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The Burger Court and Preemption Doctrine: Federalism in the Balance

The supremacy clause of the Constitution, which provides that federal law can preclude the operation of contrary state law, is the foundation of the preemption doctrine.¹ Although constitutionally based, the preemption doctrine is implemented through federal statutes.² Arising out of our federalist system of government, the preemption doctrine defines the boundaries of state power vis-à-vis the federal government.³ The Supreme Court, through its interpretation of the federal statutes involved and determination of congressional intent, plays a major role in shaping the preemption doctrine, and thus, the vitality of our federalism.

This note examines the Burger Court's treatment of preemption cases, specifically its application of traditional preemption standards in reconciling competing state and federal interests. Part I explores the types of preemption and resultant preemption standards which previous Courts developed. Part II analyzes several Burger Court preemption decisions. This analysis focuses upon the Court's attempt to maintain a balance of federalism by curbing the

1 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.

U.S. CONST. art. VI, cl. 2.

A state law may be contrary to a federal law in several ways. First, the federal law may, on its face, expressly preclude the state law. Second, the state law may directly conflict with the federal law or hinder the accomplishment of the federal law's objectives. Third, the federal law may leave no room for the state law, thereby occupying the field. See note 7 *infra*.

2 Traditionally, the preemption doctrine has arisen where the federal government has acted in some manner, i.e., where a federal statute exists. For example, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Court stated: "The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* at 236.

3 A federalist system requires a rule for determining the priority of law in the event of a conflict between the state and federal law. James Madison realized that a central government, with laws subordinate to the laws of the individual states, would be powerless. According to Madison, if the state constitutions had remained supreme, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

THE FEDERALIST No. 44, at 287 (J. Madison) (C. Rossiter ed. 1961). The Framers of the Constitution, therefore, included the supremacy clause. See note 1 *supra*.

excesses of federal power without restricting the legitimate exercise of that power. Part III suggests that the Burger Court has applied the traditional preemption standards, tailoring them to the subject matter of the statutes and the type of preemption involved. It concludes that the dominant theme of the Burger Court's preemption decisions is to uphold the legitimate exercise of federal power, while not preempting state law in situations where it can be avoided. In achieving this goal, the Court appears more willing to preempt state law in areas involving traditionally strong federal concerns than in areas involving traditional uses of a state's police power. Similarly, the Court has been more willing to preempt a state law using a conflict analysis rather than an occupation of the field preemption analysis.

I. Development of the Preemption Doctrine: Express, Conflict, and Occupation of the Field

Preemption can occur whenever a state attempts to regulate in an area where the federal government has the power to act.⁴ Because preemption cases involve a broad range of subject matters and a variety of statutes,⁵ each decision is fact specific. The outcome in one preemption case will not necessarily determine the outcome of the next case.⁶ Consequently, the analysis underlying each decision is important in ascertaining whether a consistent "doctrine" of preemption exists.

4 Because the preemption doctrine is based upon the supremacy clause, federal law can preempt state law in any situation where the Constitution grants the federal government the power to regulate. See note 1 *supra*. However, speaking in regard to the supremacy clause, Alexander Hamilton stated:

But it will not follow from this doctrine that acts of the [federal government] which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the [states], will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

THE FEDERALIST No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original). The Burger Court, in *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983), stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*." *Id.* at 384 (emphasis in original).

5 For example, preemption problems have arisen in such disparate situations as cable television broadcasts, *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984); construction of nuclear power plants, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); business takeovers, *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); solid waste disposal, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); employment of illegal aliens, *DeCanas v. Bica*, 424 U.S. 351 (1976); trade secrets, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); and record piracy, *Goldstein v. California*, 412 U.S. 546 (1973).

6 See Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515. "The need for focussing on . . . specifics means that the Court's preemption decisions are largely based on ad hoc considerations, especially on the exact statutes in question." *Id.* at 520-21.

The Supreme Court traditionally has recognized three types of preemption—express, conflict, and occupation of the field.⁷ By analyzing cases in this manner, the Court also defines the scope of its role in preempting state law.⁸ Preemption thus deals not only with the relationship between the state and federal governments but also with the proper role of the Supreme Court within the federal government.⁹

Express preemption of a state law occurs when Congress specifically states in the federal statute that it intends to preempt state law in a particular area.¹⁰ Such a “preemption clause” divests the Court of any discretion on the question of preemption.¹¹ If the Court finds that Congress acted within its constitutionally defined power, the federal law will prevail over contrary state law. The explicit statement of congressional intent obviates the need for a judicially created standard to resolve express preemption problems. Thus, these cases generate few difficulties and little dissension within the Court.¹² This note focuses on the more problematic conflict and occupation of the field preemption cases.¹³

Conflict preemption can arise in one of two ways. First, a state law may require a person to do something which a federal law forbids.¹⁴ This creates an impossibility of performance situation and

7 See, e.g., *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 104 S. Ct. 2518, 2523 (1984) (detailing the three ways in which preemption of state law can occur—express, conflict, and occupation of the field).

8 The Court's role varies with the type of preemption involved. In express preemption cases, the Court plays a minor role; its role increases in conflict and occupation of the field cases. See notes 11, 17, 18, and 22 *infra* and accompanying text.

