

Environmental Control Higher State Standards and the Question of Preemption

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NOTES

ENVIRONMENTAL CONTROL: HIGHER STATE STANDARDS AND THE QUESTION OF PREEMPTION

The threat posed by alterations of the human environment is rapidly expanding as a public issue. The potential severity of the consequences of fouling the environment has led all levels of government¹ to action imposing controls on pollution of air and water.² With the development of nuclear power plants, local interest is also increasing in the matter of radiations from atomic energy sources.³ Recently, Minnesota imposed radiation emission standards on a nuclear power plant which would permit slightly over one-fiftieth the amount of escaping radiation that is currently allowed under Atomic Energy Commission regulations.⁴

¹ In addition to the federal, state, and municipal governments, new hybrid levels of government have emerged in response to the problem. This has been praised as "creative federalism" constituting "the first stages in the evolution of limited regional governments" with reference to regional river basin commissions created to plan the development of water resources. Hart, *Creative Federalism: Recent Trends in Regional Water Resources Planning and Development*, 39 U. COLO. L. REV. 29 (1966). These bodies derive powers from both the federal and state governments. *Id.* at 46. The air pollution control regions, created by Air Quality Act of 1967, § 107, 42 U.S.C. § 1857c-2 (Supp. IV, 1969), have been criticized because of internal limitations which leave little more than a "grotesque administrative unit." Reitze, *The Role of the "Region" in Air Pollution Control*, 20 CASE W. RES. L. REV. 809 (1969). Regional entities created through interstate compacts have been criticized as permitting lax control in a serious problem area. Note, *Interstate Agreements for Air Pollution Control*, 1968 WASH. U.L.Q. 260, 282.

² Responding to pressure from numerous citizens groups, local officials, state legislators, and governors are sponsoring legislation running the gamut from the creation of state agencies, councils, and commissions to imposing stiff fines on polluting sources. N.Y. Times, Feb. 24, 1970, at 1, col. 5 (city ed.). For examples of existing local, state, and federal legislation, see *Symposium—Air Pollution*, 1968 WASH. U.L.Q. 205, 232-324.

A comprehensive environmental control bill was recently introduced in the New York Legislature, sponsored by 41 legislators with bipartisan backing in both houses, and supported by 300 nature and conservation organizations. N.Y. Times, Feb. 18, 1970, at 1, col. 4. President Nixon recently set up an executive Council on Environmental Quality (Exec. Order No. 11,472, 34 Fed. Reg. 8693 (1969)), and his administration has proposed broad legislation on pollution control. PRESIDENTIAL MESSAGE ON ENVIRONMENTAL QUALITY, H.R. Doc. No. 225, 91st Cong., 2d Sess., in 116 CONG. REC. S 1604 (daily ed. Feb. 10, 1970).

³ See Helman, *Pre-emption: Approaching Federal-State Conflict over Licensing Nuclear Power Plants*, 51 MARQ. L. REV. 43, 43-47 (1967); Lemov, *State and Local Control over the Location of Nuclear Reactors under the Atomic Energy Act of 1954*, 39 N.Y.U.L. REV. 1008, 1008-09 (1964).

⁴ N.Y. Times, Jan. 28, 1970, at 17, col. 3. State attempts to impose independent

The AEC has jurisdiction over nuclear power facilities, and the Minnesota attempt to regulate is being challenged in court by a power company on the basis of preemption by AEC standards.⁵ Viewing the extremely broad and comprehensive federal program of regulation in the field of peaceful uses of the atom and considering that the complex technology of nuclear energy was federally developed, this challenge seems tenable.⁶ But viewed from the standpoint of the state, whose paramount interest lies in the protection of its populace, the immediate threat of harm from radiation may appear as serious as that of air pollution, notwithstanding the current federal regulatory scheme.⁷ State

radiation controls are not new. See Estep & Adelman, *State Control of Radiation Hazards: An Intergovernmental Relations Problem*, 60 MICH. L. REV. 41, 42-43 (1961).

Minnesota has been outspoken in the past in its opposition to federal preemption of the control of peaceful atomic energy. See Cavers, *State Responsibility in the Regulation of Atomic Reactors*, 50 KY. L.J. 29, 31-32 (1961); Esgain, *State Authority and Responsibility in the Atomic Energy Field*, 1962 DUKE L.J. 163, 188.

⁵ See N.Y. Times, Jan. 28, 1970, at 17, col. 3. Four states have petitioned in federal court for permission to file amicus curiae briefs supporting Minnesota's position, and seven states have told Minnesota's Attorney General that they want their names attached to his brief. *Id.* at 17, col. 7.

Congress has authorized the AEC to establish health and safety standards governing possession and use of nuclear materials. Atomic Energy Act of 1954, § 161(b), 42 U.S.C. § 2201(b) (1964).

