

Regulatory Vacuums: Federalism, Deregulation, and Judicial Review

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As federal deregulation has become more common, tension between federal centralization and state autonomy has heightened. When Congress and federal agencies deregulate, they often assert power to prevent the states from filling the void, thus creating regulatory vacuums. This Article examines the regulatory vacuum phenomenon against the backdrop of dormant commerce clause jurisprudence, federal preemption, and federalism concerns. It recommends that courts maintain their traditional role of balancing state and federal powers. Finally, it offers courts a framework for determining whether regulatory vacuums created by Congress or federal agencies violate constitutional federalism.

INTRODUCTION

After decades of increasing federal regulation,¹ disenchantment with regulatory "failure" has created a demand for federal deregulation, often with states' rights overtones.² The manner in which federal de-

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¹ C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 7-12 (1977) (describing growth of federal regulatory activity since the 1950's). Much of this period's legislation was prompted by a failure of state regulation. For example, the Senate Report on the proposed Occupational Safety and Health Act noted that "only a relatively few states have modern laws relating to occupational health and safety and have devoted adequate resources to their administration and enforcement." S. REP. NO. 1282, 91st Cong., 2d Sess. 4, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5177, 5180.

² See Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93, 94-95 (1983):

The New Federalism is President Reagan's effort to restore local control to local units of government.

In establishing or revising regulatory programs, the Administration em-

regulation has occurred, however, has led to two significant and unrecognized effects on federalism. Federal power has increased at the expense of the states, and decisionmaking on federalism issues has shifted from the federal judicial branch to the legislative and executive branches.

The rhetoric of deregulation implies that federal intervention will be reduced. Standing alone, deregulation would do just that. However, in "dismantling" federal power, the government often has barred states from filling the federal gap. The result is a regulatory vacuum: states cannot regulate and the federal government chooses not to do so.³

Congress has expressly created regulatory vacuums by statute.⁴ Federal agencies have created vacuums by enacting preemptive regula-

phasizes the return of regulatory authority to states and localities. This gives state and local governments the ability to fashion their own solutions and to set their own priorities.

All sectors of the federal government have boarded this deregulation bandwagon in some measure. Indeed, a primary goal of President Reagan's first term was to "get the government off the people's back." Peterson & Ross, *The Deregulation Bandwagon Has Almost Rolled to a Halt*, *The Washington Post National Weekly Edition*, Feb. 20, 1984, at 31, col. 1. The President established a task force that was authorized to review regulatory proposals and contest regulations objectionable to its members; he also signed an Executive Order requiring agencies to justify regulations through cost-benefit analysis. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

The pace of deregulation clearly has slackened in recent months. There are a number of explanations for this: the weakening of the pro-market consensus in the face of new enthusiasm for industrial policy, Guzzardi, *Reagan's Reluctant Deregulators*, *FORTUNE*, Mar. 8, 1982, at 34-40, a realization by business that federal regulatory inactivity may lead to a multitude of state laws, Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 *VA. L. REV.* 1429 (1984), and a "firestorm of opposition" from some members of Congress and consumer groups toward proposals that would relax health and safety standards, *Federal Deregulation Runs into a Backlash*, *N.Y. Times*, Dec. 14, 1983, at 1, col. 8. In some instances, the courts themselves have halted efforts to undo pending regulatory initiatives. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29 (1983) (holding that National Highway Traffic Safety Administration (NHTSA) officials acted improperly when they eliminated the new car air bag and automatic seat belt requirement); *Public Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984) (overturning as "arbitrary and capricious" NHTSA's decision to drop a tire tread-wear standard).

³ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-1 (1978). In one sense the federal government is regulating, because it is declaring a federal policy of "no-regulation." The structural consequences of this form of "no-regulation" regulation are the topic of this Article.

⁴ See, e.g., *Staggers Rail Act of 1980*, Pub. L. No. 96-448, 94 Stat. 1895 (1980), discussed *infra* notes 65-76 and accompanying text; *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at scattered sections of 49 U.S.C. (1982)), discussed *infra* notes 62-64 and accompanying text.

tions.⁵ From a federalism perspective, regulatory vacuums reflect the shift from a policy of federal intervention for remedying market “deficiencies” to a policy of enforced laissez faire in support of competition.⁶

Regulatory vacuums raise the recurrent conflict in a federal system between centralization and state autonomy.⁷ Vacuums ensure an unencumbered national market by preventing both federal and state intervention in the field. However, they always have an adverse impact on states because they forbid state regulation, often in fields that were previously within the states’ domain. Thus, regulatory vacuums necessarily undermine the traditional political values associated with state autonomy, such as diffusion of power, experimentation at the state level, and the opportunity for states to set economic and social priorities for themselves.⁸

Legislative and administrative vacuums also represent a horizontal shift in the locus of decisionmaking across the branches of the federal government. Prior to any federal regulation,⁹ the states’ customary role

⁵ See *infra* text accompanying notes 77-83 (discussing Federal Communications Commission); *infra* text accompanying notes 84-87 (discussing Food and Drug Administration).

⁶ Complete state exclusion of this magnitude is new. Even in the 1970’s, the heyday of federal regulation, Congress made considerable effort to involve the states in the new regulatory initiatives. However, there were some exceptions in which Congress preempted all state laws. See Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4846 (1982); Federal Meat Inspection Act, 21 U.S.C. § 678 (1982); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334 (1982). In many statutes, Congress included complex preemption provisions to encourage state participation. Most environmental protection statutes adopted a cooperative federalism model. See, e.g., The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982); The Clean Air Act, 42 U.S.C. § 7507 (1982). For a discussion of cooperative federalism, see Battle, *Transportation Controls Under the Clean Air Act — An Experience in (Un)cooperative Federalism*, 15 LAND & WATER L. REV. 1 (1980). In other statutes, Congress delegated to the implementing agencies limited authority to exempt state laws from preemption. This necessarily gave the agency the authority to preempt states as well. For discussion of this delegation or “administrative preemption” in the context of the Occupational Health and Safety Act and the Medical Device Amendments of 1976, see Foote, *supra* note 2, at 1429-30.

⁷ Some have argued that centralization has already destroyed the federal system. For a review of these death notices, see Scheiber, *Federalism and the Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC. REV. 663, 666-67 (1980). However, Scheiber argues persuasively that traditional state interests have survived this trend.

⁸ Kaden, *Federalism in the Courts: Agenda for the 1980’s*, in *The Future of Federalism in the 1980s: Reports and Papers*, (Advisory Commission on Intergovernmental Relations, July 1980) at 91. See also Scheiber, *supra* note 7.

⁹ The federal government’s departure from regulation does not restore the status quo

of economic and social regulation was constrained only by the dormant commerce clause. The commerce clause was a judicial tool by which the federal courts determined whether state regulation interfered with interstate commerce in areas unoccupied by express congressional policies.¹⁰ In addition to their role in dormant commerce clause cases, federal courts also had discretion to shape federalism through statutory interpretation. When Congress did regulate, it rarely articulated the intended effect of federal statutes on state law.¹¹ By creating legislative and administrative vacuums, Congress and the federal agencies now are assuming this traditional judicial role in the structure of federalism.

Regulatory vacuums, like all other preemptive federal regulation, raise important issues regarding federal and state interests. But regulatory vacuums differ from affirmative preemptive regulation. The particular federalism question that regulatory vacuums present is how to balance the federal prerogative to impose an *unencumbered* marketplace against the states' right to intervene in the market. Both affirmative preemptive regulation and regulatory vacuums raise concerns about how the federal branches of government can effectuate federal prerogatives. Affirmative preemption, by definition, follows from explicit or implicit congressional statements. The difference between preemption and regulatory vacuums arises because Congress' silence in creating regulatory vacuums makes it difficult to determine whether Congress intended to delegate the power to create vacuums to implementing agencies. This difference provides a focus for exploration into the past, present, and future of regulatory vacuums in our federal system.

Part I of this Article describes the traditional judicial role in creating regulatory vacuums. Part II provides examples of congressional and administrative regulatory vacuums and analyzes their structural implications.¹² Part III proposes methods for judicial review of both congress-

existing before federal involvement. States had long traditions of economic and social regulation. For example, many states established independent state railroad commissions with the power to set rates prior to the passage of the Interstate Commerce Act. See C. PUSATERI, *A HISTORY OF AMERICAN BUSINESS* 211 *passim* (1984). Such rate-setting powers have not been restored with deregulation under the Staggers Act.

¹⁰ The power of the courts to invalidate state laws that erect barriers to the free flow of interstate commerce was established long ago in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). For a discussion of the problems in dormant commerce clause cases, see Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

¹¹ For a review of the preemption doctrine, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereafter Note, *Shifting Perspectives*].

¹² For a discussion of the importance of structural arguments in constitutional analy-

sional and administrative regulatory vacuums and explains why such review is constitutionally required.

The use of regulatory vacuums by the legislative and administrative branches of government is a recent innovation that remains largely unexplored and merits inquiry. Because of the impact of regulatory vacuums upon state autonomy, Congress should create vacuums sparingly. Courts must respect congressional wisdom in this regard, but may require Congress to meet the "clear statement" test upon judicial review.¹³ Unlike Congress, federal agencies do not include state representation in their structure. When they create vacuums without congressional authority, agencies are not entitled to judicial deference, and courts must determine whether the regulatory vacuum facilitates or conflicts with an agency's statutory purpose.¹⁴ If a court determines that vacuums are authorized, it may then construe the scope of the vacuum to reconcile federal and state prerogatives under the implied preemption doctrine.¹⁵ At the very least, policymakers in all branches of government must be apprised of the federalism implications of regulatory vacuums, so that they do not inadvertently contribute to a pattern of preemption, oblivious to the consequences for our federal system.

I. REGULATORY VACUUMS AND THE JUDICIAL BRANCH

Regulatory vacuums have played an important part in debates about the federal structure since the nation's founding. This Part describes the historical role of the judicial branch in the creation of regulatory vacuums.

A. *Judicial Regulatory Vacuums Under the Dormant Commerce Clause*

The earliest form of regulatory vacuum can be traced to the negative implications of the commerce clause.¹⁶ The language of the Constitution does not explicitly refer to state interference with interstate commerce. It was only by interpreting the document's silence that courts

sis, see C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); P. BOBBIT, *CONSTITUTIONAL FATE* 74-92 (1982).

¹³ See *infra* text accompanying notes 123-34.

¹⁴ See *infra* text accompanying notes 134-41.

¹⁵ See *infra* text accompanying notes 135-79.

¹⁶ Article I, § 8 of the Constitution states an affirmative grant of power to Congress: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" See also L. TRIBE, *supra* note 3, § 6-2.

could ascertain the states' role in regulating commerce.

