BOYLE AS CONSTITUTIONAL PREEMPTION

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INTRODUCTION

During his remarkable tenure on the Supreme Court, Justice Antonin Scalia was widely acknowledged to be the Court's leading proponent of textualism and originalism[1]—methodological commitments that instruct judges to interpret legal texts according to what a reasonably skilled user of language would have understood the text to mean at the time of its adoption. These commitments generally led Justice Scalia to disfavor doctrines—such as federal common law—that license judges to exercise broad discretion unmoored from federal constitutional or statutory texts.[2] Such doctrines are in tension with separation of powers and federalism because they enable judges to encroach upon the constitutional domain of the political branches and the states. Justice Scalia's opinion for the Court in *Boyle v. United Technologies Corp.*[3] arguably departed from his usual preferences by recognizing a government contractor defense as a matter of federal common law.[4]

Numerous critics have pointed out the apparent inconsistency between *Boyle* and Justice Scalia's broader methodological commitments. Whatever one thinks of the Court's opinion, however, the actual decision in *Boyle* finds substantial support in the text and structure of the Constitution. When the executive branch contracts to procure specialized military equipment to meet its needs, it does so pursuant to constitutional and statutory authorization. It is these underlying constitutional and statutory provisions—not fed-

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* William Cranch Research Professor of Law, George Washington University Law School. I dedicate this Essay to Justice Antonin Scalia for whom I clerked during the October 1989 Term. I thank A.J. Bellia, Bill Kelley, John Manning, and Amanda Tyler for their insightful comments and suggestions, and Zachary Tyree for excellent research assistance.

1 *See* William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601 (2012).

2 *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017) (book review).

3 487 U.S. 500 (1988).

4 For an earlier analysis of *Boyle*, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1368–75 (1996).

eral common law rules—that preempt a state's efforts to deter or impede the performance of such contracts. Understanding *Boyle* as a case of constitutional preemption avoids reliance on disfavored doctrines of judicial discretion such as federal common law.

This Essay proceeds in three parts. Part I summarizes the Supreme Court's decision in *Boyle* and describes both the majority and dissenting opinions. Part II recounts various criticisms of Justice Scalia's opinion in *Boyle*, particularly the claim that he abandoned his deeper commitments to textualism, originalism, separation of powers, and federalism. Part III offers an alternative rationale for the decision in *Boyle* grounded in constitutional preemption, and explains why this approach is more consistent with Justice Scalia's broader methodological and constitutional commitments.

I. THE *BOYLE* DECISION

Boyle was a state law wrongful death action brought by the estate of a U.S. Marine helicopter copilot who died when his helicopter crashed in the waters off the coast of Virginia during a training exercise.[5] The copilot drowned after the crash because—in accordance with the military's design specifications—the helicopter's hatch opened "out" rather than "in."[6] The estate could not sue the United States or the government officials who approved the specifications because they were immune from suit. Accordingly, the copilot's father brought a diversity action in federal court against the helicopter's manufacturer, United Technologies, alleging that the company had defectively designed the copilot's emergency escape system.[7]

The jury returned a verdict in favor of the plaintiff and awarded damages against the manufacturer.[8] The Fourth Circuit reversed on appeal, holding that the defendant satisfied the requirements of the "military contractor defense" recognized by that court in another case.[9] The Supreme Court granted the plaintiff's petition for a writ of certiorari and upheld the validity of this defense as a matter of federal common law.

Justice Scalia began his analysis in *Boyle* by rejecting the contention "that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense."[10] He explained that the Supreme Court has

> held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a

5 *Boyle*, 487 U.S. at 502.
6 *Id.* at 502–03.
7 *Id.*
8 *Id.* at 503.
9 *Id.* (quoting Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)).
10 *Id.* at 504.

