

Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study

BY CHARLES B. WIGGINS

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BY CHARLES B. WIGGINS*

I. INTRODUCTION

Few public issues in recent times have caused such widespread concern, inspired such acrimonious debate and proven more difficult to resolve than whether our nation should continue to increase its reliance on nuclear power to meet its enormous energy needs. Until the past year the proponents of nuclear power, supported by hard empirical data and scientific reports, a multi-billion dollar industrial base and a seemingly captive federal regulatory agency, clearly were gaining momentum. By contrast, the opposition was often reduced to reliance upon vague environmental and economic concerns, and upon intuitive rather than explicitly provable fears about nuclear power development. During the past year, however, chinks have appeared in the armor of nuclear power advocates. First, a review committee of the Nuclear Regulatory Commission (NRC) fatally undercut an earlier comprehensive NRC study of the risks of nuclear plants by revealing serious flaws in the statistical bases for its conclusions.¹ Next, the NRC shut down five East Coast nuclear plants because of an error in the computer program used to design against potential earth-

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¹ AD HOC RISK ASSESSMENT REVIEW GROUP, RISK ASSESSMENT REVIEW GROUP REPORT TO THE U.S. NUCLEAR REGULATORY COMMISSION at viii-x, 6-13 (1978) (also known as the Lewis Report, after its Chairperson, Professor Harold Lewis of the University of California).

The Lewis Report finds serious, perhaps fatal, fault with the analysis of the earlier Rasmussen Report, U.S. NUCLEAR REGULATORY COMM'N, REACTOR SAFETY STUDY: AN ASSESSMENT OF ACCIDENT RISKS IN U.S. COMMERCIAL NUCLEAR POWER PLANTS (1975), which had become the nuclear industry brief on the safety of nuclear power. See generally Lanouette, *Nuclear Safety Report is Not So "Fail-Safe" After All*, 10 NAT'L J. 1860 (1978).

quake damage.² Most recently, at Three Mile Island in Pennsylvania, a core "meltdown" almost became a reality, despite allegations of industry spokespersons that such a catastrophe was all but impossible.³ The debate over nuclear power has now assumed worldwide proportions, as evidenced by problems with nuclear fuel reprocessing in Britain,⁴ increasingly violent anti-nuclear demonstrations and sabotage of reactors in France,⁵ and public refusal to permit the commencement of reprocessing in Germany.⁶

In California, the nuclear power controversy has been waged as a part of an even broader concern over future energy needs. In 1973 the Warren-Alquist Act created an administrative agency, the California Energy Resources Conservation and Development Commission (Energy Commission), to rationalize the process of energy decisionmaking.⁷ The legislature charged the agency with forecasting the state's energy requirements and researching alternative methods of providing electricity.⁸ Most importantly, the Energy Commission was granted exclusive authority to certify applications by public utilities for the construction of new power generating facilities in the state.⁹ It was hoped that this agency

² Press Release, U.S. Nuclear Regulatory Commission, March 13, 1979; Los Angeles Times, March 14, 1979, Part I, at 1, col. 5.

³ The events at Three Mile Island occupied the front page of the nation's newspapers and magazines for some ten days following the "event." See, e.g., Los Angeles Times, March 29, 1979, Part I, at 1, col. 5; *A Nuclear Nightmare*, TIME, April 9, 1979, at 8. For an engaging description of the control room chronology of the disaster see Gray, *What Really Happened at Three Mile Island*, 291 ROLLING STONE 47 (1979).

Numerous investigatory bodies were created by the NRC, the Congress, the President and others to investigate the implications of Three Mile Island. See generally Cottrell, *Developments Pertaining to the Three Mile Island Accident*, 20 NUCLEAR SAFETY 613 (1979) (summary of status of reports by all major investigators); Casto & Cottrell, *Preliminary Report on the Three Mile Island Incident*, 20 NUCLEAR SAFETY 483 (1979). Even California explored the consequences, since its Rancho Seco facility near Sacramento is the design twin of the Babcock & Wilcox installation at Three Mile Island. *Oversight Hearings Before the California Assembly Permanent Subcommittee on Energy, Nuclear Power Plant Safety: The Three Mile Island Nuclear Power Accident and Its Implications for California* 1-6 (1979).

⁴ See, e.g., *Washing Windscale's Dirty Linen*, THE ECONOMIST, June 18, 1977, at 122; Lean, *Windscale Fight Has Just Begun*, OBSERVER MAGAZINE, March 12, 1978, at 14.

⁵ Los Angeles Times, April 7, 1979, Part I, at 1, col. 5.

⁶ Los Angeles Times, March 17, 1979, Part I, at 7, col. 3.

⁷ CAL. PUB. RES. CODE §§ 25000-25968 (West 1977).

⁸ *Id.* §§ 25005.5, 25216, 25300-25322, 25400-25401, 25600-25604, 25700-25705.

⁹ *Id.* § 25500.

would provide "one-stop" power plant siting procedures which could accommodate the numerous interested parties desiring to participate in these complicated public decisions.¹⁰

The Warren-Alquist Act presumed that the initial decision as to the need for additional facilities, as well as subsidiary decisions like the capacity of the proposed plant and the type of fuel to be used, would be made by the public utility seeking certification from the Energy Commission.¹¹ Some utilities looking to expand their capacity presumably would favor nuclear plants while others would favor nonnuclear systems. The Energy Commission's role would be to remain neutral in the debate over nuclear power. Irrespective of the type of fuel to be used by the proposed facility, the agency would merely determine whether the application of a utility met its statutory certification criteria.¹² In 1976, however, an amendment to the Warren-Alquist Act modified the Energy Commission's neutrality.¹³ Three sections were added to the Act that have postponed, perhaps indefinitely, the licensing of nuclear power facilities in California.¹⁴ One section, referred to in this article as the California Nuclear Law, has generated the most attention. It provides, in part:

No nuclear fission thermal powerplant . . . shall be permitted land use in the state, or where applicable, be certified by the commission [Energy Commission] until both conditions (a) and (b) have been met:

(a) The commission finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste.

(b) The commission has reported its findings and the reasons therefor pursuant to paragraph (a) to the Legislature [which is granted power to disaffirm the commission findings]¹⁵

It is hardly surprising that the California Legislature would consider problems of nuclear waste disposal relevant to power plant certification procedures. The lack of a technology for permanent disposal of high-level radioactive waste products gener-

¹⁰ *Id.* §§ 25005, 25005.5, 25006, 25500. See generally Note, *California's Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 U.C.L.A.L. REV. 1313, 1322 n.54 (1977).

¹¹ CAL. PUB. RES. CODE §§ 25504, 25504.5 (West 1977).

¹² *Id.* §§ 25523(b), 25525.

¹³ 1976 Cal. Stats., ch. 195, § 1. The final section is codified as CAL. PUB. RES. CODE § 25524.3 (West Cum. Supp. 1979), amended by 1977 Cal. Stats., ch. 61, § 1.

¹⁴ CAL. PUB. RES. CODE §§ 25524.1-.3 (West 1977).

¹⁵ *Id.* § 25524.2 (West 1977).

ated by nuclear plants has long hindered wider acceptance of nuclear power.¹⁶ These wastes must be completely isolated from the ecosystem for extraordinarily long periods of time. Thus, a utility faces enormous potential consequences in the absence of a viable disposal mechanism. No "technological fix" to date has proven practicable, though some suggestions might startle Buck Rogers.¹⁷ The federal government has been attempting for some time to solve the problem, so far unsuccessfully,¹⁸ and several states are now struggling to avoid becoming dumping grounds for spent nuclear fuels.¹⁹ In spite of this lack of a waste disposal technology, the NRC continues to grant permits for the construction of nuclear plants. California, however, has balked at affording land use to nuclear plants until the situation is remedied. Public utilities already have either postponed or scrapped plans to construct new nuclear power plants in California as a result of

¹⁶ It has been estimated that the current radioactive waste inventory would have to be diluted by water equalling 50 times the volume of Lake Superior or 1200 year's flow volume of the Mississippi River to achieve the maximum permissible levels specified by NRC regulations To dilute the radioactive wastes expected to be on hand in the year 2000 to maximum permissible levels would require water equalling approximately 4 percent of the world's oceans, or almost twice the fresh water found in lakes, rivers, groundwater and glaciers around the world.

Jaksetic, *Legal Aspects of Radioactive High-Level Waste Management*, 9 ENV'T L. 347, 350 (1979). See generally Bodansky & Schmidt, *The Nuclear Alternative*, 30 MERCER L. REV. 395, 402-17 (1979).

¹⁷ Proposals for disposing of nuclear wastes range from the currently advanced solution of burial in deep bedded salt deposits to burial in the polar ice caps. The development of the technology for launching cargo rockets filled with spent nuclear wastes into space destined for the sun is also proposed. See generally 4 U.S. ENERGY RESEARCH & DEVELOPMENT ADMINISTRATION, *ALTERNATIVE FOR MANAGING WASTES FROM REACTORS AND POST-FISSION OPERATIONS IN THE LWR FUEL CYCLE* §§ 25.2, 25.3, 26 (1976); DEP'T OF ENERGY, *DRAFT REPORT OF THE TASK FORCES FOR REVIEW OF NUCLEAR WASTE MANAGEMENT* 159-65 (1978).

¹⁸ See generally INTERAGENCY REVIEW GROUP ON NUCLEAR WASTE MANAGEMENT, *REPORT TO THE PRESIDENT* 35-80 (1979).

¹⁹ See, e.g., Carter, *Nuclear Wastes: Popular Antipathy Narrows Search for Disposal Sites*, 197 SCIENCE 1265 (1977); Ivins, *'Nuclear Dump' Debate Heats Up in Carlsbad, N.M.*, N.Y. Times, Jan. 22, 1978, § 1, at 20; see generally England, *Recent Regulatory Developments Concerning the Transportation of Nuclear Fuel and Other Radioactive Materials*, 7 ENV'T L. 203 (1977); Comment, *Preemption Under the Atomic Energy Act of 1954: Permissible State Regulation of Nuclear Facilities' Location, Transportation of Radioactive Materials, and Radioactive Waste Disposal*, 11 TULSA L.J. 397 (1976); Note, *Nuclear Waste Management: A Challenge to Federalism*, 7 ECOLOGY L.Q. 917 (1979).

this enactment.²⁰

As is so often the case in this country, a court will ultimately determine the effectiveness of the legislative policy decision to postpone the construction of new nuclear power facilities in California. Early this year, in *Pacific Legal Foundation v. ERCDC*,²¹ a federal district court in San Diego held that the California Nuclear Law was unconstitutional because state decisions about the propriety of nuclear plants had been preempted by federal law. The court was persuaded that by enacting comprehensive regulation of the construction and operation of reactors to safeguard against radiation hazards, Congress precluded states from deciding whether to utilize nuclear power generating facilities because of concern over the problems of waste disposal. The decision is being appealed,²² and seems a likely candidate for ultimate review by the United States Supreme Court.

Any finding of preemption must be based upon a delicate judicial balancing of the state and federal interests in regulating the affected subject matter. In recent years the Supreme Court has been redefining the preemption doctrine as a part of its overall reassessment of approaches to problems of federalism and, more broadly, of the role of the judiciary in public policymaking. This article will first make some general points about an emerging methodology employed by the current Supreme Court in deciding cases raising issues of federalism. The Court's recent preemption opinions will then be analyzed to show how they reflect this new approach. Finally, the article will suggest a method of balancing the state and federal factors involved in the decision by a state to impose conditions on the utilization of nuclear power as an alternative to that advanced by the district court in *PLF*.

²⁰ For instance, a joint utility proposal to construct a large nuclear power reactor in the Southern California Desert, the Sundesert Nuclear Project, was allegedly suspended because of the Warren-Alquist Act Amendments of 1976. Cf. *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979), Complaint at 5.

²¹ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979). This case will be referred to by its acronym, *PLF v. ERCDC*, or by its short form, *PLF*, in all future textual references.

²² The defendants and intervenors filed appeals with the Court of Appeals for the Ninth Circuit on June 19, 20, and 29, 1979. *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979), *appeal docketed*, No. 79-3365 (9th Cir. June 19, 1979).

II. PRINCIPLE AND POLICY IN CONSTITUTIONAL DECISIONMAKING—AN OVERVIEW OF THE TERRAIN²³

A. A General Premise

Recent attempts by academic commentators to rationalize the Supreme Court's decisionmaking methodology suffer an almost schizophrenic detachment from the way the Court itself decides individual cases. For over twenty years now, the journal pages have been filled with permutations of the basic premise of Herbert Wechsler's now famous Holmes Lecture²⁴—that a valid Constitutional decision should be based on "neutral principles" of a generalizable nature and should avoid idiosyncratic, result-oriented rationalizations of the policy preferences of a majority of the Justices.²⁵ This assessment of the judicial task can perhaps best be understood as a thoughtful reaction to the more extreme conclusions of some earlier Realist writers, who rebelled at viewing decisionmaking as a process of mere rule application and who first analyzed judicial review in terms of the personal value preferences of the Justices.²⁶ During the Warren Court era a powerful

²³ This section presents a brief outline of an emerging methodology of federalism. It is offered to provide a lens through which the reader can view the Court's recent preemption decisions analyzed in Part III.

²⁴ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

²⁵ The number of articles spawned by the Wechsler article is an awesome tribute to the man and his thought. A generation of the annual Forwards to the Supreme Court Review of the *Harvard Law Review* were almost all in this vein. See, e.g., Bickel, *The Supreme Court, 1960 Term, Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Kurland, *The Supreme Court, 1963 Term, Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964); Henkin, *The Supreme Court, 1967 Term, Forward: On Drawing Lines*, 82 HARV. L. REV. 63 (1968). See generally A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970). For the counterpoint to this line of argument, see, e.g., Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971); Black, *The Supreme Court, 1966 Term, Forward: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964).

²⁶ An answer to these questions [about the place of rules in judicial decisionmaking] must lead to a vision of law as something more than rules and principles, must lead us again to the opinion that the personality of the judge is the pivotal factor. Where, then, is the hope for complete uniformity, certainty, continuity in law? It is gone

faction, notably Justices Black, Frankfurter and Harlan, shared the belief that judicial policymaking should be confined by a process of "reasoned elaboration." Thus, there was a consensus among a large segment of both scholastic and judicial writers as to proper Supreme Court decisionmaking methodology.

Significant changes during the Seventies, however, have tarnished the appeal of this approach to the work of the Court. For the most part, the academic writers have continued to analyze judicial decisionmaking in terms of overarching structures encompassing large groupings of cases.²⁷ Members of the Court, however, have been walking another path. Gone are the Justices who could be relied upon to engage Wechsler's admonition.²⁸ In their place is a Court which appears very much enamored of the policy aspects of the cases coming before it. Individual value preferences have become more and more obviously a critical ingredient in the resolution of Constitutional disputes. The large number of separate opinions written by members of the Burger Court is but one example of the current importance of personal judicial value preferences.²⁹ Often a new opinion closely resem-

except to the extent that the personalities of all judges will be substantially alike, to the extent that the judges will all have substantially identical mental and emotional habits.

J. FRANK, *LAW AND THE MODERN MIND* 143 (1930). See also Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1929). For an excellent general treatment of this transition from Realism, see White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

²⁷ Again the *Harvard Law Review* Forwards figure prominently. See, e.g., Karst, *The Supreme Court, 1976 Term, Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Brest, *The Supreme Court, 1975 Term, Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

²⁸ It is somewhat simplistic to think of the Court as a bloc rather than looking at the work of each Justice as a whole. For example, Justice Brennan has worked mightily for a dozen cases or so to develop a principled approach to gender discrimination claims arising under the equal protection clause. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976) ("... classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. *Id.* at 197). A further elaboration of this point, however, is beyond the scope of this outline.

²⁹ The classic example of this phenomenon is *Furman v. Georgia*, 408 U.S. 238 (1972). The *per curiam* opinion for the Court, finding unconstitutional the imposition of the death penalty in the cases presented, is six sentences long. The separate opinions of each of the nine Justices occupies the next two hundred

bles the seriatim practice of the English House of Lords, where each Lord of Appeal writes his own speech on the case and the reader is left to count noses on each issue of law.³⁰ With such an emphasis on individual opinion, consensus easily gives way to fragmentation and confusion, the precedential value of these opinions is seriously eroded, and the gulf between the older style of scholarly comment and the newer style of judicial decision is magnified.

A major premise of the remainder of this section, and indeed a key to the remainder of this article, is that subjective judicial values about the proper balance of state and federal regulatory authority have become increasingly important in the Court's disposition of cases raising federalism issues. The current Court uses techniques of "federalism balancing" in an effort to preserve a domain of state regulatory power which cannot easily be invaded by action of the national government. By employing presump-

thirty pages of the United States Reports. Even more intriguing, except to affected parties or those attempting to glean some precedential value from the cases, are two decisions in which the inability of a majority of the Justices to agree upon an approach allowed one Justice to write the Opinion of the Court although no one else agreed with his analysis. See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (caption reads: "MR. JUSTICE BLACK, announcing the judgments of the Court in an opinion expressing his own view of the cases." *Id.* at 117.). The statistical data prepared annually by the *Harvard Law Review* indicates an expansion of the number of separate opinions. Compare *The Supreme Court, 1976 Term, Statistics*, 91 HARV. L. REV. 295 (1977) (142 Opinions of the Court, 91 Concurrences, 140 Dissents) and *1975 Term, Statistics*, 90 HARV. L. REV. 276 (1976) (159 Opinions of the Court, 89 Concurrences, 126 Dissents) with *The Supreme Court, 1966 Term, Statistics*, 81 HARV. L. REV. 130 (1967) (119 Opinions of the Court, 26 Concurrences, 97 Dissents) and *The Supreme Court, 1965 Term, Statistics*, 80 HARV. L. REV. 144 (1966) (107 Opinions of the Court, 37 Concurrences, 74 Dissents).

³⁰ In *Hyam v. Dir. Pub. Prosec.*, [1974] 2 All E.R. 41, for example, the House of Lords reinterpreted the *mens rea* of murder. One question was whether proof of an intent to commit grievous bodily harm was sufficient to establish the required malice, or whether proof of an intent to kill or endanger life was required. Lord Hailsham of St. Marylebone and Viscount Dilhorne found the lesser showing of intent sufficient. Lords Diplock and Kilbrandon disagreed. Lord Cross of Chelsea, the deciding vote on the court, had this to say:

My noble and learned friend [Lord Diplock] may be right. On the other hand, my noble and learned friend, Viscount Dilhorne, whose speech I have also had the advantage of reading, thinks that he is wrong—and he may be right in so thinking. All that I am certain of is that I am not prepared to decide between them.

Id. at 72. Needless to say, this nonopinion has made the instructing of juries in murder cases in England somewhat problematic.

tions and balancing standards and by assigning weights to the competing interests to be balanced, the judiciary can act as the guarantor of the states' autonomy at a time when the national legislature is encroaching on areas historically subject to the state's police powers.

B. Federalism Problems and the Burger Court

Preemption decisions have generally arisen when federal regulation of a given subject has not clearly established the ability of the states to exercise concurrent regulatory authority. In the absence of obvious congressional intent, the judiciary has considerable latitude to set boundaries of state and federal power in the field. Section III will be concerned with the approach of the Burger Court to preemption problems. But there are two other categories of cases which also require a judicial decision about the proper balance of state and federal power. The first arises from a challenge to a state statute which allegedly discriminates against or unduly burdens the interstate free market in goods mandated by the commerce clause.³² These are popularly referred to as "dormant" or "negative" commerce clause cases, since there has been no affirmative exercise of power by the national government.³³ The second category is presented when an act of Congress affects a subject matter customarily regulated by the states, and may be viewed as cutting impermissibly into an area of traditional state authority.³⁴ For some time these cases did not pose

³¹ See generally, Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 (1972).

³² See, e.g., the famous regulation trilogy of *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). For two examples of state taxation cases, see *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

³³ Recently several helpful articles on the subject have appeared, e.g., Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473 (1978); Maltz, *The Burger Court, The Commerce Clause, and the Problem of Differential Treatment*, 54 INDIANA L.J. 165 (1979); Maltz, *The Burger Court, The Regulation of Interstate Transportation, And The Concept of Local Concern: The Jurisprudence of Categories*, 46 TENN. L. REV. 406 (1979); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

³⁴ E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hammer v. Dagenhart*,

great problems for the Court, and congressional authority was routinely upheld, but the winds of change may be blowing.³⁵ When viewed as a whole, the current Court's decisions in the three areas of federalism balancing show rekindled concern for protecting state regulatory authority while assuring ultimate federal supremacy. A brief look at this development in cases considering the constitutionality of both state and federal regulations of interstate commerce may help explain the shift in preemption methodology analyzed in Part III of this article.

1. Dormant Commerce Clause Cases

The Court has recently decided a spate of "dormant commerce clause" cases. These decisions continue to evidence judicial hostility to state regulations that tend to upset the interstate common market mandated by the commerce clause of the Constitution.³⁶ The Court employs a balancing standard which weighs the

247 U.S. 251 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

³⁵ Beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), decided just after, and perhaps because of, the collision of the New Deal with the old Justices, the Court did not invalidate the exercise of federal power for almost forty years. Some rather expansive concepts of the scope of congressional authority were developed during this period. *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Congress has the authority to bar discrimination in restaurants "offering to serve interstate travellers or serving food, a substantial portion of which has moved in interstate commerce." *Id.* at 304); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress has authority to penalize a farmer for growing wheat on his own property mainly for personal use because of its "substantial effect" on interstate commerce. *Id.* at 128-29). *But see* *National League of Cities v. Usery*, 426 U.S. 833 (1976), and text accompanying notes 43-80 *infra*.

