ARTICLE

Preemption and Federalism: The Missing Link

By PAUL WOLFSON*

Introduction

As a weapon against state economic and social regulation, the preemption doctrine threatens to become the new *Lochner*.[1] As the states take up much of the regulatory power that Congress has forsworn,[2] corporations are advancing the Supremacy Clause[3] as an obstacle to state regulation in fields such as environmental protection,[4] employment discrimination,[5] labor law,[6] nuclear power,[7] workplace safety,[8] and securities.[9] The courts have had many opportunities to develop a readily applied preemption doctrine. Preemption cases have reached the Supreme Court frequently because they have often come within the

* Associate, Wilmer, Cutler & Pickering, Washington, D.C., J.D. Yale Law School, 1987. The author wishes to thank Betsy Cavendish, Michael Froomkin, and Paul Kahn for their many helpful comments and suggestions.

1. Lochner v. New York, 198 U.S. 45 (1905) (New York statute limiting bakers to 60 hour work week violated Due Process Clause of Fourteenth Amendment).

2. *See, e.g., Can-Do Capitals: States Enlarge Roles As Congress Is Unable To Solve Problems*, Wall St. J., June 28, 1988, at 1, col. 1.

3. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

4. *See* California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987); International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987).

5. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987).

6. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

7. *See* Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n, 461 U.S. 190 (1983).

8. *See* Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

9. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987); Edgar v. MITE Corp., 457 U.S. 624 (1982).

Court's mandatory appellate jurisdiction.[10] When it can do so, the Court usually bases its rulings on preemption rather than other constitutional provisions because preemption cases concern congressional intent, and therefore Congress can overturn the Court's interpretation if the Court is mistaken.[11] Yet frequent opportunities to refine preemption doctrine have not yielded a consistent jurisprudence.

Although the Supreme Court has referred to four categories of preemption in almost every one of its recent preemption cases,[12] the catego-

10. Until recently, parties could appeal of right to the Supreme Court from federal appellate decisions striking down state statutes as "repugnant to the Constitution, treaties, or laws of the United States," 28 U.S.C. § 1254(2) (1982), and from state court decisions upholding state statutes against a supremacy clause challenge, 28 U.S.C. § 1257(2) (1982). The Supreme Court has recently heard several preemption cases on appeal. *See, e.g.,* Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704, 1708 (1988); Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2214 (1987); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738 (1985). Congress recently eliminated most of the Supreme Court's mandatory appellate jurisdiction. *See* Pub. L. No. 100-352, 1988 U.S. CODE CONG. & ADMIN. NEWS 102 Stat. 662.

11. *See, e.g.,* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Blum v. Bacon, 457 U.S. 132, 137-38 (1982). The Court occasionally has given the impression of reaching out for the preemption issue even when the claim was not raised and considered below. *See, e.g.,* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697-98 (1984); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 382 & n.6 (1983); Blum v. Bacon, 457 U.S. at 137 n.5. This practice enables the Court to avoid constitutional issues on which there is no consensus. *See, e.g.,* Blum v. Bacon, 457 U.S at 146 (unanimous ruling on supremacy clause issue made moot claim that state program excluding recipients of Aid to Families with Dependent Children (AFDC) from receiving emergency cash assistance violated Equal Protection Clause). *Compare* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (unanimous resolution on preemption issue made moot question whether state statute prohibiting broadcast of liquor advertisements violated First Amendment) *with* Posadas de P.R. Assocs. v. Tourism Co., 106 S. Ct. 2968 (1986) (five-to-four split on whether Puerto Rico statute restricting advertising of casino gambling violated First Amendment). The Court's reliance on congressional willingness to overturn mistaken cases of statutory interpretation has been severely criticized in several contexts. *See, e.g.,* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1472-73 (1987) (Scalia, J., dissenting). *See generally* Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future,* 13 HASTINGS CONST. L.Q. 185, 211 (1986).

12. The cases usually contain some version of the following:

> It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because the 'Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

ries are useless in difficult cases. It is often hard to determine which category governs a particular case. One of the nation's eminent appellate judges recently wrote, "We are somewhat wary that these ready citations list, but do not describe, and catalog, but do not define, any real distinctions among the various types of preemption."[13]

The Supreme Court's failure to appreciate the link between preemption and the Constitution is the chief cause of the defects in preemption doctrine. This Article explores ways in which that link might be restored. Part One examines the salient difficulties with the Supreme Court's current preemption jurisprudence. First, the Court's cases holding that state laws must fall if Congress has "occupied the field" of legislation have failed to provide courts with adequate guidance for determining whether a field has been occupied. Second, the Court's pronouncement that state laws must yield if they "stand as an obstacle" to a congressional objective is functionally indistinguishable from the Court's holding that state laws are ousted when Congress "occupies the field," although the Court treats the two rules as separate bases for preemption. The "stands as an obstacle" test also forces the courts either to search quixotically for the "spirit" of a statute, or to choose between two doctrinally deficient theories of preemption, which I shall call the "floor, not ceiling" theory and the "delicate balance" theory.

Part Two discusses the roots of this dissonance in preemption, particularly the Court's reluctance to consider preemption doctrine as an aspect of constitutional law and its preference to treat preemption as an exercise in statutory interpretation. Part Two argues that preemption cases raise important questions about the nature of federalism under our Constitution and present delicate questions concerning the legislative

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Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted). For other recent incantations of the test, see California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1425 (1987); International Paper Co. v. Ouellette, 107 S. Ct. 805, 811 (1987); California Fed. Sav. & Loan Ass'n. v. Guerra, 107 S. Ct. 683, 689 (1987).

Justice White listed four types of preemption in *Pacific Gas & Electric*: express preemption, "leaving no room" preemption (known as "occupying the field" preemption in other cases), physical impossibility preemption, and obstacle preemption. But citing *Pacific Gas & Electric* in a later case, Justice White found only two general types of preemption, one with two subtypes. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Justice Marshall identifies three types of preemption. *See Guerra*, 107 S. Ct. at 689. One commentator agrees with Justice Marshall but suggests that one type has two sub-types. Note, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, 60 NOTRE DAME L. REV. 1233, 1235 (1985).

13. Palmer v. Liggett Group, 825 F.2d 620, 624 (1st Cir. 1987) (Brown, J.). *See also* Missouri Pac. R.R. v. Railroad Comm'n, 833 F.2d 570, 573 (5th Cir. 1987) ("these guides are easier to state than to apply. . . .").

process and administrative discretion. Finally, Part Two considers preemption as constitutional law in light of how far preemption doctrine has strayed from the Framers' understanding of relations between the federal government and the states.

Part Three suggests four ways in which the courts could restore the link between preemption and the Constitution. First, the courts might adopt a two-tiered approach to preemption under which statutes enacted pursuant to heavy federal interests would enjoy greater preemptive force than other federal laws. Second, courts could act to ensure that plaintiffs relying on preemption doctrine are not trying to revive dormant commerce clause restrictions on state power. Third, courts should view preemption invoked by administrative agencies more critically. Finally, courts should require Congress to state explicitly its intention to preempt state laws outside those areas where the Constitution gives the federal government exclusive power.

I. The Preemption Puzzle

A. Occupying the Field

Few preemption cases, and even fewer difficult ones, present situations in which state and federal laws actually conflict.[14] Many preemption cases involve federal and state regulations of the same subject that are motivated by the same purposes, with the state regulation going "further" than the federal law.[15] The parties challenging such state regulation usually argue that Congress has precluded any further state regulation by legislating comprehensively in the field. This type of preemption is called "occupying the field"[16] or "leaving no room" for the states.[17]

"Occupying the field" cases pose at least two definitional difficulties for the courts. First, what is the field? Second, what determines whether or not it is occupied? This Article is concerned with only the latter question as it touches more directly on fundamental issues concerning the allocation of power under the Constitution.

When a court finds that Congress has occupied a field, it holds that the states are completely barred from regulating in that area. Courts bar

14. For an example of an easy case, see Rose v. Arkansas State Police, 479 U.S. 1 (1986).

15. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 689 (1987); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 172-73 (1942) (Stone, C.J., dissenting).

16. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

17. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983); Rice v. Santa Fe Elevator Corp., 331 U.S. at 230.

state regulation not because the Constitution gives Congress certain exclusive powers such as the foreign affairs power,[18] or power over immigration,[19] but because Congress has deemed it necessary and proper to exclude the states from a particular area. Congress may occupy a field even when it seems unlikely that the operation of state law would disrupt the regulatory scheme Congress has established.

The first of the Court's modern preemption cases, *Cloverleaf Butter Co. v. Patterson*,[20] provides an example. In *Cloverleaf Butter*, the Supreme Court held that pervasive federal regulation of butter manufacturing precluded further state regulation in the field. Butter manufacturing is not an area for which the Constitution requires a single, uniform rule, provided solely by the federal government. How, then, did the Supreme Court conclude that Congress intended to exclude the states entirely? The Court noted that the Department of Agriculture had been given authority to protect consumers' interests "throughout the process of manufacture and distribution," and that the Department had regulated "such minutiae as the clean hands of the employees and the elimination of objectionable odors."[21] In short, the Court concluded that the existence of broad and detailed regulatory authority in the hands of the federal government was inconsistent with any regulation by the states. The Court did not look to any statutory language expressing the intent to prevent state regulation; instead, the Court was persuaded that the detailed statutes and regulations that the federal government had established precluded interference by the states.[22]

The idea that a complex federal scheme could be disrupted by the mere existence of state legislation has a certain logical appeal. For example, Congress could conclude, as it has in the field of employees' retirement and health benefits, that the burden of complying with regulation is so heavy that parties should have to follow only one set of laws. In that field, however, Congress has *expressly* stated that state laws are preempted.[23] Without an explicit statement by Congress, courts are faced with a highly subjective question: how "complex" must a federal scheme be for a court to conclude that state law is preempted? This question,

18. U.S. CONST. art. 1, § 8.

19. U.S. CONST. art. 1, § 8.

20. 315 U.S. 148 (1942).

21. *Id.* at 168.

22. For a more recent case employing an approach similar to *Cloverleaf Butter*, see City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633-34 (1973).

23. *See* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) (discussing preemption under Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (1982 & Supp. 1985)).

however, misses the point. Preemption is a matter of congressional intent to preempt state law, not a matter of legislative complexity.[24] The complexity approach to "occupying the field" does not address Congress' intent to preempt state law. Instead, this approach forces courts to balance federal and state laws and to hold state laws preempted when the courts conclude: (a) a scheme of regulation is so broad and detailed as to be comprehensive, and (b) because the scheme is comprehensive, any further regulation by the states would disrupt Congress' general vision for the field.

In some recent cases, the Supreme Court has abjured the *Cloverleaf Butter* approach and has declined to acknowledge the comprehensiveness of administrative regulations as a factor favoring preemption. The Court has reasoned that administrative agency regulations are always more complex than statutes, for they are intended to address issues in greater detail.[25] Moreover, Justice Powell once wrote for the Court that the comprehensive nature of the federal work-incentive statute governing recipients of Aid to Families with Dependent Children (AFDC) did not require preemption of similar state provisions, because most modern social and regulatory problems require complex treatment.[26] But one recent case, *International Paper Co. v. Ouellette*,[27] suggests that the Court has not given up on the complexity argument altogether. In *Oullette*, the Court was loath to find that Congress had occupied the entire field of water pollution regulation. Nevertheless it concluded that the comprehensiveness of the federal scheme of environmental regulation required preemption of state nuisance actions, as additional state regulation would interfere with federal administrative uniformity.[28] Thus, comprehensiveness may or may not be a factor favoring preemption, prompting one court of appeals to state that "preemption is not to be inferred *merely* from the comprehensiveness of the federal scheme."[29] The comprehensiveness approach evidently does not provide much guidance.

24. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2216 (1987) (focus of preemption doctrine is congressional intent); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1983); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988) (preemption issue "largely a matter of statutory construction").

25. *See* California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1426 (1987); Hillsborough County, Fla. v. Automated Medical Labs, 471 U.S. 707, 718 (1985).

26. New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973); *accord* De Canas v. Bica, 424 U.S. 351, 359-60 (1976).

27. 107 S. Ct. 805 (1987).

28. *Id.* at 813.

29. Automated Medical Labs v. Hillsborough County, Fla., 722 F.2d 1526, 1531 (11th Cir. 1984) (emphasis added), *rev'd*, 471 U.S. 707 (1985).

B. Standing as an Obstacle: The "Delicate Balance" Theory

1. The Development of the Theory

Even if Congress has not occupied a field, a state law may be preempted if it "stands as an obstacle to the full purposes and objectives of Congress."[30] Although this type of preemption now poses a significant threat to the states' regulatory authority, the phrase "stands as an obstacle" was originally used merely to describe existing doctrine.

