportation of property.'" *Id.* at 1778 (quoting 49 U.S.C. § 14501(c)(1) (2014)). In its opinion, the Court affirmed the view of FAAAA preemption expressed by Justice Scalia in his *Ours Garage & Wrecker Service, Inc.* dissent. *See id.* at 1778-79; *see also supra* notes 54-55 (discussing effect of this clause on FAAAA preemption).

3. Current Controversy

Courts have held that state laws relating to a range of topics such as safety, tow-truck regulation, and contract claims may be lawfully preempted.[60] Recently, FAAAA preemption litigation has focused on employment law.[61] In *Sanchez v. Lasership, Inc.*—a case decided in April 2013—a Virginia federal district court applying Massachusetts law struck down a Bay State statute that sought to impose high barriers to employers who wanted to use independent contractors in the Commonwealth.[62] The court, in *Lasership, Inc.*, admittedly departed from the presumption against preemption due to the "unprecedented" impact the law would have on motor carriers.[63] Here, the court looked to ADA jurisprudence and earlier FAAAA preemption cases in reaching its conclusion.[64]

In July 2013—two months after the Supreme Court handed down its *Dan's City Used Cars, Inc.* decision—in *Schwann v. FedEx Ground Package Systems, Inc.*, a federal district court in Massachusetts reached the opposite conclusion of the Virginia federal court.[65] The court in *Schwann* relied heavily on *Dan's City Used Cars, Inc.*'s explicit requirement that a state law relate to the transportation of property in order for it to be preempted by the FAAAA.[66] Further, the court stated the indirect economic impact of a generally applicable law on a motor carrier is too tenuous to be grounds for preemption.[67] A recent First Circuit ruling, however, indicates that such a reading of the FAAAA's preemption clause may be erroneous.[68]

60. *See supra* notes 54-56 (discussing preemption cases).

61. *See supra* notes 7-9 and accompanying text (laying forth controversy over employment law).

62. *See* 937 F. Supp. 2d 730, 752-53 (E.D. Va. 2013) (holding Massachusetts employee misclassification act preempted by FAAAA). Under the Massachusetts law, it would have been virtually impossible for delivery companies to use independent contractors as drivers. *See* MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014); *Lasership, Inc.*, 937 F. Supp. 2d at 736-53 (discussing impact of law on delivery companies).

63. *See Lasership, Inc.*, 937 F. Supp. 2d at 752-53 (explaining rationale for holding).

64. *See id.* at 736-40 (explaining applicable law). The court cited ADA decisions, as well as *Rowe*, for the proposition that a state law's indirect effect could be grounds for preemption, among others. *See id.*; *see also supra* note 56 (explaining operation of preemption in ADA and pre-*Dan's City Used Cars, Inc.* FAAAA cases).

65. *See* Schwann v. FedEx Ground Package Sys., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509, at *9 (D. Mass. July 3, 2013) (holding Massachusetts employee misclassification statute not preempted by FAAAA); *see also* Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1769 (2013) (showing May 13, 2013 as date of decision).

66. *See Schwann*, 2013 U.S. Dist. LEXIS 93509, at *9 (discussing application of *Dan's City Used Cars, Inc.* to instant case); *see also Dan's City Used Cars, Inc.*, 133 S. Ct. at 1778-79. *But see* Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 22-23 (1st Cir. 2014) (downplaying *Dan's City Used Cars, Inc.*'s adoption of *Ours Garage & Wrecker Service, Inc.*'s "massively limits" language).

67. *See Schwann*, 2013 U.S. Dist. LEXIS 93509, at *7, *10-11 (discussing limits of "significant impact" test); *see also* DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 89 (1st Cir. 2011) (explaining some laws not preempted merely because of indirect economic impact).