³⁶ *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (residents' preference in Alaskan oilfield employment discriminates against nonresidents in employment opportunities affecting interstate commerce) (dictum); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey prohibition of importation of out-of-state garbage discriminates against interstate commerce); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (Wisconsin prohibition of extra-long trucks burdens interstate commerce in absence of evidence to support state justification on safety ground); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina law prohibiting display of Washington apple grade markings discriminates against and burdens interstate sales of apples from Washington); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) (Virginia prohibition of menhaden fishing in state waters by noncitizens discriminates against interstate commerce) (dictum); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (Mississippi prohibition on sales of milk from another state unless the other state reciprocally accepted Mississippi milk unduly burdened interstate commerce). *But see* *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (Maryland statute prohibiting ownership of retail gas

state interest advanced by the challenged regulation against the national interest in open boundaries to commerce.³⁷ This explicit reliance on balancing to maintain constitutionally-guaranteed access to state markets actively involves the judiciary in matters of basic structural policy. It has been eloquently criticized in the past,³⁸ and seems out of keeping with the restrictive image of the judicial function cultivated by the Burger Court.³⁹ The results of

stations by oil producers or refiners does not discriminate against or unduly burden interstate commerce); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (Maryland refusal to pay bounty to processors of junked vehicles titled in states other than Maryland without burdensome documentation requirements did not give rise to a negative commerce clause claim. The bounty plan was not "the kind of action with which the Commerce Clause is concerned." *Id.* at 805). The *Hughes* decision was written over a powerful dissent by Justices Brennan, White and Marshall, *id.* at 817, and has evoked the wrath of Judge Friendly. Commenting on *Hughes* and on *National League of Cities*, see text accompanying notes 43-80 *infra*, Judge Friendly stated: "Altogether June 24, 1976, was one of the poorest days the commerce clause has had for a century." Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019, 1033 (1977). He also concluded "[i]t would be dangerous, however, to regard the *Hughes* case as having much doctrinal significance." *Id.* at n.119.

³⁷ Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation . . . imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945) (Stone, C.J.).

³⁸ Justice Black was the foremost opponent of balancing in commerce clause cases. See *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129 (1968); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 784 (Black, J., dissenting):

[T]he determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.

Id. at 789.

³⁹ With notable exceptions in some areas, the new majority has a much more modest view of the judicial function within our democratic society. Elements of this philosophy have emerged and been acted upon in such fields as individual rights (especially equal protection), access to the federal courts (for example, standing), and federal-state relations (for example, revivification of the eleventh

the balancing also appear hard to reconcile with the current Court's state-supportive value preference in federalism cases.⁴⁰ On closer inspection, however, the issue addressed in dormant commerce clause cases differs from that in the other two categories of federalism cases, where Congress has, in fact, acted affirmatively. This difference is probably best explained by the distinct separation of powers considerations involved in the two types of cases.

In dormant commerce clause cases there is no conflict between national and state legislation on the same subject. The dispute in these cases is really at the state level, with the home state regulating commerce in a way that disadvantages those in other states. The federalism problem arises only because the commerce clause limits the power of one state to erect barriers to commercial entry by persons from other states even where Congress has not acted. The judicial role here is to umpire the dispute to assure that otherwise valid methods for protecting home state interests, or for assuring that out-of-state products "pay their way," do not become tools for shielding home state industries from constitutionally-required competition in the national marketplace.

In these cases, then, the Court is the only branch of the national government involved in the federalism balancing process. It acts without prior indication of intention from the coordinate legislative branch, so judicially-adopted standards will set the pattern for decisionmaking in the area. Since the Court should not expect the home state to have full regard for the virtues of a national "Common Market," it has developed balancing techniques which look with suspicion at discriminatory or unduly burdensome state regulations of commerce.⁴¹ The Court's self-

amendment and resurrection of the doctrine of comity as limitations on federal judicial activity). The overriding themes appear to include judicial self-restraint, reliance on and faith for force in the democratic process, skepticism about the wisdom and effectiveness of active judicial intervention in the resolution of basic societal disagreements, and a certain nervousness about continual confrontations between the Court—an institution perceived by many as undemocratic and countermajoritarian—and popularly elected, and therefore politically accountable, legislative and executive officials.

Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473, 475-78 (1978) (the footnotes accompanying this passage are a rich resource for the interested explorer).

⁴⁰ See section B(2) *infra*.

⁴¹ Justice Jackson, in a characteristically monumental passage, put it like this:

perception as the national body responsible for maintaining interstate free trade has continued to the present time, and the Burger Court has routinely struck down state enactments which would impinge upon this goal.⁴²

2. Commerce Clause Cases

In the other two areas where federalism balancing is possible, the current Court's opinions show a remarkable shift in perspective from earlier times. In both its preemption and its commerce clause cases the maintenance of state regulatory autonomy has increasingly become a guiding principle. In these areas the Court is not the sole voice of the national government on matters of federal-state power. Congress has already enacted legislation, and the issue before the Court is whether that federal action should displace state decisionmaking authority. Presumably, then, the Congress has already performed the primary federalism balancing function, and the judiciary merely interprets whether the initial balance is appropriate.

In light of the Court's characteristic feelings about institutional

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

...
The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.

...
Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-39 (1949). *Accord*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). See note 38 *supra*, for Justice Black's differing conception.

⁴² See cases cited in note 36 *supra*. See also *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974) (quoting *Hood* extensively).

self-restraint and deference to legislative judgments generally, one might expect that it would be reluctant to protect state regulatory authority in areas where Congress has seemingly expressed contrary desires. In fact, however, preemption and commerce clause cases are objects of the Court's greatest activism today. Its preemption opinions, though not universally consistent, suggest that the Court is attempting as far as possible to preserve state regulatory authority unless congressional language or history or the nature of the subject regulated makes a finding of preemption inescapable. This development will be detailed in Part III of this article. This same trend may also be appearing in commerce clause litigation. In 1976, congressional action—concededly pursuant to an enumerated power—was invalidated because it infringed on an “integral governmental function” of the states. The analysis used by the Court in *National League of Cities v. Usery*⁴³ indicates that the plenary power of Congress to legislate under the commerce clause may be up for review.

In *McCulloch v. Maryland*⁴⁴ in 1819, Chief Justice John Marshall set the pattern for the Court's approach to commerce clause cases for the next 150 years when he declared:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁴⁵

There were early suggestions in *McCulloch* itself that acts of Congress taken under “pretext” would be outside the scope³ of its authority,⁴⁶ and there were rumblings early in this century that the tenth amendment created a system of “dual federalism” which imposed a barrier to federal power.⁴⁷ Nonetheless, the conventional wisdom, which had received almost Biblical reverence in the forty years preceding *National League of Cities*, was that the Court's essential task was to determine whether the matter regulated by Congress was in fact “commerce.” Once it established that Congress had the basic power to act, the Court's role was limited to a deferential scrutiny of means, examining only cursorily the acceptability of the regulatory method selected. The consistent theme since *McCulloch* was that federal power, once

⁴³ 426 U.S. 833 (1976).

⁴⁴ 17 U.S. (4 Wheat.) 316 (1819).

⁴⁵ *Id.* at 421.

⁴⁶ *Id.* at 423.

⁴⁷ See cases cited in note 34 *supra*.

found, is plenary.⁴⁸

National League of Cities v. Usery, however, adds a new ingredient to the federalism mix.⁴⁹ In 1974 Congress amended the Fair Labor Standards Act to extend minimum wage and maximum hour provisions to certain employees of the state itself.⁵⁰ Justice Rehnquist used the constitutional challenge as a springboard for suggesting a new approach to commerce clause analysis. The Court determined that beyond some point the federal interest in regulation, when exercised on states directly, may infringe upon a state interest which affirmatively limits the otherwise plenary power of the federal government. This point was reached, and the 1974 amendments were thus found unconstitutional, because the federal regulation impinged upon "the States' freedom to structure integral operations in areas of traditional governmental functions."⁵¹ Earlier Justice Rehnquist had said:

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty 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. We have repeatedly recognized that there are attributes of sovereignty at-

⁴⁸ It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

United States v. Darby, 312 U.S. 100, 114-15 (1941) (Stone, J.).

⁴⁹ The case unleashed a mammoth amount of academic commentary. See, e.g., Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161; Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35; Michaelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977); and myriad student notes.

⁵⁰ 29 U.S.C. §§ 203(d), (s)(5), (x) (1976).

⁵¹ *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

taching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.⁵²

The ultimate structural framework of this new test of federalism is still unclear. Perhaps *National League of Cities* represents a polar extreme, never again to be reached, in which the Court makes it clear to Congress that judicial review in this area of federalism balancing is not totally moribund. If so, *National League of Cities* may merely be the *Schechter* of the Seventies,⁵³ a convenient but largely irrelevant reminder of ultimate limits. The decision may also be far more enduring. Indeed, *National League of Cities* just may initiate a new judicial methodology in federalism cases. It is a methodology which is familiar in constitutional jurisprudence, for it mirrors the development in the last fifteen years of a two-tier standard in individual rights analysis by the Court.

The Warren Court discovered that there were certain cases involving equal protection claims which could not be satisfactorily resolved by employing a deferential rational relation standard.⁵⁴ In the Sixties and early Seventies the Court characterized these cases as involving either "suspect classifications"⁵⁵ or

⁵² *Id.* at 845.

⁵³ In the "Sick Chicken" case, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court unanimously struck down the fair practice codes of the National Industrial Recovery Act, a key early piece of New Deal legislation. Justice Cardozo, one who was often troubled by judicial invalidation of congressional legislation, *see, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 324 (Cardozo, J., dissenting), wrote a concurrence in *Schechter*. When faced with the prospect of having to find a connection between the Schechter Brothers' kosher chicken slaughterhouse on Flatbush Avenue in Brooklyn and interstate commerce he concluded: "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain [citation]. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere." 295 U.S. at 554.

⁵⁴ *E.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955). *See generally* Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁵⁵ *E.g., Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73 (1972) (illegitimacy) (dictum); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender) (Brennan, J., for a four-person plurality). With respect to gender, *see also* note 28 *supra* and note 61 *infra*.

"fundamental rights"⁵⁶ of persons, and it utilized a far more stringent standard of review in deciding the constitutionality of statutes affecting these interests. Thus developed the "strict scrutiny" standard of equal protection.

Similarly, in due process cases, the Court has discovered and given content to a fundamental right to privacy, rooted initially in the penumbrae of the Bill of Rights.⁵⁷ The constitutional right of privacy also triggers a strict scrutiny standard of review, making it very difficult for states to regulate in the area. This substantive due process, blessing of Harlan⁵⁸ and bane of Black,⁵⁹ now seems anchored in constitutional analysis more firmly than earlier attempts, like *Lochner*,⁶⁰ were ever able to manage.

The Burger Court is obviously less than enamored of the expansionist tendencies of its predecessor Court in the area of individual rights. It has not turned its back on the individual as many had feared, but neither has it dramatically expanded the protections afforded the solitary citizen, except in a few isolated areas. The Court has, however, been revitalizing the role of state courts and state legislatures in areas in which many believed federal regulation had destroyed state incentives to act. *National League of Cities* has capped this growth of what may be termed "substantive federalism."

3. Substantive Federalism and Judicial Review

The present Court can draw on a variety of structural approaches in fashioning a substantive federalism, just as the Warren Court did in developing its individual rights methodology. The Court might adopt a two-tiered approach to the problem, first identifying "integral governmental functions" of a state as

⁵⁶ *E.g.*, *Douglas v. California*, 372 U.S. 353 (1963) (equal treatment in the administration of criminal justice); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (exercise of the franchise).

⁵⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Douglas, J.).

⁵⁸ *Id.* at 499 (Harlan, J., concurring).

⁵⁹ *Id.* at 507 (Black, J., dissenting).

⁶⁰ In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a state maximum hours statute for bakers. The statute was held invalid under the due process clause of the fourteenth amendment for interfering with the freedom of contract of baker and employer. It perhaps leads the list of most reviled Supreme Court decisions (*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), may be a close second) because of its advancement of subjective notions about the constitutional significance of *laissez faire* capitalism.

cases come before it and then applying either a deferential or a stringent standard of review based upon its characterization of the state function at issue. This seems to be the approach of Rehnquist in *National League of Cities*, and it parallels the approach currently taken in much of the Court's individual rights analysis.⁶¹ But there is good reason to suspect that a more flexible approach to the problem will ultimately be adopted. Most of the Justices have expressed some frustration with the mechanistic two-tiered standard in individual rights cases and may well desire to avoid the same problems in the area of federalism. Secondly, and more importantly, the Court has for over a century utilized a more flexible approach in the two other areas of federalism balancing, preemption and state regulation of commerce. It might seem conceptually useful to employ such a flexible standard in this area as well. By utilizing a balancing test of the kind first announced in *Cooley v. Board of Wardens*,⁶² the Court could avoid many of the pitfalls associated with two-tier analysis and bring conceptual unity of approach to the entire area of judicial review of federal-state relations. Mr. Justice Blackmun seemed to favor this approach in his concurrence, necessary to make the majority in *National League of Cities*.⁶³ As demonstrated in *Roe v. Wade*,⁶⁴ Blackmun can be more sensitive than some of his fellow Justices to constitutional decisionmaking methodology. The use of a balancing standard in substantive federalism cases could well appeal to the dissenters in *National League of Cities* in ways Rehnquist's notions of quasi-dual federalism never could.

The major conceptual difficulty with *National League of Cities*, pointed out admirably by Justice Brennan's dissent, is that the case undercuts Chief Justice Marshall's statement that the Congress has plenary power when acting under an enumer-

⁶¹ The rigidity of the two-tiered analysis was assured by Justice Powell's efforts in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). It has been supplemented, however, with regard to gender classifications, see *Craig v. Boren*, 429 U.S. 190, 197 (1976) and illegitimacy classifications, see *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

⁶² 53 U.S. (12 How.) 299 (1851). See text accompanying notes 138-67 *infra*.

⁶³ I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.

National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

⁶⁴ 410 U.S. 113 (1973).

ated power such as the commerce clause.⁶⁵ It is a revolutionary step for Rehnquist to concede that the subject matter regulated by the Fair Labor Standards Act Amendments is within the scope of Congress's commerce clause powers,⁶⁶ but nonetheless to find federal power limited when it infringes on an area of state sovereignty. And this difficulty is not cured by comparing this opinion to earlier decisions of the Court, cases like *Hammer v. Dagenhart*⁶⁷ or *Carter v. Carter Coal*,⁶⁸ since there the question was whether the federal legislation really regulated "commerce," not whether an admitted regulation of commerce could be limited by state sovereignty.

Despite its striking departure from long established constitutional doctrine, *National League of Cities* can be rationalized by comparing its result to the Court's development of privacy cases beginning with *Griswold v. Connecticut*.⁶⁹ The substantive due process right of privacy did not receive explicit textual protection by the Framers. Yet, when the Bill of Rights is viewed as a whole, it is clear that a key concept underlying many of its provisions is the freedom of the individual from unacceptable interference by the State. The citizen's home was inviolable by marshalls⁷⁰ or the militia.⁷¹ His or her right to a fair trial could not be compromised by the State through inadequate arrest or trial procedures.⁷² The term "privacy," as a legal idea, was not coined until Warren and Brandeis's article in 1890.⁷³ But if you asked a twentieth century James Madison to explain in one word the ultimate import of the Bill of Rights, "privacy" would be as close a word as any in contemporary usage. It is this generic look at the Bill of Rights that is the foundation of the Douglas opinion in *Griswold*. And it is this generic approach to finding privacy as the "first principle" of the Bill of Rights that makes the Goldberg reliance on the ninth amendment in *Griswold* comprehensible.⁷⁴

⁶⁵ 426 U.S. at 857 (Brennan, J., dissenting) (quoting Marshall, C.J. in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

⁶⁶ 426 U.S. at 841.

⁶⁷ 247 U.S. 251 (1918).

⁶⁸ 298 U.S. 238 (1936).

⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965). Those strict Hohfeldian readers who are troubled by this metaphoric mixing of "power" and "right" will be excused the occasional shudder.

⁷⁰ U.S. CONST., amend. IV.

⁷¹ *Id.* amend. III.

⁷² *Id.* amends. V & VI.

⁷³ Warren & Brandeis, *The Right to Privacy*, 4 HARV.L. REV. 193 (1890).

⁷⁴ 381 U.S. 479, 486 (Goldberg, J., concurring).

The federalism analogue of this finding of privacy underlying the Bill of Rights is the tenth amendment.⁷⁵ Like the ninth, it confers no specific rights but rather affirms a federalism "privacy" that the Framers probably did not even think needed explicit protection. It seems hardly likely that Marshall would have intended his opinion in *McCulloch* to cover the Fair Labor Standards Act Amendments invalidated in 1976. After all, in *Gibbons v. Ogden*,⁷⁶ a contemporary of *McCulloch*, one critical question for Marshall was whether congressional legislation could reach *any* intrastate activity under the commerce clause. The finding that *some* local activity was regulable by Congress needed a number of paragraphs of explanation.⁷⁷ Even in *McCulloch*, Marshall seemed so concerned about the consequences of vesting such broad authority in Congress that he added shortly after his telic "means-ends" quotation the following sentence in order to show the limits to his argument:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.⁷⁸

Though the consummate Federalist, if one had asked Marshall whether there was, as in the area of individual rights, some zone of state "privacy" from federal regulation, his answer would almost assuredly have been "yes." This same zone of state privacy, made necessary by the extraordinary expansion of federal power in the twentieth century, provides a conceptual basis for Justice Rehnquist's opinion in *National League of Cities*. The majority may well have viewed this expansion as traceable not only to political and economic factors, but also to those judicial opinions like *Darby*⁷⁹ and *Wickard*⁸⁰ which seem to have given Congress carte blanche in the area of commerce clause regulation.

A renewed concern for preserving a zone of state regulatory privacy while acknowledging basic federal supremacy has thus appeared in the federalism opinions of the Burger Court. It is

⁷⁵ U.S. CONST., amend. X.

⁷⁶ 22 U.S. (9 Wheat.) 1 (1824).

⁷⁷ *Id.* at 193-96.

⁷⁸ 17 U.S. (4 Wheat.) 316, 423 (1819).

⁷⁹ *United States v. Darby*, 312 U.S. 100 (1941).

⁸⁰ *Wickard v. Filburn*, 317 U.S. 111 (1942); *see also Katzenbach v. McClung*, 379 U.S. 294 (1964).

most dramatically presented by *National League of Cities*, where the ultimate implications are as yet unknown and certainly have the potential for being very disruptive of legislative-judicial relations. But the clearest demonstration of this new approach can be found in the Court's treatment of claims of federal preemption of state regulatory authority, an area where the legitimacy of an active judicial monitoring role is more firmly established. The development of judicial support for this state regulatory autonomy is the subject of the following section analyzing recent preemption decisions.

III. THE PREEMPTION DOCTRINE

A. *Some General Observations About Preemption Decisionmaking*

Article VI, clause 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause requires the preemption of state legislation which impinges on the terms or sphere of operation of a federal enactment.⁸¹ But federal legislation rarely preempts explicitly. In the more frequent case, where there is no guidance from a clear congressional statement, the judiciary must itself determine whether state regulatory action has invaded an exclusively federal domain. The Court naturally asserts that its task is one of divining legislative intent. "The question in each case is what the purpose of Congress was."⁸² Realistically, however, Congress does not often oblige with clear legislative history, and in truth the judicial resolution of preemption cases normally depends more upon subjective values about the optimal balance of state and national authority than on quotations from the Congressional Record.⁸³ Consequently, the Court, not the Congress,

⁸¹ There is some dispute about this statement by the commentators. See, e.g., Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630, 634-37 (1972); Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 IND. L.J. 848, 852-54 (1975). But there has been no dispute by the Court.

⁸² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁸³ See the conflicting uses of legislative history in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

makes the ultimate preemption decision.⁸⁴ This highly personalized view of the Justice's role may be both necessary and desirable.⁸⁵

Unlike the other areas in which federalism balancing is possible,⁸⁶ the Court historically has not developed principles which could guide future preemption decisions or reconcile past ones.⁸⁷ As a consequence, preemption cases remain highly fact-bound, and time-bound.⁸⁸ The Court has on occasion displayed an almost purposeful unwillingness to develop a consistent preemption approach. Justice Black catalogued the terms utilized in earlier preemption cases: ". . . conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference."⁸⁹ With this variation in the use of basic terms it is not surprising that until recently the

⁸⁴ Even Justice Frankfurter, who might have been expected to rebel at this opportunity for judicial policymaking, in fact expressed his approval in the following language in a labor case:

Many of these problems probably could not have been, at all events were not, foreseen by Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240 (1959).