In the standard recitation of preemption tests repeated in Supreme Court opinions, the "stands as an obstacle" prong is usually followed by a citation to *Hines v. Davidowitz*.[31] *Hines v. Davidowitz* was an "occupying the field" case. Davidowitz challenged Pennsylvania's alien registration law, requiring him to carry an identification card at all times, as an encroachment on Congress' power to regulate immigration. A three-judge district court held the Pennsylvania alien registration law unconstitutional. Congress passed a federal alien registration act during the pendency of Pennsylvania's appeal to the Supreme Court; therefore, the focus of the appeal shifted from the existence of constitutional restraints on Pennsylvania's power to require alien registration to the preemptive effect of the federal statute. The two statutes were not in actual conflict; the state was not prohibiting something required by the federal government nor vice versa. The Court indicated, however, that the absence of actual conflict could not be dispositive on the preemption issue. The real question was whether the Pennsylvania law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[32]

As a rule of decision for preemption cases, the "stands as an obstacle" formula exists at a lofty level of generality. Particularly when read in the context of the *Davidowitz* opinion, it is clear that the formula was not intended to advance a new test for preemption. It merely restated

30. For lower court cases recognizing the "standing as an obstacle" approach as a distinct prong of preemption doctrine, see Abbot v. American Cyanamid Co., 844 F.2d 1108, 1111 (4th Cir. 1988); Massachusetts Medical Soc'y v. Dukakis, 815 F.2d 790, 791 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 229 (1987).

31. 312 U.S. 32 (1941). *See, e.g.*, Felder v. Casey, 108 S. Ct. 2302, 2306 (1988); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Goldstein v. California, 412 U.S. 546, 561 (1973).

32. Hines v. Davidowitz, 312 U.S. at 67 (footnote omitted). Some commentators viewed *Hines v. Davidowitz* as the fountainhead of a period of expansive construction of preemption doctrine, which ended with De Canas v. Bica, 424 U.S. 351 (1976) (California statute prohibiting employment of undocumented aliens not preempted by federal immigration law). *See* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 306 (1977). Reports of preemption's demise, like those of Mark Twain's death, have been greatly exaggerated.

the tests that the Court had previously advanced to assess preemption, tying together the "actual conflict" prong with the "occupying the field" prong.

Hines v. Davidowitz was rarely cited until the "stands as an obstacle" issue reemerged twenty years later in *Florida Lime & Avocado Growers v. Paul*.[33] *Florida Lime & Avocado Growers* was the Supreme Court's foray into the long and bitter war between California and Florida agricultural interests over California's attempt to exclude Florida avocados.[34] The majority held that the California law did not stand as an obstacle to the accomplishment of Congress' purposes and objectives.[35] The majority understood its analysis simply to embrace two long-standing preemption tests: the existence of an actual conflict between federal and state laws, and the occupation of an entire field by Congress.[36] The *Florida Lime & Avocado Growers* majority used the phrase "stands as an obstacle" much as the *Davidowitz* majority had used it, as a catchall referring to the general spirit of preemption.

The dissenters in *Florida Lime & Avocado Growers*, however, introduced a new aspect to preemption doctrine that may yet prevail as the great hope of opponents of state economic regulation. The dissenters concluded that even without total occupation of the field, Congress had preempted state law because its purpose in enacting federal standards was to establish uniform standards of avocado quality throughout the nation.[37] Uniformity in commerce represented a strong federal interest because "[l]ack of uniformity tends to obstruct commerce, to divide the Nation into many markets."[38] Thus the dissenters drew on themes from dormant commerce clause jurisprudence[39] (one purpose of the Commerce Clause being the establishment of a national common market)[40] to conclude that state economic regulation could not coexist with federal regulation in the avocado field.

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33. 373 U.S. 132 (1963).

34. California prohibited the sale of avocados that were less than eight percent oil by weight, on the theory that avocados picked with too little oil were underripe and failed to mature after picking. Florida avocados were already subject to federal marketing orders that gauged maturity without regard to oil content. Many Florida avocados were ripe under federal regulations but not under California law. *Id.* at 133-34.

35. *Id.* at 141.

36. *Id.*

37. *Id.* at 169 (White, J., dissenting).

38. *Id.*

39. *See id.* (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

40. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976). *See also* McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).

The dissenters' move was subtle but significant. The regulation of avocado quality was not a field where state regulation was absolutely barred; federal interests did not clearly predominate, and the very nature of the field did not require uniformity.[41] Nor was avocado quality a field expressly occupied by Congress. The dissenters suggested that even absent a clearly expressed congressional intent to preempt the field, courts might conclude that some federal regulation requires the ouster of parallel state legislation. Following the dissenters' view, courts should hold that state laws are preempted whenever the federal government strikes a particular balance among competing considerations that could be upset by more stringent state regulation.[42]

The Court has never really repudiated the view of the *Florida Lime & Avocado Growers* dissenters, and it has used "delicate balance" language in subsequent majority opinions. Indeed, the notion that state laws should be preempted when Congress has struck a "delicate balance"[43] among competing interests in a particular field may have great appeal for those advocating judicial restraint. To a court that believes that social policy decisions are best made by a legislature representing various, competing interests, legislation appears as a package of compromises that could be untied through judicial interference. The arguments in favor of preempting state laws that could disrupt the delicate balance effected by Congress closely resemble the arguments against implying rights of action for money damages: Congress has surveyed the area; given a realistic view of the legislative process, as dominated by competition among interest groups, what Congress has not legislated is surely as important as what Congress has legislated; and state legislation

41. *See* Florida Lime & Avocado Growers v. Paul, 373 U.S. at 144 (majority noting that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern").

42. As discussed *infra*, in text accompanying notes 66-68, it is often quite difficult to distinguish an "occupying the field" argument from a "delicate balance" argument. For example, in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the Court held that Burbank's ordinance prohibiting jet aircraft takeoffs from Burbank airport was preempted by the Federal Aviation Act of 1958 and the Noise Control Act of 1972. After discussing the "pervasive" control of aircraft flights by the federal government, 411 U.S. at 638, a factor relevant to "occupying the field" analysis, the Court stressed that the Federal Aviation Act had established a "delicate balance" between safety and efficiency. *Id.* The Court may have found that Congress occupied the field because it had struck a "delicate balance" between the two most important factors. The Court's preemption analysis in *City of Burbank* was further complicated by its suggestion that Congress had expressly preempted local curfews of aircraft flights, *id.* at 634-37 (quoting legislative history), and that Burbank's ordinance conflicted with a Federal Aviation Administration (FAA) order, *id.* at 626 n.2. Rather than rely on these more direct avenues of preemption analysis, the Court chose the more meandering "stands as an obstacle" road. *Id.* at 639.

43. *See* City of Burbank v. Lockheed Air Terminal, 411 U.S. at 638-39.

should not disrupt the outcome of the legislative process by speaking when Congress has been silent.

It is not surprising, therefore, that Justice Powell, who opposed the implication of rights of action from federal statutes as an intrusion on the legislative domain,[44] favored preemption to protect a delicate balance set by Congress.[45] The majority opinion written by Justice Powell in *International Paper Co. v. Ouellette* is an excellent recent example of the "delicate balance" theory.[46] The Court recognized that the federal Clean Water Act had not occupied the entire field of water pollution regulation.[47] Nonetheless, the Court concluded that by setting up an elaborate permit system for the discharge of polluting effluents, Congress had established a delicate balance that should not be upset by the application of Vermont law. The language of the majority opinion is a classic expression of the view that legislation comprises a package of compromises.[48]

Ouellette represented a victory for a preemption theory that had been rejected at least twice by the Supreme Court in the previous three years.[49] Five years earlier in *Edgar v. MITE Corp.*, three Justices had advanced this "delicate balance" theory, with only slight success.[50] But

44. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981); Cannon v. University of Chicago, 441 U.S. 677, 730-48 (1979) (Powell, J., dissenting).

45. The theme of balancing ran throughout Justice Powell's jurisprudence. *See generally* Kahn, *The Court, The Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

46. 107 S. Ct. 805 (1987). *Ouellette* involved an attempt by Vermont residents to proceed under Vermont nuisance law against an International Paper Company plant in New York.

47. *Id.* at 812.

48. "Congress implicitly has recognized that the goal of the [Clean Water Act]—elimination of water pollution—cannot be achieved immediately, and that it cannot be realized without incurring costs." *Id.* at 813.

49. *See* Hillsborough County, Fla. v. Automated Medical Labs, 471 U.S. 707, 720-21 (1985) (rejecting view that federal regulation of blood plasma production had struck a particular balance between plasma safety and availability); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250-52, 256 (1984) (rejecting Justice Powell's dissenting argument that state cause of action for exposure to plutonium taken from nuclear plant interfered with balance between nuclear development and public safety struck by federal administrative agency).

50. 457 U.S. 624, 630-34 (1982) (plurality opinion by White, J., joined by Burger, C.J., and Blackmun, J.) Chief Justice Burger, Justice White, and Justice Blackmun concluded that an Illinois antitakeover statute upset the balance Congress struck through the Williams Act among the interests of investors, management, and the takeover bidder. The preemption theory of the *MITE* plurality failed to command a majority of the Court, and the Court later adopted a quite different interpretation of the Williams Act. In CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987), a majority of the Court concluded that the Williams Act was intended to protect investors from the pressures of tender offers, not promote investor "autonomy" from both management and tender offerors. *Compare* Edgar v. MITE Corp., 457 U.S. at 639-40 (plurality opinion) (Williams Act intended to make investors "free to make their own decisions") *with* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1646 (1987). The Court thus discarded the approach of the *MITE* plurality, with its "delicate bal-

in the labor field the "delicate balance" theory has scored a significant victory. The doctrine of "*Machinists* preemption"[51] currently protects the balance established by Congress between management and labor in the collective bargaining process by precluding state regulation of the peaceful economic weapons available to both sides.[52] The Court adopted Professor Archibald Cox's view[53] that in matters of labor disputes *generally*, Congress has struck a "balance of protection, prohibition, and laissez-faire."[54] As a result of "*Machinists* preemption," the states' authority to regulate peaceful union activity is quite limited.

The Court has also been willing to conclude that a balance struck by an administrative agency preempts state legislation. Administrative-

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ance" implications. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. at 1654-55 (White, J., dissenting) (arguing that Indiana statute protects shareholders as a group, whereas Williams Act protects right of individual shareholders to make decisions).

51. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 750-51 (1985); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

52. "*Machinists* preemption" had its origin, as did "delicate balance" preemption generally, in an "occupying the field" case. *Cf. supra* notes 31-36 and accompanying text (discussing *Hines v. Davidowitz*). In that case, Local 20, Teamsters v. Morton, 377 U.S. 252 (1964), the Supreme Court held that the states could not prohibit striking unions from pressuring the management of other companies to boycott a struck employer. The Court concluded that Congress had occupied the field of secondary strike activity, so the states were not free to impose any further restrictions on union activity in that area. *Id.* at 258-59. *Machinists*, which followed *Teamsters*, did not involve secondary strike activity.

53. Cox, *Labor Law Preemption Revisited*, 45 HARV. L. REV. 1337, 1352 (1972).

54. *Machinists*, 427 U.S. at 140 & n.4. The Court took a tremendous leap from holding that the small field of secondary boycotts was occupied to concluding that Congress had established a delicate balance for all collective bargaining activities. Balancing preemption also emerged in one of the most widely noted preemption cases in the courts of appeals, Palmer v. Liggett Group, 825 F.2d 620 (1st Cir. 1987). In *Palmer*, the First Circuit held that a state cause of action against tobacco producers based on the duty to warn of the risks of smoking was preempted by the federal Cigarette Labelling Act's requirement of specific warning labels on cigarette packages. The First Circuit noted that Congress had explicitly stated that the labels represented a balance between health and commerce. Permitting a plaintiff to proceed against tobacco companies on a theory of failure to warn could lead to jury verdicts against tobacco companies even when the companies had complied with federal labelling law, and thus could lead to more stringent cigarette labelling standards imposed as a matter of state common law. 825 F.2d at 627.

For an arguably contrary view, compare Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988). In *Abbot*, a child sued the manufacturer of a diphtheria-tetanus-pertussis vaccine on a state law theory of breach of implied warranty, encompassing failure to warn. Federal regulations required certain labelling of the potential adverse reactions associated with the vaccine's use, and these labels, once approved, could not be changed without federal approval. *See id.* at 1112. The Court did not consider the effect that a judgment on the failure to warn theory might have on the content of the labels. Federal law may have expressly allowed the states flexibility in this area, however. *See id.* at 1117 (Wilkins, J., concurring) (federal law establishes rebuttable presumption that warnings are adequate if they comply with federal regulation).

balancing preemption is initially surprising because the "delicate balance" theory rests largely on the idea that political decisions made by Congress to accommodate competing interests in a particular way should not be upset by the states. In the classical view of administrative law, Congress makes the overarching political decisions, leaving the agencies to fill in the details.[55]

Of course, the agencies frequently balance competing political interests.[56] The Court still attempts to mask this reality in preemption cases, however, by describing the function served by the agencies as what might be called "technical balancing," *i.e.*, reconciliation of difficult but low-level considerations such as cost and timing.[57] Technical balancing allows the Court to justify preemption in the name of administrative efficiency and uniformity. Justice Powell justified preemption in *Ouellette* precisely along these lines,[58] and he urged the same view in *California Coastal Commission v. Granite Rock Co.*[59] and *Silkwood v. Kerr-McGee Corp.*[60] Yet the technical balances struck by the administrative agencies overseeing particular programs often reflect important political decisions, and the states might well interfere with these decisions by regulating the same field. For example, in approving rates for interstate sales of power, the Federal Energy Regulatory Commission (FERC) makes decisions that might appear impenetrably technical to many, but these decisions, which indirectly affect the price that consumers pay for power, often have profound political repercussions and are the subject of intense lobbying and litigation by utilities and consumer groups. Thus by precluding the states from setting even intrastate wholesale power rates, the Court prevents the states from achieving a different balance than the one struck by FERC.[61]

2. *The Unraveling of the Theory*

If this concept of regulation as a delicate balance among competing interests comports with suspicions about the reality of the legislative and

55. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745-49 (D.D.C. 1971) (three-judge court).

56. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3:3, 3:5 (2d ed. 1978).

57. *See, e.g.*, Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981); Ray v. Atlantic Richfield Co., 435 U.S. 151, 177-78 (1978).

58. *See* International Paper Co. v. Ouellette, 107 S. Ct. 805, 813-14 (1987).

59. 107 S. Ct. 1419, 1433-34, 1436, 1437 (1987) (Powell, J., concurring in part and dissenting in part).

60. 464 U.S. 238, 281-83 (1984) (Powell, J., dissenting).

61. *See* Nantahala Power & Light Co. v. Thornburg, 106 S. Ct. 2349 (1986). *But cf.* New Orleans Pub. Serv. v. Council of New Orleans, 833 F.2d 583, 586 (5th Cir. 1987) (states retain authority to set intrastate retail rates for electricity).

administrative processes, then what is wrong with it? If courts gave preemptive effect to every federal regulation reflecting such a balance, state laws would soon be preempted in almost every field imaginable. Consider, for example, the preemption claim recently advanced to, but rejected by, the First Circuit in *Massachusetts Medical Society v. Dukakis*.[62] Under the federal Medicare system, a Medicare carrier reimburses doctors either on the basis of an itemized bill or on the basis of the assignment of the patient's right to payment from the carrier. When a doctor chooses the assignment method, Medicare pays him directly for eighty percent of a "reasonable charge." The doctor may then seek the remaining twenty percent of the reasonable charge from the patient but may not seek payment above any reasonable charge. Under the itemized-bill method, however, the doctor obtains his fee from the patient, not Medicare, and Medicare implicitly permits the doctor to "balance bill" the patient, or to seek payment above the reasonable charge.[63] Balance billing under the itemized bill method thus allows the doctor to weigh the risk of patient nonpayment against the reward of obtaining more than a reasonable charge. Massachusetts prohibited doctors from balance billing the patient even under the itemized-bill method.

The doctors' organizations argued that the state was interfering with the balance that Congress had established through Medicare. The federal government had intentionally given the doctors two options for billing, yet the state took one of those options away. This state interference altered the balance struck by Medicare between affordability (ensuring that elderly patients can afford their medical bills) and access (ensuring that doctors will not stop taking Medicare patients because the doctors feel underpaid).[64] The doctors' argument made a great deal of sense. Compromises between affordability and access run throughout Medicare.[65]

The problem with balancing preemption is simple but vexing. If, as we suspect, virtually every federal regulatory statute reflects a delicate balance among competing interests, and if the courts conclude that such a balance should have preemptive effect, the states would soon be left with only a tiny amount of legislative authority. The "delicate balance" theory overlooks one of the most obvious characteristics of federalism:

62. 815 F.2d 790 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 229 (1987).

63. 815 F.2d at 793.

64. The court's opinion indicates that it would not deny that the Massachusetts rule might be preempted if doctors actually became disenchanted with Medicare because of the ban on balance billing. The court found it difficult to believe that doctors were actually abandoning Medicare because of the balance billing restriction. *Id.*

65. *See generally* P. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982).

at least two levels of legislative activity, federal and state, operate in this country. Congress' decision to strike a particular balance on the federal level does not necessarily mean that it is unwilling to have the balance altered by the states.[66] Proponents of the "delicate balance" theory might argue, in reply, that if the states are allowed to alter the balance struck by Congress, then there is no reason for Congress to strike a balance.[67]

Simply put, a conclusion that Congress has established a balance among competing interests that requires preemption has the identical effect as a conclusion that Congress has occupied the field. If Congress has occupied the field, then the balance it has struck cannot be altered by the states, and the states are divested completely of authority in that subject area. If, however, Congress has not occupied the field but continues to operate under the assumption that state legislatures continue to pass laws and state administrators continue to issue regulations,[68] "delicate balance" preemption requires the irreconcilable positions that (1) Congress has struck a general balance that the states must not undo but (2) the states may continue to pass laws affecting the field of legislation. The only way to resolve this conundrum is to reconvert "delicate balance" preemption back into "occupying the field"—that is, to mark out a mini-field that Congress has preempted.

This is precisely what the Court has done recently with "*Machinists* preemption." "*Machinists* preemption" rests on the assumption that the National Labor Relations Act struck a particular balance between management and labor, and among protection, prohibition, and laissez-faire.[69] Virtually every state law touching on the subject of employment

66. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 240 (1986) (Powell, J., dissenting); Edgar v. MITE Corp., 457 U.S. 624, 655 (1982) (Stevens, J., concurring in part and concurring in the judgment).

67. There is also tension between "delicate balance" preemption and the currently prevailing jurisprudence about implied private rights of action in federal statutes. The modern cases in the latter field are governed by the four-factor analysis of Cort v. Ash, 422 U.S. 66, 78 (1975). The last prong of the *Cort* test asks, "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* This prong suggests that, in areas where state and federal authority overlap, federal courts should take care that federal law does not disturb the balance that the *states* have established.

68. This assumption is not just a fiction. Many members of Congress serve in state government before running for Congress, and they undoubtedly have a solid grasp of the range of substantive regulation in effect, at least in their home states.

69. *See supra* text accompanying notes 51-54.

can affect this balance.[70] Appreciating the potentially drastic impact of "*Machinists* preemption" on state labor legislation, employers began to argue that a broad range of such legislation, such as laws giving unemployment benefits to strikers,[71] requiring employers to provide health care benefits to their employees,[72] and mandating severance pay after plant closings,[73] altered the balance struck by federal labor law. In response, the Court retreated, holding that the federal balance governs only the collective bargaining process and does not apply to what one might call "substantive" employment regulation such as minimum wage laws or employment security provisions.[74] Essentially, the Court abandoned the "balancing" basis of *Machinists* preemption and instead carved out a small field for Congress to occupy.

C. Not Standing as an Obstacle: "Floor, Not Ceiling"

"Delicate balance" preemption has not had the field to itself. On the contrary, it has been overshadowed lately by the concept that federal statutes generally operate as a floor below which state regulations may not drop, not a ceiling above which they may not rise.[75] The most recent manifestation of this theory is Justice Marshall's opinion for the Court in *California Federal Savings & Loan Association v. Guerra*.[76] In *Guerra*, the petitioners argued that California's statute requiring unpaid leave for pregnant workers was preempted by the Pregnancy Discrimination Act (PDA), which requires that women affected by pregnancy be treated "the same" as other disabled but nonpregnant employees.[77] In light of the "remedial purpose of the PDA"[78] and the goal of Title VII (of which the PDA is a part) "to achieve equality of employment opportunities and

70. Justice Powell expressed concern on this subject in *Machinists*. Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 156 (1976) (Powell, J., concurring).

71. *See* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979).

72. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

73. *See* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987).

74. *See, e.g., id.* at 2222-23; Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 754-58. For a case involving a similar retreat, see CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1647 (1987) (remarking that if the Court held that delay in takeovers occasioned by Indiana's anti-takeover statute warranted preemption, it would call into question "a variety of state corporate laws of hitherto unquestioned validity").

75. For an older example of the "floor, not ceiling" theory, see Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 723-24 (1963).

76. 107 S. Ct. 683 (1987).

77. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982).

78. *Guerra*, 107 S. Ct. at 691.

remove barriers that have operated in the past,"[79] the Court concluded that California's pregnancy leave policy was consonant with the animating spirit of the PDA.

Similarly, in *CTS Corp. v. Dynamics Corp. of America*,[80] decided during the same Term as *Guerra*, the Court upheld Indiana's takeover statute because it "further[ed] the federal policy of investor protection" codified in the Williams Act.[81] Two terms earlier, the Court relied on similar reasoning to uphold a Florida county's ordinance regulating blood plasma production as not preempted by Food and Drug Administration regulations.[82] In the plasma case, the Court concluded that the federal regulations merely established minimum safety standards, and that the states were free to impose more stringent standards.[83]

To many, the "floor, not ceiling" theory may represent precisely how preemption should operate. As a vision of federalism, this view parallels Justice Brennan's campaign for the protection of individual rights by state constitutions beyond the guarantees afforded by the federal Constitution.[84] In preemption doctrine, however, the "floor, not ceiling" approach has difficulties as yet unresolved by the Court.

First, to be successful, this approach depends on the use of creative methods of statutory interpretation usually viewed with great suspicion by the Supreme Court. In *Guerra*, for example, the Court had to get around the problem that the PDA requires pregnant employees to be treated "the same" as disabled, nonpregnant employees. If the Court had decided that the same meant absolutely "the same," California's

79. *Id.* at 693 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)). The PDA is actually an amendment to Title VII. *See* 107 S. Ct. at 687 n.6.

80. 107 S. Ct. 1637 (1987).

81. *But cf.* Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96, 110-16 (1987). Professor Langevoort, who takes a skeptical view of the Court's analysis in *CTS*, argues that the Court's preemption analysis shifted from a "broad interpretive approach" to strict constructionism between Edgar v. MITE Corp., 457 U.S. 624 (1982) and *CTS*. Langevoort, *supra*, at 112. This roughly parallels a shift from the "stands as an obstacle" prong of preemption to inquiring whether an "actual conflict" existed. But regardless of which analysis it used, the Court had to ask what the policy of the Williams Act was before deciding whether it preempted state laws. If the Court had decided that the Williams Act established a "delicate balance," it could much more easily have held that the Act preempted state anti-takeover laws. *See* Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 261-63 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987). If, on the other hand, the Williams Act has the policy of establishing a "floor" for investor protection, then under current preemption doctrine, most state statutes furthering the same policy must be valid.

82. Hillsborough County, Fla. v. Automated Medical Labs, 471 U.S. 707 (1985).

83. *Id.* at 721.

84. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

statute might well have been preempted.[85] The Court had to abandon what has become its dominant rule of statutory interpretation, that the plain language of a statute will ordinarily resolve a controversy,[86] and rely instead on the underlying purposes of the statute. As the *Guerra* court stated, "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[87] Such reliance on the policy behind the statute, instead of on its language, is rare for the present Court[88] and, in the context of Title VII, provoked a storm of protest from the dissenters later in the term.[89]

A second problem is that emphasizing the spirit rather than the letter of the laws can lead courts to make simplistic and naive conclusions about legislative intent. In some cases, like those involving Title VII, the Court may concentrate on the purpose instead of the language of the legislation to make clear that the statute should be applied with reference to simple and abiding principles. But the Court does federal courts and private parties a great disservice when it oversimplifies statutes like the Williams Act by stating that the federal policy is merely "investor protection." These clumsy interpretations provide ammunition for opponents of "judicial activism" who argue that courts are ill-suited to make social policy, and bolster the suspicion that the courts have only a loose grasp of complex and delicate matters such as corporate takeovers. Such vague statements also support the rationale behind "delicate balancing" theory, that the difficult process of accommodating society's wants and needs is best left to Congress, and that once Congress has struck that balance, the courts should vigorously enforce it.

Furthermore, the "floor, not ceiling" approach encounters insuperable difficulties when Congress is explicit (or honest) about striking a balance among competing interests. Consider, for example, the two similar

85. The majority in *Guerra* did not believe this would be the case, however, because California's pregnancy-leave policy did not require employers to treat pregnant employees better than nonpregnant ones; it simply required employers to offer leave to pregnant employees. *Guerra*, 107 S. Ct. at 694-95. *See generally* Note, *Employment Equality under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985).

86. *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894-98 (1982). *But see* Schauer, *Formalism*, 97 YALE L.J. 509, 517, 533 (1988) (arguing that reliance on purpose rather than words of rule is "current paradigm of American statutory interpretation" and citing several examples of reliance on purpose rather than words, including *Guerra*).

87. *Guerra*, 107 S. Ct. at 691 (quoting Steelworkers v. Weber, 443 U.S. 193, 201 (1979) (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892))).

88. *See Note, supra* note 86.

89. *See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1471-75 (1987) (Scalia, J., dissenting).

cases of *Michigan Canners & Freezers Association v. Agricultural Marketing & Bargaining Board*[90] and *Hayfield Northern Railroad v. Chicago & Northwest Transportation Co.*[91] *Michigan Canners* involved a conflict between the federal Agricultural Fair Practices Act and Michigan's Agricultural Marketing and Bargaining Act. The federal act, which was designed in part to help American farmers in their economic relations with powerful food processors, permits farmers to market their produce through agricultural cooperatives. The Michigan act took this policy a step further by requiring farmers to abide by a contract negotiated by a cooperative if that cooperative controlled more than fifty percent of total production.[92] The state act could have assisted the Michigan farmers significantly in their dealings with food processors.[93] The Supreme Court held the Michigan law preempted, noting that Congress had specifically prohibited the coercion of farmers to join cooperatives.[94] Congress had heard testimony from representatives of food processors who stated that an agricultural cooperative can attain a monopoly position to the detriment of consumers.[95] In short, the federal act bolstered the power of the farmers a bit, but not too much.