A detailed analysis of the question of federal preemption as applied to atomic energy matters concluded that, with the Atomic Energy Act of 1954, Congress intended generally to preempt the field. E. STASON, S. ESTEP & W. PIERCE, *ATOMS AND THE LAW 1002-74* (1959) [hereinafter cited as *ATOMS AND THE LAW*]. A later comment determined that "the generally pre-emptive effect of the [amended Act] leads to only one conclusion: unless a state executes an agreement with the AEC, the state is constitutionally precluded from imposing general health and safety regulations upon users of [certain radioactive] materials." Estep & Adelman, *supra* note 4, at 63. See Cavers, *supra* note 4. A more recent effort found that "the scheme of federal licensing established by the 1954 Act necessitates preclusion of state regulation of radiation hazards associated with nuclear power plants, if the objectives of the Act are to be realized . . ." Helman, *supra* note 3, at 67.

In contrast to these analyses, one study of the 1954 Act, as amended in 1959, along with its legislative history, concluded that the Act "should be construed to establish *minimum* federal safety standards and to give state and local authorities concurrent authority over the location of commercial reactors." Lemov, *supra* note 3, at 1026 (emphasis added). It is thus apparent that the Minnesota action raises a difficult issue of federal preemption in a field of pervasive federal regulation, but less than clear congressional intent. See *generally* JOINT COMM. ON ATOMIC ENERGY, 86th CONG., 1ST SESS., *SELECTED MATERIALS ON FEDERAL-STATE COOPERATION IN THE ATOMIC ENERGY FIELD* 283-453 (Comm. Print 1959).

⁶ A comprehensive federal program is an indication of preemptive intent. Since use of atomic energy was developed under federal auspices and control, this area of conflict stands apart from situations where state action has been tolerated. See *ATOMS AND THE LAW* 1023; Helman, *supra* note 3, at 59.

⁷ In the area of air pollution the current federal program expressly provides for substantial state regulatory action. Note 14 *infra*.

It is not suggested that the control of radiation hazards is ultimately best suited to

fears of the hazards of overexposure to radiation are no less justified because the federal government has arrived at what it considers safe standards.⁸ Radiation disease is relatively new to science, and there is disagreement among experts as to what constitutes safe levels of released radiation.⁹

The conflict developing in Minnesota may be a prototype of federal-state controversies to come in the area of environmental control. Faced with overlapping state and federal powers to protect the public health and welfare, courts may find a comprehensive scheme of federal regulation to supersede state regulation of the same subject matter.¹⁰ There is, however, support within the framework of concurrent powers and the traditional doctrine of preemption for upholding conflicting state regulation in such areas of potentially urgent need.

varying state regulations but only that the doctrine of federal preemption should not bar state action in such an area of immediate need when current federal safety standards become subject to doubt.

⁸ A recent development has underscored the increasing necessity for state vigilance in the area of radiation hazards. After a large fire in May 1969 a group of Colorado scientists made an independent study of the amounts of radioactive plutonium released over the years into the air, water, and soil by the Rocky Flats, Colorado, atomic bomb manufacturing plant. They reported their findings to the AEC. The AEC did not dispute the levels of plutonium found, but disagreed with the scientists in their assessment of the public health hazards represented by such levels. The Colorado group had found a "serious threat to the health and safety of the people of Denver," but the AEC insisted that the levels discovered posed no public health hazard. Notwithstanding this ominous difference of opinion, it is significant that until the Colorado group's study, the AEC itself was unaware of the buildup of any released plutonium beyond the plant boundaries. By its own admission, the Commission had failed to monitor adequately for such released radioactive buildup. *N.Y. Times*, Feb. 11, 1970, at 1, col. 5.

⁹ At the present time scientists within the AEC itself are beginning to question the safety of AEC standards. *Id.*, Jan. 18, 1970, at 26, col. 1.

The Secretary of Health, Education, and Welfare has called for a reevaluation of federal radiation controls. *Id.*, March 16, 1970, at 47, col. 7 (city ed.).

The AEC is currently proposing changes in its regulations which would not reduce the present maximum permissible limits of radiation emissions but which would require new nuclear power plants to strive to reduce emissions as far below these limits as possible. In announcing this proposal, the AEC revealed that this, of course, has always been the Commission's policy and the purpose now is to put it in writing. *Id.*, March 28, 1970, at 23, col. 1 (city ed.).

¹⁰ There is no constitutional bar to state police power; the state has the power to protect its citizens as does the federal government. The particular state action in exercise of its police power may overlap with federal action on the same subject matter, in that the federal government may reach the subject via its powers over such matters as the general welfare, national defense, or interstate commerce. In these circumstances the Constitution provides the basis, via the supremacy clause, for the displacement of the state action. See text at notes 26-30 *infra*.