⁸⁵ It is submitted that the Supreme Court abdicates its duty as arbiter of the federal system when it makes the test of preemption the intent of Congress, and no construction should be given to the necessary and proper clause which would diminish even further the Court's function in allocating power in the federal system. First, it is questionable whether the action of Congress should be allowed to conclusively preclude state action in any given area, unless that preclusion is justified in terms of modern federalism. It is equally doubtful whether Congress should have the sole power to decide to preclude or not preclude. The framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the line to be drawn.

Freeman, *supra* note 81, at 638.

⁸⁶ See text accompanying notes 36-60 *supra*.

⁸⁷ "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the particularities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638 (1973) (Douglas, J.).

⁸⁸ Compare, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941) with *De Canas v. Bica*, 424 U.S. 351 (1976); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) with *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

⁸⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

opinions have given little assistance to those attempting to predict future outcomes.

One reason for the Court's disjointed approach to preemption problems may be that the number of preemption cases decided in a given term is relatively small compared to those arising in subjects like equal protection or criminal procedure. Because the range of preemption problems is so broad, the Court simply does not see recurring fact patterns frequently enough to enable it to develop a stable decisional model except in isolated areas like labor law or the regulation of transportation where the volume of cases is greatest.⁹⁰ Typical of the scholarly dissatisfaction with the ragged state of the doctrine is this comment from an article written in 1972:

If the constitutional standard is that state laws must not conflict with or interfere with the operation of federal laws for certain purposes or beyond a certain extent, then the articulated standards of conflict and interference cannot guide the Court in determining how much of a conflict is too much. How, then, does the Court determine the values and norms of federal-state relations which tell it how much conflict is too much?⁹¹

The Burger Court has now begun to alter this pattern of doctrinal ambiguity. Since 1973 the Court has rendered a bumper crop of eight major opinions, more than at any comparable period in its history, which greatly clarify the conceptual bases of preemption decisionmaking.⁹² The Court has settled on an analytic framework for preemption disputes, it has reemphasized the importance of identifying the precise state and national interests at stake, and it has given tentative signals about the relative weights of those interests when undertaking federalism balancing. In general, these cases indicate a judicial preference for upholding state regulatory power against claims of preemption. This state-supportive presumption has been utilized when the language or history of the federal enactment does not obviously require otherwise, and when the state's purpose in regulating is to

⁹⁰ See Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 516-19.

⁹¹ *Id.* at 525.

⁹² In order of decision they are *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Goldstein v. California*, 412 U.S. 546 (1973); *New York Dep't of Soc. Serv. v. Dublino*, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *De Canas v. Bica*, 424 U.S. 351 (1976); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

promote what the Court finds to be an important objective of independent and traditionally local concern.

In *Jones v. Rath Packing Co.*,⁹³ decided in 1977, and again the next year in *Ray v. Atlantic Richfield Co.*,⁹⁴ the Court divided the body of preemption opinions into two categories. In the first are cases in which the Court found that Congress impliedly intended to supplant state authority in a given area. State decisionmaking was said to be disabled, the Court concluded, because federal law "occupies the field" of regulation. In the second category, the Court found a conflict in the terms of the state and federal statutes. This conflict may occur when the two statutes are irreconcilable, so that compliance with both is impossible, or when the state statute constitutes an "obstacle" to the effective operation of a specific federal enactment. Conflict preemption cases normally involve a narrower issue of federalism balancing than that presented in occupation preemption cases. In the latter category, for example, a state statute may be preempted even though Congress has not legislated specifically on the subject.

Both conflict and occupation cases require the Court to draw lines establishing the relative regulatory capacities of the state and national governments. Not surprisingly, this line-drawing depends in part upon the subject matter of the regulation involved and upon extrinsic evidence of Congressional intent. The most important factor in this line-drawing process, however, is the collective attitude of the Justices regarding the proper balance of federal and state power at any given time. The present Court shows great willingness to sustain state regulatory capability in the face of preemption attack. This collective attitude will certainly influence the Court's treatment of nuclear moratorium legislation if the issue is presented. The remainder of this section is devoted to an analysis of general principles applicable to the two categories of preemption cases and to a consideration of the employment of those principles by the current Court to encourage state regulatory activity in the absence of an irresistible congressional mandate to preempt.

B. The State-Supportive Presumption in Preemption Cases

One theme above all others must be born in mind when analyzing both conflict and occupation preemption cases. A preemption decision invariably begins with the recital of a presumption that

⁹³ 430 U.S. 519 (1977).

⁹⁴ 435 U.S. 151 (1978).

state regulatory authority should not be ousted by judicial determination unless a persuasive argument can be mustered that Congress truly intended that result. After all, if Congress made its preemption desires known by legislating explicitly there would be no need for judicial involvement. "But Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law."⁹⁵ For this reason, the Justices are ordinarily reluctant to substitute their own federalism policy preferences for those which could have come from Congress if their decision would deprive states of traditional regulatory powers. Justice Douglas provided the language often quoted in subsequent cases⁹⁶ in an introduction to his important statement of factors employed in occupation preemption analysis:⁹⁷

Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.⁹⁸

This hesitancy to find preemption is as much a commentary on the proper scope of judicial review as it is a philosophy of federalism. The Court, of course, is not the primary national body with power to invalidate state statutes. Congress, so long as it acts pursuant to an enumerated power,⁹⁹ can always "preempt" state legislation in a given field. When it has failed to do so, the Court is faced with two options having very different consequences for federal-state relations. If it forecloses state regulatory power by finding a state enactment preempted, the states cannot avoid the

⁹⁵ Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 (1959).

⁹⁶ E.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

⁹⁷ See text accompanying notes 112-76 *infra*.

⁹⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted). It was stated even more strongly in a more recent case where the Court held:

[T]hat federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

⁹⁹ See generally Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973). But cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (discussed at text accompanying notes 43-80 *supra*.)

result but must cease to act in a field that may be of great local or regional concern. If the Court finds against preemption, however, the state remains capable of regulating the subject. If Congress disagrees, it can legislate away state authority explicitly.¹⁰⁰ Thus, a state-supportive presumption in preemption cases shows deference to primary congressional responsibility for the federalism balance.¹⁰¹

Of course stating the presumption and applying it are two different matters. The state-supportive presumption has been recited even in cases which vastly expand federal power at the expense of the states.¹⁰² Ambiguous legislative history may also persuade some Justices that there is congressional intent where others fail to find it.¹⁰³ But in view of the current Court's preference for upholding state decisionmaking after two decades of judicial support for expansion of federal power,¹⁰⁴ this state-supportive presumption is proving an accurate guide to present preemption decisionmaking.

The watershed case for this new state-supportive approach to preemption cases is *City of Burbank v. Lockheed Air Terminals, Inc.*,¹⁰⁵ decided in mid-1973. *Burbank* is a perfect showpiece of the two primary methods of federalism balancing. The city imposed a late-night curfew on jet flights out of Hollywood-Burbank Airport.¹⁰⁶ The ordinance addressed a problem of great importance

¹⁰⁰ "[T]he state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943).

¹⁰¹ It also "comports with the basic conception of federal law as interstitial in nature." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 384 n.1 (1978).

¹⁰² Cf. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

¹⁰³ Even in *Rice* itself this situation occurred. *Compare* 331 U.S. 218, 232-35 (Douglas, J.) *with id.* at 242-44 (Frankfurter, J., dissenting); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-38 (Douglas, J.) *with id.* at 644-52 (Rehnquist, J., dissenting).

¹⁰⁴ See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 630-39 (1975).

¹⁰⁵ 411 U.S. 624 (1973). The case generated an extraordinary amount of student attention. See, e.g., Note, *Federal Preemption of Local Airport Noise Regulation*, 25 CATH. U.L. REV. 580 (1976); Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?*, 60 CORNELL L. REV. 269 (1975); Comment, *City of Burbank v. Lockheed Air Terminal, Inc.: Federal Preemption of Aircraft Noise Regulation and the Future of Proprietary Restrictions*, 4 N.Y.U. REV. L. & SOC. CHANGE 99 (1974).

¹⁰⁶ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 625-26 (1973). In a way the case has a great deal to do with not very much, since only one flight, scheduled on Sunday night, was affected. *Id.* at 626.

to local government—the regulation of excessive noise. It was claimed, however, that the field of “airspace management” had been occupied by federal administrative regulation, so that a state noise control ordinance which affected the departure of aircraft was constitutionally impermissible.¹⁰⁷

Justice Douglas’ opinion for the five-person majority focused almost exclusively on the federal aspects of the federalism balancing necessitated by the case. The reader feels inundated by congressional history and searches in vain for recognition of the countervailing state interest in regulating noise. Toward the end of the opinion this pair of sentences appears:

Control of noise is of course deep-seated in police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls.¹⁰⁸

The first is the only sentence in the opinion acknowledging the state’s concern with aircraft noise, and the second discounts it peremptorily, without any real analysis of the knotty balancing problem involved. This opinion represents the swansong of a style of preemption analysis utilized for over two decades to expand federal regulatory power.¹⁰⁹

Justice Rehnquist’s opinion for the four-person dissent heralds an approach to preemption which applies the state-supportive presumption to preserve state regulatory authority. Like the majority, Justice Rehnquist summons up voluminous legislative history to justify his belief that the judiciary should not cavalierly oust state regulatory power.¹¹⁰ But compare this quotation toward the end of the dissent with the one by Douglas quoted earlier:

Clearly Congress could preempt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of FAA . . . is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until one of them does,

¹⁰⁷ *Id.* at 626, 639. A claim of conflict preemption sustained by the Court of Appeals was not reached, as the ordinance could be invalidated on the alternative occupation ground. *Id.* at 626 n.2.

¹⁰⁸ *Id.* at 638.

¹⁰⁹ See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 630-39 (1975); Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

¹¹⁰ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (Rehnquist, J., dissenting).

the ordinance of the city of Burbank is a valid exercise of its police power.¹¹¹

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Justice Rehnquist's *Burbank* dissent, with its heavy emphasis on maintaining state power in the absence of a lucid Congressional mandate otherwise, is the prototype for more recent decisions applying the state-supportive presumption to determine preemption questions. The application of this state-supportive presumption in the Court's newer occupation and conflict preemption opinions, the two categories outlined in *Rath Packing* and *Arco*, will be analyzed in the remainder of this section.

C. Occupation Preemption

In the first category of cases discussed in *Rath Packing* and *Arco*,¹¹² the ground for the challenge to state authority is that the Congress has already exercised the power to regulate the subject involved and has "occupied the field." Preemption by occupation forecloses state authority even though Congress has not enacted legislation dealing with the precise subject under scrutiny. The state-supportive presumption¹¹³ should figure heavily in deciding occupation preemption cases, since "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."¹¹⁴ The manner in which the Court employs the presumption, however, is highly dependent upon collective judicial perceptions of the proper balance of federal and state regulatory power over a given subject matter.

The Court often asserts that its function in these cases is to divine congressional intent to occupy the field,¹¹⁵ but in fact it is the rare statute that contains clear occupation language. For this reason, the Court has developed three factors, first stated in 1947 by Justice Douglas in *Rice v. Santa Fe Elevator Co.*, to assist it in finding Congressional intent.

¹¹¹ *Id.* at 653.

¹¹² See text accompanying notes 93-94 *supra*.

¹¹³ See text accompanying notes 95-111 *supra*.

¹¹⁴ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

¹¹⁵ *E.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But see Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-17 (1959) ("By framing the preemption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself." *Id.* at 209).

Such a purpose [to occupy the field] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or 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. Likewise, the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal the same purpose. . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.¹¹⁶

Although the Court has only once used these factors as a checklist,¹¹⁷ it frequently employs them to frame its argument in occupation preemption opinions. The factors overlap to a great extent. Indeed, all may really be variants of the second, which has a long and distinguished history of service in federalism decisionmaking. In any event, the Court's utilization of the *Rice* factors in recent preemption decisions has often resulted in protection of state regulatory authority from occupation of the field by federal action.

1. Comprehensiveness of Federal Scheme

The first *Rice* factor for determining whether Congress intended to occupy the field of regulation and preempt state police power authority is whether "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."¹¹⁸ On occasion¹¹⁹ this factor alone has seemed sufficient to preclude states from legislating in a subject area of heavy federal regulation. *Burbank*,¹²⁰ for instance, turned on whether local noise regulations, imposing a curfew on late night jet flights, were unconstitutional infringements on the sweeping responsibility granted to the Federal Aviation Authority to regulate in the field. The case stands a bit apart from orthodox preemption cases because of its heavy emphasis on disputed legislative history.¹²¹ This history might have supported a finding of preemption based on a congressional objective to provide uniform national standards gov-

¹¹⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

¹¹⁷ *Pennsylvania v. Nelson*, 350 U.S. 497, 502-509 (1956).

¹¹⁸ 331 U.S. 218, 230 (1947).

¹¹⁹ See, e.g., *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

¹²⁰ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

¹²¹ *Id.* at 635-38. See text accompanying notes 105-111 *supra*.

erning the subject.¹²² But after reciting his side of the legislative history and stating the three factors from *Rice*, Douglas selects the first and not the second factor as controlling. "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption."¹²³

The dissent in *Burbank*, authored by Justice Rehnquist and joined by Justices Stewart, White and Marshall, objects to the finding that congressional legislation has "pervaded"¹²⁴ the field of aircraft noise regulation. Their main complaint was with the legislative history utilized by the majority, and they provide history of their own which they contend refutes its conclusion of preemption. More important for purposes of predicting future Supreme Court decisionmaking, the dissenters appear to discount the *Rice* pervasiveness standard as a legitimate criterion for implying preemption.

The dissenters' conclusion is not surprising. The "pervasiveness" of federal regulation—the scope of its subject matter coverage, the complexity of its regulatory schemes, the sheer bulk of regulation—has seemed to expand geometrically since 1960. Indeed, it is difficult today to cite many significant federal enactments which could not be characterized as "pervasive" as Congress extensively regulates in newer fields. In the absence of clear statements by Congress, either in statutes themselves or in their legislative history, it has become increasingly problematic to try to resolve preemption questions solely on the basis of the existence of comprehensive federal legislation.

Reflecting this conclusion, the Court has now explicitly adopted the *Burbank* dissenters' view that "pervasiveness" is no longer an accurate guide to implying preemptive intent. In *New York Department of Social Services v. Dublino*,¹²⁵ a New York statute, part of a cooperative federal-state public assistance program, required that all persons claiming eligibility for AFDC payments participate in state training and job-seeking programs.¹²⁶ These Work Rules imposed greater burdens on AFDC recipients than were mandated by the federal program which they were

¹²² The Court admits as much. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). See text accompanying notes 135-67 *infra*. Compare *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978).

¹²³ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

¹²⁴ *Id.* at 640 (quotations in the dissent).

¹²⁵ 413 U.S. 405 (1973).

¹²⁶ N.Y. Soc. SERV. LAW § 131(4) (McKinney 1976).

implementing.¹²⁷ AFDC recipients in New York State contended that the Work Rules were preempted by the comprehensive federal legislation. Although Congress had not expressly forbidden more stringent state legislation in the field, the petitioners claimed that the first of the *Rice* factors should be utilized to invalidate the Work Rules.

Justice Powell was reluctant to ascribe to Congress an intent to preempt unless justified by "direct and unambiguous language" of the statute or its legislative history.¹²⁸ Even more specifically, said Justice Powell:

We reject, to begin with, the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . . Given the complexity of the matter addressed by Congress in WIN, a detailed statutory scheme was both likely and appropriate, completely apart from any questions of preemptive intent.¹²⁹

The demise of this first *Rice* factor was confirmed in *De Canas v. Bica*¹³⁰ two years later. A California labor statute prohibited the employment of undocumented aliens if their employment would adversely affect the resident work force.¹³¹ Although ultimately decided on conflict grounds, a preliminary matter for the Court was whether the federal immigration laws¹³² were so comprehensive that state laws affecting illegal aliens were preempted. Justice Brennan held that comprehensiveness was to be expected in such a federal statute and, as in *Dublino*, it was irrelevant to the outcome on preemption.¹³³ Thus, merely because Congress may have enacted "pervasive" legislation on a subject, its regulatory interest will not automatically be converted into preemption of state legislation in the same field. A finding that the California Nuclear Law invades a field exclusively occupied by federal regulatory authority must thus be based on a sounder footing than the mere fact of abundant federal legislative activity.

2. National Character of the Subject Matter

The second of the *Rice* factors allows the Court to infer congressional intent from the nature of the regulated subject matter.

¹²⁷ 42 U.S.C. §§ 602(a)(19), 630-644 (1976).

¹²⁸ *New York Dep't of Social Services v. Dublino*, 413 U.S. 405, 414 (1973).

¹²⁹ *Id.* at 415.

¹³⁰ 424 U.S. 351 (1976).

¹³¹ CAL. LAB. CODE § 2805(a) (West Cum. Supp. 1979).

¹³² 8 U.S.C. §§ 1101-1503 (1976).

¹³³ *De Canas v. Bica*, 424 U.S. 351, 359-60 (1976).

Some activities can best be supervised on a national basis, with uniform standards imposed to promote efficiency or to eliminate the clashes that inevitably develop when each state constructs its own regulatory system. Foreign affairs policy is a classic early example of a subject which should be regulated only at the federal level.¹³⁴ Recently, labor regulation has been added to the list of preempted subjects.¹³⁵ In most other areas, on the other hand, the balkanization of regulation that occurs when each state constructs a system of control is not a sufficient problem to warrant the ouster of legitimate desires to maintain some local control. There is no catalogue dividing the myriad subjects of regulatory action into these two categories, so an ad hoc determination is necessary as each case arises. Unfortunately, the cases finding subject matter occupation have frequently stated their conclusion without analyzing the justifications for that conclusion. Prediction of future results is therefore not easy. The methodology the Court claims it employs in these cases is, however, a familiar one, imported for preemption purposes from the sister doctrine of determining the constitutionality of state regulations of interstate commerce.

From its very early opinions, the Court has considered the constitutionality of state statutes which may discriminate against or interfere excessively with interstate commerce.¹³⁶ The Court's decision to displace state power comes not from its analysis of express or implied Congressional action but from its role as protector of the paramount authority over interstate commerce vested in Congress¹³⁷ even when unexercised and dormant. The Court has used a number of tests for assessing how much state regulation of interstate commerce is too much. One of the earliest and most durable comes from *Cooley v. Board of Wardens*,¹³⁸ which held that the nature of the subject matter regulated by a state statute has a crucial bearing on its constitutionality. "Whatever subjects of this power are in their nature national, or

¹³⁴ *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹³⁵ *E.g.*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). *But see* *NLRB v. Boeing Co.*, 412 U.S. 67 (1973); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

¹³⁶ *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 319-42 (1978). *See also* text accompanying notes 36-42 *supra*.

¹³⁷ "The Congress shall have power . . . To regulate commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

¹³⁸ 53 U.S. (12 How.) 299 (1851).

admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."¹³⁹ When employed in preemption analysis, this rather subjective doctrine allows the Court to include in its federalism balancing equation a concern for the nature of a particular subject which Congress has partially regulated. When the federal enactment does not cover the precise matter addressed by the state,¹⁴⁰ the problem is to determine whether regulatory authority should be reserved for Congress because the entire subject should be governed by a single national scheme.

The Court's recent preemption opinions are not totally consistent, but they do suggest an increasing reluctance to infer preemption because the subject matter regulated by the state requires uniform national rules. On occasion the Court's reasoning is rather opaque when applying *Cooley* to preemption. In *Burbank*, for instance, Justice Douglas held that *Cooley* "stated the rule of pre-emption which is the critical issue in the present case."¹⁴¹ He then went on to evaluate legislative history allegedly preempting the field of aircraft noise regulation before concluding that "[i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption."¹⁴² Of course this is an application of the first *Rice* factor, now discredited,¹⁴³ to a problem involving the second *Rice* factor, a point not lost on a rather testy Justice Rehnquist in dissent.¹⁴⁴ Usually, however, the Court attempts to employ the *Cooley* doctrine more clearly as a tool to monitor federal-state relationships in the regulation of a given subject matter.

The Court's recent bout with the copyright clause¹⁴⁵ provides the most lucid example of the use of subject matter analysis to achieve a state-supportive result in occupation cases. In 1964, companion cases had held that the copyright clause embodied the Framers' preference for uniform national regulation in the field,¹⁴⁶ and broad language virtually erased the authority of states to

¹³⁹ *Id.* at 319.

¹⁴⁰ Otherwise conflict preemption analysis is appropriate. See text accompanying notes 177-250 *infra*.

¹⁴¹ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 625 (1973).

¹⁴² *Id.* at 633.

¹⁴³ See text accompanying notes 118-33 *supra*.

¹⁴⁴ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 654 n.5 (1973).

¹⁴⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁴⁶ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

provide remedies for infringements of intellectual property rights. Writing for a unanimous Court, Justice Black strongly suggested that the Constitution granted exclusive jurisdiction to the national government to protect against unfair product simulation, and that in any event Congress had so intended when it adopted the patent laws. Therefore, products which were not eligible for a federal patent were in the "public domain" and could not be protected by state unfair competition laws.