68. *See Mass. Delivery Ass'n*, 769 F.3d at 22-23. In *Massachusetts Delivery Association*, Chief Judge Lynch held that the district court applied the FAAAA's preemption clause both too broadly and too narrowly. *Id.* Specifically, Chief Judge Lynch held that the lower court applied the phrase, "related to a price, route, or

C. Employee Classification

1. History of Employee Classification

The concept of independent contractors came about as a restraint on the doctrine of vicarious liability, which emerged in the English common law in the early part of the eighteenth century.[69] Prior to the rise of vicarious liability, masters were only liable for the torts committed by their servants when they ordered them to act.[70] At the turn of the eighteenth century master-servant law evolved when Justice Holt handed down a series of cases, which gave rise to the idea that a master may be responsible for acts of his servants even if he did

service" too narrowly in part because it failed to examine the "logical" effects of Massachusetts's employee classification statute. *See id.* at 18-20. Chief Judge Lynch, however, quoting the First Circuit's decision in *Rowe*, rejected the idea that such "logical" effects need to be based on empirical evidence. *See id.* at 21; N.H. Motor Transp. Ass'n v. Rowe, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008). In regards to the phrase, "with respect to the transportation of property," Chief Judge Lynch said the lower court "misread[] the import of *Dan's City*" by requiring that the law in question "regulate" a carrier's transportation of property, rather than just "concern" it. *See Mass. Delivery Ass'n*, 769 F.3d at 22. Further, she stated that in *Dan's City Used Cars, Inc.* the Supreme Court did not indicate that the "transportation of property" phrase overruled all earlier precedent regarding the first part of the FAAAA's preemption clause. *See id.* at 22-23. While paying lip service to *Dan's City Used Cars, Inc.*, Chief Judge Lynch concludes that the facts of *Massachusetts Delivery Association* are "a far cry" from *Dan's City Used Cars, Inc.*, without listing any specific instances of how they are different. *See id.* at 23. Chief Judge Lynch downplays the Supreme Court's use of "massively" before "limits" twice in her opinion by excluding the adverb. *See id.* at 22-23. This reading may underestimate the Court's use of "massively" as a search of Westlaw reveals that the Court has only used the word twelve times in its history; with two of those instances being in *Ours Garage & Wrecker Service, Inc.* and *Dan's City Used Cars, Inc.* Search of WESTLAW NEXT'S database "U.S. Supreme Court Cases" (Dec. 23, 2014) (search for "massively"); *see also* Harris v. Quinn, 134 S. Ct. 2618, 2648 (2014) (Kagan, J., dissenting); *Dan's City Used Cars, Inc.*, 133 S. Ct. at 1778; Morgan Stanley Capital Grp., Inc., v. Pub. Util. Dist. No. 1, 554 U.S. 527, 538 (2008); District of Columbia v. Heller, 554 U.S. 570, 616 (2008); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting); Printz v. United States, 521 U.S. 898, 923 n.12 (1997); United States v. Winstar Corp., 518 U.S. 839, 907 n.55 (1996) (quoting Carteret Sav. Bank, F.A. v. Office of Thrift Supervision, 963 F.2d 567, 581 (3d Cir. 1992)); Atkins v. Parker, 472 U.S. 115, 142 (1985) (Brennan, J., dissenting); California v. United States, 438 U.S. 645, 681 (1978) (White, J., dissenting); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 757 (1973) (syllabus); Lemon v. Kurtzman, 403 U.S. 602, 631 (1971) (Douglas, J., concurring). Regardless, Chief Judge Lynch's reasoned opinion calls into question the viability of *Schwann*'s application of the FAAAA's preemption clause to Massachusetts's employee classification provision. *See Mass. Delivery Ass'n*, 769 F.3d at 22-23.

69. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 96 (1984) (discussing emergence of liability for employers for acts of employees); *see also* 8 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 472-82 (1926) (explaining history of vicarious liability in common law); Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 109 (1916) (explaining vicarious liability does not apply to independent contractors); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 315 (1894) (emphasizing importance of understanding history of tort law).