I

COMPETING STATE AND FEDERAL POWERS

A. *Power to Protect the Public Health and Welfare*

The ability of the state to act for the protection of the health, safety, welfare, and morals of its citizens has been traditionally acknowledged as the state's police power.¹¹ At one time the states had a monopoly on such police power objectives under the theory of "federal equilibrium," which held that the national and state governments were equal sovereigns, but possessed mutually exclusive powers.¹² Today, the states have no such exclusive sphere of power; when the Supreme Court finally upheld New Deal legislation in the late 1930's, the equilibrium theory was laid to rest and with it the notion of police power exclusive to the states.¹³

There currently exists, however, a healthy respect for the state's police power, both in Congress and the Supreme Court. Congress indicated its desire not to displace state police power in enacting air pollution control legislation;¹⁴ in Supreme Court cases upholding allegedly preempted state action, an attitude of deference to the exercise of state police power is apparent.¹⁵

A federal power analogous to the police power is derived from

¹¹ *E.g.*, *Sligh v. Kirkwood*, 237 U.S. 52, 58-62 (1915); *Mugler v. Kansas*, 123 U.S. 623, 657-70 (1887). See LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. NO. 39, 88th Cong., 1st Sess. 1085, 1089 (Small ed. 1964) [hereinafter cited as CONSTITUTION ANNOTATED]. Other goals subsumed under the police power include the protection of the public interest in the promotion of the economic interests of the community and the promotion of the public convenience. *Id.* at 1089 and cases cited therein.

¹² Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 13-17 (1950). The tenth amendment reserves to the states those "powers not delegated to the United States by the Constitution." The states, as sovereigns equal to the federal government, could claim exclusive power to provide for the public health, safety, and welfare of their citizenry. Corwin, *supra*, at 15-17.

¹³ Corwin, *supra* note 12, at 17. Federal regulatory schemes of much lesser magnitude than that of atomic energy have displaced state exercise of police power. For example, in the area of interstate railroad rates and liability, most state regulation has been precluded. Abraham & Loder, *The Supreme Court and the Preemption Question*, 53 KY. L.J. 289, 319-21 (1965).

¹⁴ ["The Congress finds—] that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . ." Air Quality Act of 1967, § 101(a)(3), 42 U.S.C. § 1857(a)(3) (Supp. IV, 1969).

¹⁵ Abraham & Loder, *supra* note 13, at 307. See, *e.g.*, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

the general welfare clause.¹⁶ This clause has been interpreted as a substantive grant of legislative power to Congress.¹⁷ Further support for analogous federal power is provided by the broad construction of the "necessary and proper" clause¹⁸ which led to the doctrine of implied powers.¹⁹ The latter clause was held to justify all legislative means appropriate to achieving legitimate ends of the Constitution,²⁰ thus paving the way for Congress to expand the powers enumerated in the Constitution by exercising them for ulterior police purposes.²¹

Activities regulated by the state under its police power may also come under federal control via the power of Congress over particular subject matter, without regard to health and safety objectives. Thus the federal commerce, proprietary, admiralty, defense, taxing, and spending powers²² have been the basis of federal regulation of matters such as radiation from atomic energy sources,²³ air pollution,²⁴ and water pollution.²⁵

¹⁶ U.S. CONST. art. I, § 8, cl. 1, provides in part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"

¹⁷ Corwin, *supra* note 12, at 5-6. The preamble to the Constitution lends support to this, noting, among others, the constitutional objectives to "promote the general Welfare." But see *United States v. Butler*, 297 U.S. 1, 64-67 (1936) which construes "the general Welfare" as the confines within which the power to "lay and collect Taxes" is conferred by U.S. CONST. art. I, § 8, cl. 1.

The protection of public health and welfare can be a concomitant of the exercise of the federal commerce power. See Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067, 1076-77 (1965).

¹⁸ U.S. CONST. art. I, § 8, cl. 18.

¹⁹ The groundwork of the doctrine was laid in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See CONSTITUTION ANNOTATED 93-95; Corwin, *supra* note 12, at 7.

²⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²¹ See CONSTITUTION ANNOTATED 357-62. In the *Lottery Cases*, 188 U.S. 321 (1903), Congress began to expand its powers by exerting the commerce power for the ulterior purpose of improving public morals. Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200, 217-20 (1927).

²² The federal power to tax and spend has long been held "limited only by the requirement that it shall be exercised to provide for the general welfare of the United States." *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

²³ The federal defense, proprietary, admiralty, and commerce powers have been exercised in the area of peaceful atomic energy radiation control. Estep & Adelman, *supra* note 4, at 44-54; Helman, *supra* note 3, at 56-57.

²⁴ The federal commerce power has been exercised in the control of interstate air pollution. In conjunction with the federal power over the navigable air space, the commerce power has been exercised to regulate intrastate air pollution. Edelman, *supra* note 17, at 1070-73, 1078-87; Note, *The Expanding Scope of Air Pollution Abatement*, 70 W. VA. L. REV. 195, 200-01 (1968).