To allow a State by the use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law said belongs to the public.¹⁴⁷

State authority to prevent consumer deception was therefore limited to "precautionary steps" such as labeling standards which would not inhibit freedom to reproduce items not protected by federal law.¹⁴⁸ The opinions were characteristic of Justice Black, rather terse and absolutist,¹⁴⁹ and typical of the mid-1960's Warren Court with its preference for federalizing regulatory responsibility.¹⁵⁰ Because they were written so broadly, the cases had the potential to sweep away many other forms of state protective measures like trade secret and state copyright laws, although lower courts worked to narrow this radical transformation of the federal-state balance.¹⁵¹

The Court's treatment of state prohibition of record and tape piracy a decade later, in *Goldstein v. California*,¹⁵² the first of the modern state-supportive preemption cases, is a marked departure from the *Sears-Compco* legacy, which favored displacement of state regulatory authority. Because the coverage of the federal copyright laws extended only to "all writings"¹⁵³ it did not cover the production of records and tapes. A crafty entrepreneur could purchase a top-selling record or tape, rerecord the performance and distribute it at bargain price without paying royalties to the

¹⁴⁷ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32 (1964).

¹⁴⁸ *Id.* at 232.

¹⁴⁹ See Handler, *Product Simulation: A Right or a Wrong?*, 64 COLUM. L. REV. 1183, 1184 (1964).

¹⁵⁰ See generally Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 630-39 (1975).

¹⁵¹ See generally Comment, *Goldstein v. California: Breaking Up Federal Copyright Preemption*, 74 COLUM. L. REV. 960, 961-62 (1974).

¹⁵² 412 U.S. 546 (1973).

¹⁵³ 17 U.S.C. § 4 (1976).

performer or the recording company. To protect its powerful record industry, California made this record and tape piracy a criminal offense. The Supreme Court, in a five-four opinion, moved away from the *Sears-Compco* rationale and upheld state power to regulate in the absence of explicit congressional intent to occupy the field.

The holdings of patent preemption in *Sears-Compco* were based, at least in part, on the Court's finding of a constitutional imperative in language which did not explicitly require such a conclusion.¹⁵⁴ Nonetheless, the Court held that the constitutional language mandated national regulation and ousted state authority. Much of Chief Justice Burger's opinion in *Goldstein* discusses this issue of "constitutional preemption," so it differs somewhat from the more typical preemption case which examines the effect of Congressional action pursuant to an enumerated power. Furthermore, the unique context in which the case arose, with the passage of interim federal legislation while the *Goldstein* appeal was pending which extended copyright protection to recordings,¹⁵⁵ greatly lessens the practical, and perhaps even the precedential importance of the opinion. The Chief Justice employed orthodox preemption doctrine in deciding *Goldstein*, however, and the case has been treated as a preemption case. Accordingly, it provides an instructive first look at the current Court's use of federalism balancing in occupation cases. Characteristic of the employment of the state-supportive presumption, state regulatory power was upheld regarding a subject matter which only recently had been viewed as exclusively national.

Because the Constitution does not specifically forbid state regulation of intellectual property or confer exclusive authority to do so on the national government, state authority can be denied only if policy reasons dictate exclusive federal regulation of the subject. Typically, the Court relied on *Cooley v. Board of Wardens*¹⁵⁶ as its guiding case. The *Cooley* doctrine would require classifying the subject matter regulated as either national or local.¹⁵⁷ Now

¹⁵⁴ The Framers did show that they knew the significance of words like "uniform" (U.S. CONST., art. I, § 8, cl. 4, dealing with bankruptcy, and with immigration and naturalization) and "sole" (U.S. CONST., art. I, § 3, dealing with impeachment) but did not choose to use them in the copyright clause.

¹⁵⁵ Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. This enactment was incorporated into the long-awaited comprehensive revision of the copyright laws, The Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1976)).

¹⁵⁶ 53 U.S. (12 How.) 299 (1851).

¹⁵⁷ *Id.* at 319.

when this same problem arose in 1964, the Court determined that protecting patentable industrial designs was a national subject matter,¹⁵⁸ just as it had reached the same conclusion earlier regarding the subjects of foreign affairs¹⁵⁹ and immigration and naturalization.¹⁶⁰ But in *Goldstein* the Chief Justice found residual state power to regulate items of intellectual property not touched by Congressional action. The scope of subject matter preemption was drastically limited only to those "matters which are necessarily national in import"¹⁶¹ Throughout the remainder of the opinion he used similar phrases to indicate his strong preference for upholding state regulatory authority in this federalism balancing exercise. For example, after conceding the benefits of a national copyright scheme, he noted that state patents were common in the eighteenth century to promote locally produced scientific and artistic accomplishments, and that the same state interest in local intellectual property exists today.

In view of that enormous diversity [in contemporary America], it is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects. Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to *exclusive* federal control.¹⁶²

No authority is cited for this statement. It is simply made as if obviously true, and it is the key element in the Court's rejection of the *Sears-Compco* approach. Concurrent state and federal

¹⁵⁸ See note 146 *supra*.

¹⁵⁹ *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1947).

¹⁶⁰ *E.g.*, *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). *But see* *De Canas v. Bica*, 424 U.S. 151 (1976).

¹⁶¹ *Goldstein v. California*, 412 U.S. 546, 554 (1973) (emphasis by the Chief Justice).

¹⁶² *Id.* at 557-58. This view is not universally held, and the Chief Justice's conclusion "bears a quality of artificiality" which makes it "oblivious to reality" according to the leading copyright authority:

One may agree that national diversity is such that any given work will not be met with a uniform appeal. But the crucial point which the Court seemed to ignore is that whatever the diversity of taste and interest in works of authorship, such diversity bears almost no relationship to regional differences. It is rather an expression of a number of complex factors such as differences in age, education, class, and other more subtle factors that have nothing to do with geography.

1 M. NIMMER, NIMMER ON COPYRIGHT, § 1.01[A], at 1-4, 1-5 (1978).

copyright power would not "necessarily and inevitably lead to difficulty."¹⁶³ Since there was also no conflict with provisions of the federal copyright law, the California record piracy statutes were upheld.¹⁶⁴

Goldstein disfavors a finding by the judiciary that the regulation of a particular subject matter is preempted unless of exclusively national concern. This restrictive view has not met with universal approval,¹⁶⁵ but it is being applied in occupation preemption cases. For example, *Goldstein* was used one year later to support the constitutional acceptability of state trade secret laws.¹⁶⁶ It has also been applied most recently in two cases which seem to all but obliterate the remaining legacy of the *Sears-Compco* analysis.¹⁶⁷ Thus, the Court continues to afford protection for matters perceived to be of importance to the state in a field formerly deemed to be of exclusively national concern. This state-supportive approach to occupation preemption decision-making will be crucial to a proper determination of the constitutionality of the California Nuclear Law.

¹⁶³ *Goldstein v. California*, 412 U.S. 546, 559 (1973). Congress also appears to have noticed this problem, but came to a different conclusion. The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1976)), explicitly preempts most state copyright authority and establishes a uniform national system.

¹⁶⁴ *Goldstein v. California*, 412 U.S. 546, 559 (1973). See text accompanying notes 191-95 *infra* for a discussion of the conflict preemption aspect of *Goldstein*.

¹⁶⁵ A four person dissent relied on *Sears-Compco* to reach the opposite conclusion. Typical is the reasoning of Justice Marshall:

In light of the presumption of *Sears* and *Compco* that Congressional silence betokens a determination that the benefits of competition outweigh the impediments placed on creativity by the lack of copyright protection, and in the absence of a congressional determination that the opposite is true, we should not let our distaste for "pirates" interfere with our interpretation of the copyright laws.

Goldstein v. California, 412 U.S. 546, 579 (1973) (Marshall, J., dissenting). See also Note, 15 B.C. IND. & COMM. L. REV. 636 (1974).

¹⁶⁶ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); see text accompanying notes 196-206 *infra*.

¹⁶⁷ *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979) (copyright clause does not prevent enforcement of royalties for unpatentable article under state contract law); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (first amendment, and by implication copyright clause, does not prohibit judgment for infringement of right of publicity in action authorized by state law).

3. Congressional Purpose Favoring Preemption

Under the third of the *Rice* factors "the object sought to be obtained by the federal law and the character of the obligations imposed by it may reveal [a purpose to preempt]." ¹⁶⁸ This factor does not seem to have been utilized independently to determine occupation preemption cases. In fact, it appears to have been transformed into an important component of conflict preemption analysis. The Court now employs it to compare regulatory objectives in determining whether a state enactment obstructs the attainment of federal goals. ¹⁶⁹

The purpose factor has been cited only once in the Court's recent preemption decisions. In *Arco*, ¹⁷⁰ the above quotation from *Rice* ends Justice White's appraisal of a portion of the Washington State Tanker Law which was found preempted because its objective was identical to that of federal regulation of the same subject. ¹⁷¹ Therefore, extensive discussion of the utility of this factor in deciding preemption cases will be deferred to that portion of the article.

4. Concluding Observations About Occupation Preemption

In its most recent decisions the Court has significantly altered the use of the factors established in *Rice* to govern occupation preemption decisionmaking. The comprehensiveness of a federal legislative scheme no longer is held to indicate Congressional intent to occupy the field. ¹⁷² Since *Rice* was written in 1947 the Court has witnessed a vast expansion of national power by broad and detailed methods of regulation. Federal occupation might be found every time Congress entered a field if comprehensiveness alone were a sufficient factor. Certainly state regulatory autonomy can be better preserved if the federalism balance is struck without undue regard for the complexity of federal legislation.

The Court has also deemphasized the importance of the purpose for which Congress legislates as a single criterion of intent to occupy the field. An intent to preempt may be strongly suggested by the language or history of a federal enactment. In the less obvious cases which normally arise, however, the Court now

¹⁶⁸ *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947).

¹⁶⁹ See text accompanying notes 213-248 *infra*.

¹⁷⁰ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

¹⁷¹ *Id.* at 168. For a full discussion of the preemption issue raised by this state regulation see text accompanying notes 234-47 *infra*.

¹⁷² See text accompanying notes 118-33 *supra*.

seeks to compare the objectives of state and federal legislation to uphold both actions if possible. Thus, the purpose factor of *Rice* has been transplanted from occupation to conflict analysis.¹⁷³

The remaining *Rice* factor, the characterization of the subject matter regulated as either national or local, is the key to occupation analysis. The Court is familiar with the federalism balancing function involved in employing this standard because it has been used in dormant commerce clause cases since *Cooley*. It is also a sufficiently standardless guidepost to permit the value preferences of the Justices regarding appropriate federal-state authority over a particular subject matter to predominate. As one writer put it:

The tension lies not between the doctrine [of preemption] and tight compartments of subject matter, but between the doctrine and the Justice's reactions to the merits of the individual case. While the Court is never explicit as to the point where the doctrine impresses itself upon the facts, or the facts upon the doctrine, the Court's reliance on presumptions embody perspectives of federalism that tend to influence its approach to the cases' merits.¹⁷⁴

Thus, a labeling of the subject regulated by the California Nuclear Law, both a subjective and an objective judicial task, will be crucial to the resolution of its constitutionality.

Unfortunately, the Court has at no time offered guidance as to the grounds for its characterization of a subject as national or local. Most frequently, as in *Goldstein*, it simply states its conclusion without analysis. One recent article on the use of the *Cooley* doctrine in dormant commerce clause decisionmaking identified three considerations framing the judicial characterization. They are: "congressional attitude toward state regulation of the general area"; "[t]he degree to which the effects of the challenged regulations are localized so as not to affect . . . other states"; and "the degree to which [the state's] judgment is based upon uniquely local conditions rather than on factors common throughout the country."¹⁷⁵ These three factors, weighed in the context of the California Nuclear Law, will help determine whether the subject regulated by the state is of local or national concern.

One last point should be made here before the California Nu-

¹⁷³ See text accompanying notes 168-71 *supra*.

¹⁷⁴ Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 639 n.107 (1975).

¹⁷⁵ Maltz, *The Burger Court, the Regulation of Interstate Transportation, and the Concept of Local Concern: The Jurisprudence of Categories*, 46 TENN. L. REV. 407, 420-23 (1979).

clear Law may be evaluated as a case of occupation preemption. In labeling a subject as national or local, the Court will be deciding a matter of political as much as legal importance, because the label selected will virtually determine the scope of state power to regulate. However, the Court's decision is always subject to review by the Congress. The Court is applying the *Cooley* doctrine to impute legislative intent, but Congress can override the judicial determination if it desires either to nationalize or localize the subject. Perhaps we should accept this broader statement of the *Cooley* principle: "The Court should ask, first, whether in its judgment this is an area where uniformity is desirable, and second, whether, if it errs, the appropriate interests will be able to mobilize Congress to act."¹⁷⁶ This concern for the political monitoring function of Congress will provide an additional guide to evaluating the constitutionality of the California Nuclear Law.

D. Conflict Preemption

In the second category of preemption cases recognized by *Rath Packing* and *Arco*,¹⁷⁷ state legislation is challenged because it allegedly conflicts with a federal enactment. From time to time the Court has maintained that conflict preemption cases merely involve problems of statutory construction, and no federalism balancing is necessary.¹⁷⁸ In the great majority of conflict preemption cases, however, this description of the judicial function is oversimplified and oftentimes masks difficult constitutional policymaking which is highly dependent upon judicial value preferences regarding the state and federal interests presented.

1. "Inconsistency" Conflicts

In one category of conflict preemption situations little more than statutory construction is in fact involved. As Justice Brennan put it: "A holding of federal exclusion of state law is inescap-

¹⁷⁶ Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 153.

¹⁷⁷ See text accompanying notes 93-94 *supra*.

¹⁷⁸ Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.

Perez v. Campbell, 402 U.S. 637, 644 (1971); see also *Kesler v. Dep't of Public Safety*, 369 U.S. 153, 179 n.13 (1962) (Warren, C.J. dissenting).

able and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility"¹⁷⁹ Occasionally Congress expresses itself so clearly that the question for the Court is a straightforward one. In *Rath Packing*,¹⁸⁰ for instance, a federal meat processing regulation barred state labeling requirements "in addition to, or different than" the federal standards.¹⁸¹ When a California regulation of bacon packers was construed to involve "labeling" and its requirements were "different than" the federal ones, Congress, said the Court, "dictates" the outcome.¹⁸² Similarly in *Arco*,¹⁸³ federal maritime regulations provided that "[n]o State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States"¹⁸⁴ When Washington State attempted to require that federally enrolled oil tankers take on a state-licensed pilot even though the Coast Guard permitted them to be operated with only federally-licensed pilots aboard, the state Tanker Law provision was held preempted.¹⁸⁵ But cases of explicit conflict are rare.¹⁸⁶ Far more frequently, the Court must imply a conflict between state and federal law, and principles of statutory construction necessarily give way to federalism balancing markedly similar to that utilized in occupation preemption cases.

2. "Obstacle" Conflicts

In dealing with the typical conflict preemption case, one not involving explicitly inconsistent statutes, the Court's "primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁸⁷ If Congress has not clearly explained its objectives

¹⁷⁹ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹⁸⁰ *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

¹⁸¹ 21 U.S.C. § 678 (1976).

¹⁸² *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977).

¹⁸³ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

¹⁸⁴ 46 U.S.C. § 215 (1976).

¹⁸⁵ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 159 (1978).

¹⁸⁶ This is hardly surprising, considering the expense of raising this issue before the Supreme Court only to be told that the argument "twists the language beyond the breaking point" or that it is "strained." *Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977).

¹⁸⁷ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

or an intent to preempt, though, a state statute can hardly be held an obstacle to federal purposes merely by a process of statutory construction. Federalism balancing must be an important decisionmaking tool in these cases as well. Two subsidiary questions, often unspoken, have bedeviled the Justices as they work to prevent state obstacles to the exercise of federal power.

a. Matters of Degree in Conflict Preemption

With a bit of imagination, most lawyers and judges can create a hypothetical set of facts under which any two regulations touching the same general subject matter would conflict. The assumption, however, that the bare possibility of a conflict automatically invalidates state regulatory authority, especially if the facts are not presented in the case before the Court, results in an enormous expansion of federal power. The state-supportive presumption utilized in preemption cases generally would not permit this result,¹⁸⁸ and the current Court has not endorsed it. So an initial problem has been: How does the relative remoteness of possible state interference with federal regulatory purpose affect the Court's decision about conflict preemption?¹⁸⁹ As the degree of unavoidable conflict required by the Court increases, it becomes more likely that state regulation will be tolerated. Federalism balancing lies at the heart of the solution to this problem. The Court has vacillated between strict and permissive requirements for several decades,¹⁹⁰ but recently the Burger Court has resolved the matter in favor of litigants seeking to uphold state regulatory power. Again, the case which began the course of modern preemption decisions on this issue was *Goldstein v. California*.¹⁹¹

One argument raised by the petitioners in *Goldstein* was that

¹⁸⁸ See text accompanying notes 95-111 *supra*.

¹⁸⁹ The Court here deals with the relation between the federal law and the state law with which it is said to conflict. This relation will fall on a continuum ranging from conflicts which are direct and unavoidable in every case to the opposite extreme at which the operation of the state law is utterly irrelevant to the federal law. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 519.

¹⁹⁰ See Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 628-30, 637 (1975).

¹⁹¹ 412 U.S. 546 (1973). The case has been criticized bitterly for its substantive holding, see, e.g., Brown, *Publication and Preemption in Copyright Law: Elegiac Reflections on Goldstein v. California*, 22 U.C.L.A. L. REV. 1022 (1975). Its preemption contribution has gone relatively unheralded. See Comment, *supra* note 190, at 640.

because the field of copyright regulation was exclusively of national concern, no state regulation was constitutionally permissible.¹⁹² After acknowledging the possibility of exclusively national subjects under the *Cooley* doctrine,¹⁹³ the Court inserted the following caveat:

We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . 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 [state] sovereignty."¹⁹⁴

This comment represents a significant departure from earlier preemption cases in which state regulatory power was invalidated because of the potential for conflict with specifically worded constitutional clauses.¹⁹⁵ The Court's statement is dictum, but its wording, together with the use of italics, make it obvious that the Chief Justice intended to convey a message that state regulatory power should not be extinguished frivolously by the judiciary in the absence of quite clear guidance from Congress. In establishing this state preference in conflict cases the Court discounted important countervailing justifications for a national rule on record piracy, a point not lost on the dissenters.¹⁹⁶

Once the standard was established in *Goldstein*, the problem, as always, became one of application. Its resolution involved a matter of degree: How close to a showing of actual inconsistency must there be before the Court will find that two statutes "*will necessarily*" conflict? The Justices have had occasional problems in the application of the rule, but thus far continue to find the *Goldstein* standard authoritative.

The copyright clause again provided an opportunity for comment some two years after *Goldstein*. In *Kewanee Oil Co. v. Bicron Corp.*,¹⁹⁷ the Court returned to a problem of patent law preemption akin to that of *Sears-Compco*.¹⁹⁸ It was urged to hold that state trade secret statutes conflicted with federal patent law

¹⁹² *Goldstein v. California*, 412 U.S. 546, 552 (1973).

¹⁹³ See text accompanying notes 138-67 *supra*.

¹⁹⁴ *Goldstein v. California*, 412 U.S. 546, 554-55 (1973), *citing* The Federalist No. 32, pg. 243 (B. Wright ed. 1961) (emphasis by the Chief Justice).

¹⁹⁵ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹⁹⁶ *Goldstein v. California*, 412 U.S. 546, 574-75 (1973) (Douglas, J., dissenting).

¹⁹⁷ 416 U.S. 470 (1974).

¹⁹⁸ See text accompanying notes 145-51 *supra*.

and were therefore preempted. Chief Justice Burger rejected this approach by analyzing the three possible fact patterns in which a conflict between the state and federal enactments might arise. He held that the only hypothetical situation in which federal patent and state trade secret law could conflict significantly was when a clearly patentable invention was involved.¹⁹⁹ If the existence of state trade secret laws deterred inventors from seeking federal patents for which they were qualified, the state law would be preempted.²⁰⁰ No such deterrent effect was foreseen by Chief Justice Burger, however, and he found two reasons for refusing to limit state regulatory authority. First, the protection afforded inventions by trade secret law is so much weaker than patent law that few inventors would rely on it as an option. "Where patent law acts as a barrier, trade secret law functions relatively as a sieve."²⁰¹ Furthermore, it seemed likely to him that inventions would so often be duplicated independently that any patentable item would not remain secret for long. "If Watson and Crick had not discovered the structure of DNA it is likely that Linus Pauling would have made the discovery soon."²⁰² Following this line of argument, so different from the federalizing tendencies of *Sears-Compco*, the Court even rejected partial preemption of clearly patentable inventions, because administrative difficulties would militate against such a holding.²⁰³ Thus, the *Goldstein* requirement of a showing of very serious potential for conflict continued to determine the outcome of the preemption question.

Perhaps the real justification for upholding state trade secret laws was not the logic of the three hypotheticals, but a practical acknowledgment of congressional feelings which the Court discussed toward the end of the majority opinion, and which formed the basis for Justice Marshall's concurrence.²⁰⁴ Over the years Congress repeatedly had been presented with the opportunity to restrict state trade secret protection but had always declined to do so, and had even augmented state trade secret procedures.²⁰⁵ Thus it might look unseemly for the judiciary to sustain an attack

¹⁹⁹ The Court dismissed as inconsequential the conflicts which could arise if the invention was either clearly nonpatentable or of dubious patentability. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484-89 (1974).

²⁰⁰ *Id.* at 489.

²⁰¹ *Id.* at 490.