> content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."[11]

He found federal common law applicable in *Boyle* because "the civil liabilities arising out of the performance of federal procurement contracts" implicate a uniquely federal interest.[12] The Court found this interest to be closely related to two uniquely federal interests previously recognized by the Court: the rights and obligations of the United States under its contracts, and the civil liability of federal officials for actions taken within the course of their duty.[13] Although Justice Scalia acknowledged that *Boyle* involved "an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee," he stressed that both scenarios "obviously implicated the same interest in getting the Government's work done."[14]

Having found a uniquely federal interest, Justice Scalia proceeded to examine whether there was a significant conflict between this interest and the operation of state law. He found the requisite conflict because "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[15] In either case, the application of state tort law would burden or impede the federal government's objective. For these reasons, the Supreme Court "agree[d] with the scope of displacement adopted by the Fourth Circuit."[16]

In a forceful dissent, Justice Brennan argued that the Supreme "Court lacks both authority and expertise to fashion such a rule" of federal common law.[17] He asserted that the Court had never extended immunity beyond federal officers to nongovernment employees such as government contractors.[18] He also pointed out that Congress had considered but failed to enact a law establishing a federal contractor defense.[19] Thus, he concluded that the Court's recognition of a government contractor defense was improper because "[w]e are judges not legislators, and the vote is not ours to cast."[20] In a separate dissent, Justice Stevens did not reject federal common lawmaking in all cases, but stressed that Congress rather than the Court was "better equipped to perform the task at hand"[21]—namely, to balance "the conflict-

11 *Id.* (citations omitted) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

12 *Id.* at 506.

13 *Id.* at 504–05.

14 *Id.* at 505.

15 *Id.* at 512.

16 *Id.*

17 *Id.* at 516 (Brennan, J., dissenting).

18 *See id.* at 522–23.

19 *Id.* at 531.

20 *Id.*

21 *Id.* (Stevens, J., dissenting).

ing interests in the efficient operation of a massive governmental program and the protection of the rights of the individual."[22]

Boyle's majority and dissenting opinions appear to represent something of a role reversal for their authors. In other cases, Justice Scalia generally disfavored broad judicial lawmaking whereas Justice Brennan frequently championed such lawmaking. It would be easy to dismiss *Boyle*'s role reversal as an aberration based on policy preferences. As Part III of this Essay explains, however, the decision actually rests on a firmer constitutional foundation than mere federal common law. Nonetheless, as the next Part recounts, commentators have been quick to point out the apparent inconsistency between Justice Scalia's opinion in *Boyle* and his larger methodological commitments.

II. CRITICISM OF *BOYLE*

Numerous commentators have observed that *Boyle* represented a departure from Justice Scalia's general commitments to textualism and originalism, and marked "a notable exception to Justice Scalia's objections to federal common-lawmaking."[23] For example, soon after the decision, Professor Nick Zeppos wrote that "the result in *Boyle* seems flatly inconsistent with the textualist approach."[24] Even if the Supreme Court believed that "the military could not function if its contractors were subject to state tort law," Zeppos explained, "the usual textualist response to such 'policy' arguments is to relegate litigants to the legislative process."[25]

Likewise, Professor Bill Marshall described *Boyle* as an example of "nonoriginalist activism."[26] In his view, "[n]o text or history supports a military contractor's defense, and no argument from constitutional structure can justify the Court's creation of federal tort law in this case (federal courts are, after all, not common law courts)."[27] Indeed, Marshall characterized *Boyle* as a "breathtaking" example of judicial activism because it "transgressed federalism concerns" and "ignored separation of powers."[28]

Somewhat more charitably, Professor Caleb Nelson has suggested that *Boyle* was a consequence of the Supreme Court's approach to federal com-

22 *Id.* at 532.

23 Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1909 n.19 (2011).

24 Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1367 (1990).

25 *Id.* at 1368.