70. *See* Wigmore, *supra* note 69, at 332. Wigmore explains that in Norman England a master was only liable for the acts he ordered his servant or a member of his household to perform. *See id.* This was still a "liberalization" of the "primitive" rule of ancient societies where it was only the "doer of a deed" who was responsible for its consequences. *Id.* at 317-18; *see also* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 62-67 (1920) (explaining nature of early master-servant liability).

not command them.[71] Vicarious liability emerged for a number of reasons, but perhaps the best reason is with the rise of the merchant economy, people began to rely more heavily on third parties for their survival; and it was sound public policy to safeguard this reliance by imposing liability on a master for his servant's misdeeds.[72]

Independent contractors emerged in the nineteenth century to protect masters from an onerous extension of liability.[73] In the same way the imposition of vicarious liability helped to usher in the merchant era, the creation of independent contractors aided in the development of the industrial age.[74] With the rise of independent contractors came the need to distinguish them from employees for the purpose of vicarious liability; and English courts developed a rule based on the right of the employer to control the execution of the work that was soon adopted by American courts and remains largely intact today.[75]

71. *See* Hern v. Nichols, (1708) 91 Eng. Rep. 256 (K.B.) 256; 1 Salk. 289 (pondering placing liability on least-cost avoider). In a case involving fraud on the part of a servant, Justice Holt held that it was more reasonable to have the master bear the burden of the damage than the third-party victim. *Id.*; Turberville v. Stampe, (1697) 91 Eng. Rep. 1072 (K.B.) 1073; 1 Ld. Raym. 264 (holding master liable for fire set by servant because servant acted with presumed authority); Boson v. Sandford, (1689) 91 Eng. Rep. 382 (K.B.) 382; 2 Salk. 440 (holding ship owners liable for damaged caused by ship master); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *428-32 (stating conception of vicarious liability for masters in his first book); Dowd, *supra* note 69 at 96-97 (explaining importance of Justice Holt's decisions).

72. *See* Farwell v. Bos. & Worcester R.R. Corp., 45 Mass. 49, 55-56 (1842) (stating maxim of respondeat superior based on public policy). The court explained: "If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable . . . ." *Id.*; *see also* Laski, *supra* note 69 at 111-14 (explaining employer in best position to bear his employee's losses). Professor Laski also points out that the shift in society made employers more like public servants and thus answerable to the public for wrongs. *See* Laski, *supra* note 69, at 112; *see also* Dowd, *supra* note 69, at 97-98 (discussing reasoning for emergence of vicarious liability).

73. *See* Dowd, *supra* note 69, at 98-99 (explaining how industrial revolution helped give rise to independent contractors); Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 511-12 (1935). Professor Steffen explains that the need for a variety of skilled workers in an industrial economy helped create the idea of independent contractors. *See id.* In addition, he notes that the concepts of individualism popular during the nineteenth century were also a factor in the emergence of independent contractors. *See id.* at 512.

74. *See supra* notes 72-73 (discussing vicarious liability and independent contractors' role in moving society and economy forward); *see also* Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, 72 MICH. B.J. 671, 673 (1993) (explaining consequences of employer's use of independent contractors in modern times).

75. *See* Sadler v. Henlock, (1855) 119 Eng. Rep. 209 (Q.B.) 212; 4 El. & Bl. 570 (Crompton, J., concurring) (stating test for distinguishing employees and independent contractors based on control). In his concurrence, Justice Crompton articulated the right-to-control test as follows: "The test here is, whether the defendant retained the power of controuling [sic] the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job." *Id.*; *see also* Hilliard v. Richardson, 69 Mass. 349, 366 (1855) (declining to impose liability on employer where no control over worker's performance); Blake v. Ferris, 5 N.Y. 48, 54 (1851) (stating power to control determines employer's liability); RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (defining liability of principal for agent's acts within scope of employment); Dowd, *supra* note 69, at 99-100 (explaining development and proliferation of employee-independent contractor test). The applicable Restatement section states the principle of respondeat superior: "An employer is subject to liability for torts committed by employees while acting within the scope of their employment." RESTATEMENT