In *Hayfield Northern Railroad*,[96] decided the day after *Michigan Canners*, the Court considered a preemption challenge to the use of Minnesota's eminent domain power by commercial shippers to obtain control of the track on unprofitable rail lines that freight railroads wished to abandon. The rail carriers hoped to pick up the track for redeployment on profitable lines. The process by which such lines could be abandoned and redeployed is comprehensively governed by the federal Staggers Rail Act, which permits shippers to offer to subsidize unprofitable lines that carriers seek to abandon. The Staggers Act prescribes an administrative procedure by which the parties can bargain for a price, or if they fail to agree on a price, can have the Interstate Commerce Commission (ICC) establish a price.[97]

Eminent domain power gave Minnesota shippers a second bite at the apple: they could participate in the ICC proceeding, withdraw, and

90. 467 U.S. 461 (1984).

91. 467 U.S. 622 (1984).

92. 467 U.S. at 464-68.

93. Undoubtedly, more cynical explanations could be advanced for the policy, such as capture of the Michigan legislature by agricultural cooperatives that themselves had become powerful.

94. 467 U.S. at 473-74.

95. *Id.* at 472.

96. 467 U.S. 622 (1984).

97. *Id.* at 629-30.

then try for a more favorable price in state courts.[98] Although the Staggers Act fairly explicitly attempts to balance the traditionally adversarial interests of shippers and railroads, the Supreme Court declined to hold that the state eminent domain action interfered with the operation of the Staggers Act.

Anticipating that the Court might reject their version of the "delicate balance" theory, the railroads also argued that the Staggers Act was animated by an overall purpose "to make the railroad industry more efficient and productive."[99] If the Staggers Act set a "floor" of railroad efficiency below which the states could not drop, the exercise of the Minnesota eminent domain power plainly had to give way. But to this argument, the Court replied that the Staggers Act did not have such an overarching purpose. Indeed, the Staggers Act is filled with legislative recognition of considerations other than efficiency, such as the competing interests of the shippers.[100] The railroads could not win with either the "delicate balance" theory or the "floor, not ceiling" theory.

When cases such as *Michigan Canners* and *Hayfield Northern Railroad*, presenting similar issues, are decided unanimously, yet with opposite results, there is a flaw either in the rule or in its application. As noted earlier, courts and commentators consistently state that the measure of preemption is congressional intent to preempt state law.[101] Yet the opinions in preemption cases oddly measure effects or, more precisely, they compare the effects of the state laws with the purposes of the federal laws. The courts avoid the central question, whether Congress intended to oust state law, and rather examine what general purposes Congress intended its legislation to have in the subject area and consider whether the state law interferes with these purposes in any way.

98. *See id.* at 636 (acknowledging this point).

99. *Id.* at 636-637 n.15. The Court suggested that the ICC's price determination might have res judicata effect on the state court but declined to so hold and "intimate[d] no position on the issue inasmuch as it is not now before us." *Id.* The Court instead indicated that the question presented was better analyzed in terms of res judicata than preemption. *Id.* The case was similar to the "filed rate" cases in which the Supreme Court has held that rates for the sale of power approved by the Federal Energy Regulatory Commission (FERC) are binding on state judicial and administrative proceedings. *See, e.g.*, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986). The Court should have decided the res judicata issue, for if the ICC determination was res judicata, then the state court proceeding was a mere formality. If, on the other hand, the ICC determination was not a binding adjudication, then the Court should have faced more squarely the possibility that state eminent domain power interfered with the objectives of the Staggers Act.

100. 467 U.S. at 636.

101. *See supra* note 24; *see also* Langevoort, *supra* note 81, at 110; Note, *supra* note 8, at 541.

This approach may be entirely appropriate if there is a claim of conflict between federal and state law. If the laws actually conflict, the state law must fall. The state law would fall, however, not because of a congressional intent to preempt, but because of the Supremacy Clause itself. But true preemption is more subtle, and more powerful, than simple operation of the Supremacy Clause. Preemption rests on the idea of (for lack of a better term) a "preemptive strike" against state laws *before* they conflict with federal law. There need be no actual conflict for the state law to be preempted;[102] there need only be an "interference" or an "obstacle." In many cases, "interference" exists only at the level of broad, simplistic characterizations of congressional intent.[103] As will be explained in Part Two, this understanding of preemption is at odds with conceptions of federalism prevailing now and when the Constitution was framed.

II. The Missing Link

Although the effect of a preemption is to prevent a state from enforcing its laws, preemption cases rarely indicate that the doctrine implicates the very structure of federalism established by the Constitution. The courts repeatedly state that preemption cases are decided by the intent of Congress.[104] Professor Tribe similarly assures us that preemption cases "may pose complex questions of statutory construction but raise no controversial issues of power."[105] Yet preemption does implicate controversial issues of power because of its similarity to a power that the Framers denied Congress: the power to veto state laws.[106] Preemption doctrine as a surrogate for the rejected congressional veto undermines the political safeguards of federalism built into the Constitution.

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102. For an example of analysis that confuses "standing as an obstacle" with "actual conflict," see Note, *supra* note 8, at 541, 548-49.

103. *See infra* text accompanying notes 165-75.

104. *See supra* note 24.

105. L. TRIBE, *supra* note 24, § 6-25, at 479.

106. *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 27, 29-30 (R. Ketcham 1987); THE FEDERALIST NO. 32, at 200-01 (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to the C. Rossiter 1961 edition] (state laws not to be ousted by a "mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty"); THE FEDERALIST NO. 34, at 206 (A. Hamilton) ("there is no power on either side to annul the acts of the other"); Carey, *James Madison on Federalism: The Search for Abiding Principles*, 3 BENCHMARK 27, 29-30 (1987).

A. Preemption Doctrine and the Congressional Veto

The idea of a congressional veto over state legislation first emerged at the Constitutional Convention as part of the Virginia Plan, introduced on May 31, 1787. A clause of the Virginia Plan giving Congress the power to "negative all State laws contravening in the opinion of the Nat[ional] Leg[islature] the articles of Union" passed the Committee of the Whole House without debate or dissent.[107] A week later, however, a move to replace the clause with a more forceful one, granting Congress the power to "negative all laws which to them shall appear improper" failed by a vote of seven to three, with only the large states of Virginia, Pennsylvania, and Massachusetts voting in favor.[108] The Convention was apparently not stirred by Madison's warning that a congressional veto was essential to prevent the encroachment of the states on the federal government.[109]

Those Convention delegates suspicious of increased federal powers saw two dangers in the congressional veto. First, Congress might not understand the individual states' needs in regulating purely local matters and thus might veto state laws imprudently. Second, large states might use the veto to further their own sectional ambitions at the expense of other states. Elbridge Gerry, of Massachusetts, noted that the various states "have different interests and are ignorant of each other's interests."[110] Hugh Williamson, of North Carolina, pointed out that whatever powers Congress might have in issues of national concern, the states ought to possess independence in purely local affairs.[111] Gunning Bedford, of Delaware, was even more direct in his suggestion that large states such as Pennsylvania and Virginia would use the congressional veto to "crush" the small states.[112]

One of Madison's comments suggests that the congressional veto was simply the wrong solution to an admittedly important problem. Madison was concerned that state judges, who were bound to enforce state laws, would fail to give effect to federal law.[113] The New Jersey

107. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 54 (M. Farrand ed. 1937) [hereinafter M. FARRAND].

108. 1 *id.* at 162-63.

109. 1 *id.* at 164-65.

110. 1 *id.* at 166.

111. 1 *id.* at 171.

112. 1 *id.* at 167.

113. 1 *id.* at 169. This problem, of course, is precisely what the modern Supremacy Clause addresses, requiring that the judges in every state be bound by the supreme law of the land. U.S. CONST. art. VI. The role that Madison envisioned for Congress in controlling state courts has largely been assumed by the Supreme Court through its exercise of jurisdiction over appeals from state supreme courts, *see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816);

Plan, a counterattack by delegates opposing a strong national government, addressed the problem in a proposal that closely resembles the modern Supremacy Clause.[114] This provision of the New Jersey Plan, unlike many others, actually made it into the Constitution. After further efforts by Madison to obtain support for the congressional veto failed,[115] the Convention rejected the restricted congressional veto previously approved by the Committee of the Whole House, which would have permitted a federal negative on all laws contravening, in the opinion of the Congress, the articles of union.[116] In place of the congressional veto, the modern Supremacy Clause was unanimously adopted.[117] One last attempt to insert a congressional veto, this time permitting a federal negative on state laws by a two-thirds vote of both houses, also failed. Roger Sherman pointed out that because the Supremacy Clause was in the Constitution, the congressional veto was unnecessary to protect federal interests from state encroachment.[118]

Thus the Convention explicitly adopted the Supremacy Clause as an alternative to the congressional veto, because (1) it was concerned that Congress might abuse the congressional veto, and (2) it was confident that the Supremacy Clause would ensure that state judges enforced federal law. Gouverneur Morris insinuated that under the Supremacy Clause, the business of sorting out conflicts between federal and state laws would belong to the judges, not Congress.[119] But preemption doctrine gives Congress a power very similar to, yet broader than, the one the Convention rejected. The congressional veto would have permitted Congress to strike down, after the fact, particular laws passed by the states. Preemption permits Congress to block off whole areas of legislation and say to the states, "Here you shall not enter."

Admittedly, Congress can preempt state regulation only in those fields of legislation where Congress can constitutionally operate pursuant

28 U.S.C. § 1257 (1982), and by the lower federal courts through the exercise of their jurisdiction to hear cases arising under the Constitution and their power to enjoin the enforcement of unconstitutional state laws, *see Ex parte* Young, 209 U.S. 123 (1908); 28 U.S.C. § 1331 (1982). It may not have been apparent to Madison that either of these routes would be available. Gouverneur Morris suggested precisely the regime that has actually developed: "A law that ought to be negatived will be set aside in the Judiciary departm[en]t[] and if that security should fail[] may be repealed by a Nation[a]l[] law." 2 M. FARRAND, *supra* note 107, at 28.

114. 1 M. FARRAND, *supra* note 107, at 245. The New Jersey Plan originally gave the federal executive the power to compel the states' obedience to federal law through military force.

115. *See* 1 *id.* at 363, 447; 2 *id.* at 27-28.

116. 2 *id.* at 21-22.

117. 2 *id.* at 28-29.

118. 2 *id.* at 390-91.

119. *See supra* note 113.

to its enumerated powers. Nonetheless, an attempt to distinguish between the congressional veto rejected by the Framers and the preemption doctrine in force today along enumerated-powers lines fails because the limitations on congressional power set forth in Article I, Section 8 are practically no limitations at all. The expansive interpretation of the federal commerce power prevailing since *United States v. Darby*[120] makes it very unlikely that the courts will strike down any exercise of Congress' commerce power as beyond Congress' enumerated powers. Combined with the broad reading of the Necessary and Proper Clause established by Chief Justice Marshall,[121] congressional power under the Commerce Clause includes the power to prohibit the states from enacting laws.[122]

Congress now exercises a power that the Framers probably intended to deny it. There is considerable support for the view that the expansion of Congress' commerce power was essential to enable some part of the government to address commercial problems that are national in scope, and thus beyond the power of the states to regulate effectively,[123] and yet not so national in nature as to demand regulation by Congress alone.[124] But even if the courts are not prepared to deny that Congress has the power to preempt state legislation, they can still play a large role in preserving the federal structure by fashioning a doctrine that minimizes conflicts between the federal government and the states.

120. 312 U.S. 100 (1941).

121. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

122. This distinction between congressional veto and preemption doctrine also bears an eerie resemblance to the unconvincing contrast drawn by Justice Rehnquist in National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled*, 469 U.S. 528 (1985), between preemption doctrine and the Tenth Amendment. In *National League of Cities*, the federal government argued that the application of the Fair Labor Standards Act to state and municipal governments infringed state sovereignty no more than the preemption of state regulation of the private sector already upheld by the Supreme Court. Justice Rehnquist responded:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

426 U.S. at 845. These two sentences overlook the point that many congressional statutes do regulate the States as States, because they oust not only state laws that conflict with federal laws, but any state regulation at all. For example, ERISA, 29 U.S.C. §§ 1001-1461 (1982 and Supp. 1985), preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This section of ERISA does expressly what all preemption provisions must do: it prohibits state laws. The Supremacy Clause, as interpreted by Justice Rehnquist in *National League of Cities*, merely provides a defense against existing state regulations that actually conflict with federal regulations.

123. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581, 583-85 (1985) (O'Connor, J., dissenting).

124. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

B. Divided and Concurrent Powers

The Framers probably did not expect that the simultaneous operation of congressional and state power would lead to as many conflicts, real or alleged, as appear in modern preemption cases. In *The Federalist*, at least, they indicated a belief that Congress and the states would respect a sharp division between their spheres of authority.[125] First, they felt that many of the powers delegated to Congress belonged to Congress alone. The Framers believed that it was inappropriate for the states to exercise the war power or the foreign affairs power,[126] or power over currency.[127] Modern cases have added fields such as immigration[128] and admiralty[129] to the list of areas in which the states are largely precluded from acting. Second, the Framers probably did not have the current, broader understanding of Congress' commerce power. The authors of *The Federalist* discussed the commerce power very little, apparently assuming that the necessity of congressional regulation of interstate matters was widely recognized.[130]

In the field of taxation, however, all agreed that the Constitution permitted concurrent federal and state regulation.[131] The Anti-Federalists strenuously opposed Congress' power to tax the people directly.[132] The Articles of Confederation had required Congress to rely on the states' supply of funds for the national treasury.[133] The Anti-

125. THE FEDERALIST No. 32 (A. Hamilton), No. 41 (J. Madison), No. 46 (J. Madison). *But see* Carey, *supra* note 106, at 33 (arguing that Madison believed the boundary between federal and state authority "would be worked out over time" and "could be altered").

126. U.S. CONST. art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal"); THE FEDERALIST No. 41, at 258-59 (J. Madison) (dangers of constituent states of confederacies having military power); THE FEDERALIST No. 44, at 281 (J. Madison).

127. U.S. CONST. art. I, § 10 ("No State shall . . . coin Money; emit Bills of Credit . . . ."); *see also* THE FEDERALIST No. 44, at 280-81 (J. Madison).

128. *See* Toll v. Moreno, 458 U.S. 1, 10-11 (1982).

129. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221, 227-29 (1986); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-17, at 48 (2d ed. 1975).

130. *See* THE FEDERALIST No. 45, at 293 (J. Madison). Madison's notes state that the "Clause for regulating commerce with foreign nations &c. [was] agreed to nem. con." 2 M. FARRAND, *supra* note 107, at 308. If the clause Madison referred to above is the same clause that appears in Madison's copy of the Committee of Detail's report, 2 *id.* at 181, it included the "interstate" commerce clause. Certainly the records of the Convention demonstrate nothing resembling the furor that erupted over the proposal to prohibit duties on exports from the states. *See* 2 *id.* at 306-07, 359-63.

131. *See* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 333, 399-403, 413-14, 416 (J. Kaminski & G. Saladino eds. 1981); THE FEDERALIST NOS. 31, 32, 33 (A. Hamilton).

132. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . . ." U.S. CONST. art. I, § 8, cl. 1.; *see* sources cited *supra* note 131.

133. ARTICLES OF CONFEDERATON art. VIII (1777).

Federalists argued that Congress could, by combining its taxing power with its necessary and proper clause power, simply prohibit the states from imposing their own taxes and thus endanger the very existence of the states.[134]

Hamilton particularly appreciated the force of this argument, for he understood that the taxing power was essential to any effective government. Hamilton argued that the lack of any congressional taxing power had been a chief cause of Congress' weakness under the Articles of Confederation.[135] To refute the Anti-Federalist argument that the Necessary and Proper Clause gave Congress the power to override all constitutional limitations on its authority, including limitations inherent in the federal structure, Hamilton (and perhaps Madison) suggested, albeit in a whisper, that the courts would stand ready to prevent Congress from eroding the sovereignty of the states.[136] If the courts did not enforce the constitutional limits, the people and the states could force Congress to respect the proper boundaries of federalism through their influence on senatorial and presidential elections.[137] Although Hamilton never specified what exercises of the taxing power by Congress might violate state sovereignty, he accepted the idea that the power was limited.

Today the boundary between most federal and state powers more closely resembles the elusive line that the authors of *The Federalist* attempted to draw between federal and state taxing powers than the clear line that the Framers confidently drew between federal and state powers in other spheres of operation. Three factors have made the division between the federal and state powers indeterminate. The most important factor is the vast expansion of the congressional commerce power, as interpreted by the courts and exercised by Congress. Second, the expansion of congressional power has been accompanied by a judicially blessed expansion of the states' commerce power, as the courts have abandoned both constitutional limits placed on the states by the Due Process

134. *See supra* note 131.

135. THE FEDERALIST NO. 21, at 140-43 (A. Hamilton); THE FEDERALIST NO. 31, at 195 (A. Hamilton).

136. *See, e.g.,* THE FEDERALIST NO. 34, at 204 (A. Hamilton) ("These acts will be merely acts of usurpation, and will deserve to be treated as such."); THE FEDERALIST NO. 44, at 286-87 (J. Madison) (success of congressional usurpation of state powers would depend on compliance of executive and judiciary, "which are to expound and give effect to the legislative acts"); *see also* Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 774 (arguing that in THE FEDERALIST NO. 78, Hamilton implied the availability of judicial review to protect the federal structure).

137. THE FEDERALIST NO. 32, at 197 (A. Hamilton); *accord* THE FEDERALIST NO. 45, at 290-91 (J. Madison); THE FEDERALIST NO. 46, at 296-97 (J. Madison).

Clause[138] and formalistic doctrines restricting the states to regulation of purely local commerce.[139] Modern commerce clause cases emphasize discrimination against interstate commerce and balancing of interests instead of older technical distinctions such as interstate/intrastate, direct/indirect, or retail/wholesale.[140] Today the states are more free to legislate in areas where federal law has always operated.

The ratification debates surprisingly did not presage the simple truth that even when the federal government operates within the most restricted understanding of its field of power, its regulations may conflict or nearly conflict with state regulations that are also legitimate exercises of state power. What is an army regulation to the federal government, is an exercise of the domestic relations power to the states.[141] What the federal government sees as an immigration law, the states may view as employment regulation.[142] What falls within the federal admiralty power is also covered by the states' wrongful death statutes.[143]

But rather than acknowledge that the federal government and the states share regulatory authority in several areas, the Supreme Court has tried to separate the two with preemption doctrine.[144] The Court has

138. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)); Nebbia v. New York, 291 U.S. 502, 525-29 (1934).

139. *See* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 390-91 (1983) (overruling Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927)).

140. *See Arkansas Elec. Coop. Corp.*, 461 U.S. at 393-94; Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 748-50 (1978) (overruling Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937)); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 280-81 (1977) (overruling Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951)). *But cf.* Edgar v. MITE Corp., 457 U.S. 624, 640 (1982) (plurality opinion by White, J.) (Commerce Clause prohibits "direct regulation" of interstate commerce by states). *See generally* Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1875 (1987) (arguing that Justice White "cannot mean to resurrect the old 'direct/indirect' test in all its obscure generality").

141. *See* Ridgway v. Ridgway, 454 U.S. 46 (1981) (Maine decree establishing constructive trust on proceeds of serviceman's life insurance policy for benefit of ex-wife and children is preempted by Servicemens' Group Life Insurance Act).

142. *See* De Canas v. Bica, 424 U.S. 351 (1976) (California statute prohibiting employer from knowingly employing undocumented aliens not preempted by Immigration and Nationality Act).

143. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (application of Louisiana wrongful death statute to helicopter crash 35 miles offshore preempted by Death on the High Seas Act).

144. For analysis tracking the Court's error, see Note, *supra* note 8, at 1234 (arguing that "the Court appears more willing to preempt state law in areas involving traditionally strong federal concerns than in areas involving traditional uses of state power"); *id.* at 1238 (Burger Court likely to uphold state law when subject matter of case involves "particularly local interests"). Most commentary misses the idea that a case could implicate both strong federal con-

further complicated preemption doctrine by articulating the presumption that federal statutes do not impinge on "essential" and "traditional" state interests such as health and safety regulation,[145] utility regulation,[146] tort law,[147] and domestic relations law.[148] The Supreme Court has said, for example, that state domestic relations law must do "major damage" to federal interests before it will be held to be preempted.[149]

At first, such a presumption seems like a good idea. In certain areas of law the states, not the federal government, still do most of the regulating. Yet the Supreme Court's list of essential and traditional state interests is so long that it may not actually exclude anything.[150] Nor is there any reason for preemption doctrine to pick and choose among state interests. The Tenth Amendment[151] left to the states all the powers not delegated to Congress. Federal courts are not competent to judge which among those powers are more highly prized by the states themselves.[152]

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cerns and particularly local interests. *See, e.g., id.* at 1240 & n.40, discussing Rice v. Norman Williams Co., 458 U.S. 654 (1982), and noting that "California had a legitimate interest" in the case. Was there really no strong federal interest implicated, as the commentator suggests? The case involved the Sherman Act.

145. *See* Hillsborough County, Fla. v. Automated Medical Labs, 471 U.S. 707, 715 (1985).

146. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983).

147. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

148. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

149. *Id.*; *see also* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978) (applauding Supreme Court doctrine that distinguishes between state laws protecting citizens from physical harm and other state laws, and affords greater deference to former).

150. *Cf.* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (implying that relative importance of law to state is irrelevant for preemption purposes).

151. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

152. A recent casualty of the Court's flawed approach is Michigan's attempt to regulate the issuance of securities by natural gas companies. Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988). The Court held Michigan's statute preempted because it intruded on the comprehensive federal regulation of natural gas sales under the Natural Gas Act of 1938, which gave federal regulators de facto power to approve or disapprove the capital structures of natural gas companies. *Id.* at 1151-52. The *Schneidewind* Court had to address Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), in which the Court upheld Illinois' regulation of securities issued by grain elevator companies, even though the United States Warehouse Act comprehensively regulated facilities, rates, and services of grain elevators. 331 U.S. at 237. The *Schneidewind* Court distinguished *Rice* by arguing that the regulation of natural gas companies, unlike the regulation of grain elevators, was not an area traditionally occupied by the states. *See Schneidewind*, 108 S. Ct. at 1156 n.13 (quoting *Rice*, 337 U.S at 230). Why should it matter whether states had "traditionally" occupied the field? States are free to experiment in regulating new areas, as long as they do not contravene the Commerce Clause or other constitutional strictures. "The states must be . . . free to engage in any activity that their citizens choose for the common wealth. . . . Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of government functions inevitably invites an unelected federal judiciary

Indeed, the states may differ on what they believe to be their essential interests. Moreover, a distinction between essential and nonessential interests is not necessary to keep the states within their proper spheres of authority. If the states attempt to exercise powers in areas where they have no legitimate interest, such as foreign affairs, the courts do not have to rely on preemption doctrine to conclude that such state regulation must be prohibited. The text and structure of the Constitution ensure that the states may not encroach on those areas reserved for Congress.

When a legitimate state regulation touches on a matter also governed by a power that the Framers intended to be exclusively federal, such as military power or power over immigration matters, there is a strong case for taking the federal, not the state, point of view. Even when it is a state domestic relations rule that impairs the effectiveness of a federal army regulation, the preemption analysis should be no different than it would be if the state law were an environmental statute. In such cases, it is the federal interest that warrants protection. On the other hand, because the Constitution demonstrates no preference for federal exclusiveness in the fields of banking,[153] environmental protection, or labor law, the courts should be more concerned with the continued vitality of state regulation in those areas. There are two types of federal powers: exclusive and nonexclusive. Preemption doctrine should reflect this dichotomy.

C. Preemption and Politics

If preemption doctrine is to serve the goals of federalism, it should secure to both the federal government and the states the right to regulate in their proper fields of authority. Where both Congress and the states operate legitimately, the states' role as laboratories for regulatory innovation makes the protection of state regulatory authority particularly important.[154] The federal structure allows us to experiment before we impose what could be a massive mistake on the country as a whole. Ac-

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to make decisions about which state policies it favors and which ones it dislikes." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

Another case decided the same Term as *Schneidewind* suggests, however, that the Court realizes the error of this "traditional" function approach. " '[T]he relative importance to the state of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield.' " Felder v. Casey, 108 S. Ct. 2302, 2306 (1988) (quoting Free v. Bland, 369 U.S. 663, 666 (1962)).

153. *But cf.* U.S. CONST. art. I, § 10 (prohibiting states from coining money, emitting bills of credit, or making anything other than gold and silver legal tender).

154. *See* New State Ice Co. v. Liebmann, 285 U.S. 282, 309-11 (1932) (Brandeis, J., dissenting).

tivists and reformers have proposed so many different approaches to welfare reform, environmental pollution, medical care for the elderly, and the protection of shareholders that we rightly pause before deciding that one rule is appropriate for the entire country.

Local governments can also be more creative, more responsive to grievances voiced by the people, and less susceptible to elitism and bureaucratic inertia than the federal government.[155] The virtues of local government are not overtly disputed by any Justice on the Supreme Court today, but rival theories have emerged concerning the proper role of the courts in protecting the federal structure. The *National League of Cities v. Usery*[156] majority saw an active role for the courts, through the exercise of judicial review, in interpreting the Tenth Amendment as a substantive limit on congressional power interfering with state regulation. The majority in *Garcia v. San Antonio Metropolitan Transit Authority*,[157] which overruled *National League of Cities*, believed that the proper safeguards of federalism were established in the political branches, through the representation of the states in the Senate and through the states' role in electing the President.[158] The dissenters in *Garcia* did not doubt that Congress should play an important role in preserving the line between state and federal authority. They argued, however, that the courts were also authorized to protect the states, and that judicial review was becoming ever more important because the rise of national interest-group politics and the adoption of the Seventeenth Amendment[159] had made the Senate less responsive to the legitimate interests of the states.[160]

A reformed preemption doctrine would unite these two approaches. It would accept that Congress has the power to oust state legislation if such ouster is necessary and proper for the exercise of a federal power. At the same time, it would recognize that the judiciary has a role in

155. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 576-77 (1985) (Powell, J., dissenting); Board of Educ. v. Pico, 457 U.S. 853, 894 (1982) (Powell, J., dissenting). *But cf.* THE FEDERALIST NO. 23 (A. Hamilton) (noting superior energy of federal government to address national issues).