²⁵ The federal commerce power and power over navigable waters, among others, have been exercised to regulate water pollution. Edelman, *supra* note 17, at 1070-78.

B. *The Constitutional Basis of Federal Power to Preempt*

Only a few relatively insignificant governmental powers are expressly delegated by the Constitution exclusively to the federal government.²⁶ The implication is that no others are, as a constitutional matter,²⁷ exclusively federal in nature.²⁸ This conclusion opens all major federal powers to concurrent state exercise, but it is qualified by the doctrine of federal supremacy. Article 6, clause 2²⁹ of the Constitution renders the Constitution itself and "the Laws of the United States which shall be made in Pursuance thereof . . . the supreme Law of the Land." The effect of this provision is to give Congress the power to impede the state's exercise of concurrent power by means of legislation, otherwise constitutional, that displaces state laws.³⁰

²⁶ U.S. CONST. art. I, § 10, cl. 1, provides in part: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit . . ." Hence these few powers are expressly exclusive to the federal government. Grant, *The Scope and Nature of Concurrent Power*, 34 COLUM. L. REV. 995, 997-1009 (1934).

U.S. CONST. art. I, § 8, cl. 17 provides that "[the Congress shall have the power] to exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia], and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." This does not mandate exclusive federal power in the areas specified but leaves to Congress the decision to exercise such power exclusively. Grant, *supra*, at 999 n.17.

²⁷ A frequent and historical use of the term "exclusive power" applies it to those powers the exercise of which by the states would be "incompatible" with a grant of the same to the federal government. At one time such incompatibility was treated by the Supreme Court as a constitutional matter, which it is not. Grant, *supra* note 26, at 998-99; see Biklé, *supra* note 21, at 214-20. See also *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 315-21 (1851).

²⁸ Grant, *supra* note 26, at 997-1009. The major powers of the federal government are set forth in U.S. CONST. art I, § 8, which begins "The Congress shall have power . . ." but which makes mention of exclusivity only in clause 17. Note 26 *supra*.

²⁹ This provision reads in full:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

³⁰ See note 33 *infra*.

This rationale was tempered by the tenth amendment which declares that powers not delegated to the federal government, nor prohibited to the states, are reserved to the states or to the people. The Supreme Court gave the tenth amendment force as an effective limitation on federal legislation for the duration of the period of dual federalism. J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* 113-14 (1964); Corwin, *supra* note 12, at 13-17. However, the Court has returned to the construction, dating from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819), that the tenth amendment itself does not affect the quantum of federal power. If federal legislation is in the first instance an exercise of delegated power, then it has passed the only relevant test. Nothing

II

THE PREEMPTION QUESTION: ABILITY OF THE STATE TO EXERCISE
CONCURRENT POWERS

Distinguishable from the question of whether Congress *may* validly displace state regulation of an activity³¹ is the more complex issue of whether it *has* precluded state action. The latter question devolves upon the judiciary,³² as does the former, but is not a constitutional issue in itself.³³

is added to the test for constitutionality of a federal act by the statement that powers not delegated are reserved. J. FLYNN, *supra* at 112-15 and cases cited therein; Estep & Adelman, *supra* note 4, at 45. See Corwin, *supra* note 12, at 13-17. The ninth and tenth amendments "have frequently been linked together and, particularly in recent years, written off as redundancies . . ." Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787, 804 (1962).

Thus it is argued that there is no state power to be found in the tenth amendment. However, it has been proposed that this amendment does limit both federal and state power in favor of rights retained by the people. Redlich, *supra* at 802-12. Cf. Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, 128-31 (1960). The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See also Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained By the People*, 51 MARQ. L. REV. 121, 134-42 (1968).

A corollary of this argument would have a right of self-protection retained by the people and enforceable by the state as guardian of the people's rights. See Comment, *Air Pollution, Pre-emption, Local Problems and the Constitution—Some Pigeonholes and Hatracks*, 10 ARIZ. L. REV. 97, 104-06 (1968). Cf. Call, *supra*; Kutner, *supra*. The state would oppose any infringement including that of a preemptive federal scheme which would potentially hamper the state's efforts. The net result is a limitation on federal power to preempt state action, and this would be useful in support of state exercise of police power to protect its citizens from imminent pollution dangers.

³¹ Its laws must be in "Pursuance" of the Constitution. U.S. CONST. art. VI, cl. 2.

³² The Supreme Court has been the final arbiter of the allocation of power in the federal system since *Marbury v. Madison*, 5 U.S. (1 Cranch) 368 (1803). See Corwin, *supra* note 12, at 15-16.