26 William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1231 (2002).

27 *Id.*

28 *Id.* (footnote omitted); *see also* Donald L. Doernberg, *Juridical Chameleons in the "New* Erie *" Canal*, 1990 UTAH L. REV. 759, 788–90 ("Justice Scalia engaged in significant judicial legislation in *Boyle v. United Technologies Corp.*"); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1383 (1996) ("*Boyle* is an activist decision because the Court usurped Congress' role in creating the new defense.").

mon law, which seeks to limit such law to several "narrow areas"[29] or "enclaves."[30] On the one hand, this approach leads judges to "conclude that they cannot legitimately recognize federal common law on many topics."[31] On the other hand, "[i]n areas where courts do recognize federal common law, federal judges can properly base the content of that law on their own views of sound policy" because they "are operating on the theory that they enjoy delegated power to make law (as opposed to the duty to identify rules of decision supplied by pre-existing sources)."[32] Nelson suggests that perhaps "Justice Scalia can be forgiven for not trying to derive the applicable rule of decision from . . . external sources"[33] given that the Court's current approach "encourage[s] relatively unconstrained judicial policymaking" in recognized enclaves.[34]

Other commentators, including Professor Tom Merrill, regard *Boyle*'s embrace of federal common law as little more than an aberration.[35] According to Merrill, "[b]oth before and after the decision, recourse to federal common law was noticeably diminishing."[36] More specifically, he pointed out that

> Justice Scalia's freewheeling, policy-based analysis in *Boyle* contrasts sharply with his subsequent decision for the Court in *O'Melveny & Myers*, where he declined to apply federal common law to determine the duty of a law firm to investigate fraud committed by a savings and loan client subsequently taken over by the FDIC. The latter decision stresses the illegitimacy of lawmaking by courts, and observes that the "function of weighing and appraising" multiple variables is best left for the legislature.[37]

In sum, commentators have criticized Justice Scalia's decision in *Boyle* largely on the grounds that it was inconsistent with his overarching commitments to textualism, originalism, separation of powers, and federalism—commitments to which he adhered more faithfully both before and after *Boyle*. Upon deeper analysis, however, *Boyle* may not be as great a departure from

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29 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

30 *See* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 42–45 (2015).

31 *Id.* at 42.

32 *Id.*

33 *Id.* at 44.

34 *Id.* at 45.

35 *See, e.g.*, Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 463 (2010).

36 *Id.*

37 *Id.* n.64 (citations omitted) (quoting O'Melveny & Meyers v. FDIC, 512 U.S. 79, 89 (1994)). Professor Merrill similarly criticized Justice Scalia's practice of joining the Rehnquist Court's federalism decisions on the ground that these votes were inconsistent with his sincerely held beliefs. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003). Upon analysis, however, Justice Scalia's votes in federalism cases were largely—if not entirely—consistent with his respect for the constitutional structure. *See* Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS U. L.J. 753 (2003).

these commitments as these critics believe. In fact, there is a plausible case that *Boyle* was a relatively straightforward case of constitutional preemption based on a direct conflict between state tort law and federal actions authorized by both federal constitutional and statutory provisions. Part III examines this potential alternative rationale for *Boyle* and several historical antecedents.

III. RERATIONALIZING *BOYLE* AS CONSTITUTIONAL PREEMPTION

Notwithstanding the criticisms described in Part II, the decision in *Boyle* may have a firmer constitutional foundation than the one set forth in Justice Scalia's opinion for the Court. The Supreme Court has long recognized that the Constitution preempts state law that operates to burden or impede the legitimate exercise of federal authority. Such "constitutional preemption" is not an example of federal common law. Rather, it is a relatively straightforward application of the Supremacy Clause to resolve conflicts between state law and the Constitution dating back to the early days of the republic.[38] Federal common law, by contrast, is a twentieth-century innovation that permits courts to fashion "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[39]

The Supreme Court's decision in *McCulloch v. Maryland*[40] provides an important early example of constitutional preemption. Although the decision is best known for upholding Congress's power to charter the Second Bank of the United States, it also held that the Constitution preempted Maryland's efforts to tax the Bank. On the first question, the Court acknowledged that the Constitution did not give Congress express power to incorporate a bank.[41] The Court nonetheless upheld this power as a proper means of executing "the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[42] After observing that "the powers given to the government imply the ordinary means of execution,"[43] the Court proceeded to reject Maryland's contention that the Necessary and Proper Clause somehow

38 *See generally* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967). Although the original understanding of the Supremacy Clause alone might support this kind of constitutional preemption, the early decisions of the Marshall Court provide additional support for preemption in these circumstances. Thus, one need not rely exclusively on Founding materials to find constitutional preemption in *Boyle*, but can also invoke "arguments predicated upon text, structure, and purpose, as well as unfolding historical practice and precedent." Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1750 (2015) (footnotes omitted).