2. The Massachusetts Statute

The common-law concepts of right-to-control and respondeat superior are still an important part of modern, American jurisprudence, but some states—such as Massachusetts—have adopted statutes that provide for the classification of employees.[76] In Massachusetts, an individual is considered an independent contractor if he is free from control in the performance of his work, the work he performs is "outside the usual course of the business of the employer," *and* he is "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed."[77]

Aside from the high hurdle it presents to employers seeking to use independent contractors in the Commonwealth, this standard is unique because it starts with the presumption of employment.[78] Prior to the amendment of chapter 149, § 148B of the Massachusetts General Law in 2004, the Bay State utilized the common-law right-to-control test.[79] Massachusetts jurisprudence did not require the right be exercised in order to find an employment relationship, just that the right was held by the employer.[80] Massachusetts's decision to abandon the right-to-control test and impose a strong barrier to the

(THIRD) OF AGENCY § 2.04 (2006); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (including principal's right to "control" in definition of agency).

76. *See, e.g.*, Dias v. Brigham Med. Assocs., Inc., 780 N.E.2d 447, 449 (Mass. 2002) (discussing role of respondeat superior in modern Massachusetts jurisprudence); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency, in part, as principal's right to "control" agent); RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (explaining rule of respondeat superior); *see also, e.g.*, CONN. GEN. STAT. ANN. § 31-222(a)(1)(B) (West 2014) (setting forth employee classification statute); ME. REV. STAT. ANN. tit. 39-A, § 102 (2014) (delineating employee classification statute); MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014) (setting forth criteria for independent contractor classification).

77. MASS. GEN. LAWS ANN. ch. 149, § 148B(a) (establishing independent contractor test with conjunctive criteria). Massachusetts's law is unique because all three prongs of the test must be met to establish independent contractor status. *See* Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730, 741 (E.D. Va. 2013) (explaining employee classification statute's conjunctive nature makes it "unprecedented" departure from independent contractor law). Its most distinctive feature is its requirement that the individual perform work outside of the employer's usual course of business. *See id. Compare* ch. 149, § 148B, *with* CONN. GEN. STAT. ANN. § 31-222(a)(1)(B) (using *disjunctive* test with outside usual course being one prong), *and* ME. REV. STAT. ANN. tit. 39-A, § 102 (listing outside usual course as one of eight factors in employee classification determination).

78. *See* MASS. GEN. LAWS ANN. ch. 149, § 148B(a) ("individual . . . considered to be an employee . . . unless"); *see also* Marsha E. Hunter, *Contingent Workers and Independent Contractors in Massachusetts*, BOS. B. J., Nov.-Dec. 2001, at 8, 8 (explaining presumption of employment "far stricter" than common law or IRS tests).

79. *See* Commonwealth v. Savage, 583 N.E.2d 276, 278 (Mass. App. Ct. 1991) (utilizing right-to-control test); *see also* Silvia v. Woodhouse, 248 N.E.2d 260, 264 (Mass. 1969) (explaining employment relationship depends on right to control); Khoury v. Edison Elec. Illuminating Co., 164 N.E. 77, 78-79 (Mass. 1928) (applying right-to-control test), *overruled in part by* Konick v. Berke, Moore Co., Inc., 245 N.E.2d 750 (Mass. 1969); Hunter, *supra* note 78, at 21 (detailing progression from right-to-control test); *supra* note 75 and accompanying text (discussing history of right-to-control test).

80. *See Khoury*, 164 N.E. at 78 ("merely a right of the master to control" creates employment relationship); Hunter, *supra* note 78, at 8 (explaining Massachusetts jurisprudence under right-to-control test).

use of independent contractors in the Commonwealth reflects a policy decision aimed at preventing the misclassification of workers as independent contractors.[81]

III. ANALYSIS

While the Supreme Court's decision in *Dan's City Used Cars, Inc.* seems to have made the Virginia court's reasoning in *Lasership, Inc.* untenable, the case has not been explicitly overruled.[82] As a result, a possible controversy still exists between these two interpretations of the Massachusetts law as it relates to motor carriers; and thus, the examination of FAAAA preemption in the context of modern preemption doctrine will be worthwhile.[83]