James Madison, one of the Constitution's Framers, believed that Congress would rarely regulate under the commerce clause but that states would always be powerless to intervene.¹⁷ Under his view, then, constitutional silence ensured a permanent vacuum that always would prevent state regulation. Chief Justice Marshall, also an advocate of strong central power, had a less extreme interpretation. He believed that a state could not regulate commerce for its own sake, but could regulate for other legitimate state goals even if these regulations affected commercial relations among states.¹⁸

Chief Justice Taney, Marshall's successor, advocated no such restraints on states. He thought that the commerce clause permitted states to regulate so long as their laws did not conflict with valid federal statutes.¹⁹ Under Taney's view, vacuums never existed because states were free to legislate in the absence of federal regulation.

Professor Tribe has argued that each of these views has left its mark on dormant commerce clause jurisprudence.²⁰ Madison's legacy is a pervasive suspicion of any state action that seriously burdens citizens outside the state. Taney's anti-Madisonian position survives as a reluctance to treat subjects as exclusively federal unless federal regulation is likely. In sum, Taney's reluctance "has been defended as necessary to avoid a regulatory vacuum . . . [that flies] in the face of Madison's conclusion that the commerce clause *should* cause precisely such a vacuum"²¹

Modern dormant commerce clause jurisprudence has long involved the judiciary in this recurrent conflict. Courts are called on to balance the needs of an unregulated national marketplace against the regulatory goals of the sovereign states. The Supreme Court has developed a relatively indeterminate balancing test, upholding state regulation that affects interstate commerce if the regulation is rationally related to a legitimate state interest and if the state interest in regulation outweighs the burden imposed on commerce.²² Under the dormant commerce

¹⁷ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824) (Marshall, C.J.) (dictum).

¹⁸ See generally B. GAVITT, *COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION* 10 (1932); L. TRIBE, *supra* note 3, § 6-3.

¹⁹ *The License Cases*, 46 U.S. (5 How.) 504, 585-86 (1847) (sustaining the constitutionality of state laws in the absence of conflicting acts of Congress).

²⁰ L. TRIBE, *supra* note 3, § 6-3.

²¹ *Id.* § 6-3, at 323 (emphasis in original).

²² See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954-55 (1982) (Nebraska regulation of groundwater intended for use in adjoining state violated com-

clause, federal courts are the guardians of Congress' power over interstate commerce, the implied beneficiary of judicial inquiry.²³

B. *Judicial Vacuums Through Statutory Interpretation*

Even when Congress has actively regulated, the judicial role of shaping federalism has endured. The Supreme Court has played a lively part in allocating federal and state power through statutory interpretation. The judge-made state action exemption in antitrust law serves to illustrate this point. With the Sherman Act,²⁴ Congress created widespread regulatory vacuums by forbidding any anticompetitive practices that interfered with a free market.²⁵ However, applying competing principles of federalism, the Court tempered the broad reach of antitrust law in pursuit of this economic free market goal.

The famous case of *Parker v. Brown*²⁶ enunciated the doctrine of state action immunity, holding that Congress did not intend federal antitrust laws to apply to "state action."²⁷ The doctrine relies not upon the rather ambiguous legislative history²⁸ but rather on federalism val-

merce clause); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 444-45 (1979); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945).

²³ For a criticism of the balancing test, see Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1415-21 (1979); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 128.

²⁴ Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

²⁵ *United States v. Topco Assocs.*, 405 U.S. 596 (1972). Writing for the *Topco* majority, Justice Marshall stated:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free-enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.

Id. at 610.

²⁶ 317 U.S. 341 (1943).

²⁷ *Id.* at 351. In *Parker*, the plaintiff sought to enjoin enforcement of an agricultural proration program administered under laws restricting production of various commodities in order to stabilize market prices. The Court held that the California scheme was exempt from federal antitrust scrutiny under the state action doctrine.

²⁸ Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 905 n.43 (1977).

ues.²⁹ While the *Parker* doctrine's underlying reasoning³⁰ and scope³¹ have been debated, it is well accepted that states should have some freedom "to make their own economic decisions."³² Recent Supreme Court cases have confirmed the structural purpose for the exemption: "The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the states possess a significant measure of sovereignty under our Constitution."³³ Thus, the antitrust example shows how the courts act as guardians of federalism in the absence of clear congressional intention to create a regulatory vacuum.

C. Judicial Vacuums and Implied Preemption

Courts have also reconciled federal and state interests through the vehicle of implied preemption under the supremacy clause. The supremacy clause permits Congress to preempt state legislation; Congress may exercise its constitutionally enumerated powers in regulatory areas already occupied by the states.³⁴ The Framers included the supremacy clause in the Constitution as a compromise that would re-

²⁹ See Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 331-34 (1975) ("At the core of the *Parker* doctrine are higher policies of federalism and judicial economic neutrality which counsel against intervention in state regulatory decisions.").

³⁰ Interesting scholarship addresses whether the proper analysis should be preemption rather than exemption. According to Handler, preemption deals with federalism, that is, two sovereigns, while exemption involves statutory construction of the language of the federal law. Handler, *Antitrust — 1978*, 78 COLUM. L. REV. 1363, 1378-79 (1978); see also *infra* notes 162-64 and accompanying text.

³¹ Recent cases have wrestled with the issue of whether the *Parker* doctrine extends to municipalities that engage in anticompetitive behavior. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1981); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

³² Verkuil, *supra* note 29, at 334. Subsequent case law has developed a two-pronged test for antitrust immunity under *Parker*: If the state has a clearly articulated and affirmatively expressed intention to replace entrepreneurial liberty with regulation and actively supervises the arrangement, then the state action is exempt from the reach of the federal law. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle of Cal. v. Fox*, 439 U.S. 96, 109 (1978).

³³ *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 53 (1981). See also *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1009-10 (1985) (discussed *infra* notes 98 & 107-14 and accompanying text).

³⁴ U.S. CONST. art. IV, cl. 2. See Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) [hereafter Note, *Preemption as a Preferential Ground*]; Note, *Shifting Perspectives*, *supra* note 11, at 623.

solve federal and state conflicts in favor of the national union.³⁵ If Congress expressly states its intention with regard to preemption, courts will effectuate that intention. In many situations, Congress fails to express a law's intended impact on the states. In these cases, courts will imply preemption if there is federal-state conflict, if the state law frustrates the purpose of a federal scheme, or if Congress intended to occupy the field.³⁶ Since Congress has rarely articulated its specific intention in regard to state law, the judiciary has had relatively broad

³⁵ The Framers of the Constitution expressly rejected a general congressional power to invalidate state laws. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1937). During the Constitutional Convention, Virginia's Governor Randolph proposed that Congress should be given the power "to negative all laws passed by the several States, contravening the opinion of the National Legislature on the articles of Union" *Id.* at 21. The Committee of the Whole House approved this suggestion without debate. *Id.* at 61. Soon thereafter, Charles Pinckney moved to extend the congressional negative to all state laws "which [Congress] should judge to be improper." *Id.* at 164. Madison was a strong supporter of this federal power, which he regarded as "absolutely necessary to a perfect system." *Id.* See generally A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 793 (1941). However, there was considerable criticism, particularly from the smaller states, on this extension of national power at state expense. Governor Morris of Pennsylvania thought such power was "likely to be terrible to the states." *Id.* at 798. Elbridge Gerry thought the idea might "enslave the States." Hugh Williamson thought "the State Legislatures ought to possess independent powers in cases purely local." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 165-71. When informed of the proposals, Thomas Jefferson also vehemently opposed them. See generally J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957 (1958). The Convention rejected Pinckney's proposal and later that summer reversed its approval of the Virginia plan. *Id.* at 10.

Defeat of the congressional negative emphasized the need to create an alternative mechanism to resolve federal and state conflicts. A compromise proposal became the basis for the supremacy clause. See also C. ROSSITER, 1787: THE GRAND CONVENTION 196-97 (1966). Rossiter characterizes the supremacy clause as Madison's "consolation prize" for losing on the power to "negative" state laws. *Id.* at 197. Thus, the final version of the Constitution denied Congress legislative power over state governments. Congress, however, received the power to enact its own laws and enforce them over conflicting state laws. Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 COLUM. J. ENVTL. L. 290, 359 (1976) (this substitution of the supremacy clause for the negative "evidenced the clear distinction in [the Framers'] minds between the supremacy of the nation, which they approved, and the power of the nation to control the functioning of the states, which they rejected."). See also *Federal Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 796-97 (1982) (O'Connor, J., dissenting) (discussion of constitutional history).

³⁶ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

discretion to interpret congressional "intent."³⁷

The implied preemption doctrine often has involved the judiciary in controversial issues of power allocation. Of course, if federal and state law actually conflict, a court's task is simple: the federal sovereign must prevail. However, if the court broadly construes congressional intention to occupy a field of regulation, state power is ousted, not because of actual conflict with what Congress has done, "but because of negative implications thought to flow from what Congress might have done"³⁸ Broad construction permits courts to create regulatory vacuums through interpretation.

The breadth of federal court discretion in the development of the implied preemption doctrine demonstrates varying judicial perspectives on federalism in different historical periods. Thus, while paying lip service to congressional intention, the courts themselves have played an important role in shaping federalism under the preemption doctrine. Analysis of Supreme Court preemption cases over time reveals important shifts from pro-federal presumptions by the Courts of the 1950's and 1960's to pro-state presumptions by the Burger Court.³⁹ Ironically, the supremacy clause, originally intended to protect national interests,

³⁷ Some commentators have argued that the courts themselves are the sources of the relevant intent. See *Crampton, Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. PA. L. REV. 85, 86 (1958) ("The answer is said to turn on the intent of Congress. Since in any case likely to reach a court, Congress has remained silent with respect to the displacement of state law, the courts are left to solve the problem with few if any guides."); Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II*, 22 COLUM. L. REV. 28, 48 (1922) ("[T]he judicial umpiring of practical contests" between state and federal interests is done "under rules that leave the umpire largely free to settle each dispute as it thinks best."").

The courts have implied preemption if a state statute obstructs the "accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

³⁸ L. TRIBE, *supra* note 3, § 6-23, at 376 ("states are deemed powerless to act because of a vacuum deliberately, even if not expressly, created by federal legislation").

³⁹ The best work on the role of the court under changing views on federalism is Note, *Shifting Perspectives*, *supra* note 11. Examples of preemption cases decided by the Burger Court include: *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973) (state law upheld despite conflict with § 6 of the Securities and Exchange Act of 1934 on ground that "where the government has provided for collaboration the courts shall not find conflict"); *Department of Social Servs. v. Dublino*, 413 U.S. 405 (1973) (sustained the New York Work Rules requiring that individuals accept employment as a condition to receipt of federal AFDC assistance against preemption challenge); *Goldstein v. California*, 412 U.S. 546 (1973) (aggressively protected state's right to prohibit the reproduction of phonograph records from misappropriated copies by narrowly construing the preemptive scope of the copyright clause).

has become a vehicle for judicial protection of the states in recent years.⁴⁰

Supreme Court decisions construing the National Labor Relations Act (NLRA)⁴¹ illustrate the judiciary's important role in defining the scope of regulatory vacuums through the preemption doctrine. Into the complex web of labor legislation, the courts, not Congress, introduced the notion of federal vacuums. Lacking clear congressional direction, the courts have carefully crafted a body of decisions that reconciles competing federal and state interests in the labor field.