39 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 635 (7th ed. 2015).

40 17 U.S. (4 Wheat.) 316 (1819).

41 *Id.* at 406.

42 *Id.* at 407.

43 *Id.* at 409.

limited Congress's choice of means. The Court gave two reasons why "[the clause] cannot be construed to restrain the powers of Congress"[44]—first, "[t]he clause is placed among the powers of Congress, not among the limitations on those powers,"[45] and second, "[i]ts terms purport to enlarge, not to diminish the powers vested in the government."[46] Accordingly, the Court concluded that Congress has broad constitutional power to employ all means "plainly adapted" to the pursuit of "legitimate" ends.[47]

Having concluded that the Constitution gave Congress authority to incorporate a bank with a branch in Maryland, the *McCulloch* Court proceeded to answer the second question presented in the case: "Whether the State of Maryland may, without violating the constitution, tax that branch?"[48] The Court concluded that the Constitution preempted Maryland's efforts to tax the Bank based on three propositions:

> 1st. [T]hat a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.[49]

The *McCulloch* Court applied these principles broadly to conclude that any attempt by Maryland to tax the Bank was unconstitutional and void.

Maryland conceded that "the States may [not] directly resist a law of Congress,"[50] but argued that the Constitution leaves the states the right to exercise their acknowledged powers (including the power of taxation) upon acts of Congress "in the confidence that they will not abuse it."[51] The Supreme Court rejected this proposition in the broadest possible terms, declaring that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[52] The Court characterized this conclusion as "the unavoidable consequence of that supremacy which the constitution has declared."[53]

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44 *Id.* at 420.

45 *Id.* at 419.

46 *Id.* at 420. Professor Samuel Bray has recently offered an additional reason in support of the Court's interpretation. He argues that "necessary and proper" is an example of a figure of speech known as "*hendiadys*, in which two terms separated by a conjunction work together as a single complex expression." Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688 (2016).

47 *McCulloch*, 17 U.S. (4 Wheat.) at 421. For a discussion of *McCulloch*'s continuing relevance to a wide range of questions, see John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014).

48 *McCulloch*, 17 U.S. (4 Wheat.) at 425.

49 *Id.* at 426.

50 *Id.* at 427.

51 *Id.* at 428.

52 *Id.* at 436.

53 *Id.*

The *McCulloch* Court's reliance on constitutional preemption has obvious relevance to cases such as *Boyle*. To be sure, the plaintiff in *Boyle* did not go so far as to argue that Virginia could prohibit a manufacturer from supplying the federal government with military equipment built according to the government's precise specifications. But he did argue that Virginia could hold the manufacturer liable in tort for design defects associated with such equipment. It is difficult to avoid the conclusion that such liability could, in the words of the *McCulloch* Court, "retard, impede, burden, or in [some] manner control, the operations of the constitutional laws enacted by Congress" to procure military equipment.[54] For this reason, the Supreme Court could have relied on *McCulloch*'s second holding to conclude that the Constitution itself preempted the application of Virginia tort law in *Boyle*.

Critics of the military contractor defense might try to distinguish *McCulloch* from *Boyle* on the ground that the application of state tax law to the Second Bank of the United States represented a more direct interference with federal functions than the application of state tort law to a private military contractor. Although it is sometimes assumed that the Bank was a government entity, its charter established that private interests would control the Bank. To be sure, Congress chartered the Bank for public purposes, but the charter specified that eighty percent of the Bank's capital stock would be held by private investors,[55] and only five of its twenty-five directors would be appointed by the President and confirmed by the Senate.[56] Thus, *McCulloch* did not hold that Maryland's tax was unconstitutional because it applied to an instrumentality of the federal government, but because it interfered with activities authorized by Congress in the exercise of its constitutional powers.