A. Lasership, Inc. *and* Schwann

Whether the Massachusetts employee classification statute should be preempted by the FAAAA has been answered two different ways by federal courts.[84] In modern times, congressional intent must be shown for preemption to exist, and this intent certainly exists in the FAAAA.[85] Once intent is found,

81. *See* Amero v. Townsend Oil Co., No. 071080C, 2008 WL 5609064, at *3 (Mass. Super. Ct. Dec. 3, 2008) (explaining policy behind presumption of employment). The court in *Amero* said that the presumption of employment was enacted in order to prevent "unscrupulous employers from obtaining a comparative advantage by classifying their workers as independent contractors and thereby avoiding the requirements of wage, overtime, and other laws." *Id*.; *see also* Hunter, *supra* note 78, at 8 (describing abandonment of right-to-control test based on public policy of avoiding misclassification).

82. *See* Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730 (E.D. Va. 2013) (revealing no subsequent history as of December 29, 2014); *see also* Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778-79 (2013) (noting inclusion of "transportation of property" narrows scope of FAAAA's preemption provision); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting) (explaining effect of "transportation of property" language on FAAAA preemption); *supra* note 66 and accompanying text (discussing effect of *Dan's City Used Cars, Inc.* holding on *Lasership, Inc.* court's reasoning).

83. *See supra* notes 9-10 and accompanying text (explaining controversy caused by the holdings of *Schwann* and *Lasership, Inc.*). Preemption provisions in other laws can be instructive. *See* Californians For Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1187-88 (9th Cir. 1998) (relying on previous interpretations of ADA and ERISA preemption provisions to guide FAAAA analysis); *Lasership, Inc.*, 937 F. Supp. 2d at 738 (stating Congress intended to incorporate ADA jurisprudence when enacting the FAAAA); *see also supra* note 56 (detailing courts' reliance on interpretation of preemption statutes in other laws during preemption analysis). *But see supra* notes 54-55 (explaining potential issues when looking to other preemption provisions).

84. *See supra* notes 9-10 and accompanying text (discussing conflict between cases); *supra* Part II.B.3 (detailing conflict between *Lasership, Inc.* and *Schwann* over preemption).

85. *See* 49 U.S.C. § 14501(c)(1) (2014) (showing inclusion of express preemption provision in FAAAA). The cases and scholars are in agreement that congressional intent—whether express or implied—must be present in order for a federal law to properly preempt a state statute. *See* Barnett Bank v. Nelson, 517 U.S. 25, 30 (1996) (explaining centrality of intent to modern preemption analysis); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947) (holding there exists presumption against preemption, showing necessity of intent to preemption); Mintz v. Baldwin, 289 U.S. 346, 351 (1933) (discussing intent's role in express preemption); *see also* Engdahl, *supra* note 14, at 78-79 (addressing emergence of intent in modern preemption cases); Gardbaum, *supra* note 1, at 805-07 (outlining how intent factors into modern preemption); Nelson, *supra* note 17, at 276-77 (considering role of intent in modern preemption doctrine).

preemption is generally given a broad interpretation with any state law that has a connection, mention, or "significant impact"—even an indirect one—on "rates, routes, or services" being preempted.[86]

It is clear that when enacting the FAAAA Congress intended to preempt any state law or regulation that "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[87] Thus the question answered differently by *Lasership, Inc.* and *Schwann* is: Does Massachusetts's employee classification statute have a connection, reference, or significant impact on motor carriers' price, route, or service with respect to the transportation of property?[88]

Under preemption jurisprudence, a state law "refers" to a federal law if it "acts immediately and exclusively upon" it or where the existence of the subject matter of the federal law is necessary for the state law's operation.[89] The Massachusetts law in question does not explicitly reference the prices, routes, or services of motor carriers or any other type of employer, nor does it single out the FAAAA.[90] The regulation of the prices, routes, and services of motor carriers is not essential to the existence of chapter 149, § 148B of the Massachusetts General Laws as it is a generally applicable law that affects all employers in the commonwealth.[91] Thus it cannot be said that the Massachusetts law "refers" to the FAAAA.[92]

For obvious reasons the "connection" analysis is different from the

86. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 386-90 (1992) (explaining preemption contemplates "significant impact" of state law on subject matter); *supra* note 56 (detailing guidelines of FAAAA preemption analysis). *But see supra* note 54 (showing importance of "transportation of property" language to preemption interpretation).