The NLRA provides comprehensive and uniform federal regulation of industrial relations through the National Labor Relations Board (NLRB).⁴² The NLRA controls many aspects of labor-management relations exclusively, while other issues remain subject to state laws.⁴³ Since the NLRA left many borderline questions open and the relationship of federal and state laws was unclear, attempts to reconcile federal authority with surrounding state legal systems led to widespread litigation.⁴⁴

Broad judicial interpretations of federal authority created a "no man's land,"⁴⁵ in which the states were preempted⁴⁶ but the federal agency did not regulate either. The NLRA created two types of jurisdictional voids: issues that are "arguably" subject to the NLRA, but with respect to which the agency (NLRB) refuses to act,⁴⁷ and activi-

⁴⁰ Note, *Preemption as a Preferential Ground*, *supra* note 34, at 209. Recent decisions of the Burger Court have generally insisted on specific congressional intention. See also Note, *Shifting Perspectives*, *supra* note 11.

⁴¹ National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982).

⁴² *Id.* § 153(a).

⁴³ Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1337-38 (1972).

⁴⁴ *Id.*

⁴⁵ The term "no man's land" was used in Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 643 (1961) (quoting *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957)). Other adjectives used in judicial opinions include "hiatus" and "vacuum" in Justice Harlan's opinion in *Taggart v. Weinacker's Inc.*, 397 U.S. 223, 230 (1969), and "unwarranted and illogical lacuna" in *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 156 (1971) (White, J., dissenting).

⁴⁶ Preemption here refers to suspension of state adjudicative powers (and the powers of federal courts acting on diversity grounds) to hear cases based on state law when the dispute allegedly is within the federal government's primary or exclusive jurisdiction. See Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 556 n.24 (1970).

⁴⁷ The best example of this type of jurisdictional hiatus occurred in *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). The Supreme Court held that states could not assume jurisdiction over federally proscribed conduct even though the Board, in its direction, had refused jurisdiction because the Board's requirement that the employer's

ties that, while outside the jurisdiction of the Act, were intended to be free from state or federal government control.⁴⁸

Addressing the first type of jurisdictional void, the Court in *San Diego Building Trades Council v. Garmon* held that if the conduct at issue is arguably prohibited or protected, then otherwise applicable state laws and procedures ordinarily are preempted.⁴⁹ However, when the conduct affects interests “so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct.”⁵⁰ The Court must have “appropriate consideration for the vitality of [the] federal system and for a rational allocation of functions.”⁵¹

The Supreme Court acknowledged the possibility of the second type of jurisdictional void in dictum in *Garner v. Teamsters Local 776*: “For a state to impinge on the area of labor combat designed to be free [from regulation] is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods

business significantly affect interstate commerce had not been met. This “no-man’s land” was removed by the addition to the NLRA of § 14(c), which gives the states jurisdiction over such cases. Pub. L. No. 86-257, 73 Stat. 541 (codified at 29 U.S.C. § 164(c)(2) (1982)). See also *NLRB v. Nash-Finch*, 404 U.S. 138 (1971) (NLRB has implied authority to obtain federal injunction against state court action even in the absence of an unfair labor practice charge).

⁴⁸ See, e.g., *Garner v. Teamsters Union Local 776*, 346 U.S. 485 (1953), discussed *infra* text accompanying note 52.

⁴⁹ 359 U.S. 236, 244-48 (1959) (reversing California decision that awarded an employer damages for harm resulting from peaceful union picketing, an unfair labor practice under state law).

⁵⁰ *Local 926 Int’l Union of Operating Eng’rs v. Jones*, 460 U.S. 669, 676 (1983) (citing *Garmon*, 359 U.S. at 243-44):

“The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board’s exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

⁵¹ *Brown v. Hotel & Restaurant Employees*, 104 S. Ct. 3179, 3187 (1984). Under the local interests exception, the Court has refrained from finding NLRA preemption of state court jurisdiction over state breach of contract actions by strike replacements. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). See also *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (same holding in regard to state trespass action); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (state tort remedies for intentional infliction of emotional distress).

which the federal Act prohibits.”⁵² This free zone⁵³ or area of “privileged”⁵⁴ activity suggests that “Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces.”⁵⁵ Several recent decisions have also relied on the *Garner* dictum to declare that certain “peaceful economic weapons” were intentionally preempted and left unregulated by Congress.⁵⁶

Interestingly, the judiciary retained the important role of construing the scope of regulatory vacuums in the labor context. When an activity is unprotected by the NLRA, the courts, not the NLRB, determine whether the activity is free from both federal and state regulation.⁵⁷ The scope of the resulting free zone often reflects the diverse federalism philosophies of particular members of the bench.⁵⁸

Traditionally, the judicial branch of the federal government has played a primary role in creating regulatory vacuums that prevent state regulation. Of course, the judiciary acted as a surrogate for Congress,

⁵² 346 U.S. 485, 500 (1953).

⁵³ *Cox*, *supra* note 43, at 1352.

⁵⁴ *Broomfield*, *supra* note 46, at 561.

⁵⁵ *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976) (federal law preempts state jurisdiction when the conduct consists of peaceful economic weapons in support of bargaining demands; employees' concerted refusals to work overtime are within the class of preempted activities).

⁵⁶ *Id. Cf. New York Tel. Co. v. Department of Labor*, 440 U.S. 519 (1979) (New York statute authorizing payment of unemployment compensation upheld despite conflicts with federal labor policy; legislative history indicated that such conflict was one that Congress had decided to tolerate); *Local 20 Teamsters v. Morton*, 377 U.S. 252 (1964) (any conduct not specifically regulated was within “an area of labor combat designed to be free”).

⁵⁷ *See Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959) (dictum).

⁵⁸ The two most recent opinions are pluralities. *See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (Brennan, J.) (concerted refusals to work overtime are within the class of conduct which, while not arguably protected or prohibited, falls within the zone of peaceful economic weapons in support of bargaining demands). In this case, Justice Brennan expressed the views of six members of the court. But Justices Powell and Burger joined with the understanding that states were not precluded from enforcing laws that may have an incidental effect on relative bargaining strength. Justices Stevens, Stewart, and Rehnquist dissented on the ground that state jurisdiction is preempted only when the conduct is within the scope of the NLRA. In *New York Tel. Co. v. Department of Labor*, 440 U.S. 519 (1979) (discussed *supra* note 56), Justice Stevens announced the judgment in which Justices White and Rehnquist joined. Justice Brennan concurred in the result, as did Justice Blackmun joined by Justice Marshall. Justice Powell filed a dissenting opinion, joined by Justice Stewart and the Chief Justice.

protecting interstate commerce under the dormant commerce clause or searching for congressional "intent" through statutory interpretation and implied preemption. Over time, the judiciary developed mechanisms to implement its role as arbiter of federal and state relations — creating regulatory vacuums in support of federal economic interests — or narrowing federal preemption doctrines to protect traditional state police powers. Congress and various administrative agencies now have begun to create regulatory vacuums and to erode this judicial role considerably.

II. LEGISLATIVE AND EXECUTIVE BRANCH REGULATORY VACUUMS

In many statutes passed during the 1960's and 1970's, Congress included express provisions articulating the regulatory role of states in light of new federal laws. Aware that state participation was essential to the success of its ambitious programs, Congress developed cooperative federalism models that permitted joint regulation by state and federal officials.⁵⁹

When the move toward deregulation began in the late 1970's, Congress also enacted express preemption provisions that served a totally different purpose. Rather than encouraging cooperation, Congress prevented the states from regulating in order to promote an unfettered marketplace. This congressional solicitude for an unregulated market resembles the Madisonian view that the federal government can prevent state intervention in the national economy, even in the absence of specific federal requirements.⁶⁰

Congressionally created regulatory vacuums do not restore the status quo, as was the case when courts protected the national market on Congress' behalf through the dormant commerce clause. Instead, Congress now is acting under the commerce clause to *prevent* state regulation, thereby shifting the locus of decisionmaking from the judicial to the legislative forum.

A second institutional shift was also apparent in the move toward agency deregulation. Those same federal agencies that had administered complex regulatory schemes in the past were now encouraged to

⁵⁹ See *supra* note 8.

⁶⁰ Note that these express deregulation provisions emanate not from the silences of the Constitution, traditionally associated with Madison's view of the commerce clause, but from express congressional directives. See *supra* notes 16-19 and accompanying text.

deregulate.⁶¹ Some agencies assumed preemptive authority and imposed regulatory vacuums similar to those created by Congress, although the agencies were operating under statutes passed before express congressional preemption was in vogue. This Part discusses examples of congressional and administrative regulatory vacuums and analyzes their structural implications.

A. Congressional Regulatory Vacuums

The Airline Deregulation Act of 1978 was the first of a series of laws reflecting a shift from federal policies of regulation to policies favoring an unencumbered, competitive marketplace. To promote competition, the Act instituted a phase-out of the Civil Aeronautics Board (CAB), which had regulated many aspects of the industry.⁶²

Section 105 of the Act included an express preemption provision that provided "no State or political subdivision thereof and no interstate agency . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . ."⁶³ The purpose of this provision was to prevent states from passing laws that would conflict with federal regulations, thus inhibiting competition.⁶⁴

Congress deregulated other areas on the same theory. The goal of the Staggers Rail Act of 1980 was to remove "unnecessary and inefficient" regulations and deregulate the competitive segments of the railroad industry.⁶⁵ Based on a rate formula, certain rates automatically fall outside Interstate Commerce Commission (ICC) jurisdiction.⁶⁶ The

⁶¹ See *supra* note 2.

⁶² Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at scattered sections of 49 U.S.C. (1982)). Section 4 applies to all carriers subject to the Federal Aviation Act. Only carriers whose flights are exclusively intrastate are not covered by the rate deregulation. H.R. REP. NO. 1211, 95th Cong., 2d Sess. 1-2 (1978). To clarify the role of the federal government, the Act was amended by Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703. See also H.R. REP. NO. 793, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 2857. The CAB Sunset Act amendments clarified the 1978 Act, *inter alia*, leaving intact and transferring the CAB's consumer protection, prevention of unfair competition, and carrier "fitness" finding functions to the Department of Transportation. Without this clarification, the 1978 Act might have been construed to include these noneconomic functions as part of its preemption deregulation.

⁶³ 49 U.S.C. § 1305(a) (1978).

⁶⁴ H.R. REP. NO. 793, *supra* note 62, at 16.

⁶⁵ Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of 11, 45, and 49 U.S.C. (Supp. 1983)).

⁶⁶ The ICC can set jurisdictional thresholds as a test for market dominance. If a

ICC retained authority, however, to determine whether a particular market was competitive. Thus, unlike the dismantled CAB, the ICC can continue to exercise some degree of control over industry rates.