156. 426 U.S. 833 (1976).

157. 469 U.S. 528 (1985).

158. *See id.* at 551 & n.11 (citing Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

159. U.S. CONST. amend XVII (senators to be elected by people of each state; superseding U.S. CONST. art. I, § 3, providing for election of senators by state legislatures).

160. *See Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting); *cf.* THE FEDERALIST NO. 46, at 296 (J. Madison) (members of Congress unlikely to encroach on state prerogatives because they will "attach themselves too much to local objects" and will pass measures based on "prejudices, interests, and pursuits" of the individual states).

ensuring that Congress face up to the political consequences of upsetting the status quo balance of powers between the federal government and the states. Greater judicial skepticism about congressional intent to preempt state authority in any particular statute would provoke more clear articulations by Congress of such intent. Then, if the people dislike the drift of authority from the states to the federal government, they can vote appropriately.[161]

Preemption doctrine has two basic flaws that prevent it from protecting the federal-state balance: (1) interpretation of congressional intent in terms of objectives that may be hindered by the state law in question, and (2) leniency in finding state laws preempted by administrative agency regulations. As noted earlier, the courts usually analyze preemption cases in terms of the effect of the state law on the operation of the federal scheme rather than the intent of Congress to displace state authority.[162] Courts state that they analyze congressional intent, but often they consider the general purpose of the relevant federal statute instead of the specific intent to displace the states. Congressional "intent" is analyzed as if the states did not exist, and the state law is then placed in opposition to that intent. This kind of analysis is only appropriate if there is an actual conflict between state and federal law, if the state requires something that the federal government prohibits, or vice versa. Such cases are rare and easy to decide.[163] Preemption cases present no actual conflict. Most preemption opinions first characterize the goal of the federal statute broadly and then decide whether the state statute moves in the opposite direction (in nonbalancing cases) or any direction at all (in balancing cases).[164]

The result is usually a sweeping but dissatisfying statement about

161. *See* THE FEDERALIST NO. 44, at 286 (J. Madison); *cf.* THE FEDERALIST NO. 32, at 197 (A. Hamilton) (in conflict between states and federal government, states are likely to prevail because states possess greater influence over the people).

162. *See supra* text accompanying notes 101-03.

163. For example, the Supreme Court ruled in Rose v. Arkansas State Police, 479 U.S. 1 (1986), that the Arkansas Workers' Compensation Act requiring state workers' compensation for public employees to be offset by any benefits obtained from the federal government, conflicted with a federal statute conferring death benefits on state law-enforcement officers killed in the line of duty and explicitly stating that such death benefits were in addition to any compensation from the state. The state statute thus attempted to do what the federal statute prohibited the state from doing, reducing the state compensation by the amount of the federal compensation.

164. While preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purposes theory is more an exercise in policy choices by a court than strict statutory construction. An independent judgment that federal purposes require preemption comes in the face of congressional silence, both express and implied on the subject. Abbot v. American Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988).

the purposes of a federal statute.[165] For example, in *Pacific Gas & Electric*[166] and *Silkwood*,[167] the parties challenging the state laws contended that they frustrated the Atomic Energy Act's purpose of developing the widespread commercial use of nuclear power.[168] The Court could not deny that Congress wanted to encourage development of nuclear power through the Atomic Energy Act but concluded that Congress did not intend the promotion of nuclear power to be accomplished "at all costs."[169] Indeed, the Atomic Energy Act explicitly states that its goal is to achieve the maximum promotion of nuclear power consistent with public safety, and it is inconceivable that Congress would intend that nuclear power be promoted without any regard for the costs.[170] Yet *Silkwood* and *Pacific Gas & Electric* tell us nothing about Congress' intent to preempt state laws, and in particular they tell us nothing about which costs are to be assessed or at which level of government they are to be assessed. The Court tossed off an ill-conceived and snappy depiction of Congress' intent that is certain to haunt it in the future.

Similarly dissatisfying is the Court's resolution of the "delicate balance" case of *Michigan Canners*.[171] In that case, the Court held the state law preempted because it required farmers to abide by the terms negotiated by agricultural cooperative associations, whereas a federal statute had given the farmers the right to join such cooperatives but had prohibited any coercion of farmers to join.[172] The Court did not rely on a finding of congressional intent to preempt state legislation.[173] The federal

165. *See supra* text following note 89; *see also* Felder v. Casey, 108 S. Ct. 2302, 2317, 2319 (1988) (O'Connor, J., dissenting) (criticizing Court's vague discussion of policies behind federal civil rights laws). At times the Court seems to drift entirely from the intent of Congress by discussing the purposes behind federal regulation. In Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), the Court engaged in a free-ranging examination of the nature and purpose of federal patent law and state trade secret law. The opinion is filled with aphorisms but largely empty of any consideration of Congress' preemptive intent. *See id.* at 493-95 (Marshall, J., concurring in result) (crucial issue is whether Congress intended to displace state law, not possible tension between objectives of two regulatory schemes).

166. 461 U.S. 190 (1983).

167. 464 U.S. 238 (1984).

168. *Silkwood*, 464 U.S. at 257; *Pacific Gas & Elec.*, 461 U.S. at 220.

169. *Silkwood*, 464 U.S. at 257; *Pacific Gas & Elec.*, 461 U.S. at 222.

170. *Silkwood*, 464 U.S. at 257 (quoting 42 U.S.C. § 2013(d) (1982)).

171. Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461 (1984).

172. *See supra* text accompanying notes 92-95.

173. The Court could have concluded that the Michigan statute directly conflicted with the federal statute by construing the word "coerce" to include state action that made the contract negotiated by the cooperative binding on all farmers. This interpretation would have been problematic, however, because the statutory language made it unlawful for the *producers' associations* to coerce individual farmers.

statute made no mention of the future viability of state regulation.[174] The Court relied instead on its conclusion that Congress had established a balance between bolstering producers' bargaining power and preventing abuse of power by the producers' unions. Following the legislative history, the Court interpreted the objective of the statute as protecting the producers' "free choice."[175] The Michigan statute contravened this very vague formulation of the congressional policy and thus fell, despite Congress' failure to indicate any intent to displace state law.

The outcomes of balancing cases such as *Michigan Canners* are appealing because of their common-sense approach to regulation as a bargain among competing interests. Notwithstanding the Court's uplifting talk about freedom from coercion in *Michigan Canners*, one suspects that the statutory language is actually the result of a pitched political struggle between farmers and food processors. Perhaps the balance struck by Congress does deserve deference. But when the Court interprets this balance as having preemptive effect on state regulations, without relying on any clear statement of congressional intent to preempt state law, it encourages Congress to proceed in a troublesome fashion. The Court encourages Congress to fool the adversary political interests by avoiding statutory language about preemption. If, in passing the Agricultural Fair Practices Act, Congress really did intend to set the final terms for a truce between farmers and food processors, it should have thought about the possibility that the parties would turn to the states for additional ammunition. Certainly the parties knew that state legislatures offered them another possible theater of conflict. By avoiding preemptive language in the federal statute, Congress may have been trying to hoodwink the lobbyists into thinking that the federal statute was, or was not, the final word on the matter.

Congress may also have been trying to avoid resolution of a difficult issue. Avoiding difficult issues is part of politics, but the Supreme Court ought not encourage this kind of politics. The Court should be especially chary of encouraging games played at the cost of the integrity of the federal system. When Congress enacts a statute that balances adverse interests without mentioning preemption, it not only fails to address the lasting effect of the statute on the parties; it also ignores the statute's effect on the states. Congress thus evades the checks against its own aggrandizement that are built into the Constitution.

The Senate and the President are supposed to guard the states' interests and the people's interest in maintaining viable state governments.

174. *See* 467 U.S. at 469.
175. *See id.* at 470.

By inferring preemptive intent, cases such as *Michigan Canners* undermine the ability of the Senate and the President to ensure that the federal government does not assume sole responsibility for all the important regulatory decisions in our society. These cases also undermine the ability of the people to perceive and judge the drift of authority to the federal government from the states.[176]

The second basic flaw of the preemption doctrine is the Court's lenient attitude toward the preemptive effect of administrative agency regulations. The problem occurs when the agency, operating under a general organic statute, takes upon itself the decision to preempt state laws. The Court has tended to view this issue as one of administrative law. If the administrator's decision to preempt state law is not inconsistent with the underlying statute, then the Court will uphold it.[177]

As a result, administrative agencies can preempt state laws without considering the political consequences to the states. In fact, the Court has held that administrative agencies do not even have to consider alternatives less disruptive of state authority when deciding whether to preempt state laws.[178] Yet administrative agency officials, not subject to electoral constraints on their exercise of power, are even less likely to consider the consequences to the states than are members of Congress. Agency officials are unelected and thus not immediately answerable to popular sentiment. Unlike members of Congress, most probably have not worked their way up state political ladders and thus lack the familiarity with the *corpus juris* of state regulation that assists members of Congress in deciding whether federal intervention in a particular problem is necessary and proper.

The cost to federalism is evident from *Fidelity Federal Savings & Loan Association v. De La Cuesta*.[179] That case involved a clash between California's populist doctrine sharply limiting the enforceability of due-on-sale clauses in real estate mortgages and a federal regulation explicitly

176. Very few among the electorate may monitor the general drift of authority from the federal government to the states. It is very likely, however, that interest groups such as unions, corporations, and environmentalist organizations (to name only three) monitor the federal/state balance closely and then attempt to use their prestige and financial resources to inform and influence the electorate.

177. *See, e.g.*, City of New York v. FCC, 108 S. Ct. 1637, 1642 (1988) (FCC preemption of state technical standards governing cable television signals); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (FCC preemption of state power to censor cable television signals); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982) (Federal Home Loan Bank Board preemption of state law governing due-on-sale clauses in residential real estate mortgages).

178. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. at 154.

179. 458 U.S. 141 (1982).

authorizing the inclusion of due-on-sale clauses in mortgage contracts written by federal savings and loan associations.[180] The Court hesitated to find a direct conflict between the two doctrines, because the Federal Home Loan Bank Board had not *required* federal savings and loans to insert due-on-sale clauses in their mortgages. Thus, the states were not prohibiting something that the federal government had mandated.[181] Instead, the Court relied on the agency's express decision that due-on-sale practices of federal savings and loan banks should be governed solely by federal law.[182] As a result, California's controversial innovation in restricting due-on-sale clauses was terminated only four years after the California Supreme Court had decided to try the doctrine.

Preemption doctrine's current inadequacies stem from the Court's failure to recognize the link between preemption and the Constitution and to grasp the fundamental issues of allocation of power implicated in preemption cases. Reformed preemption doctrine should make both the federal government and the states more secure in their appropriate fields of regulation. To do so, preemption doctrine must recognize (1) that the states may regulate in any area from which they are not excluded by the Constitution; (2) in areas where the states may legislate, the Constitution intends that Congress weigh and consider carefully any displacement of state authority; and (3) in areas reserved to federal authority, Congress need not give the states' interests the same consideration, for it may assume that only the federal government operates legitimately in that field.

If preemption doctrine were so reformed, with its link to the Constitution restored, it could preserve the states' authority without intruding on Congress' power, when appropriately exercised, to displace the states. Unchained from the Constitution, current preemption doctrine has the formidable potential to stifle regulatory creativity and innovation. Part Three of this Article sets forth four proposals to avoid this consequence by restoring the link between preemption and federalism.

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180. *Id.* at 146 (quoting 12 C.F.R. § 545.8-3(f) (1982)), 149 (citing Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978)).

181. 458 U.S. at 155 ("compliance with both § 545.8-3(f) and the *Wellenkamp* rule may not be 'a physical impossibility' ").

182. *Id.* at 159.

III. Restoring the Link

A. The courts should recognize that some federal interests are more important than others and accordingly should give federal statutes in certain fields greater preemptive force than in others.

As suggested in Part Two, although the Framers expected Congress and the states to respect a clear division of their fields of authority, the expansion of the federal commerce power has eliminated the possibility of drawing that boundary today.[183] That Congress has a vast but legitimate power to regulate commerce need not mean, however, that the exercise of this power has the same preemptive force as the exercise of other federal powers. The power to regulate commerce surely does not require exclusive federal control, as do powers such as coinage and war, over which supreme federal authority is so essential that the Framers largely divested the states of authority. Sole federal control over the outer reaches of the commerce power, as it is understood today, is not essential to the structure of the nation. When Congress reaches beyond its power over purely interstate commerce to regulate matters merely "affecting" commerce, it must know that it will run into the whole array of legitimate state regulation. The very existence of that state regulation hardly threatens our country's ability to hang together.

There are several ready objections to the development of a two-tier preemption doctrine. First, our legal culture has conditioned courts to avoid making constitutional law whenever it is unnecessary to do so.[184] A two-tier preemption doctrine would require courts to decide first whether a congressional statute implicated a "heavy" federal interest or a "light" federal interest and would thus create an entirely new layer of constitutional law. Indeed, the very idea of courts deciding that some federal powers are more important than others may make some uneasy.