87. 49 U.S.C. § 14501(c)(1) (laying forth FAAAA's preemption language); *see also* Schwann v. FedEx Ground Package Sys. Inc., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509, at *6-8 (D. Mass. July 3, 2013) (showing Congress's intent to preempt certain types of laws through FAAAA).

88. *See Schwann*, 2013 U.S. Dist. LEXIS 93509, at *2-3 (explaining matter before court); Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730, 736 (E.D. Va. 2013) (laying forth issue presented by case); *see also* 49 U.S.C. § 14501(c)(1) (providing FAAAA preemption language); *supra* note 56 (discussing operation of preemption under FAAAA).

89. *See* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324-25 (1997) (explaining interpretation of "refer" in preemption analysis); District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130-31 (1992) (holding state laws premised on existence of federal laws with preemption "refer[]" to such laws); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829-30 (1988) (holding when state laws "single out" federal laws with preemption provisions they "refer" to such laws); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) (establishing meaning of "relate[] to" in analysis of certain preemption provisions).

90. *See* MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2014) (showing no reference to price, route, or service).

91. *See id.*; Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 375 (2008) (implying laws applying to carriers in same way they apply to public generally not preempted); DiFiore v. Am. Airlines, Inc., 688 F. Supp. 2d 15, 21 (D. Mass. 2009), *rev'd*, 646 F.3d 81 (1st Cir. 2011). The U.S. District Court of Massachusetts stated in *DiFiore* that "[e]mployment laws are usually laws of general applicability." *DiFiore*, 688 F. Supp. 2d at 21.

92. *See* MASS. GEN. LAWS ANN. ch. 149, § 148B (showing no reference to price, route, or service of motor carriers); *supra* note 89 (explaining meaning of "refer" in preemption analysis).

"reference" analysis.[93] This "connection" analysis involves more than merely analyzing the text of the statute, as Congress's intent must be examined.[94] Specifically, one must look to the "objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive."[95] Congress enacted the FAAAA in part to level the playing field between ground operators and the hybrid operators covered by the ADA.[96] Thus, it is proper to examine the purpose of the ADA to determine the purpose of the FAAAA.[97] The ADA was enacted to increase competition among airlines mostly through deregulation, and so the underlying purpose of the FAAAA is to further increase competition between carriers of all types when transporting property.[98] The Massachusetts law was enacted to prevent the misclassification of employees as independent contractors.[99] The proper classification of employees was not likely part of Congress's agenda when it enacted the FAAAA and its preemption provision.[100] In addition, the inclusion of the phrase "with respect to the transportation of property" shows the FAAAA was supposed to preempt even fewer state laws than the ADA.[101] Therefore, the

93. *Compare supra* notes 89-92 and accompanying text (discussing "reference"), *with* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (indicating intent key to "connection" analysis).

94. *See N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 656 (explaining need to examine federal law's objectives in this part of preemption analysis).

95. *See id.* (reasoning "connection" analysis must look at intent). The Court in *Travelers* stated that an "uncritical literalism" when interpreting the meaning of "connection" would be of no help because, on some level, everything is interconnected. *See id.* at 655-56; *see also* Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997) (referring to analysis method in *Travelers* approvingly).

96. *See supra* note 54 (explaining reasoning behind Congress's enactment of FAAAA). In *Federal Express Corp. v. California Public Utilities Commission*, the Ninth Circuit held that ground transportation used by air carriers was dependent on air transportation and thus regulation of the former would impact the latter; therefore the ADA preempted the state code. *See* Fed. Express Corp. v. Cal. Pub. Util. Comm'n, 936 F.2d 1075, 1078-79 (9th Cir. 1991); *supra* notes 51-58 and accompanying text (providing overview of FAAAA's background).

