



## The Supremacy Clause

**Abstract:** In this lesson, students will explore the origins and evolution of the Supremacy Clause. First, students will identify how the U.S. Constitution establishes and attempts to resolve tension between state and federal power. Afterward, students will view the video “The Supremacy Clause” and discuss the meaning, early history, and application of the Supremacy Clause. Of particular attention will be the landmark Supreme Court case, *McCulloch v. Maryland* (1819), in which the court was asked to resolve the issue of the legality of state taxation of federal banks. Once situated in the ideological, historical and legal tension, students will have the option to select a historical or more current conflict between federal and state power to understand how such questions of supremacy are ongoing and resolved.

### Essential Question

How do conflicts between federal and state power emerge and get resolved?

### Pennsylvania Standards

Principles and Documents of Government

PA 5.1.12.D: Evaluate state and federal powers based on significant documents and other critical sources.

PA 5.1.12.B: Employ historical examples and political philosophy to evaluate the major arguments advanced for the necessity of government.

Rights and Responsibilities of Citizenship

PA 5.2.12.B: Examine the causes of conflicts in society and evaluate techniques to address those conflicts.

How government works

PA 5.3.12.A: Analyze the changes in power and authority among the three branches of government over time.

## National Standards

Power, Authority, and Governance: The development of civic competence requires an understanding of the foundations of political thought, and the historical development of various structures of power, authority, and governance. It also requires knowledge of the evolving functions of these structures in contemporary U.S. society, as well as in other parts of the world. Learning the basic ideals and values of a constitutional democracy is crucial to understanding our system of government. By examining the purposes and characteristics of various governance systems, learners develop an understanding of how different groups and nations attempt to resolve conflicts and seek to establish order and security.

## Objectives

- Identify the history and principles of the Supremacy Clause
- Identify the impact of *McCulloch v. Maryland* (1819) on federal power
- Evaluate a historical or current issue regarding conflict between federal and state power

## Activities

1. Warm-up: Are there rules that matter more in school than at home? Are there rules from home that contradict rules at school? Which authority should reign supreme when a school and home rule are in contradiction?

Possible Example for Discussion: Cell phone policies are a typical area of school-home rule tension. On the one hand, parents purchase and give their children cell phones for communication purposes. The typical rule is that when a parent calls the child, it is expected he or she will answer the phone. It is not uncommon for parents to call or text the child directly during school hours rather than communicate through the school office, which is typical school policy. On the other hand, students are not supposed to be on their phones during instruction (and in some schools, not at all). It is often a disruption to student learning. So, a parent calling a child's cell phone during school hours might actually violate school policy but not the rule at home. Which rule reigns supreme: The school's or parents'?

Debrief: Though not a perfect analogy, the question of home vs. school cell phone rule illustrates the tension between federal and state power when there is a disagreement over a law/policy. Which reigns supreme? In the cell phone case, the power of the school would supersede the house rule. If the

school has a policy that students are not to use their phones during school hours, then the student answering a parent's call is in violation; families' rules do not nullify school rules.

Similarly, state rules cannot contradict federal law whether it is specifically listed or implied. Yet, conflicts between the two parties arise. The Supremacy Clause enumerates that federal law is the "supreme law of the land." The federal government has certain enumerated powers that are spelled out in the U.S. Constitution: the right to regulate commerce, declare war, levy taxes, establish immigration and bankruptcy laws, and so forth. Judges in every state must follow the Constitution, laws and treaties of the federal government in matters directly or indirectly within the government's control. Federal law preempts state law, even when the laws conflict, otherwise known as the doctrine of preemption. That said, nullification is the historical idea that states can ignore federal laws or pass laws that supersede them; though, that policy approach has never been legally upheld. Still, the 10th Amendment provides enough constitutional flexibility that the conflict between state and federal power will, in the words of Chief Justice of the United States John Marshall, "probably continue to arise, as long as system shall exist." Why? Have students complete Handout 1.

- a. In your own words, what does Article VI, Section 1, Clause 2 mean? In cases where state and federal law are in conflict, due to direct violation or implied, federal law reigns.
  - b. What does the 10th Amendment mean? States can make laws or establish rights not listed specifically in the Constitution.
  - c. How might these two aspects of the Constitution create conflict over federal and state power? There are many rights and powers that the state can exercise in absence of federal law, but such laws could contradict or undermine federal law. Medicinal marijuana is one such example in which some state laws have made it legal, yet such laws violate federal policy.
2. View the video "The Supremacy Clause" and use the Video Worksheet to help students take notes and lead a discussion.
- a. The following resources can help the teacher extend the conversation:
    - i. Why was the U.S. Constitution Necessary?  
<http://www.annenbergclassroom.org/ibooks?chapterId=1>