²⁰² *Id.* at 490-91 n.19.

²⁰³ *Id.* at 491-92.

²⁰⁴ *Id.* at 494 (Marshall, J., concurring).

²⁰⁵ See, e.g., 5 U.S.C. § 552(b)(4) (1976); 18 U.S.C. § 1905 (1976).

on these state enactments based on presumed Congressional intent when Congress had repeatedly declined the same invitation. The Court did not use this relatively easy avenue of escape, however, and as a consequence the most revealing aspect of *Kewanee Oil* is the way in which the majority avoided dealing with *Sears-Compco*. Here more than in *Goldstein*, which was a copyright and not a patent case, the Court should have confronted the earlier expansive reading of federal power in the patent field, but the majority offers no clear justification for refusing to follow its earlier federalizing dictum. The rule is acknowledged, then all but ignored. This failure to recognize the new approach to federalism balancing is the focus of the dissent. Justices Douglas and Brennan recognize the same potential for conflict between these two types of protection for inventions found by the Court of Appeals,²⁰⁶ since the major justification for a federal patent monopoly is the very disclosure prevented by trade secret protection. The majority's conclusion, to the dissenters, "reflects a vigorous activist antipatent philosophy."²⁰⁷ But the opinion of the Chief Justice must also be seen as reemphasizing the vigor of the state-supportive requirement of substantial conflict in this area of preemption decisionmaking.

The Court has not been entirely consistent in requiring a showing that a conflict "*will necessarily arise*." In *Rath Packing*²⁰⁸ for instance, Justice Marshall spins an alluring hypothetical to explain why a California flour labeling regulation conflicted with a federal act. The California regulation prohibited any difference between the weight of packaged flour and that stated on the package label.²⁰⁹ Since flour absorbs moisture, so that packages containing the same amount of flour solids might weigh less in drier climates, the federal flour labeling statute permitted "reasonable variations" between actual and stated weight.²¹⁰ One of the purposes of the federal act was "to facilitate value comparisons among similar products,"²¹¹ but national manufacturers might be compelled to overpack flour which could be bound for California to avoid violating the stringent state regulation. Flour

²⁰⁶ *Kewanee Oil Co. v. Bicron Corp.*, 478 F.2d 1074 (6th Cir. 1973), *rev'd* 416 U.S. 470 (1974).

²⁰⁷ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 499 (1974) (Douglas & Brennan, JJ., dissenting).

²⁰⁸ *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

²⁰⁹ CAL. BUS. & PROF. CODE § 12211 (West 1964).

²¹⁰ 21 U.S.C. § 343(e) (1976).

²¹¹ 430 U.S. at 541.

packages from different manufacturers would not then be "similar products." This, said Justice Marshall, constituted an obstacle to the purpose of the federal act and the California regulation was held preempted.²¹²

To Justice Rehnquist in dissent, the majority did not adhere to the teaching of *Goldstein*. Since the two statutes were not irreconcilable,

[t]he Court today demonstrates only that there could be—not that there must be—a conflict between state and federal laws. Because reliance on this test to find preemption, absent an explicit preemptive clause, seriously misapprehends the carefully delimited nature of the doctrine of pre-emption, [citing *Goldstein*] I dissent²¹³

The debate in the case indicates the intensely subjective character of the decisionmaking in implied preemption cases but need not, in the absence of more detailed analysis by the Court, suggest a retreat from the state-supportive methodology of *Goldstein* and *Kewanee Oil*.

b. *Relevance of State Purpose in Conflict Cases*

A second problem in conflict cases is whether the purpose for which a state statute was adopted has any bearing on determining if an obstacle to a federal enactment is created. Unlike occupation cases, in which judicial concern is normally confined to construing the intent of Congress to preempt a given subject matter,²¹⁴ in conflict cases the Court may find that the aims of *both* state and federal law are relevant. If the statutes address the same subject, but for different reasons, state regulation may not necessarily obstruct the attainment of the federal purpose. This approach often requires a finding of objectives not available from the wording or history of the statutes themselves²¹⁵ and permits

²¹² *Id.*

²¹³ *Jones v. Rath Packing Co.*, 430 U.S. 519, 549 (1977) (Rehnquist, J., dissenting).

²¹⁴ See text accompanying notes 112-76 *supra*.

²¹⁵ The purpose of legislation rarely leaps from its text, but must be discovered by the reviewing court. A broad or narrow characterization of purpose may be crucial to a determination of preemption. See, e.g., *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). In *Napier*, several states had attempted to require the installation of devices on locomotive engines like rain screens and automatic fire doors that would promote the health and comfort of engineers and firemen in the cabs. A federal statute regulated other types of locomotive equipment for the purpose of promoting locomotive safety, but did not speak to the kind of health-related equipment required by the state. Justice Brandeis

the judiciary to select its legislative purpose by a process which maximizes the opportunity for federalism balancing. The methodological parent of this concern with difference in purpose is *Huron Portland Cement Co. v. City of Detroit*²¹⁶ decided almost twenty years ago.

In *Huron*, an apparently irreconcilable conflict between federal law and a municipal ordinance was permitted to stand. The company operated a small fleet of cement-carrying vessels on the Great Lakes. The ships were licensed by the Coast Guard, which specifically authorized the type of boilers and fuel they used. The boilers were operated even while the vessels were in port in order to power deck equipment. When they docked in Detroit, smoke emissions exceeded the limit established by the local air pollution ordinance. The company was prosecuted for violation of the ordinance by two of its ships. The Court might have opted a find a conflict between the ordinance and federal law, because it was impossible to comply with the Detroit regulation using the boilers and fuel authorized by the Coast Guard.²¹⁷ Instead, the Court held there was "no overlap"²¹⁸ between the two regulations because they were aimed at different purposes. Justice Stewart took great care to show that the ordinance was designed to protect the health and cleanliness of the city, a traditional police power function, while the objective of the federal act was to promote ship safety at sea.²¹⁹ This difference in purpose prevented preemption, even though it left *Huron* with the unattractive option of making substantial modifications to its vessels' Coast Guard-approved boilers or avoiding the Port of Detroit.

Huron is important because Detroit did not seek to regulate the type or specifications of boilers or fuel which should be utilized by ships in its harbor. It was not concerned with propulsion sources or shipboard safety at all. The city was content, and

could have analyzed the case as Justice Stewart did in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), and narrowly construed the purpose of the acts to uphold the state regulation. See text accompanying notes 217-19 *infra*. Instead, he found that "[t]he federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object." *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 612 (1926). The appropriate approach seems to vary depending on subjective factors never made explicit in the opinions. See also note 223 *infra*.

²¹⁶ 362 U.S. 440 (1960).

²¹⁷ This was the approach of Justices Douglas and Frankfurter in dissent. *Id.* at 449-55.

²¹⁸ *Id.* at 446.

²¹⁹ *Id.* at 445.

probably obligated, to leave these matters to federal regulation. What did interest Detroit was that the smoke emitted from the stack of a vessel tied to its shoreline should not exceed a certain amount or density. It was concerned with the waste produced by the ship's power plant, and unconcerned with its design, operating characteristics or safety. Obviously, smoke emissions and power plant design are interrelated. The hand-fired Scotch boilers on the *S.S. Crapo* were not physically capable of meeting the standard set by the Detroit ordinance, however diligent the crew, however much the owners shared the city's alarm over fragile air quality. The dissenters strongly felt that there was an express conflict with federal law.²²⁰ The majority, however, was simply unwilling to permit federal concern with shipboard safety to swallow up any possible state regulation of licensed vessels in port when matters of historic and justifiable importance to the state were at stake. "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists."²²¹

The *Huron* principle, that enactments with different purposes are less likely to conflict with one another, can have a dramatic effect on federalism balancing in conflict cases. Like the requirement that conflicts "*must necessarily arise*" for state regulations to constitute obstacles to federal ones,²²² this principle offers the judiciary a method for upholding state authority in the absence of explicit Congressional intent to preempt. A finding of difference in purpose has been utilized to obtain state-ordered results in two of the Court's recent preemption opinions, and appears now to be an important ingredient in conflict preemption doctrine.²²³

²²⁰ *Id.* at 450.

²²¹ *Id.* at 446.

²²² See text accompanying notes 188-213 *supra*.

²²³ In all fairness it must be noted that the *Huron* principle has not met with unqualified approval. In fact, in the first decade after the case was decided it had a rather checkered career. In 1963 Justice Brennan wrote:

The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142 (1963). The circularity of this argument apparently escaped the Justices, and in any event *Huron* itself was cited with approval twice in the same section of the opinion. *Id.*

In the first of these cases, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,²²⁴ the Court took the *Huron* principle several giant steps forward when it permitted an actual conflict between a state statute and a New York Stock Exchange Rule²²⁵ to exist because of the different purposes of the two enactments. Mr. Ware was wooed from Merrill Lynch to work for a rival brokerage house, thereby forfeiting his accrued pension rights under a provision in his employment contract mandated by the Exchange Rule. He claimed the forfeiture provision was unenforceable because of a California statute invalidating contracts "by which

The Court also entertained a three decades-long squabble about the purpose of state financial responsibility laws which deny restoration of driving privileges to motorists whose licenses are suspended because of accidents until related judgment creditors have been paid. The problem was with a provision of the federal Bankruptcy Act (11 U.S.C. § 35 (1976)) which mandated a release from all debts for persons discharged in bankruptcy. In *Kesler v. Dep't of Public Safety*, 369 U.S. 153 (1962), the Court upheld a Utah statute because its objective of promoting traffic safety differed from the Bankruptcy Act's concern with the debtor-creditor relationship. This result, said Justice Frankfurter, a dissenter on the very issue in *Huron*, was dictated by "the complicated demands of our federalism." *Id.* at 172.

Kesler was attacked in 1972, and its "aberrational doctrine" overruled. *Perez v. Campbell*, 402 U.S. 637, 651. In yet another 5-4 opinion on the subject (an earlier opinion, *Reitz v. Mealey*, 314 U.S. 33 (1941), had been decided on the same basis as *Kesler*) the Court refused to believe that traffic safety was the purpose of these state financial responsibility statutes. Rather, it adopted state court conclusions that they were designed to provide "leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent." *Id.* at 646-47. Since the very purpose of the bankruptcy laws was to permit an escape from this kind of "leverage," the *Hines* doctrine of obstacle conflict was applied to invalidate the state statute. All this promoted an exasperated Justice Blackmun to proclaim:

I doubt if Justices Roberts, Stone, Reed, Frankfurter, Murphy, Warren, Clark, Harlan, Brennan and Stewart, who constituted the respective majorities on the merits in *Reitz* and *Kesler*, were all that wrong.

Id. at 668. (Blackmun, J., dissenting).

This same questioning of the strict meaning of *Perez* can be seen in Justice Powell's opinion in *New York Dep't of Soc. Serv. v. Dublino*, 413 U.S. 405 (1973) ("Conflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial." *Id.* at 423 n.29). For a good discussion of the *Kesler-Perez* situation, see generally Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 533-38.

²²⁴ *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973).

²²⁵ The Court gives a rather muddy account of whether the exchange rule is "Law" for supremacy clause purposes, but seems to assume that it should be if its objective is germane to the purposes of the federal securities laws. *Id.* at 130-31.

anyone is restrained from engaging in a lawful profession”²²⁶ When he learned that another Exchange Rule required him to submit his complaint to binding arbitration, he raised a California law which prohibited compulsory arbitration of wage disputes.²²⁷ The state statutes and the plan conditions implementing federal Exchange Rules clearly conflicted, but a unanimous Court refused to find the state statutes preempted.

The federal securities laws contemplate placing broad self-regulatory power in the exchanges themselves.²²⁸ In *Ware*, Justice Blackmun relied on an earlier case²²⁹ in which the purpose of two comprehensive *federal* schemes of regulation—the securities and the antitrust laws—were compared to determine whether the Court should mandate modification of exchange self-regulation procedures in lieu of imposing antitrust liability.²³⁰ A similar analysis of purpose was dispositive in *Ware* as well, even though this claim of conflict was between a state statute and a federal administrative rule.

The analogy drawn from *Silver* reveals a surprising reassertion of the *Huron* principle in an even more radical form. Remember—the state statute prohibited pension forfeitures while the federal Exchange Rule mandated pension forfeitures; the state statute forbade mandatory arbitration of wage disputes while the federal rule required them. The two schemes, however, had different purposes. The federal securities laws were designed to promote fair dealing and to protect investors in the marketplace. The state statutes, on the other hand, were designed to carry out a typical police power function—discouraging employers’ attempts to condition employment on a waiver of important worker rights.²³¹ The Court found the connection between the requirements of the Exchange Rules and the investment market protection purpose of the securities laws “extremely attenuated and peripheral, if it exists at all”²³² Therefore, the significant

²²⁶ CAL. BUS. & PROF. CODE § 16600 (West 1964).

²²⁷ CAL. LAB. CODE § 229 (West 1971).

²²⁸ See *Silver v. New York Stock Exchange*, 373 U.S. 341, 352 (1963).

²²⁹ *Id.*

²³⁰ *Id.* at 357-61. The NYSE had terminated direct-line phone service to a nonmember without affording notice or hearing, and was required to comply with these procedures in the future, since its conduct was just the sort of “anticompetitive collective action” the antitrust laws were designed to discourage. *Id.* at 364.

²³¹ *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Ware*, 414 U.S. 117, 131-33 (1973).

²³² *Id.* at 135.

state interest in worker protection must prevail, even though there was *an actual conflict* presented. What the Court must really have been saying was that the state interest in protecting wage earners is so important, and is so directly promoted by the state statutes in question, while the federal interest involved is so weakly linked to the purposes of the securities laws, that federalism considerations require resolving the conflict in favor of state regulatory power.²³³ During the previous term, Justice Powell had suggested this state-supportive balancing function in conflict cases when he stated that “[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial.”²³⁴ But *Ware* combines the *Huron* concern over difference in purpose with a sensitivity to the relative importance of the allegedly conflicting regulations to the attainment of those state or national purposes.

The Court’s most recent employment of the *Huron* principle came in *Arco*,²³⁵ another case involving regulation of ships in navigable waters. In 1975 Washington State enacted a comprehensive statute controlling the design characteristics and operation of tankers carrying Alaskan crude oil to refineries on Puget Sound. The Tanker Law was challenged as preempted by federal statutes which governed navigation on those waters and themselves regulated oil tanker design. One provision of the Tanker Law required that a laden tanker of specified displacement either possess certain “standard safety features” or be operated only with tug escort when in Puget Sound.²³⁶ In Title II of the Ports and Waterways Safety Act of 1972,²³⁷ however, Congress had enacted an elaborate system to ensure “comprehensive minimum standards of design” for oil tankers. The Secretary of Transportation, acting on behalf of the Coast Guard, is empowered to promulgate safety and environmental protection requirements,²³⁸

²³³ *Id.* at 139-40.

In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme. We find in the structure of the Act an intent on the part of Congress that state policies in this area should operate vigorously.

²³⁴ *New York Dep’t of Soc. Serv. v. Dublino*, 413 U.S. 405, 423 n.29 (1973).

²³⁵ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

²³⁶ WASH. REV. CODE § 88.16.190(2) (Supp. 1978).

²³⁷ 46 U.S.C. § 391a(1) (1976).

²³⁸ *Id.* §§ 391a(3), (5), (6) (1976).

and permits are issued to tankers which comply with the regulations. A tanker licensed by the Coast Guard would face this choice upon entering Puget Sound: Comply with the state design requirements²³⁹ or take a tug escort through Puget Sound. The majority treated the design and tug escort alternatives as raising separate preemption issues, and the *Huron* principle was critical to its determination of the constitutionality of the state alternatives.

Justice White's opinion for the Court on the design requirement option is rather opaque, and seems to be based upon both occupation and conflict grounds. He asserts that Congress did not intend to have federally licensed vessels barred for safety reasons from using navigable waters,²⁴⁰ and finds that state design statutes would "frustrate" the Congressional desire to have international standards at some future date,²⁴¹ both of which are occupation concerns. The Court does, however, comment extensively on the relevance of the *Huron* principle.

Huron could be viewed as authorizing state environmental protection regulations augmenting minimum federal standards. If so, state and federal law would not overlap in *Arco*, since the goal of the Tanker Law design requirement was to protect the environment by guaranteeing that only those very safe tankers used Puget Sound. Justice White construed *Huron* differently, though, and concluded that its emphasis was on the effect of a dissimilarity in purpose. Unlike the Detroit ordinance in *Huron*, which furthered an environmental objective different from the federal concern with ship safety at sea, the Tanker Law design requirement was adopted for the very same reason as the federal provision—"[t]o implement the twin goals of providing for vessel safety and protecting the marine environment."²⁴²

Here, we have the very situation that *Huron Portland Cement Co. v. Detroit* . . . put aside . . . Refusing to accept the federal judgment . . . the State now seeks to exclude from Puget Sound vessels certified by the Secretary as having acceptable design characteristics, unless they satisfy the different and higher design requirements imposed by the state law. The Supremacy Clause dictates that the

²³⁹ The Catch-22 of the piece is that no tanker then built could comply with the design features requirement of the Tanker Law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 173 n.24 (1978).

²⁴⁰ *Id.* at 163-64.

²⁴¹ *Id.* at 166-67.

²⁴² *Id.* at 161.

federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.²⁴³

Thus, when state and national regulation are aimed at the same purpose the Court seems more willing to find the state statute obstructs federal law and is therefore unconstitutional. This is true even where, as in *Arco*, Congressional use of the words "minimum standards"²⁴⁴ could provide a different approach. This conclusion, however, did not foreclose the validity of the tug escort alternative to the Tanker Law design requirements. To Justices Stevens and Powell in dissent, the tug escort provision was inseparable from the design requirements because it was written as a proviso to those requirements in the statute.²⁴⁵ "The federal interest that prohibits state enforcement of these [design] requirements should also prohibit state enforcement of a special penalty for failure to comply with them."²⁴⁶ The other seven Justices saw the problem differently, agreeing with Justice White's conclusion that the purpose of the tug escort alternative was distinct from the one that invalidated the design requirements.²⁴⁷ Because it was not a design requirement, it did not fall under Title II of the federal act. Instead, this "safety measure" was permitted under Title I of the federal act, which specifically authorized states to adopt safety regulations in the absence of action by the national government.²⁴⁸ The majority opinion in *Arco* demonstrates again that the characterization of the state purpose remains very important in conflict preemption decisionmaking.

What lessons can be drawn from this discussion of the *Huron* principle? Initially, it appears that the Court intuitively engages in a process of federalism balancing when it considers the relevance of the state purpose in conflict cases. Of course the asserted purpose must first be found an appropriate use of the state's police power, as it was in *Huron*, *Ware* and *Arco*. This meant that the Court should take seriously the state claim to be free to regulate. Next, this state interest must be balanced against the

²⁴³ *Id.* at 165. The Court went on to find Congressional intent to establish a uniform tanker design scheme, apparently in the hope of obtaining an international standardization of design features. State regulation would frustrate this goal, and thus was preempted under the third of the *Rice* occupation factors. *Id.* at 168. See text accompanying notes 168-71 *supra*.

²⁴⁴ 46 U.S.C. § 391(a)(1) (1976).

²⁴⁵ WASH. REV. CODE § 88.16.190(2) (Supp. 1978).

²⁴⁶ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 189 (1978) (Stevens & Powell, JJ., dissenting).

²⁴⁷ *Id.* at 171.

²⁴⁸ *Id.* at 171-72, construing 33 U.S.C. §§ 1221-27 (1976).

equally justifiable federal interest in regulating the same subject. The Court has searched to fashion some principle which would distinguish state regulation that may tolerably impinge on federal law from state action that must be held preempted. The *Huron* principle performs this function. The closer the objective of the state and federal regulations, the more the Court feels compelled to find state power preempted. After all, when both the Congress and a state legislature act in the same field for the same reason, the state action cannot be validated unless the Court is willing to permit the state to second guess the merits of the regulatory scheme. If, on the other hand, state and national power is utilized to solve different problems, the state's action should be encouraged if the degree of overlap between the two provisions is found to be incidental to the operation of both. The *Huron* principle, then, can be summarized as follows: The closer the identity of the state and national objectives in legislating to meet a particular problem, the more likely it is that any significant overlap in coverage will result in preemption. In this way, the Court can preserve the autonomy of state police power whenever possible and promote a healthy state regulatory structure.²⁴⁹

In summary, the Court's approach in recent conflict preemption decisions provides the framework for assessing this aspect of the constitutionality of the California Nuclear Law. The state-supportive presumption will require those advocating preemption to establish that a conflict with some federal enactment "*will necessarily arise*" because California has postponed granting land use to proposed nuclear facilities. Furthermore, the *Huron* principle will militate against preemption if the objective the California Nuclear Law is found to differ significantly from the purposes of applicable federal law. It will also serve to distinguish California's enactment from the Minnesota regulation struck down by the Eighth Circuit in 1971,²⁵⁰ which forms the basis for the district court finding of conflict preemption in *PLF*.²⁵¹ The concluding section of this article, after an analysis of *PLF*, will apply the occupation and conflict preemption analysis developed in this section to clarify the issues involved in analyzing California's nuclear regulatory efforts.

²⁴⁹ See text accompanying notes 95-111 *supra*.