97. *See supra* notes 51-54 and accompanying text (explaining relationship of ADA and FAAAA).

98. *See supra* note 51 and accompanying text (addressing rationale behind enactment of ADA); *supra* notes 51-54 and accompanying text (demonstrating connection between ADA and FAAAA); *see also* 49 U.S.C. § 14501(c)(1) (2014) (laying forth FAAAA preemption provision).

99. *See supra* note 81 and accompanying text (explaining reasoning behind enactment of chapter 149, § 148B of Massachusetts General Laws).

100. *See* H.R. REP. NO. 103-677, at 83 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 (explaining rationale behind inclusion of preemptive language in FAAAA); Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778-79 (2013) (stating uniqueness of FAAAA preemption provision); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting) (highlighting distinguishing feature of FAAAA preemption language); *see also* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (stating Congress's objectives must guide preemptions scope); Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509, at *7-9 (D. Mass. July 3, 2013) (reasoning Massachusetts employee classification law not related to FAAAA's scope). *But see* Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 22-23 (1st Cir. 2014) (emphasizing Congress's intent in FAAAA to deregulate motor carrier industry).

101. *See Dan's City Used Cars, Inc*., 133 S. Ct. at 1778-79 (holding added language alters FAAAA

Massachusetts law does not have a connection to the FAAAA under the preemption analysis.[102]

As there is no reference to or connection between the FAAAA and the Massachusetts law, if the latter is properly preempted by the former then it must be because of its significant impact upon the subject matter sought to be governed by the federal statute.[103] This is so even if the impact is indirect.[104] The analysis of whether a state law has a "significant impact" on the subject matter of the preemption provision looks at the law's overall effect.[105] As a result, the question is: Does the Massachusetts employee classification statute have a significant impact on ground carriers' prices, routes or services "with respect to the transportation of property?"[106] Common sense, and case law, show that the answer to this question must be no.[107] The ability to classify a worker as an independent contractor rather than an employee may have an indirect impact on a carrier's rates as the cost of the latter is typically higher than the former.[108] This, however, has nothing to do with the transportation of property.[109] In sum, it cannot be fairly said that a law dictating how workers

preemption analysis from ADA); *Ours Garage & Wrecker Serv., Inc*., 536 U.S. at 449 (Scalia, J., dissenting) (explaining impact of added language). As previously discussed, Justice Scalia noted the added language "massively limits the scope of preemption to include only laws, regulations, and other provisions that single out for special treatment 'motor carriers of property.'" *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. at 449; *see also Schwann*, 2013 U.S. Dist. LEXIS 93509, at *8-9 (noting impact of *Dan's City Used Cars, Inc.* on FAAAA preemption analysis).

102. *See supra* notes 100-01 and accompanying text (discussing absence of connection between FAAAA and Massachusetts law).

103. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) (stating "significant impact" may lead to preemption); *see also* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 367 (2008) (partly using significant impact test to rule state law preempted).

104. *See Morales*, 504 U.S. at 386 (explaining preemption may occur even if state law has indirect effect).

105. *See id.* at 389-90 (examining impact of state guidelines on airline advertising). The Court in *Morales* examined the manner in which airline fares were set and advertised when ruling that guidelines created for the industry by the states were preempted by the ADA. *See id.*

106. *See* 49 U.S.C. § 14501(c)(1) (2014); *Morales*, 504 U.S. at 389-90 (demonstrating "significant impact" analysis).

107. *See* Schwann v. FedEx Ground Package Sys., Inc., No. 11-11094-RGS, 2013 U.S. Dist. LEXIS 93509, at *7-9 (D. Mass. July 3, 2013) (declining to hold Massachusetts law had significant impact on transportation of property); *see also* Dan's City Used Cars, Inc. v. Pelkey, 133 S. Ct. 1769, 1778-79 (2013) (declining to preempt state law related to storage, not movement, of vehicle). *But see* Mass. Delivery Ass'n v. Coakley, 769 F.3d 11, 23 (1st Cir. 2014) (reversing and remanding case where district court held Massachusetts's law not preempted).