- ii. Background on Federalist vs. Anti-Federalist debate:  
<http://www.annenbergclassroom.org/ibooks?chapterId=1>
  - iii. Tenth Amendment, Federalism & Commerce Clause  
<https://constitutioncenter.org/media/files/LP - CB - Federalism, the Commerce Clause, and the Tenth Amendment.pdf>
  - iv. The Heritage Foundation's perspective on Supremacy Clause:  
<https://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause>
3. Research and Presentation Activity: In small groups, have students identify an issue – historical or current – in which there was/is conflict between federal and state power. Use the guiding questions in Handout 3 for sample topics, Handout 2 to help develop an analysis, and Handout 4 for a possible grading criteria. Students will present their findings to the class in any format deemed appropriate by the teacher and/or students. The teacher can establish the pacing for such an activity.



## **Video Worksheet**

1. At the founding of the United States, what was the ultimate purpose of the Supremacy Clause?
2. Why was it so important?
3. What lessons did leaders glean from governing under the Articles of Confederation?
4. What arguments for and against a strong central government were advanced by Federalists and Anti-Federalists?
5. How did the creation of a national bank represent the debate between Federalists and Anti-Federalists?



## Handout 2: Guiding Questions and Principles for Determining Preemption

In small groups, identify an issue – historical or current – in which there was conflict between federal and state power. Use the guiding questions below to help develop an analysis. You will present your findings to the class.

### Guiding Questions

- What is the issue?
- What, if any, is the applicable state law? <https://statelaws.findlaw.com/>
- What, if any, is the applicable federal law? <https://www.usa.gov/laws-and-regs>
- Does the state law directly contradict federal law? (See below standards in which to determine preemption)
- Was the issue resolved? If so, how?

Executive Order 13132 of August 4, 1999 - See 64 Fed. Reg. 43, 255 - August 10, 1999, Sec. 4. Special Requirements for Preemption.

Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.

(a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.



(e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

## Handout 3: Possible Topics

The list below outline issue options but is not all-inclusive. It should also be noted that articles provide some background, but were not necessarily selected due to a balanced presentation. It is recommended that additional research be conducted on your selected issue.

Brief overview with historical examples:

<https://constitutioncenter.org/blog/constitution-check-can-states-exempt-themselves-from-federal-gun-laws>

Major court cases

[https://www.law.cornell.edu/supct/cases/topics/tog\\_supremacy\\_clause.html](https://www.law.cornell.edu/supct/cases/topics/tog_supremacy_clause.html)  
<https://www.heritage.org/constitution/#!/articles/6/essays/133/supremacy-clause> (list at end of essay; select “case law”)

State Pensions

<https://constitutioncenter.org/blog/judge-picks-supremacy-clause-in-detroits-bankruptcy-battle>

Are workers' state pensions protected by from bankruptcy law?

Marriage

<https://www.thenation.com/article/about-half-of-us-states-set-no-minimum-age-for-marriage/>

Can children marry?

[https://www.huffingtonpost.com/2015/01/21/mike-huckabee-gay-marriage-supreme-court\\_n\\_6512042.html](https://www.huffingtonpost.com/2015/01/21/mike-huckabee-gay-marriage-supreme-court_n_6512042.html)

Can states ignore the Supreme Court on Gay Marriage?

Gun Laws

<https://constitutioncenter.org/blog/constitution-check-can-states-exempt-themselves-from-federal-gun-laws>

Can states exempt themselves from federal gun laws?

Gambling

<http://www.theplainsman.com/article/2018/05/could-the-supreme-courts-decision-bring-sports-gambling-fantasy-sports-to-alabama>

Is sports gambling outside a casino legal?

Marijuana

<https://constitutioncenter.org/blog/interest-picks-up-in-legal-marijuana-as-constitutional-issue>

If the production, distribution, and consumption of marijuana is illegal under federal law, are states that allow such behaviors violating the US Constitution ?

Sexual Orientation Discrimination

<https://civilrights.findlaw.com/discrimination/gay-and-lesbian-rights-sexual-orientation-discrimination.html>

Is discrimination based on sexual orientation legal?

## Handout 4: Grading Criteria

<b>Issue</b>  / pts	Contextualized issue as a conflict between federal and state law and identified where the issue currently stands	Total Points:     / Comments:
<b>Federal Law/Action</b>  / pts	Identified appropriate federal law or action	
<b>State Law/Action</b>  / pts	Identified appropriate state law or action	
<b>Discussion of preemption</b>  / pts	Properly applied preemption guideline(s)	

**Author**

Dr. Marc Brasof is an assistant professor of education and director of secondary social studies and English education in the School of Education at Arcadia University, Glenside, Pennsylvania.