²⁵⁰ Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

²⁵¹ Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979).

IV. THE CONSTITUTIONALITY OF CALIFORNIA'S NUCLEAR LAW—A PREEMPTION CASE STUDY

A. *The District Court Opinion in PLF v. ERCDC*

On October 2, 1978, suit was filed in federal district court in San Diego, seeking a declaratory judgment that all three sections of the 1976 amendments to the Warren-Alquist Act were unconstitutional.²⁵² Plaintiffs were the Pacific Legal Foundation, a public interest group generally supporting the causes of traditional commercial and social interests in California, three other political action and labor associations, and an individual who claimed he lost his job as a nuclear engineer when his former employer allegedly abandoned its Sundesert Nuclear Project because of the effect of the 1976 amendments. The Energy Commission and its commissioners individually were named defendants. The plaintiffs' claim was based on two grounds. First, they asserted that these three sections were preempted because the federal government had enacted "comprehensive regulation of design, construction, and operation of nuclear fission thermal power plants by adopting the Atomic Energy Act of 1954"²⁵³ They also alleged that the California laws burdened interstate commerce,²⁵⁴ without presenting a particularly clear argument why this might be so. The case was assigned to Judge William B. Enright.

Because no California public utility was proposing the construction of a new nuclear power plant in the immediate future, there seemed to be little need for haste in the development of the litigation. The pace of the lawsuit was accelerated, however, when the plaintiffs moved for summary judgment on November 3, 1978.²⁵⁵ Because of the many disputed issues of fact in the case, some observers believed that this motion would be denied by the district court judge. *PLF* would then be "put on the back burner," with attention thereafter focused on another lawsuit presenting a similar constitutional issue.²⁵⁶ That scenario was not

²⁵² *Id.* The sections called into question were CAL. PUB. RES. CODE §§ 25524.1-.3 (West 1977). On the same day, a similar action was filed in federal court in Sacramento, but there the court was asked to invalidate large chunks of the Warren-Alquist Act, not just the three non-nuclear preference statutes.

²⁵³ Complaint at 9.

²⁵⁴ See text accompanying notes 36-42 *supra*.

²⁵⁵ During the pendency of the motion four environmental action groups were permitted to intervene. They were the Natural Resources Defense Council, Inc., the Sierra Club, the Environmental Defense Fund, and Californians for Nuclear Safeguards. The court allowed their intervention on January 16, 1979.

²⁵⁶ See note 252 *supra*.

to be. On Tuesday, February 27, 1979, the motion for summary judgment was argued. Exactly one week later, on Tuesday, March 6, a twenty-two page memorandum decision was filed. The court found the constitutional challenge to two of the three contested statutes was rendered moot by Energy Commission action.²⁵⁷ Thus, the California Nuclear Law²⁵⁸ was the only section considered ripe for judicial disposition. Judge Enright declared it unconstitutional on preemption grounds.

The opinion commences with a recitation of the state supportive presumption from *Rice*.²⁵⁹ It also characterizes the issue as one involving either occupation or conflict preemption. Its application of these basic principles to the preemption issues presented by the California Nuclear Law, however, seems to show inadequate sensitivity to the actual employment of the state supportive presumption by recent Burger Court decisions. As a consequence, the imprecision of the court's characterization of the subject matter regulated by the California enactment and the degree to which the state statute is found to obstruct the purposes of applicable federal law, seriously undercut the persuasiveness of the opinion.

Judge Enright first found that the California Nuclear Law was preempted "because Congress has impliedly foreclosed state leg-

²⁵⁷ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191, 194 (S.D. Cal. 1979). These two provisions were CAL. PUB. RES. CODE §§ 25524.1, 25524.3 (West 1977). Section 25524.1 required development of nuclear fuel rod reprocessing technology, and was rendered moot because the Energy Commission found it was not required and not essential to reactor design. In the Matter of Implementation of Nuclear Reprocessing and Waste Disposal Statutes, ERCDC No. 76-NL-1 (filed Jan. 25, 1978). Section 25524.3 required that the Energy Commission study underground placement of reactors. It was postponed by action of the Energy Commission. In the Matter of Determinations of the Commission Pursuant to Public Resources Code Section 25524.3, ERCDC No. 76-NL-3 (filed Sept. 13, 1978).

The district court also initially determined that one party plaintiff, the nuclear engineer, had standing to bring the action. The defendants had argued that no causal link between this individual's dismissal and the effect of the California Nuclear Law had been established, since the utility would probably have cancelled the Sundesert project on independent economic grounds. This contention created no triable issue of fact for the district court, however, and Judge Enright proceeded to address the preemption issue on the merits. The court's treatment of this standing issue in a case of summary judgment may well present a strong ground for appeal.

²⁵⁸ CAL. PUB. RES. CODE § 25524.2 (West 1977). See text accompanying note 15 *supra*.

²⁵⁹ See text accompanying notes 95-111 *supra*.

isolation on the subject of nuclear waste disposal”²⁶⁰ Thus, the issue raised was characterized as one of occupation preemption.²⁶¹ Judge Enright claimed that this conclusion was mandated because the Eighth Circuit Court of Appeals had “squarely confronted” the same issue in *Northern States Power Co. v. Minnesota*,²⁶² in which a state radioactive waste discharge standard for an existing nuclear plant was held preempted.²⁶³ The court also rejected a role for state regulatory authority in the field, alleging that defendant’s argument “rests upon an exceedingly broad interpretation” of federal law.²⁶⁴ Actually, defendants were attempting to invoke an application of the *Huron* principle²⁶⁵ to establish that the state and federal laws were aimed at different regulatory objectives. The district court refused to adopt this position, and instead found “that the question of whether nuclear power plants may be constructed and operated in the absence of a demonstrated technology for the permanent disposal of nuclear waste is exclusively reserved to the NRC by section 2021(c) and that state regulation on this subject is displaced.”²⁶⁶ An alternative analysis of the occupation issue existed which better preserved the state supportive presumption,²⁶⁷ yet the court refused to follow it.

Judge Enright next found the California Nuclear Law preempted on conflict grounds as well. In his view, “[t]he statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in developing the peaceful use of atomic energy.”²⁶⁸ Since one of the purposes of the federal law was to develop nuclear energy, the state statute was

²⁶⁰ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm’n*, 472 F. Supp. 191, 197 (S.D. Cal. 1979). The court’s terminology is somewhat different when discussing occupation preemption, as it calls it “implied preemption.”

²⁶¹ See text accompanying notes 112-76 *supra*.

²⁶² 447 F.2d 1143 (8th Cir. 1971), *aff’d mem.* 405 U.S. 1035 (1972).

²⁶³ For a full discussion of the applicability of *Northern States*, see text accompanying notes 320-48 *infra*.

²⁶⁴ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm’n*, 472 F. Supp. 191, 198 (S.D. Cal. 1979). The court was wrestling with the interplay of two subsections of section 274 of the Atomic Energy Act (codified at 42 U.S.C. §§ 2021(c), (k) (1976)).

²⁶⁵ See text accompanying notes 216-49 *supra*.

²⁶⁶ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm’n*, 472 F. Supp. 191, 199-200 (S.D. Cal. 1979).

²⁶⁷ See text accompanying notes 273-301 *infra*.

²⁶⁸ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm’n*, 472 F. Supp. 191, 201 (S.D. Cal. 1979); see text accompanying notes 187-248 *supra*.

seen as frustrating that federal promotional goal. "There seems little point in enacting an Atomic Energy Act and establishing a federal agency to promulgate extensive and pervasive regulations on the subject of construction and operation of nuclear reactors and the disposal of nuclear waste if it is within the prerogative of the states to outlaw the use of atomic energy within their borders."²⁶⁹ The California Nuclear Law was again characterized as regulating operational nuclear plants and nuclear waste disposal. Again a case, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,²⁷⁰ was found analogous, and the district court discussed it to demonstrate that "states cannot enact legislation which tends to frustrate national plans to develop resources for use in interstate commerce."²⁷¹ As in the case of occupation preemption, an alternative analysis of the promotional aspect of federal nuclear policy and the applicability of *First Iowa* existed which preserved the state's ability to regulate local activities.²⁷²

B. Preemption of the California Nuclear Law—An Alternative Assessment

The district court decision in *PLF* has now been appealed, so a reviewing court will be asked to determine whether its opinion squares with governing principles of preemption doctrine. Because that decision shows little appreciation for the use of state-supportive presumption and relies on earlier opinions unrepresentative of the current Supreme Court's preemption methodology, it may well find little favor on appeal. How, then, could the case be determined in harmony with the approach developed in Section III? This final section presents an alternative analysis of the constitutional issues raised by the California Nuclear Law. This approach attempts to be sensitive to the federalism balancing process that the Court now employs to assess whether any such important exercise of the police power of a state should be invalidated.

²⁶⁹ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191, 200 (S.D. Cal. 1979).

²⁷⁰ 328 U.S. 152 (1946).

²⁷¹ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191, 201 (S.D. Cal. 1979).

²⁷² See text accompanying notes 302-395 *infra*.

1. Occupation Preemption—"Whether" Decisions and "How" Decisions About Nuclear Power

Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in light of its constitutional setting and its legislative history.²⁷³

The California Nuclear Law conditions land use for new nuclear power plants on a finding by the Energy Commission, accepted by the legislature, that the federal government has developed a viable technology for disposing of waste materials produced by the use of nuclear fuel.²⁷⁴ In advance of such a finding, the legislature prefers the Energy Commission to grant certificates only for more proven methods of generating electricity. This preference will be upheld under the Court's current guidelines for occupation preemption decisionmaking if the state law is found to regulate a subject matter distinct from that which Congress intended to be governed by the Atomic Energy Act of 1954.²⁷⁵ Additionally, this preference for alternative energy sources must be found to be a policy decision that can be made by states individually, one not requiring a uniform national rule. A careful examination of the subject matter regulated by the Atomic Energy Act, particularly in light of the state-supportive presumption now utilized in preemption cases,²⁷⁶ leads to the conclusion that Congress has occupied the field of determining *how* nuclear power reactors must be constructed and operated, but has not even entered the field of determining *whether* they should be constructed in the first place. This "whether" decision involves a broad range of economic, social, safety, environmental, and ideological factors. By contrast, the NRC concerns itself almost exclusively with only one such factor—protection against "radiation hazards"²⁷⁷—and does not attempt to deal with all the other influ-

²⁷³ *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting).

²⁷⁴ CAL. PUB. RES. CODE § 25524.2 (West 1977).

²⁷⁵ Atomic Energy Act of 1954, Pub. L. No. 83-703, Ch. 1073, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011-2296 (1976)).

²⁷⁶ See text accompanying notes 95-111 *supra*.

²⁷⁷ The term "radiation hazards" is not defined, either in the Atomic Energy Act or the regulations. Bischoff, *Nuclear Power Regulation: Defining the Scope of State Authority*, 18 ARIZ. L. REV. 987, 992 n.45 (1976). See text accompanying notes 306-54 *infra* for clarification.

ences bearing on the selection of a type of power source to meet the energy needs of a particular community. The following hypothetical might help distinguish "whether" from "how" decisions involving nuclear power plants.

Assume that a California public utility determines that a new facility is required to meet the energy demands of its service area. A host of decisions—for example, the capacity of the plant, its site, and the type of fuel to be used—must be made in advance of construction. The selection of a type of fuel source to be used presents the utility with a complex planning and forecasting decision. For example, economic factors play a role. Petroleum-fired plants are less desirable now than they were before the 1973 oil embargo, and the prospect of supply shortages and ever-increasing prices discourages reliance on oil.²⁷⁸ The large-scale commercial use of solar, tidal or geothermal energy sources is not yet economically feasible. After Three Mile Island, the prospect of having to abandon a next-to-new and hugely expensive nuclear facility because of radioactive contamination may make nuclear power economically unattractive. Other noneconomic factors must also be considered. Some fuels have greater adverse environmental consequences than others. There seems to be growing interest in an anticonsumption energy ideology which favors conservation²⁷⁹ and the development of "soft energy paths"²⁸⁰ to lessen reliance on large-scale, resource-intensive power plants. In some communities there may be ideological opposition to impounding rivers with more hydroelectric projects; more reliance on OPEC oil, or more use of nuclear power. These competing considerations must all be weighed in order to decide what type of plant will be constructed. In California this weighing process is initially the responsibility of a public utility, which must propose a facility²⁸¹—and of the Energy Commission, which must

²⁷⁸ Federal legislation also disfavors the use of petroleum or natural gas to fuel new facilities. Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (codified at 42 U.S.C.A. §§ 8301-8483 (Supp. 1978)).

²⁷⁹ It is further the policy of the state and the intent of the Legislature to employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, thereby reducing the rate of growth of energy consumption, prudently conserve energy resources, and assure statewide environmental, public safety, and land use goals.

CAL. PUB. RES. CODE § 25007 (West 1977).

²⁸⁰ See generally A. LOVENS, *SOFT ENERGY PATHS: TOWARD A DURABLE PEACE* (1977); see also E. SCHUMACHER, *SMALL IS BEAUTIFUL* (1975).

²⁸¹ CAL. PUB. RES. CODE § 25502 (West 1977).

approve the proposal.²⁸² The Energy Commission is thereby entrusted to balance all the factors that might enter into the “whether” assessment, so there can be “one-stop” decisions about the power plants to be constructed in the state.²⁸³

Assume that before the enactment of the California Nuclear Law a utility proposed and the Energy Commission approved the building of a large nuclear power plant. The “whether” decision has been made. Now an entirely different set of questions arises. How should the reactor be constructed? What should its design specifications be? What safety devices should be employed to guard against radiation escape? How should operators of the facility be trained and supervised? These are all “how” decisions—decisions affecting the construction and operation of a nuclear plant already approved by a public utility and the Energy Commission by their independent process of “whether” decision-making.

The NRC makes these “how” decisions, all of which are concerned with protecting against the “radiation hazard” of nuclear plants.²⁸⁴ The information required in applications to the NRC for licenses to construct and operate a power reactor relates almost exclusively to the radiological safety of the proposed plant.²⁸⁵ Some rudimentary financial data must also be provided, but this requirement too seems designed to assure that inadequate capitalization will not jeopardize reactor safety.²⁸⁶ A massive set of “general design criteria” and other detailed standards concerned with radiologic safety specifications are appended to the licensing portion of the NRC’s regulations.²⁸⁷ Only persons licensed by the NRC can operate reactors.²⁸⁸

²⁸² *Id.* § 25500 (West 1977).

²⁸³ See Note, *California’s Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 U.C.L.A.L. Rev. 1313 (1977).

²⁸⁴ See text accompanying notes 306-54 *infra*.

²⁸⁵ See the application criteria established by 10 C.F.R. § 50.34 (1979). For example, 10 C.F.R. § 100.10 (1979), referred to in that section, lists the factors relevant to approval of a site by the NRC. The section commences with the following general statement:

Factors considered in the evaluation of sites include those relating both to the proposed reactor design and the characteristics peculiar to the site. It is expected that reactors will reflect through their design, construction and operation an extremely low probability for accidents that could result in release of significant quantities of radiation fission products.

²⁸⁶ 10 C.F.R. § 50.33(f) (1979).

²⁸⁷ 10 C.F.R. Part 50, App. A-K (1979).

²⁸⁸ 10 C.F.R. § 55.3 (1979); *cf.* 10 C.F.R. § 55.7 (1979) (authorizing NRC to

Clearly, then, Congress has preempted the power to decide *how* reactors should be constructed and operated, and these decisions must be made on a uniform basis by the NRC, the federal agency charged with regulatory responsibility for the radiologic aspects of reactor safety. The states, however, have not been precluded from making preliminary decisions about *whether* to utilize nuclear power.²⁸⁹ After all, the regulation of public utilities is one of the oldest recognized exercises of the state's police power, established as early as 1877.²⁹⁰

If this choice of *whether* to utilize one highly controversial alternative for generating energy is preempted, a bizarre regulatory vacuum would be created. The NRC does not evaluate proposals from utilities to determine if the construction of a new reactor is economically necessary, environmentally acceptable or consistent with the public "convenience and necessity." Its jurisdiction is concerned with the maintenance of safety against radiation hazards. If a state utility regulatory agency like California's Energy Commission is prevented from making a general evaluation of feasibility, on broad grounds of social, economic and ideological policy, then the decision *whether* to build a nuclear facility in a state will ultimately be made only by the public utility seeking its construction. So long as a reactor's design specifications meet NRC requirements, there could be no public check whatsoever on utility discretion. It would be ironic if public energy utilities, granted a jurisdictional monopoly in large part because of their heavy regulation by the state, were freed from regulatory oversight of the one decision which promises to affect the greatest number of persons over the greatest possible time.

The California Nuclear Law is just this kind of regulatory over-

exempt persons from licensing requirements *only* if safety considerations not impaired).

²⁸⁹ The characterization of a particular decision as a "whether" or a "how" decision is not subject to a bright line test. Often, the distinctions blur as factors involved in the "whether" decision include "how" considerations. See text accompanying notes 350-54 *infra* for a discussion of this aspect of the California Nuclear Law.

²⁹⁰ In *Munn v. Illinois*, 94 U.S. 113 (1877), the Court first held that the regulation of public utilities was a legitimate exercise of the state's police power. Since that time, the acts of public utilities have been extensively regulated as the *quid pro quo* for the grant of a service area monopoly. For a general discussion of the state police power in the field of nuclear energy, see Bischoff, *Nuclear Power Regulation: Defining the Scope of State Authority*, 18 ARIZ. L. REV. 987, 988-1003 (1976). See generally Hills, *A Reappraisal of Public Utility Responsibility in the Electric Utility Industry*, 9 ENV'T L. 407 (1979).

sight decision. By discouraging land use for nuclear reactors until a waste disposal technology is developed, the state provides guidance to utilities selecting fuel sources for new facilities. Because this guidance is motivated in part by concerns over the safety of nuclear reactors, it may be thought to conflict with the regulatory objectives of the Atomic Energy Act, a conflict preemption problem addressed later in this article.²⁹¹ This potential for conflict, however does not change the subject matter of the regulation, the "whether" preference, which has not been occupied by any Congressional action to date.

One last problem remains. As was established earlier,²⁹² recent Supreme Court decisions have resolved occupation preemption claims by categorizing the regulated subject matter as "national" or "local." Although no judicial criteria for applying this branch of the *Cooley* doctrine have been fixed, some guidelines were suggested²⁹³ which can help determine if the "whether" decisions about nuclear power should be made by the national government or by each state individually.

The first suggested guideline was "congressional attitude toward state regulation of the general area. . . ." Congress has not expressly dealt with this matter, as there is no federal determination whether nuclear power should be preferred to other fuels as a future energy source.²⁹⁴ The Carter Administration, which once viewed nuclear power as a last resort, is now reevaluating its guardedly anti-nuclear stance, although a policy decision seems unlikely for some time. The White House probably will not take a position until completion of a reappraisal of the Administration's policy on waste disposal, which was prompted in part by the rather concerned conclusions of the Interagency Review Group on Nuclear Waste Management.²⁹⁵ Although there are conflicting signals regarding Congressional reaction to the sluggishness of the nuclear industry,²⁹⁶ perhaps as a result of Three Mile Island and continuing problems with waste disposal management, it has thus far shown no inclination to supplant affirmatively the state's authority to determine what types of facilities will best meet local energy needs.

Secondly, a conclusion about the character of the regulated

²⁹¹ See text accompanying notes 306-54 *infra*.

²⁹² See text accompanying notes 134-67 *supra*.

²⁹³ See text accompanying note 175 *supra*.

²⁹⁴ See text accompanying notes 355-95 *infra*.

²⁹⁵ DEP'T OF ENERGY, *supra* note 17.

²⁹⁶ See, e.g., 37 CONG. Q. WEEKLY RPT. 2887 (1979).

subject matter will depend upon "[t]he degree to which the effects of the challenged regulations are localized so as not to affect . . . other states" Here again, there is little support for depriving states of individualized regulatory decisionmaking. Public utilities rarely provide service to an interstate market. Admittedly, the Federal Energy Regulatory Commission oversees an interstate power grid of pooled electricity which is designed to assure an abundant nationwide supply and to meet emergency needs,²⁹⁷ but the FERC is specifically denied "jurisdiction . . . over facilities used for the generation of electrical energy" ²⁹⁸ Therefore, it is hard to see how the decision of one state to disfavor nuclear power facilities, as long as it still meets the needs of its consumers and its responsibility to the interstate grid, would have a significant detrimental impact on interests of other states.

Finally, a subject matter may be categorized as national or local depending on "the degree to which [the state's] judgment is based upon uniquely local conditions rather than factors common throughout the country." This criterion provides the strongest argument that decisions about *whether* to utilize nuclear power should be made by the states in the absence of clear Congressional intent to the contrary. It is perhaps fortuitous that the first challenge to state decisionmaking about nuclear power arises in California. That state has developed an ideology and possesses a resource base considerably different from those of most other states in the Union. California's unique position highlights why states should be free to establish their own priorities and guidelines for meeting energy needs. This state has long been a leader in innovative ideology. Its environmental consciousness is well established. It is not surprising, therefore, that the people and the government have engaged in a long-standing debate over the desirability of nuclear power. California is also geographically and geologically well situated to utilize nonnuclear energy. Perhaps no other single area of the world is more suited to developing

²⁹⁷ 42 U.S.C. §§ 7172(a)(1)(B), (2)(A) (Supp. I 1977). The complainants in *PLF* alleged that the California Nuclear Law "burdened" interstate commerce as an alternative ground to the preemption claim, *PLF v. ERCDC*, 472 F. Supp. 191 (C.D. Cal. 1979), Complaint for Declaratory Judgment 12-13 (filed Oct. 2, 1978). The district court did not comment on this commerce clause ground when it granted summary judgment on the preemption claim.