To ensure that states would not thwart the federal goal of free competition, Congress, through the Act, instituted a major reallocation of regulatory authority between the federal and state governments. The Act replaced the prior dual jurisdiction system of regulation⁶⁷ on the grounds that it was costly to interstate carriers, owing to a lack of uniformity and regulatory delay.⁶⁸ Thus, section 214 of the Staggers Act preempted outright all state jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges, extending its jurisdiction to intrastate carriers as well. States retained only a limited regulatory role over other issues.⁶⁹

Congress has not restricted its use of regulatory vacuums to effectuating purely economic goals. In one instance, Congress advocated free market economics as a tool to accomplish conservation. The federal goal of the Energy Policy and Conservation Act⁷⁰ was the promotion of en-

particular rate produces a revenue-variable cost lower than the relevant threshold, then the ICC "shall find that the rail carrier establishing the challenged rate does not have market dominance." 49 U.S.C. § 10709(d)(2) (1982). Thus rates below the jurisdictional threshold are automatically outside the ICC's authority.

⁶⁷ Under the old system, § 10501(b) of Title 49 specifically prohibited ICC jurisdiction over rail transportation "entirely in a State." Primary jurisdiction over intrastate rates and services remained with individual state regulatory commissions. Section 10501(c) provided that unless a state requirement conflicted with an ICC order or was expressly prohibited by the Interstate Commerce Act, the ICC's congressionally granted authority "does not affect the power of a state, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission." The ICC exercised limited review over intrastate rates when a state agency caused unreasonable discrimination against or an unreasonable burden on interstate or foreign commerce, or when the state authority failed to act on changes within 120 days of filing. 49 U.S.C. § 11501(a)-(e) (1982).

⁶⁸ H.R. REP. NO. 1035, 96th Cong., 2d Sess. 34-37, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3978. *See* discussion in *Texas v. United States*, 730 F.2d 339, 344-46 (5th Cir.), *cert. denied*, 105 S. Ct. 267 (1984) (upholding constitutionality of the Staggers Act); *infra* notes 123-29 and accompanying text.

⁶⁹ If a state wishes to continue regulating other types of intrastate rate adjustments for interstate carriers, the ICC must certify that the standards and procedures conform to the federal Act. 49 U.S.C. § 11501(b)(6) (1982). States that do not apply for, or fail to receive, ICC certification cannot exercise jurisdiction over intrastate rates of interstate railway carriers. Thus, the states are allowed a limited role under the new law, but only as "delegated administrators of the Interstate Commerce Act." *See* State Intra-state Rail Rate Authority-Texas, I.C.C. Ex Parte No. 388 (Sub-No. 31) (1984) (denying Texas application for jurisdiction over intrastate rail rates).

⁷⁰ Pub. L. No. 94-163, 89 Stat. 871 (1975), *amended by* National Energy Conserva-

ergy efficiency for resource conservation, but the mechanism by which this policy was to be achieved was an unregulated marketplace.⁷¹ The Act required the Department of Energy (DOE) to issue standards setting minimum energy performance levels for major home appliances.⁷² These mandated federal standards were to supersede state performance standards already in effect. However, the statute provided that if DOE decided not to issue a standard, the federal “no-standard” standard could preempt existing or prospective state regulations.⁷³ In August 1983 DOE published a “no-standard” standard for a number of major home appliances.⁷⁴ DOE had determined that “the marketplace — together with accurate consumer information — is more effective in improving appliance efficiency than are mandatory appliance standards.”⁷⁵ According to testimony presented at subsequent Committee hearings, the “no-standard” rule nullified forty-eight states’ energy efficiency standards.⁷⁶

B. Administrative Regulatory Vacuums

In the same way that Congress has created legislative vacuums, several administrative agencies have sought through active deregulation to impose free market solutions on the states. Two such agencies are the Federal Communications Commission (FCC) and the Food and Drug

tion Policy Act of 1978 (NECPA), Pub. L. No. 95-619, 92 Stat. 3206 (1978) (codified in scattered sections of U.S.C. titles 12, 15, 42 and 50).

⁷¹ See *id.*

⁷² *Id.* Like the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of U.S.C. titles 11, 45, and 49), this legislation delegates some discretion to the implementing agency to determine when the permissible vacuums are justified.

⁷³ 42 U.S.C. § 6295(a)(1) (1982).

⁷⁴ Energy Conservation Program for Consumer Products; Final Rule for Refrigerators and Refrigerator-Freezers, Freezers, Water Heaters, Room Air Conditioners, Furnaces and Central Air Conditioners, 48 Fed. Reg. 39,376 (1983).

⁷⁵ Peterson, *Wipe Out of DOE Appliance Standards Blows the Fuses of State Regulation*, Washington Post, Sept. 9, 1983, § 1, A15.

⁷⁶ H.R. REP. NO. 351, 98th Cong., 1st Sess. 7 (1983) (comments by Senator Ross Doyen, President of the Kansas State Senate). Representatives from many states objected to the requirement of petitioning for exemptions as wasteful, expensive, and a “harassment” of the states. As a result of this pressure from the states, H.R. 3244 was introduced in 1983 to eliminate preemption of a state’s authority to establish or enforce any energy efficiency standard if the federal standard had not been established. The bill was reported out of committee in August of 1983, but no further action was taken. The states can petition the DOE for an exemption from preemption. This petitioning process resembles many similar provisions found in other health and safety statutes. See Foote, *supra* note 2, at 1442-60.

Administration (FDA).

The FCC's evolution from active regulation to active deregulation typifies the trend among federal agencies. When Congress passed the federal Communications Act in 1934,⁷⁷ Congress did not expressly grant the FCC the power to create regulatory vacuums. Indeed, the purpose of the Act was to involve the federal government in regulation of the emerging business created by rapidly developing communications technologies. In the last decade, however, the Federal Communications Commission has embarked on a deregulatory path and insists that the states not interfere with FCC policies. For example, in 1980, when the FCC decided not to apply certain regulations to nondominant communications entities it asserted: "We have found that regulation inhibits the market forces which we believe will best serve federal communications policies and goals. . . . We intend to preclude the states from regulating non-dominant entities providing communications services in competitive markets on an interstate basis."⁷⁸ This deregulation of telecommunications has increased federal dominance at state expense.⁷⁹

Federal courts have upheld the FCC's power to abandon an area of traditional federal regulation and to substitute a policy of no regulation, and have also validated the agency's assumption of power to create regulatory vacuums.⁸⁰ Thus, the FCC has successfully established zones of free enterprise in telecommunications, even in areas that the states once regulated. For example, the FCC has preempted the setting of depreciation rates for intrastate rate-making procedures and for Customer

⁷⁷ Pub. L. No. 416, 48 Stat. 1064 (1934) (codified at scattered sections of 47 U.S.C. (1982)).

⁷⁸ Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.2d 445, 519 (1980) ("We do not intend, by concluding that non-dominant communications entities are not subject to regulation as common carriers, to be merely opening the way for state commissions to impose the same kind of regulation.").

⁷⁹ The reorientation of federal telecommunications policy has not come about through administrative action alone. A series of court actions have interpreted federal power including the divestiture order, *United States v. AT&T*, 552 F. Supp. 131, 226-32 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The originally high degree of cooperation between state and federal regulators has given way to a divergence in goals, with federal regulators pursuing economic efficiency and the states committed to equity and redistribution. For an excellent discussion of changing federal and state roles, see Noam, *Federal and State Roles in Telecommunications: the Effects of Deregulation*, 36 VAND. L. REV. 949 (1983).

⁸⁰ *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (state regulation of Consumer Premises Equipment that impedes the federal goal must yield to the federal scheme).

Premises Equipment that is used interchangeably in both interstate and intrastate communication.⁸¹ This expansive interpretation of preemption⁸² led one observer to comment: "While it appears that state and federal commissions will continue the deregulation of the telephone industry, it will be interesting to observe how far federal regulation will invade rate-making areas that have been state prerogatives — *even if through federal inaction* — for many years."⁸³

Another example of administratively created regulatory vacuums is the FDA's tamper-resistant packaging rule, which was passed on an emergency basis following the Tylenol poisoning episode in 1980.⁸⁴ While the rule required tamper-resistant packaging for most ingested over-the-counter (OTC) drugs and other cosmetic products, the FDA stated that its decision not to require tamper-resistant packaging for certain noningested OTC drugs preempted state and local requirements for those products.⁸⁵ The FDA justified this "no-standard" standard on the ground that additional local requirements would interfere with the prompt implementation of the new rule. However, now that the "emergency" provision has been in effect for five years, this urgency argument is outdated. In fact, if faced with a future tampering crisis, states might be surprised to discover that the FDA barred any state level protection five years ago.

In the Food, Drug, and Cosmetic Act,⁸⁶ Congress never addressed the preemptive effect of federal policy on state law.⁸⁷ Nonetheless, the FDA assumed the power to create regulatory vacuums without statutory authorization. No legal challenges to this rule have been filed;

⁸¹ Common Carrier Doc. No. 79-105, 92 F.C.C.2d 864 (1982) (depreciation rates).

⁸² Thus, "[t]o use the F.C.C.'s jurisdiction, which derives from the regulatory mandate of the Communications Act of 1934, as the basis both for *not* regulating an area and for excluding states from doing so is an expansive interpretation of preemption." Noam, *supra* note 79, at 972 (emphasis in original).

⁸³ Gransee, *Federal Preemption of Intrastate Telephone Rate-Making Practices*, PUB. UTIL. FORT., Mar. 3, 1983, at 51, 53 (emphasis added).

⁸⁴ 21 C.F.R. § 211.132 (1985).

⁸⁵ 47 Fed. Reg. 50,448 (1982). See Taylor, *Federal Preemption and Food and Drug Regulation: The Practical, Modern Meaning of an Ancient Doctrine*, 38 FOOD DRUG COSM. L.J. 306 (1983).

⁸⁶ See Pub. L. No. 717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-42 (1982)).

⁸⁷ The Food, Drug and Cosmetic Act contains no provisions authorizing FDA to preempt in this manner. In fact, FDA has no express preemption authority over drugs, although it does have preemptive power over medical devices. See Foote, *Loops and Loopholes: Hazardous Device Regulation Under the 1976 Medical Device Amendments to the Food, Drug and Cosmetic Act*, 7 ECOLOGY L.Q. 101 (1978).

thus, the courts have not yet examined it. For the time being, one must assume that federal agencies will continue to assert broad powers to create these regulatory vacuums.