108. *See* Pacynski, *supra* note 74, at 673 (explaining implications of using independent contractors versus employees). Administrative costs for employees are typically higher than for independent contractors because the employer is required to withhold unemployment, social security, and income tax for the former but not the latter. *See id.*; *see also* 26 U.S.C. § 3306(b) (2014) (requiring employers withhold income from employees). In addition, employers are generally not liable for the torts committed by the independent contractors they hire. *See supra* note 73 and accompanying text (explaining limitation of liability for torts committed by independent contractors).

109. *See* 49 U.S.C. § 13102 (2014) (defining "transportation"). Title 49 of the U.S. Code defines "transportation" as including "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and

are classified implicates the transportation of property.[110]

B. Policy

The court in *Lasership, Inc.* predicted the effect the Massachusetts law would have on independent contractor law as "unprecedented."[111] As previously shown, however, there are certain areas of the law that states may lawfully regulate even under a broad interpretation of preemption, provided, of course, such laws have not been explicitly preempted by Congress.[112] There is no congressional intent in the FAAAA to preempt state regulation of employment law, as evidenced by the inclusion of the phrase "with respect to the transportation of property."[113] Finally, while the Massachusetts law may indeed be a major change to employment law, it certainly has precedents.[114]

IV. CONCLUSION

In practice, preemption is one of the most frequently used doctrines in modern constitutional law; however, for the past two centuries judges and scholars have struggled to come to a consensus of where it derives from, what it means, and when it applies. In the current era, it is the express or implied intent of Congress that controls the scope of preemption. By including, "with respect to the transportation of property" in the FAAAA Congress clearly showed its intent to keep the scope of the law's preemptive effect narrow. It is hard to believe that Congress intended this clause to preempt a generally applicable law in an area of traditional state authority.

The federal government's ability to regulate the states has undoubtedly

interchange of passengers and property." *Id.*; *see also* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 449 (2002) (Scalia, J., dissenting) (quoting 49 U.S.C. § 14501(c)(1)) (stating "'with respect to the transportation of property' . . . massively limits the scope of preemption."). *But see Mass. Delivery Ass'n*, 769 F.3d at 23 (stating Massachusetts's law may "concern" transportation of property).

110. *See supra* note 107 and accompanying text (showing effect of "with respect to transportation of property language"). Courts envisioned this type of impact when they placed the "tenuous, remote, or peripheral" limitation solidly in modern preemption jurisprudence. *See* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008) (applying FAAAA); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) (addressing ADA); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983) (interpreting ERISA). *But see supra* note 68 (examining recent First Circuit case indicating otherwise).

111. *See* Sanchez v. Lasership, Inc., 937 F. Supp. 2d 730, 741 (E.D. Va. 2013) (describing impact of law). Not only did the *Lasership, Inc.* court describe the change the law would cause as "unprecedented," it said that it would place an "undue burden" on competition and place a "barrier of entry" for interstate truck drivers. *See id.* at 750-51. The court did not agree with the policy behind the law. *See id.*

112. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating explicit congressional intent to preempt trumps even state's traditional police powers); *supra* note 57 and accompanying text (explaining limits of preemption).

113. *See supra* note 101 and accompanying text (showing limits to FAAAA preemption); *see also supra* note 100 and accompanying text (outlining purpose of FAAAA). *But see supra* note 68 (discussing recent First Circuit case indicating Congress may have intended preemption here).

114. *See supra* Part II.C.1 (detailing major shifts in employment policy over centuries).

increased over the past two hundred years. That does not mean, however, that courts should extend this power on their own. Modern preemption doctrine instructs us to look at the intent of Congress, and sometimes that intent is right there, in plain English.

Douglas R. Sweeney