The same kind of interference would have resulted from the application of Virginia tort law to United Technologies's design of military helicopters in *Boyle*. In the exercise of its powers to raise and support the armed forces, Congress enacted laws authorizing the military to contract with suppliers to design and purchase the kinds of equipment needed to fulfill its mission. The military decided that its mission necessitated helicopters with hatches that opened out rather than in. Virginia's imposition of tort liability on the manufacturer for providing equipment with these specifications certainly would have burdened or impeded the operation of these laws. As Justice Scalia explained in *Boyle*, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."[57]

Even Justice Brennan's dissent acknowledged that "the Government might have to pay higher prices for what it orders if delivery in accordance with the contract exposes the seller to potential liability."[58] Much like a tax,

54 *Id.*

55 *See* Act of Apr. 10, 1816, ch. 44, § 1, 3 Stat. 266, 266 (expired 1836).

56 *Id.* § 88, 3 Stat. at 269.

57 Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988).

58 *Id.* at 521–22 (Brennan, J., dissenting).

this added cost would certainly "burden" or "impede" the execution of a valid federal law enacted pursuant to the Constitution. If the Constitution prohibits Virginia from imposing even a nominal tax on the military's purchase of special-order military equipment (as *McCulloch* established), then it is hard to see why the Constitution would permit Virginia to impose potentially enormous tort liability on a manufacturer who merely builds and supplies military equipment according to the government's specifications.

Another Marshall Court opinion from the same era provides further support for constitutional preemption in *Boyle*. In *Osborn v. Bank of the United States*,[59] the Supreme Court considered Ohio's attempt to tax the Bank of the United States. After Ohio enacted a substantial tax, the Bank sued the collector to recover funds forcibly seized from the Bank and to enjoin further efforts to collect the tax.[60] Although the decision is best known for its reading of Article III's "arising under" jurisdiction,[61] it also addressed the constitutionality of Ohio's efforts to tax the Bank. After holding that the Bank's charter supported federal question jurisdiction, the Court entertained Ohio's request that it reconsider its earlier ruling in *McCulloch v. Maryland*.

Among other things, Ohio "contended, that, admitting Congress to possess the power [to exempt the Bank from taxation], this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court."[62] The *Osborn* Court rejected this contention in terms directly applicable to *Boyle*. The Court began by observing that "[i]t is not unusual, for a legislative act to involve consequences which are not expressed."[63] The *Osborn* Court offered the immunity of federal officers as an example of implied immunity.[64] "It has never been doubted, that all who are employed in [public institutions], are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress."[65] Such immunity, the Court explained, "is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone."[66]

In an attempt to avoid the force of these observations, the defendants relied "greatly on the distinction between the Bank and the public institutions, such as the mint or the post office."[67] They argued that the agents of public institutions are "officers of government," whereas the Bank's officers

59 22 U.S. (9 Wheat.) 738 (1824).

60 *Id.* at 740–43.

61 *See* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263 (2007).

62 *Osborn*, 22 U.S. (9 Wheat.) at 865.

63 *Id.*

64 More than a century and a half later, the *Boyle* Court also analogized the immunity of government contractors to the immunity of federal officials. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988).

65 *Osborn*, 22 U.S. (9 Wheat.) at 865.

66 *Id.* at 865–66.

67 *Id.* at 866.

resembled mere "contractors."[68] The Court agreed "that the directors, or other officers of the Bank, are [not] officers of government,"[69] but nonetheless rejected the suggestion that states have "the right . . . to control [the Bank's] operations, if those operations be necessary to its character, as a machine employed by the government."[70] In terms directly relevant to *Boyle*, the Court offered the example of military contractors to illustrate its point:

> Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? [O]r could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.[71]

Although the Court acknowledged "that the property of the contractor may be taxed, as the property of other citizens," it refused to admit "that the act of purchasing, or of conveying the articles purchased, can be under State control."[72]