²⁹⁸ 16 U.S.C. § 824(b) (1976). The FERC assumed the responsibilities, and is limited to the powers, of the predecessor Federal Power Commission. 42 U.S.C. §§ 7172(a)(2)(A), 7293 (Supp. I 1977).

solar, wind, geothermal, and tidal energy sources. A growing technological and production base in the state is actively promoting applications of these new energy options. To say that California cannot choose to develop alternative energy technologies, but that it must be bound by some nationally standardized selection of nuclear power, makes very little sense in the absence of an unambiguous showing of congressional intent. In sum, then, a pattern of state diversity and experimentation, which has thus far operated in energy decisionmaking, need not be disturbed unless the Congress affirmatively acts to do so.

In fact, there may be reason to believe that the state's ability to control its system for meeting energy requirements by selecting acceptable power generating sources is constitutionally protected, even if Congress *should* act. The Supreme Court, in *National League of Cities v. Usery*, held that Congress was precluded from infringing on reserved powers of state sovereignty which infringed upon "the States' freedom to structure integral operations in areas of traditional governmental functions."²⁹⁹ It might well be argued that an attempt by Congress to supersede state decisions about whether to utilize this highly controversial method of producing electricity, one fraught with possibly catastrophic long-term consequences for the affected state, was just such an unpermitted infringement.³⁰⁰ The regulation of public utility activity has long been recognized as an important exercise of the police power of the states,³⁰¹ so congressional invasion of this authority, compelling unwilling states to rely on nuclear power, could prompt judicial protection. The ultimate significance of the principle of *National League of Cities* is as yet unknown, however, and one need not go this far to conclude at least that Congress should not be held to have displaced local decision-making about nuclear power in the absence of a specific and unmistakable attempt to do so.

2. Conflict Preemption—Protection and Promotion: The Twin Objectives of Federal Nuclear Policy

The preceding discussion established that Congress has not,

²⁹⁹ *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

³⁰⁰ See generally Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 721-22 (1979) ("A much more frontal challenge to state autonomy would be difficult to imagine." *Id.* at 722). For a discussion of this principle in the context of the Burger Court's approach to federalism balancing, see text accompanying notes 43-80 *supra*.

³⁰¹ See text accompanying note 290 *supra*.

even if it could, occupied a field so as to prevent states from determining whether to prefer nonnuclear forms of energy generation. The state-supportive presumption would require an unmistakable showing of legislative intent to establish occupation preemption. More difficult, however, is the question of whether the California Nuclear Law conflicts with the terms of operation of federal law. The district court in *PLF* invalidated the California enactment largely on this ground.³⁰² The alternative assessment presented in this last portion of the article suggests the opposite conclusion.

The current pattern for regulating atomic energy was established by the Atomic Energy Act of 1954.³⁰³ When first enacted, Congress recognized the potential for nonmilitary applications of the nuclear reaction and envisioned a significant developmental role for private industry, ending the government monopoly on the use of nuclear materials. The Atomic Energy Act had two predominant themes, reflected in this statement from its purpose section:

It is the purpose of [the Act] to effectuate the policies set forth above for providing for—

. . . .
(d) a program to encourage widespread participation in the *development and utilization* of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security *and with the health and safety of the public*³⁰⁴

Thus, there was to be federal responsibility for promoting the development of nuclear energy while protecting the public from the obvious hazards of its use. The Atomic Energy Commission (AEC), first created in 1946, was charged with facilitating these two potentially conflicting objectives.

If the California Nuclear Law is to be preempted on conflict grounds, it must be found to be irreconcilable with a provision of the Atomic Energy Act or must stand as an obstacle to the attain-

³⁰² See text accompanying notes 260-66 *supra*.

³⁰³ The Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, *as amended*, 42 U.S.C. §§ 2011-2296 (1976). The best summary of the provisions of the 1954 act, its amendments and relevant legislative history, is Murphy & LaPierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 394-415 (1976). For a good introduction to the objective of the predecessor Atomic Energy Act of 1946, ch. 724, 60 Stat. 755, see Helman, *Pre-Emption: Approaching Federal-State Conflict Over Licensing Nuclear Power Plants*, 51 MARQ. L. REV. 43, 51-53 (1967).

³⁰⁴ 42 U.S.C. § 2013(d) (1976) (emphasis added).

ment of these two objectives of the legislation.³⁰⁵ The terms and legislative history of the Act and its amendments reveal no such conflict, and the state-supportive presumption of the Supreme Court's recent preemption cases would require the California law to be upheld as part of an independent state regulatory scheme. This conclusion can be reached after analyzing separately the twin objectives of the Atomic Energy Act—protection of the public against the radiation hazards of nuclear energy and promotion of a commercially attractive nuclear power technology.

a. Protection Objective—Safeguarding Against “Radiation Hazards”

The Atomic Energy Act of 1954 is replete with references to congressional concern about protecting against the radiation hazards posed by the increased use of nuclear materials.³⁰⁶ But the original act is “singularly silent”³⁰⁷ as to the division of federal and state regulatory responsibility over the safety aspects of nuclear facilities. Certainly these safety concerns would be of interest to the states, and in 1957 the AEC proposed legislation which died in committee that would have authorized the concurrent establishment of state radiation standards “not in conflict” with the federal ones.³⁰⁸ In 1959 Congress finally addressed the division of governmental authority to regulate the “radiation hazards” of nuclear materials and adopted section 274 of the Act.³⁰⁹ Congress’ primary concern was for the safe use of radioactive materials, as

³⁰⁵ See text accompanying notes 177-251 *supra*.

³⁰⁶ See, e.g., 42 U.S.C. §§ 2051(a)(5), (d), 2073(b), 2093(b), 2201(a), 2232(b) (1976).

³⁰⁷ Cavers, *State Responsibility in the Regulation of Atomic Reactors*, 50 Ky. L.J. 29 (1961). The only reference in the 1954 Act to state regulatory responsibility is section 271, 42 U.S.C. § 2018 (1976), which retained state authority “with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities” After an expansive judicial construction of the section threatened the autonomy of an operational AEC facility, *Maun v. United States*, 347 F.2d 970 (9th Cir. 1965), Congress restricted state authority with a proviso to section 271 that denied states the authority “to regulate, control, or restrict any activities of the Commission.” 42 U.S.C. § 2018 (1976). See generally Murphy & LaPierre, *Nuclear “Moratorium” Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 407-08 (1976).

³⁰⁸ See S. REP. NO. 870, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2872, 2875.

³⁰⁹ Act of September 23, 1959, Pub. L. No. 86-373, 73 Stat. 688 (codified at 42 U.S.C. § 2021 (1976)).

reflected in its division of regulatory jurisdiction.³¹⁰ Three types of nuclear materials were thought to pose little danger to the public.³¹¹ States were permitted to take over sole responsibility for regulating the "radiation hazards" of these relatively safe materials if they entered into a turnover agreement with the AEC.³¹² The federal agency, however, would "retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility"³¹³ This latter category included nuclear power plants.³¹⁴ Thus, questions of *how* nuclear plants would be constructed and operated were not to be turned over to states.

It is interesting to note that the AEC has traditionally given a very narrow construction to the scope of its responsibilities over "how" questions involving nuclear plant licensing. In *New Hampshire v. AEC*,³¹⁵ for example, the agency successfully resisted state efforts to compel it to hear evidence of possible thermal pollution of the Connecticut River at construction permit hearings on the proposed Vermont Yankee nuclear facility. The court upheld the AEC's position that its jurisdiction was limited

³¹⁰ "It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials"

Id. § 2021(a).

³¹¹ The three types are:

1) source material, like uranium and thorium, used to produce special nuclear material (*Id.* §§ 2014(z), 2091);

2) special nuclear material, like plutonium or U-233 or -235, in quantities too small to form a critical mass, which are capable of releasing substantial quantities of atomic energy and are used as nuclear fuel (*Id.* §§ 2014(aa), 2071); and

3) byproduct material, made radioactive or produced by exposure to special nuclear material in the reaction process (*Id.* § 2014(e)).

³¹² *Id.* § 2021(b).

³¹³ *Id.* § 2021(c).

³¹⁴ See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

³¹⁵ 406 F.2d 170 (1st Cir. 1969), *cert. denied* 395 U.S. 962 (1969).

to consideration of evidence bearing on radiation hazards. It was only after the adoption of NEPA³¹⁶ and its application to the reluctant agency by an indignant Judge J. Skelly Wright³¹⁷ that broader environmental issues were recognized as proper concerns in the federal licensing process.

Irrespective of these concerns, however, the states also had an obvious interest on regulating aspects of these massive nuclear projects which did not directly touch on radiation hazard protection. In section 274(k), Congress provided:

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.³¹⁸

This section was intentionally drafted in general terms, and applies both to materials subject to state takeover agreements and to the facilities covered by subsection (c), including nuclear power plants, over which the AEC retained exclusive regulatory jurisdiction. As originally proposed, the legislation contained a specific preemption clause that would eliminate any claim of concurrent state power to regulate "concerning the control of radiation hazards" from byproduct, source and special nuclear materials.³¹⁹ Even the AEC resisted adoption of this explicit preemption language, and it was ultimately deleted from the final bill. Congress was told that was preferable to leave decisions about the ultimate scope of preemption of section 274 to the courts.³²⁰ The most revealing statement of this intent is the following passage from a letter written to the Joint Committee on Atomic Energy by the General Manager of the AEC:

In suggesting the elimination of the sentence [of explicit preemption of state controls on "radiation hazards"] we do not intend to leave any room for the exercise of concurrent jurisdiction by the States *to control radiation hazards* from those materials. Our sole purpose was to leave room for the courts to determine the applicability of particular State laws and regulations dealing with *matters on the fringe of the preempted area* in the light of all the provisions

³¹⁶ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4361 (1976)).

³¹⁷ *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971) ("We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act." *Id.* at 1117.).

³¹⁸ 42 U.S.C. § 2021(k) (1976).

³¹⁹ *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess. 488 (1959).

³²⁰ *Id.* at 307.

and purposes of the Atomic Energy Act, rather than in the light of a single sentence.

For example, in the absence of the sentence, the courts might have greater latitude in sustaining *certain types of zoning requirements which have purposes other than control of radiation hazards, even though such requirements might have an incidental effect* upon the use of source, byproduct, and special nuclear materials licenses by the Commission.³²¹

In summary, in enacting section 274 Congress continued to assert federal responsibility for protecting the public against the radiation hazards of more dangerous uses of radioactive materials while permitting state regulations of less dangerous substances. It did not, however, supplant legitimate state interests in regulating aspects of the utilization of nuclear materials which might incidentally touch the federally regulated area. Section 274 was concerned solely with allocating responsibility for protecting against radiation hazards between the federal and state governments. Such matters as zoning, land use, and, arguably, the required authorization to commence a nuclear power project—"matters on the fringe of the preempted area"—were left to state authority. Ultimately, the judiciary was to draw the boundaries between state and federal power. Thus, in assessing whether the California Nuclear Law conflicts with a federal enactment, the exact scope of the regulatory authority explicitly reserved by the Congress must be delineated. In keeping with the state-supportive presumption now utilized in preemption cases,³²² state regulation of matters not explicitly preempted must be upheld.

In *PLF*, the district court, using occupation language, seemed to conclude that the California Nuclear Law conflicted with the protection objective of the Atomic Energy Act, and held controlling a 1971 decision of the Eighth Circuit, *Northern States Power Company v. Minnesota*.³²⁴ In *Northern States*, the court reviewed a radioactive waste discharge condition imposed by the Minnesota Pollution Control Agency on a waste disposal permit for a nuclear power facility. "The conditions imposed by Minnesota embrace the same area as, but are substantially more stringent

³²¹ Letter from A. R. Luedecke, General Manager, Atomic Energy Commission, to Chairman Anderson, Joint Committee on Atomic Energy, Aug. 26, 1959, *quoted in id.* at 500 (emphasis added).

³²² See text accompanying notes 95-111 *supra*.

³²³ See text accompanying note 261 *supra*.

³²⁴ 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

than, those imposed by the AEC under the federal law.”³²⁵ The question here was whether federal radiation hazard standards, enacted under section 274 in accordance with the AEC’s retained authority over nuclear power facilities, established only a regulatory floor, leaving states free to set more rigorous requirements, or set both a floor and a ceiling and displaced state authority altogether.

The majority in *Northern States* held that federal authority was exclusive, so that the states were preempted from imposing their own radiation hazard standards. There was no explicit conflict between the state and federal regulations,³²⁶ but the court found the Minnesota requirements stood as an obstacle to federal control over radioactive waste discharges from these plants.³²⁷ In dictum, the majority also found that Congress had intended “to preempt the field of regulation over the construction and design of nuclear reactors . . .”³²⁸ because of the comprehensiveness of the AEC regulatory scheme³²⁹ and because the nature of the subject matter required uniform standards.³³⁰

Analytically, the *Northern States* opinion is very similar to the Supreme Court’s *Burbank*³³¹ decision. The majority relied upon extensive legislative history to infer preemption, and the dissent offered rebutting history to establish that Congress had not “‘unmistakably’ expressed an intent to preempt the field.”³³² Like the Douglas-Rehnquist debate in *Burbank*, the two opinions in *Northern States* differ as to the employment of the state-supportive presumption in decisions involving federalism balancing. Therefore, although the Supreme Court summarily affirmed *Northern States*,³³³ the opinion is subject to criticism that the

³²⁵ *Id.* at 1145.

³²⁶ *Id.* at 1147.

³²⁷ *Id.* at 1154.

³²⁸ *Id.* at 1152.

³²⁹ *But see* text accompanying notes 118-33 *supra*.

³³⁰ *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153 (8th Cir. 1971). The precise field of occupation was “the processing and utilization of source, by-product and special nuclear material . . .” The court rejected the state’s invocation of the *Huron* principle, *see* text accompanying notes 216-51 *supra*.

³³¹ *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *see* text accompanying notes 105-111 *supra*.

³³² *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1155 (8th Cir. 1971) (Van Oosterhout, dissenting).

³³³ *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972). The Eighth Circuit opinion has also been cited by the Court. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 15-18 (1976).

current Court could well find persuasive.³³⁴ First, the utilization of the state-supportive presumption, as by the dissent in *Northern States*, is now the preferred approach to conflict preemption decisionmaking.³³⁵ Furthermore, the majority's reliance on the comprehensiveness of the federal scheme of regulation is certainly no longer an acceptable test of preemptive intent.³³⁶ Finally, in view of the Court's solicitude for more stringent state rules in cases such as *Dublino*³³⁷ and *Arco*,³³⁸ a finding of mandated national uniformity should be questioned. It might bear repeating here that

federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.³³⁹

A question remains: Does *Northern States* control the protection aspect of the conflict preemption issue posed by the California Nuclear Law? The district court in *PLF* believed it did.³⁴⁰ Its conclusion is not tenable, however, in view of the state-supportive presumption which the Burger Court employs in preemption cases.³⁴¹ In fact, the Court's most recent major preemption decision, *Ray v. Atlantic Richfield Co.*,³⁴² suggests just the opposite result—that the holding of *Northern States* provides the very ground for distinguishing California's enactment from the Minnesota regulation.

³³⁴ "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973); accord, *De Canas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976). See Note, *Nuclear Power and Preemption: Opportunities for State Regulation*, 27 CLEV. ST. L. REV. 117, 132-34 (1978) (majority opinion in *Northern States* is a "backhanded approach to preemption" *Id.* at 133.). See also Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 694-98 (1979).

³³⁵ See text accompanying notes 95-117 *supra*.

³³⁶ See text accompanying notes 118-133 *supra*.

³³⁷ *New York Dept. of Soc. Serv. v. Dublino*, 413 U.S. 405 (1973); see text accompanying notes 125-29 *supra*.

³³⁸ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); see text accompanying notes 235-48 *supra* and notes 339-48 *infra*.

³³⁹ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

³⁴⁰ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 12 ENVIR. REP. (BNA) 1899, 1904-06 (S.D. Cal. March 6, 1979) (*Northern States* seemingly treated as an occupation case).

³⁴¹ See text accompanying notes 95-111 *supra*.

³⁴² 435 U.S. 151 (1978); see text accompanying notes 235-48 *supra*.

Remember that in *Arco* the Court faced a preemption problem with the design specification and tug escort alternatives of the Washington Tanker Law. Justice White found Washington preempted from requiring that tankers entering its waters meet design specifications considerably more stringent than those set by federal regulation.³⁴³ This conclusion was based on the identity of purpose of the two regulations. Both were aimed at “precisely the same ends”³⁴⁴—assuring tanker safety and environmental protection. The Court also found that Washington was *not* preempted from requiring oil tankers failing to meet the design specifications to proceed only with tug escort.³⁴⁵ This section of the state statute was not enacted to impose standards on tanker design, but was a “safety measure”³⁴⁶ which Congress expressly had permitted states to adopt in the absence of federal regulation. The purpose for which the state had enacted the challenged legislation was thus crucial to its constitutionality. The majority also signalled its continued propensity to find preemption only when conflicts in the state and federal regulations “*will necessarily arise.*”³⁴⁷ As Justice White noted:

We do not agree . . . that the tug escort provision . . . will exert pressure on tanker owners to comply with the design standards and hence is an indirect method of achieving what they submit is beyond state power While the tug escort provision may be viewed as a penalty for noncompliance with the State's design requirements, it does not “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁴⁸

The conflict preemption issues raised by the California Nuclear Law are markedly similar to those raised by this pair of Tanker Law provisions in *Arco*. Application of the *Huron* principle,³⁴⁹ which makes the similarity or difference in regulatory purpose constitutionally significant, would invalidate Washington's attempt to second-guess the federal government's assessment of how a safe oil tanker should be constructed. On the same basis,

³⁴³ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 173.

³⁴⁶ *Id.* at 171.

³⁴⁷ *Goldstein v. California*, 412 U.S. 546, 554 (1972) (emphasis by the Court); see text accompanying notes 188-213 *supra*.

³⁴⁸ *Ray v. Atlantic Richfield Co.*, 435 U.S. at 173 n.25 quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Justices Stevens and Powell dissented on whether the tug escort provision constituted an “obstacle” to federal preemption of design standards. 435 U.S. at 190 (Stevens & Powell, JJ., dissenting).

³⁴⁹ See text accompanying notes 216-249 *supra*.

Northern States, rightly or wrongly, struck down the Minnesota attempt to impose a more stringent radiation hazard protection than that afforded by federal regulation. The court found that Congress refused to allow the states to regulate the discharge of waste from operating nuclear plants for this same protective purpose. Once a nuclear facility is authorized, the means of safeguarding the public from exposure to radioactivity is exclusively a federal concern.

The California Nuclear Law, by contrast, does not explicitly deal with reactor safety requirements. The state has not attempted to impose standards on the "how" questions of the construction and operation of nuclear plants. Its impact on the preempted subject of radiation hazard standards for existing plants is every bit as tangential as was the tug escort requirement upheld in *Arco*. The California law may reflect economic, safety, environmental and ideological concerns, and the resulting postponement of land use for nuclear plants until these concerns are resolved.³⁵⁰ It is merely an expression of a preference against a possible method of meeting the state's energy needs. Even if based in part on safety considerations, this expression can in no way be characterized as a "radiation hazard" regulation involving the "construction and operation" of already authorized nuclear power plants. Congress may well have the constitutional authority to impose a uniform rule preferring nuclear power to all other forms of energy generation.³⁵¹ As yet it has not done so. In the absence of Congressional action "unmistakably" preempting state authority, California should be permitted to continue to exercise its police power authority to accomplish an objective very much different from the Minnesota radiation hazard regulation invalidated in *Northern States*.

The distinction here is a very subtle one. The federal government monopolizes the "how" question. This is the teaching, perhaps questionable, of *Northern States*. The California Nuclear Law moves the argument to the next level of abstraction—what happens when the "whether" decision contains a "how" component? Volumes have been written on this subject in the abstract. There is not much guidance from opinions of the Court. The resolution of this question very well may depend, and should depend, upon the effect on federalism balancing of a determina-

³⁵⁰ See Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 706-14 (1979).

³⁵¹ But see text accompanying notes 299-301 *supra*.

tion that preemption of the "how" question ousts any state authority whatever to consider "how" questions, regardless of the context. Such a result would vastly expand the scope of federal power at the expense of the states and, more importantly, would accomplish the expansion by judicial rather than Congressional decision. The state-supportive presumption, which preserves a zone of state regulatory authority in the absence of clear congressional mandate to the contrary, would not favor a momentous extension of *Northern States* to cover these second-level problems as well. Rather, as state regulatory action becomes increasingly incidental to the federal enactment with which it purportedly conflicts, the judiciary should become increasingly reluctant to infer preemption. By this sensitive use of the state-supportive presumption, Congress, not the Court, will remain ultimately responsible for federalism balancing.