C. *The Structural Implications of Regulatory Vacuums*

The commerce clause clearly grants Congress the power to create regulatory vacuums. Congress' power over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁸⁸ For over forty years, the Supreme Court has held that Congress may regulate even a purely intrastate activity, as long as the activity, taken as a whole, substantially affects interstate commerce.⁸⁹ The judiciary generally has deferred to Congress' exercise of its interstate commerce power.⁹⁰

The Supreme Court has also broadly interpreted Congress' power to delegate its legitimate legislative authority to administrative agencies. With rare exceptions,⁹¹ the Court has upheld Congress' extensive dele-

⁸⁸ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

⁸⁹ The commerce clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art I, § 8, cl. 3. *See Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."). *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

⁹⁰ *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Free v. Bland*, 369 U.S. 663, 666 (1962). The only judicial review over the congressional assertion of commerce power has been to ask whether Congress had a "rational basis" for determining whether the regulated intrastate activity substantially affects interstate commerce. Thus, the act of Congress is subject only to minimum scrutiny. *See Federal Energy Regulatory Comm'n (FERC) v. Mississippi*, 456 U.S. 742, 753-54 (1982). Of course, the courts could protect the political interests of the states in the federal structure by narrowing this traditionally expansive interpretation of federal commerce powers. However, this approach would not only ignore 40 years of commerce clause jurisprudence, but might presage a return to the pre-1937 decisions which attempted to "balance" state and federal interests. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

⁹¹ The exceptions include *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (invalidating a broad delegation of power to approve detailed codes to govern all businesses subject to federal authority); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating Industrial Recovery Act's delegation to the President of the power to prohibit shipment in interstate commerce of oil produced in violation of state law).

gations of authority to regulate.⁹² In addition, Congress has the constitutional authority to preempt state laws under the supremacy clause.⁹³ When Congress has delegated preemptive authority, the Court has held that “[f]ederal regulations have no less pre-emptive effect than federal statutes.”⁹⁴

The exercise of federal power over commerce is not without restraints. Even the most ardent supporters of federal power recognize the Constitution’s structural limits on federal control over the states.⁹⁵ Determining how to define and enforce those limits has been tremendously difficult. Two recent Supreme Court decisions have wrestled with these questions. Despite the fundamentally different federalism philosophies in *National League of Cities v. Usery (NLC)*⁹⁶ and *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁷ both rest upon interpretations of constitutional structure, with occasional reference to the tenth amendment.⁹⁸

1. *National League of Cities v. Usery*

From 1937 to 1976, the Court regularly rejected tenth amendment challenges to congressional regulations that allegedly threatened state autonomy.⁹⁹ The *NLC* decision briefly revived structural federalism principles by invalidating an act of Congress passed pursuant to the

⁹² See Foote, *supra* note 2, at 1440-41 (warning of the limitations of administrative agencies to implement delegations of power over federalism issues).

⁹³ See *supra* note 34 and accompanying text.

⁹⁴ *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153, *cited in* *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2700 (1984).

⁹⁵ “Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system” *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1020 (1985).

⁹⁶ 426 U.S. 833 (1976).

⁹⁷ 105 S. Ct. 1005 (overruling *NLC*).

⁹⁸ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Justice Powell’s dissent in *Garcia* rebukes the majority for including “only a single passing reference to the Tenth Amendment.” 105 S. Ct. at 1023.

⁹⁹ See, e.g., *Fry v. United States*, 421 U.S. 542, 548 (upholding *Wickard v. Filburn*, 317 U.S. 111, 127-28, the application of wage and salary freezes to state employees under the Economic Stabilization Act of 1970, and rejecting the state sovereignty argument as not rendering states immune from federal regulation); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding extension of the Fair Labor Standards Act protection to employees of state hospitals, institutions, and schools, dismissing the tenth amendment argument of limited congressional power under commerce clause), *overruled*, *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

commerce clause.¹⁰⁰ While the Court did not restrict the power of Congress to regulate commerce, it held that when federal legislation under the commerce clause applied to "States *qua* States," performing "essential" or "traditional" state functions, the legislation encountered the "constitutional barrier" of state sovereignty.¹⁰¹ To the extent, then, that limits on federal power were definable, the judiciary surfaced as the guardian of state interests.

The *NLC* holding, however, was quite narrow; subsequent cases restricted its reach.¹⁰² In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,¹⁰³ a unanimous Supreme Court held that the tenth amendment does not restrict Congress' power to regulate private activity, even if by doing so Congress preempts the state's exercise of police power.¹⁰⁴ Thus, the Supreme Court has consistently upheld congressional power to control private entities, such as airlines, railroads,

¹⁰⁰ 426 U.S. 833 (1976). The issue was whether the commerce clause empowered Congress to regulate the states and their political subdivisions in the field of employer-employee relations. Several local entities and states challenged the validity of the 1974 amendments to the Fair Labor Standards Act, suing the Secretary of Labor and seeking declaratory and injunctive relief from the application of the Act. The states contended that when the Act applied to state and municipal employees it violated the tenth amendment. A divided bench upheld the challenge, five to four.

¹⁰¹ The majority never made clear whether the holding was grounded in the tenth amendment *per se* or in federalism restraints implicit in the Constitution. See Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81.

¹⁰² *FERC v. Mississippi*, 456 U.S. 742 (upholding the federal Public Utility Regulatory Policies Act of 1978 (PURPA) against a challenge that the Act impermissibly encroached upon state sovereignty); *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982) (tenth amendment did not prohibit application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce). See generally Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984).

¹⁰³ 452 U.S. 264 (1981).

¹⁰⁴ *Id.* The federal law at issue was the Surface Mining Control and Reclamation Act of 1977 (SMCRA) 30 U.S.C. § 1201-1328 (1976) which is a comprehensive statute designed to provide national performance standards for the coal mining industry to protect the environment. The lower court held that SMCRA deprived the states of the power to decide how best to structure their own environmental protection plans. The Supreme Court reversed, and reiterated *NLC*'s three-pronged test for determining whether a federal statute enacted pursuant to the commerce clause violates the tenth amendment: First, there must be a showing that the challenged statute regulates the "States as States"; second, the federal law must address issues that are without dispute "attributes of state sovereignty"; third, it must be apparent that a state's compliance with federal law would directly impair the ability "to structure integral operations in areas of traditional governmental functions." *Hodel*, 452 U.S. 264, 287-88.

and shippers.¹⁰⁵ The *NLC* doctrine reached only those *sovereign* acts of the states, although the case did not spell out clearly what those acts were.¹⁰⁶

2. *Garcia v. San Antonio Metropolitan Transit Authority*

In *Garcia*, a sharply divided Supreme Court overruled *NLC*.¹⁰⁷ The Court reaffirmed the importance of the states in the federal structure:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be.¹⁰⁸

The majority of the *Garcia* court rejected the *NLC* concept of “traditional governmental functions” as unworkable because “[t]here is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.”¹⁰⁹ The limitations of this arbitrary distinction had been roundly criticized.¹¹⁰ For example, Professor Stewart observed:

Some of the most important services rendered by the modern state to its citizens consist of regulating private behavior to correct for market imperfections created by externalities, large scale economies, imperfect information, and the like The values of local self-determination are surely as important in matters such as zoning and pollution control as they are in the delivery of protective services, education, sanitation, . . . and other functions deemed “integral” by *NLC*.¹¹¹

If the search for a distinction between governmental and nongovernmental, or traditional and nontraditional, state functions is abandoned, how will state interests be protected from congressional encroachment? The *Garcia* Court concluded that states should not be protected by ju-

¹⁰⁵ See cases cited in *Hodel*, 452 U.S. at 290 (“Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all — and not just inconsistent — state regulation of such activities.”).

¹⁰⁶ Indeed, the subsequent decisions under *NLC* had difficulty distinguishing which state actions were sovereign and which were not. See *Garcia*, 105 S. Ct. at 1011-15.

¹⁰⁷ 105 S. Ct. 1005 (1985) (5-4 decision) (holding that the states’ role in the federal system is primarily guaranteed not by any externally (judicially) imposed limits on the commerce power, but by the structure of Congress itself).

¹⁰⁸ *Id.* at 1015.

¹⁰⁹ *Id.* (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

¹¹⁰ See cases cited in *Garcia*, 105 S. Ct. at 1015.

¹¹¹ Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1267 (1977).

dicially imposed constraints, but rather through the procedural safeguards inherent in the federal structure itself. The only limits on Congress are the "built-in restraints" of state participation in federal governmental action:¹¹² "The political process ensures that laws that unduly burden the States will not be promulgated."¹¹³

¹¹² "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 105 S. Ct. at 1018. In the majority opinion, it is unclear if any congressional action will violate tenth amendment or structural principles. Justice Blackmun implies that some role for the judiciary remains, although that role is not presented in the *Garcia* case. ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* at 1020). *Garcia* does not absolve lawmakers of their responsibility. Constitutional constraints still exist. *Garcia* simply says it is not the courts' job to review it. Much of the scholarly criticism of *NLC* was based upon its balancing test, which had been suggested by Justice Blackmun's concurring opinion and adopted by the unanimous bench in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) (discussed *supra* note 103 and accompanying text). See Note, National League of Cities v. Usery to EEOC v. Wyoming: *Evolution of a Balancing Approach to Tenth Amendment Analysis*, 1984 DUKE L.J. 601, 601-02. Rotunda has described this balancing approach as having "disquieting similarities" to pre-1937 commerce clause cases. Rotunda, *supra* note 102, at 304.

¹¹³ 105 S. Ct. at 1020. The four dissenters rejected the conclusion that the political branch could police itself. They cited the decreasing political influence of the states due to electoral and structural modifications, as well as more subtle changes in the political process that have adversely affected state representation in both national campaigns and the integral operation of Congress. The dissenters rejected Wechsler's theories as no longer reflecting reality. 105 S. Ct. at 1025 n.9, citing Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). They stated that any past accountability and control by state legislatures (due to local supervision of districting) had been undermined by the reapportionment decisions. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). The dissent also cited Kaden, *supra* note 8, at 96. 105 S. Ct. at 1025 n.9. The core of the political transformation is a decline in importance of state party organization, the effect of money on politics, the changing use of media, and the substitution of welfare state programs for the community service functions of neighborhood political organizations. Thus, a representative's vote on any particular issue is subject to numerous conflicting pressures and obligations, only one of which is the interest of the state as such. Hence, the dissent concluded that the role of the states in the federal structure is vulnerable to the risks of centralization and contains within it the seeds for the destruction of the federal system. Many commentators have discussed this risk. L. TRIBE, *supra* note 3, § 5-20, at 302 (widespread abuse of the power to preempt could leave the states nominally in place, but in truth little more than a "gutted shell"); Shapiro, *American Federalism*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 369 (R. Collins ed. 1980) ("[T]he observer will continue to see federalism day by day until the last day, when the central government has taken away the last independent decisionmaking power of the states. Then he will say: 'Oh

Congress and the executive office represent the federal government's two political branches. The *Garcia* majority relied upon Professor Wechsler's seminal work, which distinguishes the office of the president (representing "the national spirit") from Congress (embodying the localism and separatism of the states).¹¹⁴ Professor Wechsler points out that "the Court is on *weakest* ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."¹¹⁵

Indeed, Congress both is popularly elected and represents state interests through its structure. Executive branch agencies, however, are neither elected nor representative of the states. Administrative officials are appointed, not elected, and they are charged with accomplishing national goals. While agencies certainly are accountable to the executive, "none of the influences that constrain administrative agencies can rival a popular election in its symbolic affirmation of a direct accountability to the people."¹¹⁶ Agency failure to implement the administrative preemption provisions in some federal statutes is further evidence of a national, not state-oriented, perspective.¹¹⁷

Attempts by Congress to ensure administrative accountability were curtailed by the Court's recent determination that the legislative veto is unconstitutional.¹¹⁸ The legislative veto was a device through which Congress reserved the right to disapprove an agency action by striking down regulations before they took effect. The legislative veto was easy for Congress to invoke, and over the past decade Congress routinely

yes — on Thursday we had federalism, but on Friday we had a centralized government.'"); Stewart, *supra* note 111, at 1224 (there is a potential for states to become "mere appendages" of the federal government). In the words of Justice O'Connor: "[T]here is now a real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic." 105 S. Ct. at 1035 (dissenting opinion).