³³ The power of Congress to displace state laws derives from the supremacy clause of the Constitution, hence the issue of whether or not Congress may displace state laws turns on the constitutionality of the federal law itself. Whether the state law is displaced turns on whether it is "to the Contrary" of federal laws "in Pursuance" of "This Constitution." U.S. CONST. art. VI, cl. 2. If the state law is unconstitutional in the first instance, then no issue of federal preemption is properly reached, since it is "to the Contrary" of "This Constitution" rather than the "Laws of the United States . . . in Pursuance thereof"; the issue of the constitutionality of state laws is grounded in the supremacy clause, as is the issue of preemption, but the former is an issue of contrariety with the Constitution itself:

The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment.

Ex parte Bransford, 310 U.S. 354, 358-59 (1940). See Schwarzer, *Enforcing Federal Suprem-*

Congress may expressly declare its intention to preclude state regulation of a subject matter. For example, the Air Quality Act of 1967 expressly prohibits state regulation of emissions from new automobiles.³⁴ Should a state impose its own emission standards a court would have no difficulty finding repugnance between the state and federal laws,³⁵ and consequently holding the state law inoperative;³⁶ specific congressional intent to exercise supreme legislative power is clear.³⁷

In most cases turning on the question of preemption the court is faced with state regulation that has not been specifically anticipated by Congress.³⁸ Hence no express statement by Congress on the subject is available to implement the congressional ability to make laws "in Pursuance" of the Constitution, such that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³⁹ In these cases it devolves upon the court to detect the existence of such contrariety before proceeding to the task of enforcing supreme federal law.⁴⁰

acy: Relief Against Federal-State Regulatory Conflicts, 43 CALIF. L. REV. 234, 245 & n.51 (1955). *But see Note, Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-10 & n.11 (1959).

³⁴ Air Quality Act of 1967, § 208(a), 42 U.S.C. § 1857f-6a(a) (Supp. IV, 1969).

³⁵ In such a case Congress will have dealt with the precise question faced by the court and the latter need only reiterate and enforce what is, in effect, a congressional declaration of contrariety.

³⁶ This is a finding of preemptive contrariety, not constitutional contrariety. Note 33 *supra*. In practical terms the immediate effect of either kind of contrariety is identical—state regulations are interdicted. The distinction has been obscured and with it the distinction between contrariety of state law with federal laws "in Pursuance" and contrariety of state law with "This Constitution." A finding of the former is subject to congressional overruling, in that Congress may subsequently enact legislation that consents to state action. Grant, *supra* note 26, at 1008-09. A finding of constitutional contrariety, however, is not subject to such legislative revision.

³⁷ It has been proposed that Congress enact a requirement that no future act of Congress be construed as indicating congressional intent to supersede state laws on the same subject matter unless, *inter alia*, federal legislation contains an express provision to that effect. *See Wham & Merrill, Federal Pre-Emption: How to Protect the States' Jurisdiction*, 43 A.B.A.J. 131, 134 (1957). *Cf. Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 177-79 (1942) (Frankfurter, J., dissenting).

This "shotgun approach" has been introduced as legislation in many sessions of Congress, but never passed. The objective of such bills is to remove from the judiciary the power to decide the question of implied congressional supersedure. J. FLYNN, *supra* note 30, at 124-25.

It has been suggested that even where federal legislation expressly supersedes state regulation, as in the case of late model motor vehicle pollution control, there may be sufficient jeopardy of state or individual constitutional rights that a balancing approach may be preferable to invoking immediately the supremacy clause. Comment, *supra* note 30.

³⁸ *See* J. FLYNN, *supra* note 30, at 126.

³⁹ U.S. CONST. art. VI, cl. 2.

⁴⁰ *See* notes 32-33 *supra*.

A judicial finding of contrariety may stem from a provision in federal law regulating the same activity that is the subject of state action. Comparing and contrasting the provisions of the two sovereigns, the court may find them fatally in conflict.⁴¹ Conflict may take the form of opposing provisions, as where the state nullifies federally granted rights.⁴² It may take the form of state provisions that "supplement" the federal,⁴³ or it may be found in provisions that are merely "coincidental" or "duplicative."⁴⁴ It is evident that such a finding of "conflict" is dispositive of the issue. The finding is merely shorthand for the court's determination that preemptive contrariety is present. If, on consideration of all relevant factors, supersedure seems appropriate to the court, the state regulation is in conflict with that of Congress.⁴⁵

The conclusory nature of "conflict" is even more apparent where federal action comprises an elaborate and pervasive scheme of regulation. The court may shift to notions of "danger of conflict"⁴⁶ or "occu-

⁴¹ See Abraham & Loder, *supra* note 13, at 291-98, 307-08.