Yet, despite this objection, a two-tier system would cure some of the uncertainty produced by current preemption doctrine, which has prompted courts to give too little preemptive effect to the most important federal interests and too much preemptive effect to others. Operating without a rule that immigration was of overarching federal concern, the Supreme Court decided that the states were free to prohibit the employment of undocumented aliens.[185] Conversely, the Court might not have held Vermont's common-law nuisance rule preempted had it more

183. *See supra* text accompanying notes 138-40.

184. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346-48, 354-55 (1936) (Brandeis, J., concurring).

185. De Canas v. Bica, 424 U.S. 351 (1976).

clearly recognized concurrent state and federal jurisdiction over environmental regulation.[186] Furthermore, an explicit recognition that some federal interests are more weighty than others is an improvement over the Court's current practice of (1) stating that some state powers are superior to others, and (2) failing to identify any state powers as inferior.[187] If the roll of superior state powers includes such disparate functions as utility regulation,[188] inspection of foodstuffs,[189] corporate governance,[190] and minimum labor standards,[191] we can safely conclude that no legitimate state powers are not on this list.[192]

The second objection to a two-tier preemption doctrine is that the federal courts might mistakenly identify an interest as overwhelmingly federal and thus oust the states from an area where they ought to operate. For example, the Supreme Court has identified admiralty law as an area where federal interests are paramount.[193] This conclusion appears tenuous because the power to create substantive rules of maritime law is not among the delegated powers of Article I, Section 8.[194] The states' wrongful death statutes are among the casualties of this possibly unsound

186. International Paper Co. v. Ouellette, 107 S. Ct. 806 (1987).

187. *See supra* text accompanying notes 144-50.

188. *See* Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n, 461 U.S. 190, 205 (1983).

189. *See* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 144 (1963).

190. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1647 (1987).

191. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756-57 (1985).

192. Arguably, the Supreme Court already claims to use such a two-tier approach. The Court's boilerplate preemption test, *see supra* note 12, states that a congressional intent to preempt state law may be inferred when the statute "may touch on a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject." Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983). The Supreme Court has not explicitly relied on this particular part of the test in any recent case. The Court has indicated that it is more willing to infer preemption in certain fields such as immigration, *see* Toll v. Moreno, 458 U.S. 1 (1982), and admiralty, *see* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986). However, in California Coastal Commission v. Granite Rock Co., 107 S. Ct. 1419 (1987), the majority opinion did not respond to Justice Powell's dissenting suggestion that as the federal regulations were enacted pursuant to the Property Clause, U.S. CONST. art. IV, § 3, the Court should be less concerned about preserving the states' authority. More importantly, even if the Court does on occasion realize that it is dealing with a particularly weighty federal interest, in other cases it should realize that lighter federal interests, not requiring the same protection from the states, are presented.

193. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).

194. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-17, § 1-7 (2d ed. 1975). *Compare* Goldstein v. California, 412 U.S. 546, 558 (1973) (even though Copyright Clause is among enumerated powers in art. I, § 8, copyright power is not so fundamentally national that states are prohibited from granting quasi-copyright protection to recordings) *with id.* at 573-75 (Douglas, J., dissenting) (Copyright Clause placed in Constitution principally to ensure uniformity, which additional state regulation undermines).

jurisprudence.[195] The Supreme Court might also decide that the federal power over antidiscrimination law was essential to the structure of the nation and thus preempt most state protection against race and sex discrimination.[196]

The Supreme Court may make mistakes, perhaps even egregious ones. In this area of constitutional law, however, the results of such mistakes are less devastating than in others, for Congress can always override the Supreme Court's decision to preempt the states. Because the Supremacy Clause protects congressional interests, Congress can waive its claim to paramount authority and give the states the freedom needed for operation, much as it has done in exempting state banking and insurance regulations from the strictures of the dormant Commerce Clause.[197] Thus the Court's treatment of preemption as an issue of pure statutory construction offers no particular advantage. Congress, not the Supreme Court, will always have the final say under either approach.[198]

195. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (Louisiana wrongful death statute preempted by federal Death on the High Seas Act).

196. *Cf.* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714, 723-24 (1963) (applying "floor, not ceiling" reasoning to antidiscrimination laws).

197. *See* Northeast Bancorp v. Board of Governors, 472 U.S. 159 (1985); Metropolitan Life Ins. Co v. Massachusetts, 470 U.S. 867, 880 (1985).

198. Justice Scalia may have been attempting, in Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988), to create a two-tier preemption doctrine along these lines and to establish a unified theory of preemption explaining the Court's cases both in areas involving concurrent federal and state powers and in areas of "unique federal concern." *See id.* at 2515-16. Scalia seeks to tie together the preemption cases discussed in this Article with another line of cases concerning the displacement of state law by "federal common law." *Cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Miree v. DeKalb County, 433 U.S. 25 (1977); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

Scalia's unifying principle is that in all cases involving ouster of state law, there must be "conflict" between federal and state law. *Boyle*, 108 S. Ct. at 2516. Scalia is correct in that many of the "federal common law" cases do engage in extensive discussion about the existence *vel non* of conflicts between federal and state law; in some cases, this sounds like the "obstacle" prong of preemption. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. at 734-35; United States v. Little Lake Misere Land Co., 412 U.S. at 597. But, as discussed in this Article, it is highly debatable whether there is "conflict" in many preemption cases, unless one stretches the term as Scalia does: "[T]o put the point differently, the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can." *Boyle*, 108 S. Ct. at 2515-16 (emphasis in original). Morever, it is unclear whether *Boyle* itself turned on a "conflict" between federal and state law. *See id.* at 2516-17 (extensive discussion of meaning of "significant conflict"). If the case did turn on an actual conflict, then Scalia's elaborate analysis is unnecessary; if it did not, then his analysis does not explain the "federal common law" cases.

Scalia also repudiates the entire analytic framework of the "federal common law" cases. Under this framework the Court determined, first, whether federal or state law governed an area, and second, whether a uniform federal law was necessary or whether federal law could

B. Preemption doctrine should not do the work of the dormant Commerce Clause in the name of "uniformity."

Preemption decisions talk a lot about "uniformity."[199] Those who ask the courts to invalidate state laws point out the impediments that diverse state laws place on free markets,[200] or rational corporate planning,[201] or predictable collective bargaining,[202] or efficient transportation.[203] Undoubtedly, uniformity is desirable in many fields. The advantages of uniform railroad roadbeds for efficient transportation may

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"borrow" the various state laws. *See, e.g.,* United States v. Kimbell Foods, Inc., 440 U.S. at 726-28; United States v. Little Lake Misere Land Co., 412 U.S. at 592-95; Clearfield Trust Co. v. United States, 318 U.S. at 367. The later cases in this line were greatly influenced by classic articles such as Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964), and Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797 (1957). *See, e.g., Little Lake Misere,* 412 U.S. at 591, 593. Scalia dismisses this reasoning in a footnote, scorning the idea that federal law would "deign" to borrow state law. *Boyle,* 108 S. Ct. at 2515 n.3.

Although an extensive discussion of Scalia's dicta is beyond the scope of this Article, it is noteworthy that Scalia stumbles on one fundamental point. He combines several concepts in an "upper tier" of cases touching on "unique federal concerns," but then he separates them again, stating that in "some cases," the unique federal concern so requires a uniform federal rule that the existence of any state law would pose a conflict, whereas in "others" (meaning other cases) preemption occurs only when there is a more "narrow" conflict, and only "particular" elements of state law are superseded. *Boyle,* 108 S. Ct. at 2516.

It would be simpler to admit that in areas of "unique federal concerns," a conflict is not required for the ouster of state law, but that in those areas, the Constitution precludes the operation of state law unless Congress declares otherwise. Congress may decide that uniformity is not necessary for the protection of federal interests. This is precisely what Congress has done in the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982) (state law governs liability of federal government), a factor that makes the judicially created *Feres* doctrine, precluding liability of the federal government to members of the armed forces for service-related injuries, all the more peculiar, as that doctrine relied crucially at its origin on the need for uniformity in legal relations between the federal government and members of the armed forces. *Compare* Feres v. United States, 340 U.S. 135, 143-44 (1950) *with* United States v. Johnson, 107 S. Ct. 2063, 2071-72 (1987) (Scalia, J., dissenting) (*Feres* doctrine's uniformity rationale contradicted by Congress' disavowal of uniformity as important factor in enacting FTCA). Admittedly, the suggested analysis cannot be reconciled with the result in United States v. Kimbell Foods, Inc., 460 U.S. 715 (1979), which holds that federal law governs priorities of consensual liens held by the federal government, but that such federal law "borrows" the states' commercial codes even in the absence of direction to borrow by Congress. More explicit "borrowing" instructions would be needed under the presumption in favor of preemption required under "upper tier" analysis.

199. *See, e.g.,* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2217 (1987); International Paper Co. v. Ouellette, 107 S. Ct. 805, 813-14 (1987); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 639 (1973).

200. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-28 (1978).

201. *See* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. at 2216-20.

202. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

203. *See* Missouri Pac. R.R. v. Railroad Comm'n, 833 F.2d 570 (5th Cir. 1987).

well be compelling.[204] Large corporations probably find it a great relief that they need not obey fifty-one different laws regulating pension plans.[205] In these two cases, however, Congress has unambiguously spoken to eliminate state authority, and the courts do not have to engage in any analysis of the "delicate balance" effected by Congress to conclude that federal law is supreme.

Even absent a federal statute, the Constitution itself may compel uniformity in certain fields. A uniform national policy is highly desirable in military matters, foreign affairs, currency regulation, indeed in all the areas where the Constitution gave Congress exclusive authority. The federal interest in efficient transportation of perishable goods also outweighs the various states' interests in parochial transportation regulations, such as the famous Illinois statute requiring trucks to use contoured mudguards.[206]

Outside the peculiar field of transportation, however,[207] the dormant Commerce Clause does not, in the name of uniformity, prohibit the states from taking differing approaches to problems that exist in every state.[208] Nor is there a federal interest in uniformity that requires all goods and services traded in interstate commerce to have immunity from state regulation.[209] "Uniformity," "efficiency," "predictability," and "simplicity" are euphemisms for complete disablement of state authority. "Uniformity" means exclusive federal power and state incapacity.

The Supreme Court has refrained from using the club of uniformity against the states in dormant commerce clause cases. Yet preemption doctrine, particularly the "delicate balance" theory, provides another opportunity for those who wish to be rid of burdensome state regulation to raise the banner of uniformity. If the Court ignores the implications of

204. *Id.* at 573-74.

205. *Cf.* Fort Halifax Packing Co. v. Coyne, 107 S. Ct. at 2216-20 (discussing policies behind ERISA preemption).

206. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

207. *See* Regan, *supra* note 140, at 1883.

208. This statement excludes the transportation fields, such as shipping and railroads, where the Supreme Court has shown a particular willingness to strike down state regulation as imposing an excessive burden on interstate commerce. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Ray v. Atlantic Richfield Corp., 435 U.S. 151 (1978); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Douglas v. Seacoast Products, 431 U.S. 265 (1977); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

209. One corporation brave (or brazen) enough to make such an argument astonished the Supreme Court. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-28 (1978); *see also* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1649-50, 1652 (1987); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 136-37, 140 (1973). *But cf.* Edgar v. MITE Corp., 457 U.S. 624, 641-42 (1982) (plurality opinion by White, J.) (suggesting that interstate nature of tender offers prohibited state regulation thereof).

uniformity for the federal structure, it will permit preemption to do the damage to federalism that the Court has otherwise tried to prevent through its construction of the dormant Commerce Clause.

Rather than requiring a clear statement by Congress that state laws are to be preempted, the Court has searched legislative history to find congressional "anticipations" of uniformity,[210] has combed complex regulatory structures for an implicit command for uniformity,[211] and has divined a need for uniformity from the nature of the subject.[212] If the Court must go to such lengths to find that uniformity is required by federal statutes, it is probably going farther than either Congress or the President did. When the circumstances surrounding the passage of the statute give little indication that Congress or the President perceived a threat to state regulatory authority, the courts should not assist in dismantling this authority.

Awareness of preemption's role as a substitute for the Commerce Clause in promoting uniformity also illuminates the most difficult preemption cases, the "licensing" cases. These cases typically involve a clash between a state law and a federal regulation, under which the federal government has given a party a license or certificate to establish compliance with federal standards. The ancestor of these "licensing" cases is, of course, *Gibbons v. Ogden*.[213]

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210. *See, e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151, 165-69 (1978) (holding Washington statute requiring safety features on oil tankers preempted by federal statute establishing uniform regime controlling design of oil tankers, even though federal statute referred to "minimum standards of design").

211. *See* International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987).

212. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209-10 (1985) (interpretation of obligations imposed by labor contract to be governed by uniform federal law); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962).

213. 22 U.S. (9 Wheat.) 1 (1824). *Gibbons v. Ogden* is a maddening case. It remains unclear whether the outcome rested on a simple theory of "collision" between the federal and state statutes, *id.* at 210, or reflected Chief Justice Marshall's view that the commerce power lay solely with Congress. *See generally* L. TRIBE, *supra* note 24, § 6-3, at 404-05.