¹¹⁴ Wechsler, *supra* note 113, at 552. According to this theory, the President, while popularly elected, does not reflect state representation on an ongoing basis.

¹¹⁵ *Id.* at 559 (emphasis added). Similarly, Justice Black's concurring opinion in *Helvering v. Gerhardt* states that "the people — acting . . . through their elected legislative representatives" can determine those services they want government to provide. 304 U.S. 405, 427 (1938) (emphasis added).

¹¹⁶ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (1962).

¹¹⁷ Foote, *supra* note 2, at 1441.

¹¹⁸ *INS v. Chadha*, 462 U.S. 919, 921 (1983) (the legislative veto was unconstitutional because Congress was making law without following constitutionally mandated procedures).

included legislative veto provisions in delegations of power to agencies in fields as diverse as foreign aid, energy, education, and election campaign finance.¹¹⁹ Regardless of the merits of the constitutional arguments that led to its demise, the legislative veto provided a check on federal agencies by Congress, the one branch with institutionalized state representation. Therefore, while Congress can delegate its federal preemptive power over the states to administrative agencies, the procedural safeguards touted in the *Garcia* decision may not ensure that an agency's preemption is proper.

These observations of federal institutions highlight the fundamental distinction between regulatory vacuums created by legislators (representatives of states) and those invented by federal bureaucrats. Congress' express preemption provisions authorizing regulatory vacuums appear in statutes intended to deregulate. Indeed, the purpose of both the Staggers Act and the Airline Deregulation Act was to reduce past restraints and to make continuing regulation more efficient and less cumbersome.¹²⁰ Congress clearly intended to promote deregulation by amendment of existing statutes.

In contrast, the following two examples of agency-created vacuums occurred without congressional amendments. Congress passed both the federal Communications Act of 1934 and the Food, Drug and Cosmetics Act in order to promote federal intervention — in the former to guide and develop a national communications market, and in the latter to protect the general public from harmful products.¹²¹ There is no clear evidence of congressional intention to change federal policy to promote deregulation of these areas. In each case, the administrative agency, not Congress, is spearheading a redirection of statutory policy.

Regardless of whether one approves or disapproves of the ultimate outcome, it is imperative to recognize the institutional distinction between Congress and the federal agencies. Integrating these structural distinctions, Part III describes appropriate forms of judicial review.

¹¹⁹ Sundquist, *The Legislative Veto: A Bounced Check*, BROOKINGS REV., Fall 1983, at 13-15.

¹²⁰ See *supra* notes 63-76 and accompanying text.

¹²¹ See *supra* notes 77-87 and accompanying text.

III. REGULATORY VACUUMS AND JUDICIAL REVIEW

A. *Judicial Review of Congressional Regulatory Vacuums*

The State of Texas recently challenged the constitutionality of the Staggers Act.¹²² The Fifth Circuit's decision upholding the Act provides an excellent illustration of the appropriate level of judicial scrutiny for congressionally created regulatory vacuums.

According to the Fifth Circuit in *Texas v. United States*, federal law will not preempt state regulation of activities unless Congress has made a "clear statement" of its intent to preempt.¹²³ The court searched for "statutory language or legislative history [that] constitutes a clear direction that Congress intended to exercise its commerce power in full."¹²⁴ In *Texas*, the court found that the Staggers Act met this standard. Both the language of the statute and express legislative history made it obvious that Congress intended to preempt the states.¹²⁵

This straightforward clear statement approach has three important characteristics to recommend it. First, pragmatically, requiring Congress to make a clear statement of its intent prevents Congress from using ambiguous language in the statute or legislative history "to conceal its failure to accommodate competing interests" of federal and state governments.¹²⁶ This requirement "increases the likelihood that Congress will give full attention" to state interests when considering broad preemptive legislation.¹²⁷ Second, from an institutional point of view, this approach furthers the spirit of *Garcia* by ensuring that Congress is the primary force in the allocation of power under federalism. By refusing to imply preemption in the absence of explicit congressional language or clear legislative history, courts will protect traditional state powers.

Third, the clear statement approach permits courts to avoid a clash with Congress over the constitutionality of legislation without aban-

¹²² *Texas v. United States*, 730 F.2d 339 (5th Cir.), *cert. denied*, 105 S. Ct. 267 (1984).

¹²³ 730 F.2d at 350.

¹²⁴ *Id.*

¹²⁵ "Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practices. States may only regulate in these areas if they are certified under the procedures of [the Act]." *Id.* at 348 (quoting H.R. REP. NO. 1035, *supra* note 68, at 106 (emphasis omitted)).

¹²⁶ 730 F.2d at 350.

¹²⁷ *Id.* (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)); L. TRIBE, *supra* note 3, § 5-8, at 244).

doing their role as ultimate guarantors of federalism.¹²⁸ In addition, the clear statement doctrine provides an ideal middle ground between statutory interpretation and constitutional adjudication.¹²⁹ The doctrine can “guard against infringement of inchoate constitutional rights; it can postpone the day of constitutional reckoning for collisions . . . by truncating statutes before they enter the zone of constitutional challenge.”¹³⁰ The clear statement requirements further what Congress deems to be substantive values but avoids the problem of judicial usurpation of Congress on matters within its plenary power. Nevertheless, if Congress does not satisfy the clear statement requirement, it is on notice that it is dangerously close to the constitutional limits of its authority.

One possible problem in the clear statement approach is its premise that if the courts misconstrue congressional intent, Congress can immediately revise its statutes.¹³¹ Prompt legislative responses often are impracticable, and the political intensity surrounding amendments to controversial and complex federal legislation make action difficult.¹³² If

¹²⁸ In *Texas v. United States*, 730 F.2d 339, the Fifth Circuit also held that the Act did not violate the tenth amendment or the structure of the Constitution, but stated that the courts should not “abdicate to Congress when it allocates power between the national and state levels of government, if that allocation threatens the separation of powers inherent in the federal design.” *Id.* at 355.

¹²⁹ G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1675-76 (10th ed. 1980). The most commonly cited case for use of clear statement as a doctrine of constitutional adjudication is *Kent v. Dulles*, 357 U.S. 116 (1958) (construing scope of Passport Act narrowly to limit discretion of Secretary of State to deny passports despite absence of language in the law); *see also* *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974) (construing the FCC's authority to assess charges narrowly, contrary to apparent scope of the Act, and to permit fees, not taxes; Justice Douglas wrote that this construction was compelled, because it “would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power . . .”).

¹³⁰ Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 909 (1982) [hereafter Note, *Intent, Clear Statements, and the Common Law*].

¹³¹ *Id.* at 905, *citing* *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Program*, 449 U.S. 268, 284 (1980) (“It would obviously be sound policy for Congress to re-examine [particular statutory programs] more frequently than every half century.”).

¹³² For instance, in 1978 the Carter administration introduced parallel bills in the House of Representatives and the Senate that would have overhauled the drug regulatory process comprehensively. This legislation came to be known as the Drug Regulatory Reform Act of 1978. A significantly amended version of the original bill passed the Senate but was never reported out of committee in the House. The bill died when the ninety-sixth Congress expired. Among the provisions of the 1979 version were express preemption provisions. *See* S. 1075 — The Drug Regulation Reform Act of 1979, in S.

Congress is therefore unable to respond to a court's interpretation of a statute, a substantive decision may have occurred "without either institution's explicitly confronting the choices implicated in that decision."¹³³ However, the effect that congressional deference might have on substance is more tolerable than the effect of outright judicial policymaking. If Congress defers, judicial influence results not because a court actively makes policy, but because Congress fails to act. Congress must bear the responsibility for deciding difficult federalism questions openly and clearly. Courts reinforce that congressional role through the clear statement test.

B. *Judicial Review of Administrative Regulatory Vacuums*

Many federal statutes, particularly those passed prior to the mid-1970's, contain no express preemption provisions. Administrative agencies have assumed preemptive powers in the absence of clear congressional guidance. In the examples discussed in Part II, the FCC and FDA created regulatory vacuums to adapt older statutes to the deregulation movement of the 1980's. These agency actions raise three fundamental questions. First, what role should the courts play in reviewing this kind of agency decisionmaking? The common notion of agencies as expositors of federal law conflicts with the *Garcia* process concerns when nonrepresentative bodies invalidate state laws. The second question involves the nature of regulatory vacuums. Are vacuums merely a tool to effectuate a statute's purpose or do they, in certain contexts, contradict fundamental goals of the original statute? Finally, if the tool is permissible under the statute, a question arises over how a court should review the scope of the regulatory vacuums when a state challenges the agency.

1. Courts Should Not Defer to Administrative Regulatory Vacuums

It is well settled that an agency charged with administering a statute is generally entitled to considerable deference.¹³⁴ However, in the context of regulatory vacuums, significant deference to agency decisions

REP. NO. 96-321, 96th Cong. 1st Sess. 45 (1979). See also Drug Regulation Reform Act of 1979, 125 CONG. REC. S.26259 (daily ed. Sept. 26, 1979) (remarks of Sen. Kennedy).

¹³³ Note, *Intent, Clear Statements, and the Common Law*, *supra* note 130, at 905.

¹³⁴ E.g., *Chemical Mfrs. Ass'n v. National Resources Defense Council, Inc.*, 105 S. Ct. 1102 (1985) (EPA's understanding of the Clean Water Act is sufficiently rational to preclude a court from substituting its own judgment).

may be inappropriate. The Supreme Court has noted that the general principle of deference merely sets the framework for judicial review but does not replace it.¹³⁵ The Court has also added that deference must not be a “device that emasculates the significance of judicial review.”¹³⁶

The courts have been less likely to defer when agencies interpret the scope of their own authority than when they exercise technical agency expertise.¹³⁷ Creating regulatory vacuums can greatly extend the jurisdiction of a federal agency. The regulatory vacuum carves out an exclusive territory for the federal agency, even when the agency chooses not to fill the vacuum. Surely such a jurisdiction-expanding decision merits judicial scrutiny. Moreover, the nonrepresentative federal agency is unlikely to possess special expertise in federalism.