⁴² *E.g.*, Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959) (state antitrust laws prohibitive of collective bargaining agreements authorized by federal laws); Hill v. Florida, 325 U.S. 538 (1945) (state licensing requirements prohibitive of employee freedom of choice of collective bargaining representative as authorized by federal laws). Preemptive opposition has also been found where state law authorizes that which federal law forbids. Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

When the state law opposes the federal law in express language or basic policy, the issue apparently becomes a pure question of supremacy; the state law must fall as soon as its nature is discerned by the court. However, the fact remains that the court must make the inquiry into the nature of the two laws in order to pronounce their opposition. Its action can be rationalized as implementing the "implied intent" of Congress to preclude directly opposing state laws. This kind of supersedure is distinct, then, in that the court need not reach the point of balancing the competing interests of the federal government and the states in the matter in hand. See note 56 and accompanying text *infra*.

⁴³ *E.g.*, Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) (state attempt to fill a gap in the federal regulatory scheme in the field of labor relations).

The Court has found no conflict in other cases of supplemental state laws. *E.g.*, Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) (state law filling gap in federal regulation of natural gas).

⁴⁴ Charleston & W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597 (1915) (state-imposed liability of carrier duplicative of federal penalty). "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Id.* at 604 (Holmes, J.).

Other coincidental state laws have been held to present no conflict. *E.g.*, California v. Zook, 336 U.S. 725 (1949) (state-imposed liability of carrier duplicative of federal penalty). "[T]he fact of identity does not mean the automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent." *Id.* at 730.

⁴⁵ J. FLYNN, *supra* note 30, at 125-35. See ATOMS AND THE LAW 1008-47; Abraham & Loder, *supra* note 13, at 291-311.

⁴⁶ See, *e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959)

pation of the field"⁴⁷ in cases where state regulation concerns a specific activity not itself regulated by a federal program but in a broader field of federal control. From the degree of federal "occupancy" is drawn the implication that no room remains for state action.⁴⁸

The original criteria for a judicial determination of federal preemption were announced in *Cooley v. Board of Wardens*.⁴⁹ Here the Supreme Court divided the federal power over interstate commerce into subjects national in character and requiring a uniform rule of regulation and subjects local in character permitting or necessitating diversity of regulation.⁵⁰ The former were presumed to be exclusively the subjects of federal commerce power,⁵¹ and that presumption was tantamount to framing the preemption question as a constitutional issue.⁵² A judicial finding that the subject matter of regulation lends itself to uniformity of control is nothing more than a balancing of national and local interests in the particular case.⁵³ There does not appear

(state remedy for economic injuries resulting from peaceful picketing potentially conflicting with the federal scheme of regulation which may protect or prohibit the same activity, as the NLRB so determines).

⁴⁷ See, e.g., *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926).

⁴⁸ See Note, "Occupation of the Field" in *Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262, 266-69 (1946).

It has been suggested that "occupancy of the field" is merely a rubric applied by the Court when concerned with the completeness with which Congress has regulated the particular subject matter rather than the presence of conflict, the issue being the desirability of additional state regulation. Note, *State Control of Subversion: A Problem in Federalism*, 66 HARV. L. REV. 327, 329-30 (1952).

The Court has upheld state laws despite extensive federal action in the field. Kennedy & Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 LAW & CONTEMP. PROB. 297, 313 n.66 (1968) and cases cited therein.

In areas where Congress had enacted no legislation covering the general subject matter of state regulation, congressional silence was at one time interpreted as implying congressional "intent" that no regulation is to be imposed. Biklé, *supra* note 21, at 214-20. It has been suggested that the exclusion of state laws by congressional silence, a phenomenon of the period of dual federalism, was actually a finding by the Court of the unconstitutionality of the state enactment on other grounds although nominally a preemption issue. J. FLYNN, *supra* note 30, at 111-12; Note, *supra* note 33.

⁴⁹ 53 U.S. (12 How.) 299 (1851). This test was later discarded. Note, "Occupation of the Field" in *Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262, 267-68 (1946).

⁵⁰ 53 U.S. (12 How.) at 319-20.

⁵¹ Biklé, *supra* note 21, at 200-04.

⁵² If the commerce power over subjects of "national" concern were constitutionally exclusive to the federal government, then a determination of the national character of the subject of the case at hand would be sufficient to preclude state action as being contrary to the Constitution. No contrariety to federal laws "in Pursuance thereof" would need be shown. Note 33 *supra*. The Constitution, however, does not make such a division of exclusive power. Notes 26-28 *supra*.

⁵³ This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expres-

to be any inherent quality of a "field" that earmarks it as peculiarly adapted to federal uniformity.

Since *Cooley*, the Supreme Court has relied on many factors in preemption cases which can be associated with the preemptionist or non-preemptionist leanings of the individual justices of the Court.⁵⁴

sions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

The Supreme Court, however, reverted to such timeworn expressions of the test in *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956):

First, "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." . . .

Second, the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject." . . .

Third, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.