Perhaps *Gibbons* may be understood in light of the particular subject matter, not interstate commerce, but interstate *transportation*, particularly transportation on the navigable waters. The Court has tolerated little state interference with federal regulation of the navigable waters. *See, e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Douglas v. Seacoast Products, 431 U.S. 265 (1977); First Iowa Hydro-elec. Coop. v. FPC, 328 U.S. 152 (1946). *But see* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). Perhaps, lurking beneath Mr. Gibbons' steamship, was a federal interest of constitutional dimension in uniformity in interstate transportation. This interpretation of *Gibbons* recognizes that regulation of transportation on the navigable waters is a field where the federal interest is supreme, like military matters or immigration. Such an interpretation is preferable to the contorted one emphasizing that Congress had given Gibbons a "license" to engage in the coasting trade. *See infra* text accompanying note 214; Douglas v. Seacoast Products, 431 U.S. 265 (1977); Castle v. Hayes Freight Lines, 348 U.S. 61 (1954).

Chief Justice Marshall is largely responsible for this difficulty, for he emphasized the fact that Congress had granted Gibbons a license for the coasting trade.[214] Marshall interpreted "license" to mean an absolute privilege or authority that the state cannot revoke. As a result, a very peculiar situation emerges when the states attempt to impose their valid regulatory laws on parties that have a federal "license" to undertake some activity: the states can impose their laws, but they cannot interfere with the effect of the federal license even for disobedience to the state law. If, for example, the federal government grants someone a trucking license and that person flagrantly and frequently breaks state highway laws, the state can fine him or imprison him, but it cannot suspend his right to use the highways.[215]

Gibbons and its progeny have probably relied too much on Chief Justice Marshall's interpretation of "license" as a privilege that states are powerless to restrict. The grant of a license need mean nothing more than a certification that a party has complied with minimum federal standards. Unless Congress clearly indicates that compliance with federal standards resulting in the issuance of a license makes compliance with state laws unnecessary, there is no reason for the courts to suppose that licensing implies uniformity. Moreover, when the Supreme Court discerns a congressional design to impose uniformity on the nation in the mere existence of a complex licensing scheme as it did in *Ouellette*, it infers something that Congress never intended.[216]

C. Courts should require administrative agencies to explain why preemption of state laws or uniformity of regulation is necessary to promote a statutory purpose when that determination is made.

Because "uniformity" and "efficiency" sound like technical values, courts may overlook the political implications when these values are raised in support of preemption. This danger is even greater when an administrative agency does the preempting. Uniformity and efficiency are often precisely the qualities that administrative agencies are supposed to promote. On hearing that an administrative regulation promotes these qualities, courts may instinctively decide that deference is required and may miss the implications for federalism. A laudably uniform, efficient

214. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 211-12.

215. Castle v. Hayes Freight Lines, 348 U.S. at 64.

216. *See* International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987); *accord* Ray v. Atlantic Richfield Corp., 435 U.S. 151, 165-66, 177 (1978)..

communications system, for example, may not appear to pose a threat to the legislative authority of the states.

Administrative agencies should promote uniformity and efficiency when those qualities serve the regulatory purposes Congress intended the agencies to achieve. An administrative decision to preempt state law should not be regarded, however, as merely an issue of technical competence. Agency officials lack the political sensibilities of members of Congress and thus may not have the appropriate instinct for the need to accommodate state interests. Indeed, if they are imbued with the spirit of efficiency, administrators may tend to see centralization of power as a good thing. It is hopelessly unrealistic to expect agency officials to be sympathetic to the varied, even parochial, interests of the states.[217]

When Congress legislates, the states rely on the political safeguards of federalism. These political safeguards are the equivalent of procedural safeguards for the states' interests. Because so much of the task of regulating is done by administrative agencies today, the states need a similar set of procedural safeguards in the administrative process that would function to remind the agencies of the states' interests.

Perhaps no administrative safeguards can function as well as the threat of impending elections that always faces members of Congress. Nonetheless, the courts and Congress can require an agency to show it has given serious consideration to the interests of the states before making a decision to preempt state authority. The agency should develop a record demonstrating why preemption is advisable. Upon judicial review of an agency's decision to preempt state law, courts should not be too deferential to the agency's decision.[218] The necessity for preemption is not a technical matter in which administrative agencies have particular expertise. If an agency cannot provide a reasonable explanation for the necessity of preemption, the agency's decision should be vacated.

This considered decisionmaking could also clarify the agencies' sometimes obscure objectives in pursuing particular courses. Consider, for example, how the agency's clear statement of the purposes served by preemption would have influenced the resolution in the *Fidelity Federal* case.[219] The Federal Home Loan Bank Board preempted state laws gov-

217. Many regulatory schemes enacted by Congress establish a division of authority between the federal government and the states. The lines dividing the spheres of authority are not always bright, however, and occasionally the agencies tend to overstep them. *See, e.g.*, City of New York v. FCC, 814 F.2d 720 (D.C. Cir. 1987) (split decision on FCC's authority to preempt local regulation of cable television signal quality), *aff'd*, 108 S. Ct. 1637 (1988).

218. *See* City of New York v. FCC, 814 F.2d at 729-30 (Mikva, J., dissenting).

219. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982); *see supra* text accompanying notes 179-82.

erning the enforceability of due-on-sale clauses in residential real estate mortgages, thus invalidating California's doctrine sharply limiting their validity. The Board did not, however, *require* all savings and loan associations to place due-on-sale clauses in their mortgages. A rule requiring these clauses could have been easily justified in light of the Bank Board's statutory mission to promote safe lending practices.[220] Instead, the Bank Board gave savings and loans the option of inserting due-on-sale clauses without requiring them to do so.

The Bank Board may have simply assumed that most savings and loans, given the proffered option, would take it. Nonetheless, we are left wondering what approach to safe banking practices justified authorizing, but not requiring, a particular contractual term. Normally, when the federal government implicitly authorizes something by declining to prohibit it, the state may go "further" and prohibit the activity.[221] This, after all, is the essence of the "floor, not ceiling" theory of preemption.[222] Nor could the Bank Board's preemption decision be justified on the ground that local banking conditions varied widely, so that individual banks should have the right to decide for themselves whether a due-on-sale clause was justified. When local conditions vary widely, the case for preemption is significantly weakened. The states are better at addressing local problems and assessing local conditions than the federal government, which usually takes the sweeping, national-interest perspective.

Perhaps the Bank Board was seeking to promote interstate banking and thus wanted interstate savings and loans to be able to balance different risks faced in different parts of the country. None of this is apparent from the Bank Board's proffered explanations, and the Supreme Court demanded merely that the Bank Board's preemption decision not be inconsistent with the underlying statute. Courts should require more. Agency officials, who are unconstrained by electoral influences and compelled in many cases to seek the most efficient, streamlined approach to a problem, should provide explanations for decisions that eliminate state laws.

D. The courts should require Congress to state its preemptive intent expressly.

Earlier it was argued that preemption doctrine should take account of the distinction between the powers granted exclusively to the federal

220. *See* 458 U.S. at 172-73 (Rehnquist, J., dissenting).

221. *See* City of New York v. FCC, 814 F.2d at 729-30 (Mikva, J., dissenting).

222. *See supra* text accompanying notes 75-84.

government and the powers that Congress shares with the states.[223] The line between these powers is not immutable. A primary purpose of vesting powers exclusively in the federal government is to protect the country's ability to speak with one voice; a congressional determination that such uniformity is not necessary obviates the need for close scrutiny of state laws. Congress could, for example, allow the states some authority in foreign affairs by permitting them to prohibit contracts with South African businesses. Under the federal immigration power, Congress could authorize the states to prohibit the employment of undocumented aliens. Under the federal admiralty power, Congress could authorize the application of state wrongful death statutes.

These propositions are not controversial. More troubling is Congress' decision to move the line in the other direction by resolving that federal interests require uniformity and thus prohibiting state legislation in the areas of concurrent powers such as taxation, corporate law, and labor regulation. Congress does precisely this when it expressly preempts state legislation or when it purportedly occupies a field.

Even though these types of preemption resemble the congressional veto of state laws rejected by the Framers, it is far too late to argue that Congress does not have the power, under the Necessary and Proper Clause, to prohibit state legislation. Nevertheless, although Congress has the power to prohibit state legislation, the courts do not have to assist it eagerly in doing so. This is not to suggest that the courts should scrutinize whether any particular preemption decision by Congress is necessary and proper. As both Chief Justice Marshall and the Anti-Federalists pointed out, what is necessary and proper is a policy matter more suitable for legislative than judicial decision.[224]

The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation outside those areas that the Constitution reserves for Congress alone. Preemption, after all, effects basic changes in the country's allocation of powers. When Congress occupied the field of butter manufacture,[225] for example, it essentially said, "Butter manufacture is now as important to the federal government as national defense. Accordingly, further state regulation in the field of butter manufacture can-

223. *See supra* text accompanying notes 183-98.

224. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-19 (1819); 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 232, 514 (J. Kaminski & G. Saladino eds. 1981).

225. *See* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); *supra* text accompanying notes 20-22.

not be tolerated." When one hears the holding in *Cloverleaf Butter* stated this way, one imagines that if Congress had wanted to preempt state legislation in the field of butter manufacture, it would have said so.

Undoubtedly this "clear statement" requirement deprives Congress and the courts of flexibility in protecting federal interests. Flexibility may not be a particularly desirable quality in this area. The Supreme Court has not tolerated flexibility in its eleventh amendment jurisprudence; the Court has required Congress to state clearly and explicitly that it intends to abrogate the states' sovereign immunity.[226] Flexibility may also be on the retreat in separation of powers jurisprudence.[227] Judicial staunchness seems more warranted for defending federalism than separation of powers, for the states do not have political resources, like those enjoyed by the President, to protect their interests against congressional intrusion.

Another possible objection to the "clear statement" rule is that it may pressure the Court to turn to the Constitution and discover that more federal powers are actually reserved to the federal government rather than shared with the states. The Supreme Court might, for example, revive long-slumbering doctrines prohibiting the states from "directly" regulating interstate commerce under a newfound awareness that the Framers intended to exclude the states from this area.[228]

Outweighing these speculative disadvantages are the distinct advantages of a "clear statement" rule. Under this rule, although the courts will still have to struggle with statutory language,[229] they will be working with an anchor holding them to Congress' preemptive intent. The courts will also be playing some role in requiring Congress to deal honestly in settling the expectations of those who are subject to regulation. By accepting a congressional power to make alterations in the nation's federal structure but insisting that such changes be considered, honest, and ex-

226. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 235, 244-45 (1985).

227. *See* Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating automatic deficit-reduction provision of Gramm-Rudman-Hollings Act as violating separation of powers); INS v. Chadha, 462 U.S. 919 (1983) (invalidating legislative veto). *But see* Morrison v. Olson, 108 S. Ct. 2597 (1988) (upholding independent counsel provision of Ethics in Government Act against separation of powers challenge).

228. *See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1280-81 (1986). As discussed *supra* text following note 196, the Supreme Court may make mistakes. Yet state regulation affecting interstate commerce is so entrenched today that, barring a complete victory by free-market disciples on the issue of state regulation, judicial inertia in the face of both precedents and legislation will probably prevent such a revolution. *See generally* Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987).

229. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2216-19 (1987) (discussing whether state law at issue related to a benefit "plan").

plicit, the "clear statement" rule offers the courts an opportunity to do something, but not too much, to protect federalism.

Conclusion

Preemption doctrine has suffered as a stepchild of constitutional law. Indeed, the doctrine's flaws suggest a lack of appreciation for preemption as a matter of constitutional dimension.[230] Although, as this Article suggests, claims of preemption implicate the most basic issues of allocation of power under our federal system,[231] the courts have frequently proceeded as if preemption were solely a matter of a vague, ill-defined intent of Congress and as if Congress operated in a vacuum, without knowledge of the continued existence of the states.[232] As a result, Congress has been able to exercise a power almost certainly denied it by the Framers,[233] administrative agencies have been able to circumvent the political safeguards of federalism,[234] and opponents of state regulation have been able to resist economic and social innovation.[235]

To avoid the damage to the federal system that preemption may cause, the courts must restore the link between preemption and federalism.[236] They must understand that a claim of preemption suggests a considered decision by the federal government to prevent the states from operating in a field and thus affect a basic change in the allocation of powers. Under the conceptions of federalism prevailing both now and at the framing of the Constitution,[237] such a decision is not to be taken lightly by Congress, nor should it be treated lightly by the courts.

The current jurisprudence of preemption, with its willingness to accept "implicit" congressional decisions to preempt state laws, its excessive deference to administrative agencies' decisions to preempt the states, and its credence of parties' claims that a federal scheme of regulation requires uniformity to be workable, fails to protect the political and judicial safeguards of federalism.

230. *See supra* notes 104-06 and accompanying text.
231. *See supra* notes 104-06 and accompanying text.
232. *See supra* notes 165-76 and accompanying text.
233. *See supra* notes 107-24 and accompanying text.
234. *See supra* notes 177-82 and accompanying text.
235. *See supra* notes 179-82 and accompanying text.
236. *See supra* notes 183-229 and accompanying text.
237. *See supra* notes 117-19, 131-37, 175-76 and accompanying text.