Osborn's discussion of government contractor immunity supports the Court's decision in *Boyle*. The acts of contractors taken in performance of federal contracts—like the acts of the Bank of the United States taken in accordance with its charter—are acts authorized by federal statutes made in pursuance of the Constitution. The *Osborn* Court understood the Constitution to preempt state law that interferes with these acts on the ground that such law is "repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void."[73]

Justice Scalia came close to making this argument in *Boyle*, although neither he nor the dissenting Justices discussed (or even cited) *McCulloch* or *Osborn*. Instead, Justice Scalia invoked the Court's decision in *Yearsley v. W.A. Ross Construction Co.*,[74] which immunized a contractor for services performed in accordance with the terms of its government contract.[75] Specifically, the Court held that a landowner could not hold the contractor liable under state law for the erosion of land caused by its construction of dikes for the federal government. Echoing *Osborn*, the *Yearsley* Court reasoned that "if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[76] After quoting this language, the *Boyle* Court stated that it saw no basis for distinguishing procurement contracts from service contracts.[77]

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68 *Id.*

69 *Id.* at 866–67.

70 *Id.* at 867.

71 *Id.*

72 *Id.*

73 *Id.* at 868.

74 309 U.S. 18 (1940).

75 *Id.* at 22.

76 *Id.* at 20–21.

77 Boyle v. United Techs. Corp., 487 U.S. 500, 506 (1988).

Even apart from *McCulloch* and *Osborn*, Justice Scalia might have drawn additional support from the Supreme Court's modern decision in *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*[78] The Federal Communications Act of 1934 provided that if a broadcaster permitted a candidate to use its airtime, then it had to give opposing candidates equal time on its station.[79] WDAY permitted two Senate candidates to give statements on air, and then gave a third candidate equal time in reply. In his reply, the third candidate accused his opponents of conspiring with the plaintiff to create a communist farmers union in the state. The plaintiff then sued WDAY for broadcasting this allegedly defamatory statement.[80] The question before the Court was whether federal law gave the broadcaster immunity for its part in disseminating the statement in question.[81]

The Supreme Court held that broadcasters were immune from state defamation law based on statements they aired under the equal time rule.[82] The Court acknowledged that Congress had previously considered, but failed to enact, an express immunity provision for broadcasters in this situation. Nonetheless, the Court found such immunity implicit in the statute in order to avoid "the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee."[83] A contrary reading of the statute "would either frustrate the underlying purposes for which it was enacted, or alternatively impose unreasonable burdens on the parties governed by that legislation."[84] Either way, the imposition of liability under state law would have burdened or impeded the operation of federal law.

All of these precedents—from *McCulloch* through *WDAY*—support constitutional preemption of state tort law in *Boyle*. The Constitution gave Congress power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces."[85] Congress used these constitutional powers to authorize the armed forces to procure specialized military equipment, including the helicopter at issue in *Boyle*. Under the Court's precedents, if the government approves reasonably precise specifications in the course of procuring equipment pursuant to its constitutional and statutory authority and the contractor adheres to those specifications in producing the equipment, then the Constitution preempts state law that would impose liability on the contractor for faithfully performing the contract.[86] Such preemption is not based on mod-

78 360 U.S. 525 (1959).

79 *Id.* at 526.

80 *Id.* at 526–27.

81 *Id.* at 526.

82 *Id.* at 535.

83 *Id.* at 531.

84 *Id.* at 535.

85 U.S. CONST. art. I, § 8, cls. 12–14.

86 The military contractor defense approved in *Boyle* contains a third requirement in order to trigger immunity: "[T]he supplier [must have] warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the

ern notions of federal common law. Rather, it is based on the constitutional provisions empowering Congress to authorize the procurement of military equipment, and the statutes authorizing the government to enter into the contract in question.