⁵⁴ The following guidelines have been identified by Abraham and Loder as used to justify upholding congressional displacement of state power: congressional legislation in a field immediately precludes state power in that field despite the delayed effectiveness of the federal act; signs of congressional intent to preclude state action are revealed in the wording and scope of federal acts, *i.e.*, comprehensive terminology and/or elaborate, pervasive federal scheme of regulation; partial entry of Congress into a defined field can remove the states from that field totally; congressional intent to preempt is shown when the statute spells out ways that federal agencies may cede jurisdiction to state agencies; Congress has preempted a field when it makes no express provision for federal-state cooperation; in labor-management cases, the federal government displaces state power over activities only arguably subject to § 7 and/or § 8 of the Taft-Hartley Act; federal agencies must act to preempt the states from a field, or must merely act in the field, or must merely have jurisdiction over the field; the federal government may preempt fields traditionally occupied by the states as long as it is exercising delegated power or taking necessary and proper means to exercise such power; once Congress enters a field the states have no authorization to add to or supplement even the most modest federal schemes; state laws which coincide with or duplicate federal statutes fall whether there is a danger of conflict or not; danger of conflict between federal and state governments supports preemption; state exercise of traditional police power may be precluded by congressional entry into a field.

Other guidelines have supported the Court's upholding state power: the Court should not usurp the ability of Congress to specify its intentions concerning preemption; Congress in legislating not only spells out what it will cover but circumscribes its coverage; the absence of uniform national rules in a field implies the need for state action; there are signs in federal acts that state action is not only tolerated but greatly needed; no signs of congressional intent to preclude state action are revealed in the comprehensive terminology and/or elaborate, pervasive scheme of regulation in federal acts; neither federal administrative action nor inaction in themselves imply congressional intent to preempt; the Court may respect federal agency decisions to promote or at

For one justice the pervasiveness of the federal scheme is a sign of congressional intent to preclude state action while for another it is not. Contrary conclusions on preemption are also reached from such considerations as the existence of federal administrative jurisdiction or action in the field, and even the exercise of traditional state police power in the field entered by Congress.⁵⁵

It is evident that a determination of implied supersedure of state action amounts to a judicial balancing of competing federal and state interests rather than a finding of preemption by a Congress that has actually entertained the question of competing state laws.⁵⁶

least acquiesce in state action; state legislation may coincide with or supplement federal statutes; coincidence and duplication of state and federal legislation does not per se displace state legislation; mere showing of a danger of conflict is not enough to support preemption; the historic exercise of state police and tax powers may support upholding state action.

Guidelines used in conjunction with those above, and going both ways on the preemption question, include: the question of dominant federal interest; the question of whether or not there is a conflict; concern for possible burdens on interstate commerce; whether Congress wants preemptible uniformity; the bearing of the legislative history of the federal enactment on the preemption question. Abraham & Loder, *supra* note 13, at 291-311. See Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 MICH. L. REV. 407, 417-25 (1955).

⁵⁵ Abraham & Loder, *supra* note 13, at 291-311.

⁵⁶ In the words of the Supreme Court:

The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process. Recently we indicated the task that was thus cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompleteness.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239-40 (1959) (Frankfurter, J.).

The Court must interpret both the state and federal legislation involved. To assist the determination of congressional intent on the matter of conflicting state laws, it has been proposed to require the inclusion in congressional committee reports of statements of the existing state laws in the area of each bill, the intended effect of the bill on them, and the intended preclusion of future state regulation. Wham & Merrill, *supra* note 37, at 190. This is far from a panacea for the preemption question. The kinds of overlap of federal and state laws are often not readily foreseeable as, for example, a state regulation of the smoke emission in port of a vessel otherwise regulated under the federal commerce power. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Supersedure as a matter of judicial interpretation may, of course, be expressly overruled by Congress at any time.

III

UPHOLDING HIGHER STATE STANDARDS

A. *A Presumption in Favor of Concurrent State Power*

When a state acts to protect the health and safety of its citizens by imposing more stringent controls on hazardous activities than are provided by the federal government, it acts, in the first instance, within its primary power under the federal system.⁵⁷ Faced with the question of federal preemption in a case of such state action, the court must decide whether, on balance, federal regulation stands as a bar to the state—is the federal interest paramount to the state's pursuit of the health and safety of its citizens? If the former reduces merely to a need for "uniformity" of regulation, then the state interest must prevail.⁵⁸ A judicial determination of an implied congressional intent to preempt should at least require a finding of overriding federal concern for the health and safety of the nation's citizenry; otherwise such a determination should not stand in the way of local exercise of the police power.