Preemption by regulatory vacuum is different from an agency's interpretation of statutory terms in pursuit of its substantive regulatory goals. For example, the technical expertise necessary to define the bubble concept for air pollution control¹³⁸ can be distinguished from a decision to ban state involvement in safety regulation.¹³⁹ Faced with the problem of defining the bubble concept in *Chevron v. NRDC*, the Supreme Court held that if delegation to an agency is implicit, the Court cannot substitute its own judgment for the agency when the agency's interpretation is a reasonable policy choice and a “full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”¹⁴⁰ The creation of regulatory vacuums, however, simply does not involve special administrative knowledge that entitles agencies to judicial deference.

Most importantly, the Court has ruled that deference to an expert tribunal “cannot be allowed to slip into a judicial inertia which results

¹³⁵ *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982) (Court invalidated treasury regulation that interpreted the Internal Revenue Code).

¹³⁶ *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 104 S. Ct. 2979, 2983 (1984) (upholding interpretation by the Federal Reserve Board of the Glass-Steagall Act's term “security” to include commercial paper).

¹³⁷ *National Indus. Sand Ass'n. v. Marshall*, 601 F.2d 689, 698-99 n.32 (3d. Cir. 1979) (“less deference may be called for when the agency is interpreting the scope of its own jurisdiction”) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

¹³⁸ *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc. (NRDC)*, 104 S. Ct. 2778, 2793-94 (1984) (holding that EPA regulation allowing states to treat all pollution-emitting devices within industrial grouping as though they were contained within a single “bubble” was based on a permissible construction of “stationary source” in the Clean Air Act amendments).

¹³⁹ See *supra* notes 85-87 and accompanying text.

¹⁴⁰ *Chevron v. NRDC*, 104 S. Ct. at 2783.

in *unauthorized assumption by an agency of major policy decisions properly made by Congress.*"¹⁴¹ Clearly, courts have more knowledge than do federal agencies about traditional federalism questions. Because of their active role in both dormant commerce clause and implied preemption decisions, courts have protected federal and state interests and served as Congress' surrogate. Thus, although both agencies and courts are nonmajoritarian institutions, the judiciary is better qualified to review such critical policy decisions.

2. The Scope of Judicial Review

In reviewing FCC preemption under the *Chevron v. NRDC* standard, the Court in *Capital Cities Cable Co. v. Crisp* held that judicial inquiry was limited to whether the administrator exceeded his statutory authority.¹⁴² The Court also cited *Fidelity Federal Savings and Loan v. De La Cuesta*:

When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: "If his choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."¹⁴³

The key question, then, is whether regulatory vacuums are tools that Congress implicitly authorized or whether vacuums contradict the statute's purpose. In the latter case, their use represents an unauthorized assumption of power.

¹⁴¹ *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)) (emphasis added). In *Bureau of Alcohol*, the Court examined the Federal Labor Relations Authority's interpretation of a provision of the Civil Service Reform Act requiring federal agencies to grant "official time" to employees representing unions in collective bargaining. The Court held the Authority's interpretation was an "unauthorized assumption by [the] agency of a major policy decision properly made by Congress." *Id.*

¹⁴² *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984) (state regulation of retransmission of cable television systems was preempted; Oklahoma could not require in-state cable operators to delete all alcoholic beverage advertisements contained in the out-of-state signals retransmitted to local subscribers). In *Crisp*, the Court stated that the FCC had jurisdiction over all operational aspects of cable communication, including the power to preempt. *Id.* at 2701. However, after discussing generalized federal preemption, the Court concluded that the "Oklahoma advertising ban plainly conflicts with specific federal regulations." *Id.* at 2703.

¹⁴³ *Id.* at 2700 (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982) and *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

Of course, courts must examine each statute to determine the congressional purpose. However, courts will be able to generalize somewhat on the basis of types of regulation. For example, the FCC and FDA, respectively, are agencies of economic and social regulation, falling into two distinct categories of regulatory statutes. Economic regulation generally focuses on markets, rates, competition, and the obligations of common carriers to provide service to the public. While economic regulation has obvious social effects, it can be distinguished from social regulation, which generally addresses the social and human consequences of business activities. Examples of social regulation include product safety, protection of health, and environmental concerns. A detailed examination of the enactments that created the FCC and the FDA should provide generalizations to guide review of similar statutes in the future.¹⁴⁴

a. Federal Communications Commission

The 1934 Communications Act created the FCC for the purpose of regulating "communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire and radio communication service . . ." ¹⁴⁵ Congress gave the FCC power to perform acts, make regulations, and issue orders necessary to the execution of its statutory functions.¹⁴⁶ Over time, federal responsibility for wireless communication became exclusive; federal and state authorities shared responsibility for regulating wire communications.¹⁴⁷

For many years the system of coregulation in telecommunications was characterized by a high degree of cooperation between state and federal regulators. However, that cooperative spirit has recently broken down as "the divergence in goals between the federal and state levels of government became pronounced. The federal redistributory or equity goal became subordinate to a pursuit of economic efficiency through reliance on a change in markets and competition."¹⁴⁸ The FCC has fostered this divergence by substituting "control over the market structure for control over the regulator's behavior in setting prices and qual-

¹⁴⁴ L. GRAYMER & F. THOMPSON, REFORMING SOCIAL REGULATION: ALTERNATIVE PUBLIC POLICY STRATEGIES (1982). Of course, the distinction is not absolute; some statutes have both economic and social effects.

¹⁴⁵ 47 U.S.C. § 151 (1982).

¹⁴⁶ 47 U.S.C. § 154(i) (1982).

¹⁴⁷ Noam, *supra* note 79, at 951.

¹⁴⁸ *Id.* at 950.

ity levels."¹⁴⁹ Regulatory vacuums have served as a tool in support of these market structure changes. The Court has concluded that the preemptive declaration of an affirmative regulatory policy not to regulate is a permissible federal tool in the changing telecommunications environment.¹⁵⁰

This is not to say that the policy of undermining state equity goals is wise. However, in terms of structural issues, the FCC may use regulatory vacuums to support an efficient national market in implementing the Communications Act of 1934. The effects on state policy, while significant, cannot be prevented through judicial review because the Supreme Court has found administrative vacuums permissible under the Act. Only the political process can redefine federal-state relationships, if the states demand such reform.

More generally, the purpose of most economic regulation is to achieve efficiency and uniformity in the market. Federal market controls arguably protect the public interest. The goal of shaping market structure and the use of regulatory vacuums to facilitate that goal are perfectly consistent with the general federal mandate.¹⁵¹

b. Food and Drug Administration

It is important to distinguish these economic policy goals from social regulation generally and from drug regulation in particular. The purpose of the amendments to the Food, Drug and Cosmetic Act in 1938 and 1962 was intervention in the marketplace to protect the public against market failures.¹⁵² Critics of the pharmaceutical industry argued that the market had failed not because it was inefficient or fragmented, but because it did not ensure safety.¹⁵³ The notion that FDA intervention is necessary to prevent sellers from taking advantage of consumers is implicit in the goals of the federal food, drug, and cosmetic laws.¹⁵⁴

¹⁴⁹ *Id.* at 962.

¹⁵⁰ *See Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 219 (D.C. Cir. 1982).

¹⁵¹ Indeed, in recent years Congress has expressly authorized such tools in the economic regulatory initiatives affecting rail and air transportation. *See supra* notes 63-69 and accompanying text.

¹⁵² Pub. L. No. 75-716, 52 Stat. 1040 (1938), Pub. L. No. 87-781, 76 Stat. 780 (1962) (codified as amended at 21 U.S.C. §§ 301-92) (1983). *See also* P. TEMIN, *TAKING YOUR MEDICINE: A HISTORY OF DRUG REGULATION IN THE UNITED STATES* (1980).

¹⁵³ P. TEMIN, *supra* note 152, at 55.

¹⁵⁴ Comment, *Picking Your Poison: The Drug Efficacy Requirement and the Right*

Federal marketplace intervention is not the exclusive regulatory mechanism to protect the public, however. For example, FDA regulation does not inevitably exclude state regulation of physicians.¹⁵⁵ And, despite the FDA's broad powers over the industry, states have been permitted to continue their involvement in drug safety issues.¹⁵⁶

The use of regulatory vacuums contradicts a policy of cooperation among federal and state regulators. A vacuum is premised on the notion that the unregulated marketplace is superior to a regulated one and that therefore states must refrain from regulating. A vacuum in the context of drug safety is not a tool that facilitates national goals. Rather, such a vacuum conflicts with congressional intention and clearly is not authorized by Congress. It does not appear from the statute or the legislative history that the FDA has the authority to impose a free market solution on the states.¹⁵⁷

This Article does not intend to imply that the policy underlying federal drug legislation is necessarily wise. Indeed, there are a number of vociferous critics of the goals of the food and drug laws, particularly the 1962 amendments to the FDCA.¹⁵⁸ However, the criticism centers on congressional policies. Only Congress, not the implementing agency, can reverse such policy decisions contained within the governing statute.

of Privacy, 25 UCLA L. REV. 577, 582 (1978).

¹⁵⁵ *Pharmaceutical Mfrs. Ass'n v. FDA*, 484 F. Supp. 1179, 1188 (D. Del. 1980) (the practice of medicine is traditionally regulated by the states, although federal government may at times impinge on some aspect of a doctor's practice).

¹⁵⁶ Indeed, the problems with differing state laws led to a proposal in the Drug Regulation Reform Act of 1979 to prohibit states from imposing requirements different from comparable federal requirements. However, even this proposal would have left intact all state enactments prior to passage of the Act, and would have established an administrative process whereby states could obtain exemptions from preemption. This administrative preemption provision is similar to the Medical Device Amendments of 1976. The 1979 Reform Act never passed. See S. REP. 96-321, 96th Cong., 1st Sess. 45 (1979).

¹⁵⁷ *Cf. Hillsborough County v. Automated Medical Labs, Inc.*, 105 S. Ct. 2371, 2378 (1985) (rejecting argument that federal interest in this field was dominant, the Court held that "the regulation of health and safety matters is primarily, and historically, a matter of local concern. . . . Nothing in [the federal] policy takes plasma regulation out of the health-and-safety category and converts it into an area of overriding national concern.") See also *infra* text accompanying notes 170-72.

¹⁵⁸ Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973); Roberts & Bodenheimer, *The Drug Amendments of 1962: The Anatomy of a Regulatory Failure*, 1982 ARIZ. ST. L.J. 581; Wardell, *Rx: More Regulation or Better Therapies?*, 3 REG. 25 (Sept.-Oct. 1979).

3. Judicial Review of Regulatory Vacuums Authorized Under Statutes

Even if a congressional enactment (such as the Communications Act) authorizes the creation of regulatory vacuums, subsequently arising issues may require judicial involvement. A state may challenge a regulatory vacuum that arguably preempts a particular state enactment. In the absence of clear congressional guidance, the courts must invoke the implied preemption doctrine to evaluate federal and state interests.

a. Conflict and Regulatory Vacuums

Courts will generally strike down a state statute if it "conflicts" with federal law. Conflict occurs when it is impossible to comply with both laws simultaneously. If the agency goal is to prevent all regulations, then any state law will conflict with the federal policy.