The California Nuclear Law must be seen as a component part of the Warren-Alquist Act,³⁵² which manifests a broader state concern with efficient, safe, and aesthetically satisfactory means of meeting the state's energy needs. Is the state to be totally disabled from considering the NRC's own attack on the Rasmussen Report,³⁵³ or the Three Mile Island catastrophe,³⁵⁴ when making fundamental decisions about energy alternatives? How can the Energy Commission be expected to turn a blind eye to all such factors when acting to regulate public energy utilities in the best interests of the state? Does it make any constitutional difference that this peripheral concern with "how" questions comes as a directive to the agency from the California Legislature as to preferences for "whether" decisionmaking? It seems far more likely that "how" considerations can be one of the many factors—economic, social, ideological, environmental, aesthetic, even irrational—that make up the immensely complicated decisionmaking process of assessing proposals for new energy facilities. At least this should be true until Congress indicates otherwise.

b. Promotion Objective—Nuclear Power at the Expense of Alternatives?

Protecting the public from radiation hazards was only one of

³⁵² CAL. PUB. RES. CODE §§ 25000-25968 (West 1977); see text accompanying notes 7-20 *supra*.

³⁵³ See text accompanying note 1 *supra*.

³⁵⁴ See text accompanying note 3 *supra*.

the aims of the Atomic Energy Act of 1954. Of equal importance was the development of "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes" ³⁵⁵ Other sections of the Act indicate a similar promotional purpose. ³⁵⁶ Do not the critics of the California Nuclear Law finally strike a winning argument when asserting that state regulations "stand as an obstacle" to this federal promotional objective? Again the district court in *PLF* thought so, ³⁵⁷ as did the court in *Northern States*. ³⁵⁸ However, in light of the historical context of the Atomic Energy Act, and recent Congressional activity that indicates a refusal at the federal level to prefer nuclear power over alternative energy sources, there is simply no room for the conclusion that Congress "unmistakably" intended to prohibit states from disfavoring nuclear plants when certifying public utility applications.

It is important to remember that the original Atomic Energy Act was enacted over a quarter century ago. Hiroshima and Nagasaki, now dimly remembered, had occurred only nine years before. The Act itself inaugurated the very beginning of the private nonmilitary use of nuclear energy. Certainly the prospect of wide use of atomic power must have been exciting, but the existence of a technology to make it commercially viable was some years off. The completion of the first private commercial power reactor was still three years away. ³⁵⁹ In this setting, it would be surprising indeed to find Congress intending to eliminate states' discretion to utilize nonnuclear energy facilities. Far more likely, what was to be "promoted" was not nuclear power *at the expense* of alternatives but the development of the technology that would permit nuclear power plants *to be* one of the alternatives. The committee reports on the Atomic Energy Act of 1954 suggest that private industry was being invited to assume a role in developing this new energy source, which since 1946 had been a government monopoly used solely for weaponry, in the hope that electricity

³⁵⁵ 42 U.S.C. § 2013(d) (1976).

³⁵⁶ See, e.g., *id.* §§ 2011(a), (b), 2012(a), (g), (i), 2013(a).

³⁵⁷ *Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n*, 472 F. Supp. 191, 200-01 (S.D. Cal. 1979).

³⁵⁸ *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971) (dictum), *aff'd mem.*, 405 U.S. 1035 (1972).

³⁵⁹ The Shippingport I facility in Pennsylvania, operated by Duquesne Light Co., began commercial operation in 1957. *Hearings, Development, Growth and State of the Nuclear Industry*, 93d Cong., 2d Sess. 275 (1974).

produced by atomic power would soon become reality.³⁶⁰ There are only a few snippets in the legislative history of the 1954 Act, though, that augment a common sense appraisal of what Congress must have intended. Probably the best evidence comes from a series of speeches delivered by Representative W. Sterling Cole, then Chairman of the Joint Committee on Atomic Energy:

Several years from now, I presume that the Congress will be required to stake out the ground rules for an atomic power industry—to set forth the terms and conditions under which the American people will enjoy the benefits of electric power developed from nuclear sources. That problem, however, is not the concern of the bills now before the Joint Committee.

I emphasize with all the force at my command that the problem before us in 1954 is not the formulation of federal policy for a non-existent atomic power industry.

.

It [the 1954 Act] does not deal with the problem of how such an industry will be woven into the fabric of American economic life. . . . This legislation . . . is concerned not with the theoretical question of how to regulate a non-existent atomic power industry—but with the practical question of bringing such an industry into being.

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The current legislation aimed at hastening the *development* of atomic power, is not designed to lay down ground rules for the *regulation* of an atomic power industry.³⁶¹

Perhaps the most realistic conclusion that can be advanced about legislative intent in 1954, when the framework for the infant private nuclear industry was established, is that Congress did not contemplate the expansive construction that could be given to its use of words like “develop” or “promote” a quarter century later. By 1974, however, it was certainly clear to Congress, as to the nation, that the nuclear power industry now presented an economically competitive alternative to other forms of electricity generation. Any legislative statement which established a priority for nuclear power at this time should profoundly affect the resolution of the conflict preemption issue involving the California Nuclear Law. In that year, however, Congress refused

³⁶⁰ E.g., S. REP. NO. 1698, 83d Cong., 2d Sess. 3 (1954) (“[T]he atomic reactor art has already reached the point where atomic power at prices competitive with electricity derived from conventional fuels is on the horizon, though not within our immediate reach”); H.R. REP. NO. 2181, 83d Cong., 2d Sess. 3 (1954).

³⁶¹ Excerpts from three speeches given in the summer of 1954, quoted in Lemov, *State and Local Control Over the Location of Nuclear Reactors Under the Atomic Energy Act of 1954*, 39 N.Y.U.L. REV. 1008, 1018 (1964).

to give nuclear power a legislative preference, and instead provided for a balanced system of meeting national energy demands. This legislative determination comes in the Energy Reorganization Act of 1974,³⁶² which completely restructured federal regulation of atomic energy. At least partially in recognition of the conflict of interest posed by the combination of development and regulation of nuclear facilities in the Atomic Energy Commission,³⁶⁷ Congress bifurcated the agency's responsibilities. It created two new agencies—the Nuclear Regulatory Commission (NRC) with authority over regulation and licensing,³⁶⁴ and the Energy Research and Development Administration (ERDA) to “develop, and increase the efficiency and reliability of use of, *all energy sources . . .*.”³⁶⁵ By statute³⁶⁶ and Executive Order³⁶⁷ ERDA became responsible not only for nuclear development but for fossil, solar and geothermal source development as well. It was conceived as the umbrella agency for promoting various types of energy sources, and served as the prototype for a more comprehensive Department of Energy which assumed ERDA's functions in 1977.³⁶⁸

The legislative history of the Energy Reorganization Act provides the clearest indication that Congress did not intend to compel the utilization of nuclear power facilities at the expense of alternatives. During Senate consideration of the bill several amendments were attached which gave it, in the words of one commentator, “an anti-nuclear tenor.”³⁶⁹ The Senate's chief concern was that the development of nuclear power not be given an “unwarranted priority” over other energy sources by ERDA.³⁷⁰ In place of these hostile Senate proposals, the Conference Committee settled on a compromise that required ERDA to remain neutral as to the type of energy source to be preferred in meeting the

³⁶² Pub. L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. §§ 5801-5891 (1976)).

³⁶³ See 42 U.S.C. § 5801(c) (1976).

³⁶⁴ *Id.* § 5841(f).

³⁶⁵ *Id.* § 5801(a) (emphasis added). See also *id.* § 5814(c) (transfer of AEC functions to ERDA).

³⁶⁶ *Id.* §§ 5814(c).

³⁶⁷ Exec. Order No. 11,834, 40 Fed. Reg. 2971 (1975).

³⁶⁸ Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 567 (codified at 42 U.S.C. § 7101-7352 (Supp. I 1977)).

³⁶⁹ Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1404 (1974).

³⁷⁰ S. REP. NO. 93-980, 93d Cong., 2d Sess., at 26-27 (1974).

nation's electricity demands. The purpose of the compromise is stated in the Conference Committee report:

. . . substantial input of AEC resources and personnel in the new ERDA caused concern in the committee that nuclear energy personnel and nuclear energy funding might dominate the missions and directions of the new agency. To ensure that this will not occur [the Act] has been drafted to prohibit any unwarranted bias in favor of a single energy technology . . . and to place greater relative emphasis on nonnuclear energy, including such clean renewable sources as solar and geothermal energy.

. . . .
The committee has simply designed ERDA so that its nonnuclear missions are fairly represented and funded along with the nuclear mission of the new agency.³⁷¹

The Act itself reflects this same desire to assure agency neutrality. "Congress intends that all possible sources of energy be developed consistent with warranted priorities."³⁷²

This is *not* legislative history that would support a finding that Congress "unmistakably" intended to require the promotion of nuclear energy at the expense of competing alternatives, and subsequent congressional activity bolsters this conclusion. Later that same year Congress required ERDA to engage in a comprehensive program of research and development of nonnuclear energy technology, with a potential twenty billion dollar pricetag.³⁷³ Other legislation adopted in 1974 imposes promotional duties on ERDA inconsistent with the assumption that Congress intended a developmental priority for nuclear power.³⁷⁴ Rather, this array of

³⁷¹ S. REP. NO. 93-980, 93d Cong., 2d Sess. (1974) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5480 (1974). This section of the Senate Report concludes with a list of five provisions written into the legislation to assure ERDA neutrality.

³⁷² 42 U.S.C. § 5801(b) (1977).

Determination of priorities which are warranted should be based on such considerations as power-related values of an energy source, preservation of material resources, reduction of pollutants, export market potential (including reduction of imports), among others. On such a basis, energy sources warranting priority might include, but not be limited to, the various methods of utilizing solar energy.

Id. § 5801(e).

³⁷³ Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, 88 Stat. 1879 (codified at 42 U.S.C. §§ 5901-5917 (1977)).

³⁷⁴ See, e.g., Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. No. 93-410, 88 Stat. 1079 (codified at 30 U.S.C. §§ 1101-1164 (1976)); Solar Heating and Cooling Demonstration Act of 1974, Pub. L. No. 93-409, 88 Stat. 1069 (codified at 42 U.S.C. §§ 5501-5517 (1976)); Solar Energy Research, Development and Demonstration Act of 1974, Pub. L. No. 93-473, 88 Stat. 1431 (codified at 42 U.S.C. §§ 5551-5566 (1976)).

energy-related activity suggests Congressional unwillingness to yield to pressures that would have resulted in a pronuclear bias at the national level. This same balanced federal response to alternative sources of energy generation was maintained in 1977 when Congress again reconstituted the bureaucratic structure of energy policymaking, replacing ERDA with a new Cabinet-level Department of Energy.³⁷⁵

This recent legislative history raises a similar question to that discussed earlier in this section: If Congress remains neutral as to whether nuclear power should be promoted at the expense of other forms of electricity generation, who does have authority to make decisions to favor or disfavor certain types of fuel sources when increased electricity demand warrants the construction of a new generating plant? There seem to be two possible candidates in the absence of a federal preference. The first is the public utility itself. Can it be, though, that the state, as a political entity, has no voice in the decisionmaking process once the public utility has decided to construct a particular type of plant?³⁷⁶ In the absence of explicit prioritization by Congress, it would seem fanciful to presume that no other institution of government could review this decision made in the boardroom of a highly-regulated public utility. Far more likely, and in keeping with the state-supportive presumption in preemption cases generally, the states themselves may determine priorities for types of power plants to be constructed within their borders. Until Congress "unmistakably" declares a preference for a specific fuel source, which it has not yet done, the states should retain responsibility to monitor choices made initially by a public utility. In this way their traditional police power authority can best be maintained.

The district court in *PLF* disagreed with this assessment of Congress' promotional objective, basing its conclusion in part on the "analogous" Supreme Court opinion in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.³⁷⁷ A provision

³⁷⁵ Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (codified as 42 U.S.C. §§ 7101-7352 (Supp. I 1977)). See, e.g., 42 U.S.C. § 7112(5) (Supp. I 1977) (DOE should "carry out the planning, coordination, support, and management of a balanced and comprehensive energy research and development program, including . . . (5)(C) undertaking programs for the optimal development of the various forms of energy production and conservation;"); (6) (DOE should "place major emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable energy resources . . .").

³⁷⁶ See text accompanying note 290 *supra*.

³⁷⁷ *Pacific Legal Foundation v. State Energy Resources Conservation & Devel-*

of the Federal Power Act made it "unlawful" to construct or operate any hydroelectric facility on "the navigable waters of the United States" without a license from the Federal Power Commission.³⁷⁸

First Iowa applied to the FPC for a permit to construct a dam across the navigable Cedar River. The agency had denied an earlier permit request, but was attracted to the present proposal because a canal would be constructed to divert most of the waters of the Cedar River to the Mississippi River some eight miles away. The FPC refused to grant the utility's application, however, because it had not first obtained a permit from the State of Iowa to construct the dam.³⁷⁹

This proposal had not been well received by the state for the very reason it proved so appealing to the FPC. Iowa law conditioned a state permit on a finding that water taken from a stream be "returned thereto at the nearest practicable place,"³⁸⁰ which was certainly not the distant Mississippi River. In contrast to the broad assertion of state policymaking authority made by Iowa law, the Federal Power Act specified narrow categories of permitted state responsibility in the federal licensing process, most notably a requirement that applicants comply with state riparian property laws and any state statutes bearing on their qualification to do business as a public utility.³⁸¹ Thus the Court was faced with determining the extent to which concurrent state regulatory power was ousted by federal legislation authorizing the Federal Power Commission to grant a license to construct a dam across navigable waters of the United States. The Court treated these facts as presenting an express conflict between state and federal law. Justice Burton held:

opment Comm'n, 472 F. Supp. 191, 200 (S.D. Cal. 1979), *citing* First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).

³⁷⁸ 16 U.S.C. § 817 (1976). The regulatory responsibilities of the Federal Power Commission are now performed by the Federal Energy Regulatory Administration. 42 U.S.C. § 7172(a)(1)(B) (Supp. I 1977).

³⁷⁹ This was a strange administrative decision, since the agency believed the Iowa law was superseded by the Federal Power Act. It could have, and the Court implies it should have, granted the license and allowed Iowa to challenge the validity of the license in court. First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 162 (1946).

³⁸⁰ The Federal Power Commission agreed to approve the project only because water taken from the Cedar River would *not* be returned to that stream but would be channeled into the Mississippi River over eight miles away by a diversion canal built as part of the project. *Id.* at 166 (1946).

³⁸¹ 16 U.S.C. § 802(b) 1976).

To require the petitioner to secure the actual grant to it of a state permit . . . as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over *the federal project*. Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning *which the Act provides shall depend upon the judgment of the Federal Power Commission* or other representatives of the Federal Government.³⁸²

PLF is not alone in finding the *First Iowa* analogy persuasive. It has also been cited in previous attempts to establish preemption of state decisions about constructing nuclear power plants.³⁸³ When analyzed closely, however, it does not support preemption of state decisions about nuclear power. Indeed, when viewed with attention to the *Huron* principle³⁸⁴ and the current Court's state-supportive presumption in preemption cases, *First Iowa* will lead to the conclusion that state decisions are not, in fact, preempted.

First, and most obviously, *First Iowa* is the product of a federally-expansive era of preemption decisionmaking fashionable over thirty years ago.³⁸⁵ It was decided at a time when the Court was quick to find conflict in order to advance comprehensive federal regulatory power.³⁸⁶ At the policy level, then, there is reason for arguing that since the current Court would not find that a conflict between state and federal law "*will necessarily arise*,"³⁸⁷ a different result would be reached on the merits. However, there is a far more fundamental reason why *First Iowa* does not warrant the emphasis given it in *PLF*. The Federal Power Act and the Atomic Energy Act regulate significantly different subject matters in significantly different fashions, making such analogizing unwarranted.

Remember that in conflict preemption decisionmaking, the *Huron* principle requires a close look at the purpose of the federal and state enactments.³⁸⁸ The Federal Power Act was adopted to

³⁸² 328 U.S. 152, 164 (1946) (emphasis added).

³⁸³ See, e.g., Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 448-50 (1976).

³⁸⁴ See text accompanying notes 216-48 *supra*.

³⁸⁵ See generally Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 630-39 (1975).

³⁸⁶ See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

³⁸⁷ *Goldstein v. California*, 412 U.S. 546, 554 (1973); see text accompanying notes 189-213 *supra*.

³⁸⁸ See text accompanying notes 216-48 *supra*.

make determinations of the desirability of hydroelectric projects on navigable waters solely a matter of federal agency concern.³⁸⁹ The Court correctly characterized the proposed dam as "*the federal project*." State regulatory decisions, enforceable through procedures like the Iowa statute, which also directly affect the construction of federal hydroelectric power facilities, are displaced.³⁹⁰ Thus, the Federal Power Commission was granted authority to make *both* "whether" decisions *and* "how" decisions.

It is just exactly this federal "assumption of jurisdiction" over decisions about the utilization of nuclear power that has *not yet* occurred. Congress might, if it desired, have the power to prefer nuclear power to alternative forms of energy generation and impose that preference on the states. The Atomic Energy Act of 1954 did not do this, and the more recent creation of an omnibus ERDA carefully avoided such a preference for nuclear power. Unlike the *First Iowa* situation, then, the nuclear power "whether" question has been left to state determination while the "how" decision is made with a view to national uniformity.

This distinction becomes even more apparent when the nature of the regulated subjects of hydroelectric and nuclear power are compared. Congress in essence "owns" the navigable waters across which new hydroelectric facilities are placed.³⁹¹ Only shortly before *First Iowa*, the Supreme Court reiterated that navigable waters of the United States were an exclusively federal preserve. "Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control."³⁹² Thus the Federal Power Act promotes a method of power production which affects a subject already under exclusive federal control.

Decisionmaking about nuclear power, on the other hand, affects a subject of exclusively state control. Public utilities wishing to construct nuclear power plants seek the use of private or state-owned land and facilities which, unlike navigable waters, are not at all in the federal domain. In the absence of clear evidence that Congress intended to remove state regulatory responsibility from this state-controlled subject matter, and make "whether" decisions now made by the state, *First Iowa* cannot be given control-

³⁸⁹ 16 U.S.C. § 797(e) (1976).

³⁹⁰ *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 172 (1946).

³⁹¹ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

³⁹² *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

ling significance on this question of conflict preemption.

Two later opinions of the Court reemphasized the critical importance of the federally-controlled subject matter to the scope of preemption of the Federal Power Act. In *Federal Power Commission v. Oregon*,³⁹³ state authority to prohibit construction of a dam across nonnavigable waters on lands owned by the federal government was denied. Three years later, in *City of Tacoma v. Taxpayers of Tacoma*,³⁹⁴ the Court endorsed the following statement from the Court of Appeals:

Consistent with the *First Iowa* case . . . we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream *since the stream is under the dominion of the United States*.³⁹⁵

Application of the *First Iowa* principle simply cannot be justified when the resource on which the project is to be constructed is not already in the federal domain.

V. CONCLUSION

The Supreme Court historically has assumed major responsibility for monitoring the balance of regulatory power between the national government and the states. This federalism balancing function is one particularly susceptible to the injection of subjective judicial value preferences about the extent to which federal legislation should be permitted to displace regulatory authority traditionally exercised by states. In recent years, the Burger Court has utilized the opportunities for federalism balancing presented by preemption cases to preserve a zone of state regulatory autonomy in the absence of evidence of congressional intent that would make a finding of exclusive federal power unavoidable.

The California Nuclear Law presents an instructive case study for assessing how this state-supportive presumption can be employed to resolve a claim of federal preemption. The boundaries of the subject regulated by Congress in this field must be drawn with precision, and state and federal law must be carefully examined for areas of possible conflict. When these tasks are performed, the power of a state to make the fundamental decision whether to utilize nuclear power for generating energy must be upheld. This article has provided the analytic framework for reaching such a conclusion.

³⁹³ 349 U.S. 435 (1955).

³⁹⁴ 357 U.S. 320 (1958).

³⁹⁵ *Id.* at 339, *quoting* *Washington Dep't of Game v. FPC*, 207 F.2d 391, 396 (9th Cir. 1953) (emphasis added).

The ultimate resolution of the issue may well be made by the Supreme Court itself. The Court has not yet hinted at a solution, although a related question was treated summarily in 1972 in *Northern States*.³⁹⁶ The closest the Court has come to indicating its views on the constitutionality of state efforts to prefer nonnuclear energy alternatives was in the celebrated *Vermont Yankee* decision last term.³⁹⁷ Mr. Justice Rehnquist, who so clearly stated his preference for preserving state autonomy in *National League of Cities*, had this to say for a unanimous Court concerning federalism and the regulation of nuclear power:

The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.³⁹⁸

The definition of what kinds of decisions about nuclear energy should be entrusted to the "appropriate agencies" of the state was the very issue before the district court in *PLF*.³⁹⁹ Whether its restrictive judgment was correct, or whether the broad dictum of Justice Rehnquist should be prophetic of a different holding, remains for the future.

³⁹⁶ *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

³⁹⁷ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

³⁹⁸ *Id.* at 558 (emphasis in the original).

³⁹⁹ See text accompanying notes 252-70 *supra*.