Even accepting constitutional preemption in *Boyle*, one might ask why the Constitution required the specific three-part test endorsed by the Supreme Court. The Court described "the scope of displacement" as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[87]

Upon analysis, these three requirements "appear merely to define and implement the constitutional preemption of state authority in this context."[88]

The first requirement—that the United States have approved reasonably precise specifications—is necessary to find a conflict between the application of state law and the execution of a specific federal function.[89] The second requirement—that the equipment have conformed to the specifications—ensures that the contractor was actually carrying out the task assigned by the federal government.[90] The third requirement—that the supplier have warned the United States of dangers known to the supplier but not the United States—serves to identify the scope of preemption in this context. When a supplier fails to warn the United States of such dangers, the United States may not have made the actual decision to accept the risks involved. On the other hand, when a supplier provides the required warnings, the United States's decision to proceed reflects its affirmative conclusion that the benefits outweigh the risks. The Supremacy Clause does not permit a state to override this conclusion.[91]

Understanding *Boyle* as an example of constitutional preemption places the decision on a firmer constitutional foundation because it alleviates many of the methodological problems associated with the Court's opinion and federal common law more generally. Under constitutional preemption, the fact that Congress did not enact express provisions conferring immunity in *McCulloch*, *Osborn*, *WDAY*, and *Boyle* is irrelevant because preemption results

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United States." *Boyle*, 487 U.S. at 512. The role of all three requirements in establishing constitutional preemption is discussed below. *See infra* notes 87–91 and accompanying text.

87 *Boyle*, 487 U.S. at 512.

88 Clark, *supra* note 4, at 1372.

89 *See id.* at 1372–73. Although nondiscriminatory state regulation of standard military equipment sold "off the rack" might incidentally burden the purchase of such equipment, the Court is unlikely to find preemption of such regulation. *See* Johnson v. Maryland, 254 U.S. 51, 56 (1920) (stating that it "very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the [federal] employment").

90 *See* Clark, *supra* note 4, at 1373.

91 *See id.* at 1373–74.

from the Constitution rather than an express statutory provision. Thus, upholding immunity in these cases did not violate constitutional principles of separation of powers or federalism. For example, Justice Brennan's dissent charged that finding immunity in *Boyle* violated separation of powers because Congress had not expressly authorized such immunity. The Marshall Court, however, established that express statutory immunity is not necessary when state law burdens or impedes "the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[92] Similarly, the immunity upheld in *Boyle* does not violate federalism by circumventing the Supremacy Clause and associated lawmaking procedures because the constitutional provisions and federal statutes authorizing the procurement in question themselves constitute the supreme law of the land under the Clause.

Finally, using constitutional preemption to recognize immunity in *Boyle* is consistent with originalism and textualism. As Chief Justice Marshall explained in *McCulloch*, the "power to tax involves the power to destroy," and there is a "plain repugnance" between the power to destroy in the hands of a state and Congress's constitutional power to authorize the activity being taxed.[93] The power to impose tort liability on congressionally authorized activities has no less potential to destroy such activities. Originalists recognize that the Constitution and laws made in pursuance thereof preempt contrary state law. As *McCulloch* and *Osborn* demonstrate, such constitutional preemption is not novel. From the Founding to the present, the Supreme Court has understood the Constitution to prevent states from burdening, impeding, or destroying the constitutional operations of the federal government. Such constitutional preemption is also consistent with textualism. The displacement of state law in these cases rests not on questionable notions of federal common law, but on the Supremacy Clause and an actual conflict between state law and the constitutional provisions Congress employed to authorize the conduct in question.

Conclusion

Justice Scalia's opinion in *Boyle* has been criticized for being both wrong and inconsistent with his broader methodological commitments. Certainly, the opinion's reliance on "federal common law" was not in keeping with Justice Scalia's general skepticism of broad judicial discretion. But his invocation of federal common law was also unnecessary to the Court's decision. The Marshall Court established early on that the Constitution does not permit state law "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[94] *Boyle* should have invoked

92 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

93 *Id.* at 431.

94 *Id.* at 436.

this principle and explained that the government contractor defense is not the result of judicial lawmaking or atextual interpretation, but "the unavoidable consequence of that supremacy which the constitution has declared."[95]

95 *Id.*