However, courts need not define conflict so narrowly. In fact, the Supreme Court has rejected just such a narrow definition of conflict in the preemption context. In *Exxon Corp. v. Governor of Maryland*,¹⁵⁹ the Court held that a Maryland statute prohibiting producers or refiners from operating retail service stations in the State was valid. Appellants had argued that the statute, which had an anticompetitive impact, was implicitly preempted because it conflicted with the Sherman Act's central policy of favoring free competition.¹⁶⁰ The Court stated that the type of conflict involved in *Exxon* was insufficient to invalidate the Maryland statute: "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."¹⁶¹ In his dissent in *Community Communications Co. v. City of Boulder*,¹⁶² Justice Rehnquist argued that preemption, not exemption, provides the proper framework for analyzing state action in the antitrust context.¹⁶³ Preemption involves reconciling the needs of two sovereigns, whereas exemption involves statutory construction of federal law alone. Justice Rehnquist assumed that there was no actual conflict between an unregulated market and state intervention if a state met the Court's two-

¹⁵⁹ 437 U.S. 117 (1978).

¹⁶⁰ *Id.* at 133.

¹⁶¹ *Id.*

¹⁶² 455 U.S. 40, 60 (1982).

¹⁶³ Justice Rehnquist relied upon the discussion in *Handler*, *supra* note 30, at 1384. See *City of Boulder*, 455 U.S. 40, 61. *Handler* argues that the state action doctrine raises federalism questions and, as such, should be treated as a preemption not an exemption issue. *Handler*, *supra*, at 1384.

pronged test for an exemption.¹⁶⁴ In sum, precedent exists for interpreting “conflict” flexibly when Congress is imposing a federal unregulated market policy.¹⁶⁵

Even when conflict may be present, the Supreme Court has determined that some conflict may be tolerable under the supremacy clause. In *New York Telephone Co. v. Department of Labor*, the Supreme Court upheld a New York statute that conflicted with federal labor policy under the NLRA, stating “Congress has decided to tolerate a substantial measure of diversity.”¹⁶⁶

b. Frustration of Purpose and Regulatory Vacuums

In its preemption rulings, the Court has also asked whether state law frustrates congressional purpose. The Supreme Court has held that not every state law interfering with broad federal policy goals must be preempted; such state laws do not inevitably “frustrate” the purpose of federal law. For example, in *P.G. & E. v. State Energy Resources Conservation Board*,¹⁶⁷ the Court found that the Atomic Energy Act’s primary purpose was to promote nuclear power.¹⁶⁸ However, the Court noted that this policy was not to be accomplished “at all costs.” Thus, the Court allowed the state statute, which discouraged the use of nuclear power by creating additional regulatory hurdles at the state level, to stand.¹⁶⁹

¹⁶⁴ See *supra* notes 26-33 and accompanying text. Handler rejects the conventional conflict rationale because “it would make fair game of every state enactment which controls price or production, creates barriers to entry, or otherwise substitutes regulation for competition — forms of public control which have been commonplace in this country since colonial times.” Handler, *supra* note 30, at 1382.

¹⁶⁵ Most conflict analysis under implied preemption looks for actual conflict between the federal regulations and the state laws. See, e.g., *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). In other words, it is impossible to comply with one without violating the other. This type of conflict could arguably never exist in regulatory vacuums because there are no specific federal regulations, only a general policy of a free market.

¹⁶⁶ 440 U.S. 519, 546 (1979) (upholding New York statute that authorized payment of unemployment compensation during strikes and conflicted with a federal policy of free collective bargaining).

¹⁶⁷ 461 U.S. 190 (1983).

¹⁶⁸ *Id.* at 221. The Act states that it fosters 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.” 41 U.S.C. § 2013(b) (1982).

¹⁶⁹ 461 U.S. 190. See also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981). One of the EPCA’s purposes is “to reduce the demand for petroleum prod-

Similarly, in *Hillsborough County v. Automated Medical Labs*, the Supreme Court held that FDA regulations establishing minimum standards for blood plasma collection did not preempt county ordinances governing blood collection.¹⁷⁰ The Court rejected the argument that intent to preempt can be inferred from the comprehensiveness of regulations. The Court stated it was more reluctant "to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes."¹⁷¹ The Court noted that specialized agencies deal with problems in far more detail than Congress. The Court stated:

To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.¹⁷²

The preemption doctrine, flexibly applied, allows the courts to shape federal-state relations without challenging federal power. In sum, the preemption doctrine plays a valuable role in the give and take between levels of the government, fulfilling the ultimate end of maintaining sound constitutional government.¹⁷³

c. Judicially Developed Rules for Review of Regulatory Vacuums

The courts can develop a series of presumptions to guide review of the relationship between federal regulatory vacuums and state laws with different policy goals. First, to protect traditional police powers, courts should presume that the challenged state law is valid. Courts

ucts and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources." *Id.* at 633 (quoting Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, § 2, 89 Stat. 874 (codified at 42 U.S.C. § 6201(6) (1982)). Another act "recites a similar objective to 'encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source.'" *Id.* (quoting Powerplant and Industrial Fuel Use Act of 1978 Pub. L. No. 95-620, tit. I, § 102, 92 Stat. 3291 (codified at 42 U.S.C. § 8301(b)(3) (1982)). These federal policies were not held to preempt a Montana coal severance tax that greatly affected the cost of coal extraction. *Id.* See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (federal preemption of safety aspects of nuclear energy does not extend to state-authorized award of punitive damages for tortious radiation hazards).

¹⁷⁰ 105 S. Ct. 2371 (1985).

¹⁷¹ *Id.* at 2377.

¹⁷² *Id.*

¹⁷³ Note, *Preemption as a Preferential Ground*, *supra* note 34, at 225; see also THE FEDERALIST NO. 51 (J. Madison) (discussing federal system and separation of powers).

commonly apply this presumption to law suits brought under the dormant commerce clause and implied preemption doctrines.¹⁷⁴

Second, if the state law conflicts with federal law and the state is regulating the market for economic purposes, the presumption of validity should be rebutted. For instance, because the purpose of the federal Communications Act is to make available a national market in communications technology,¹⁷⁵ state economic regulation of that particular market would be preempted.¹⁷⁶ However, state safety regulations do not necessarily conflict with or frustrate the purpose of federal economic policies addressing the same field or industry. For example, because the FCC regulates the national economics of telecommunications, a state safety statute that regulates telecommunications equipment would not inevitably frustrate the purpose of the federal statute. Even if the state law had an indirect economic effect, it would not always conflict with federal policy.¹⁷⁷

Whether a federal regulatory vacuum has an economic or safety purpose, courts need not assume that state law conflicts with or frustrates the purpose of the vacuum. I recommend that courts apply the following principles: If the state law 1) imposes a high degree of distributional equity; 2) confers local in-state benefits that significantly outweigh extra-state burdens; 3) is deeply rooted in an area of local concern; or 4) results from a compelling state interest, courts could find that the state law was not preempted by the federal vacuum.¹⁷⁸

This approach is reminiscent of the dormant commerce clause rea-

¹⁷⁴ See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (state power to regulate commerce is never greater than in matters of traditional local concern); see also *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981).

¹⁷⁵ 47 U.S.C. § 151 (1982).

¹⁷⁶ Again, this does not imply that the federal agency *should* preempt a state that regulates aspects of the communication field, but only that it legally may do so.

¹⁷⁷ Obviously, if a state did not clarify its purpose, the court would imply a purpose through scrutiny of the state law itself. States would be better off if they affirmatively expressed and articulated the purposes of their laws. Not only would clarification protect their interests, but it also would provide notice to parties within the state about the goals of the state legislation.

¹⁷⁸ The court's decision can be guided by the interest model that I developed in earlier work on federalism and regulation. The model carries the federal and state interest through five regulatory stages, identifying when federal interests in a national market outweigh state interests and vice-versa. The goal is to allow uniform federal policy when truly national interests are at stake, but to permit diversity if the individual states can demonstrate that they are willing to bear all the costs themselves and are not imposing external effects on other, unwilling states. Foote, *supra* note 2, at 1461.

soning, and intentionally so. In commerce clause cases, courts have been the arbiters of federal and state relations, protecting both the national marketplace and state sovereignty. When federal agencies create regulatory vacuums in the absence of express congressional authorization, it is fitting that courts review the effect on state law. Not only is this practice part of the traditional judicial role, it is essential to the protection of federalism.

CONCLUSION

Regulatory vacuums are not new. Vacuums have played a role in federalism since the founding of the republic. Yet the institutional shift from judicially created regulatory vacuums to vacuums imposed by Congress and administrative agencies is a new development. Regulatory vacuums favor the federal interest in an unfettered marketplace over state autonomy, and their political potential has not gone unnoticed.¹⁷⁹ Federal policymakers will undoubtedly consider regulatory vacuums as a tool for future deregulation.

Given the potential of regulatory vacuums, understanding their impact on our governmental structure is important to maintaining a vital federal system. When Congress expressly creates regulatory vacuums, courts must defer to its intent. Nevertheless, courts should invoke a clear statement test to review congressionally created vacuums. The clear statement test ensures that Congress and the courts perform the institutional functions assigned to them by the Constitution. Finally, the clear statement test protects state interests by preventing courts from finding preemption unless Congress clearly states its intention that a law be preemptive.

When agencies assume the power to create regulatory vacuums, the courts play a vital constitutional role. Because of the nonrepresentational nature of agencies and the importance of federal structure issues, courts must not defer to administrative vacuums. Generally, while administrative regulatory vacuums do not inevitably conflict with the goals of economic regulation, these vacuums do contradict the purposes of most social regulation. Therefore, when federal health and safety agencies use this device, they are generally overstepping their statutorily authorized powers. Even if Congress authorizes the regulatory vacuum, the implied preemption doctrine permits courts to construe the

¹⁷⁹ Scalia, *The Two Faces of Federalism*, 6 HARV. J. LAW & PUB. POL'Y 19, 22 (1982) (suggesting that economic conservatives could establish a federal policy prohibiting all government intervention in such areas as building code standards, rent control, and plant closure).

purpose and scope of the vacuum narrowly, in order to protect state law.

Addressing a related federalism question, Thomas Jefferson wrote:

Prima facie I do not like it. It fails in an essential character, that the hole and the patch should be commensurate; but this proposes to mend a small hole by covering the whole garment.¹⁸⁰

Jefferson's image aptly suggests the ideal policy toward federally prescribed *laissez faire*. Congress has the power to cut and apply such a patch, but should carefully tailor it to fit the political shape of federalism. On occasion, federal agencies may also alter the fabric. The judiciary's role is twofold: to facilitate the result by assuring that the pattern of federalism remains unchanged unless the new patch is described specifically by Congress — or by reviewing all agency involvement in the tailor's trade. In so doing, courts can continue their traditional role as guardians of the fundamental values of federalism.

¹⁸⁰ J. SCHMIDHAUSER, *supra* note 35, at 12.