In the case of radiation hazards of an atomic bomb plant,⁵⁹ it is conceivable that federal interest in defense of the nation as a whole may outweigh local interest in an environment safe to live in. But in the case of hazards posed by atomic power plants, no such national defense rationale exists to override local health and safety interests.⁶⁰ Where Congress has failed to expressly articulate an interest in exclusive federal environment control, the courts should indulge a presumption in favor of concurrent state action. When a state exercises its police power to regulate more strictly in response to reasonable apprehension over federal standards,⁶¹ the burden of proof on the issue of the federal interest should fall on the party asserting preemption. The supremacy doctrine should not be permitted to obscure the policy of protecting human health, safety, and welfare which is amply supported by the Constitution.⁶²

This reasoning and presumption should apply to any state efforts to impose stricter standards of pollution control in areas that are open

⁵⁷ See text at notes 11-15 *supra*.

⁵⁸ See text at notes 49-56 *supra*.

⁵⁹ Note 8 *supra*.

⁶⁰ "[T]he national interest in health and safety of the public could hardly be jeopardized by state regulations which place stricter limits than the federal regulations impose on the permissible amount of radiation exposure." Estep & Adelman, *supra* note 4, at 44.

⁶¹ Notes 8-9 *supra*.

⁶² See notes 16-17 and accompanying text *supra*.

to continuing question as the health effects of pollutants begin to materialize.⁶³

B. *The Precedent of Violent Picketing: State Action Upheld*

The Supreme Court has previously indicated its willingness to uphold limited, concurrent state exercise of police power in a "federal field"; confronted with impending emergency, the state, as guardian of public health and safety, can act, notwithstanding the doctrine of preemption. In the field of labor-management relations, in order to promote the "national labor policy," the Court has articulated a general rule that the NLRB has exclusive jurisdiction of activities arguably subject to sections 7 and 8 of the Taft-Hartley Act.⁶⁴ State power is displaced with regard to issues of arguably protected concerted activities and arguably prohibited unfair labor practices.⁶⁵ However, state regulation of violent or potentially violent picketing has been upheld.⁶⁶ Thus in an area of urgent state concern the Court has deferred to state police power despite the existence of an elaborate and pervasive scheme of federal regulation of the field of labor-management relations and the specific activity of picketing.⁶⁷ In the words of the Court:

⁶³ We are in the infancy of understanding the full health impact of, for example, specific air pollutants and air pollution in general. Cassell, *The Health Effects of Air Pollution and Their Implications for Control*, 33 LAW & CONTEMP. PROB. 197 (1968).

⁶⁴ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

⁶⁵ *Id.* at 244-46.

⁶⁶ *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956).

⁶⁷ One analysis of the preemption issue in the field of labor relations noted that [e]ven where the federal act is broad and inclusive and delegates quasi-judicial power over matters which affect public health and safety to the federal agency, the Supreme Court is reluctant to declare the state powerless to avert a local, immediate, and substantial hazard to persons and property in the area.

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The writers, however, found the *UAW* case of limited significance for the atomic energy field because (1) the danger in the latter field would not be analogous to the immediate and violent threat of damage to person and property caused by the mass and violent picketing situation, and (2) the Atomic Energy Act is centrally concerned with the public health and safety whereas the federal labor laws reflect a primary interest in economic, political, and social considerations and hence less of an intent to preempt. *Id.* at 1019-20.

The first point is not persuasive if the federal radiation standards are in fact dangerously low, permitting an overdose of radiation emissions to reach the populace. See notes 8-9 *supra*. In that case the threat may be even more immediate because the "cumulative effect" and "genetic impact" of repeated radiation doses delay the appearance of the full health consequences. The degree of potential harm may well be analogous to that of potentially violent picketing activities. See *Estep & Adelman, supra* note 4, at 44.

The second point begs the question by raising the issue of congressional intent in terms of the purpose of the federal scheme. The issue should be whether the interest of the federal government outweighs that of the state, not whether it is also a health interest. See text at notes 57-62 *supra*.

The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. . . .

The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.⁶⁸

CONCLUSION

The action taken by Minnesota in regulating the escape of harmful radiation can be compared to state action to enjoin violent or potentially violent picketing. Faced with the threat of adverse effects on public health and safety, the state must act to regulate offending activity before harm is realized. The nature of problems of environment protection causes them to be national in scope; pollution recognizes no state boundaries.⁶⁹ Effective environmental control may require effective federal regulation. Nevertheless, the interest of the state in protecting its citizens from fouling of the environment that has not been properly evaluated by federal regulatory programs outweighs the overall need for national uniformity in the field. State standards in excess of those imposed by the federal government should be upheld by courts in the face of evidence that the latter are inadequate.⁷⁰ Conceivably such state action may stimulate the federal government to pursue more effective standards of control, ultimately in the spirit of cooperative federalism.

Samuel C.V.D. Kilbourn

⁶⁸ *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 274-75 (1956).

⁶⁹ See, e.g., Zimmerman, *Political Boundaries and Air Pollution Control*, 46 J. URBAN L. 173 (1969).

⁷⁰ That current federal programs are inadequate, see, for example, O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1968) and Reitze, *supra* note 1. Cf. Cassell, *supra* note 63.