9 Hirsch, *supra* note 6, at 533.

10 See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977) (Because the “explicit pre-emption provision [in the federal law] dictate[d] the result in the controversy” the federal law prevailed.). Instead of a preemption clause, Congress may include a savings clause in the federal statute whereby any state law in the regulated area is specifically excepted, or “saved,” from federal preemption. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 222-23 (1947) (The United States Warehouse Act originally included a savings clause which stated that nothing in the act would limit or impair state law with regard to warehouses and warehousemen.).

11 The Court's opinion as to whether or not preemption of the state law is desirable is irrelevant to the decision. See note 10 *supra*.

12 See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Justice Rehnquist agreed with the majority opinion that the preemption problem as to the labeling of packaged bacon was solved by the preemption clause in the Federal Meat Inspection Act. However, he dissented in the Court's finding of conflict preemption for the labeling of packaged flour. *Id.* at 543-44 (Rehnquist, J., dissenting); see note 43 *infra*.

13 This note will also exclude a discussion of preemption cases involving the National Labor Relations Act (“NLRA”), which deserve more thorough treatment than can be given in this note. The Burger Court's NLRA preemption cases include *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 3179 (1984) (no preemption of state law); *Belknap, Inc. v. Hale*, 463 U.S. 591 (1983) (no preemption of state law); *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669 (1983) (state law preempted); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (no preemption of state law).

14 See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). The Court

thus, an actual conflict. In such a situation the supremacy clause mandates that the state law yield to the federal law.¹⁵ Although directly governed by the supremacy clause, actual conflict cases allow the Court to exercise some discretion because the Court can decide how much conflict must exist before a state law is preempted.¹⁶

Conflict preemption may also arise when a state law, although not in actual conflict with the federal law, poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁷ In such cases the Court must interpret the federal statute to ascertain its objectives and then determine whether the state law poses an obstacle to those objectives.¹⁸ Thus, obstacle conflict preemption allows the Court the discretion to determine initially what the federal objectives are and then whether the state law poses an obstacle to those objectives.¹⁹

Occupation of the field preemption results when the Court concludes that by passing a federal regulation, Congress impliedly intended to preclude state regulation in the same area.²⁰ Perhaps because of the danger of misinterpreting unexpressed congressional intent,²¹ the Court requires that this intent be "clear and

stated: "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility" *Id.* at 142-43.

15 See note 1 *supra*.

16 See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975). The author points out that some previous Supreme Court decisions required an actual conflict before a state law was preempted, while other decisions held the state law preempted because of a potential conflict with the federal law. *Id.* at 627, 636. See also text accompanying note 37 *infra*.

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

18 See *id.* at 67. The Court observed:

There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress In the final analysis, there can be no one crystal clear distinctly marked formula.

Id.

19 In ascertaining the objectives of the federal law, the Court looks to the specific statutes and facts involved in the case before it. See, e.g., *id.* at 67-68. In preempting a Pennsylvania Alien Registration law, the Court considered the fact that the registration of aliens was an area important to international relations and that it demanded broad national authority. *Id.* at 68.

But this determination of federal objectives permits room for judicial legislation, perhaps allowing a state law to operate where Congress would have preempted it or vice versa. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). The Court realized that it could end up performing a legislative role; it declined to do so by refusing to find occupation of the field preemption. *Id.* at 223; see note 119 *infra*.

20 See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The Court found that Congress had legislated in the area of warehousemen and that "Congress in effect said that the policy which it adopted in each of the nine [matters charged in the complaint] was exclusive of all others" *Id.* at 235-36.

21 In addition to not having expressed its intent explicitly, Congress may not even have

manifest.”²² This insistence offsets the comprehensive effect of occupation of the field preemption.²³ In addition, when dealing with occupation of the field preemption, the Court generally maintains a presumption against the preemption of state law.²⁴

Over the years, pre-Burger Court decisions have laid the foundation for the preemption doctrine, each case adding substance to the supremacy clause skeleton. The Burger Court, therefore, has had to incorporate existing preemption principles into its analysis and decisions, tailoring the preemption doctrine to respond to the steadily expanding scope of federal power. The Burger Court is confronted with the problem of recognizing the expansiveness of federal power while preserving state power when a particularly local interest is involved or when the federal government has overstepped its authority.

considered the preemptive effect of its legislation. See Hirsch, *supra* note 6, at 542. The author notes that “[q]uestions of the relation of the federal law to existing and potential state laws are seldom considered in detail in the drafting of federal legislation. Consequently, many federal acts are adopted without serious consideration of their impact on state laws dealing directly with the same subject matter.” This fact complicates the resolution of this type of preemption.

22 331 U.S. at 230. The Court has identified several important factors in determining Congress’ intent to preempt state law: 1) the federal regulation may be so pervasive that a state law cannot operate in the same area; 2) the federal interest may be so dominant in an area that the states are precluded from regulating it; 3) the object to be obtained by the federal law and the type of obligations imposed by it may disclose the same purpose; and 4) the result of the state law may be inconsistent with the objective of the federal law. *Id.*

The need for national uniformity is another indication that Congress intended to preempt any state regulations in an area. See Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). The author notes that “[w]hen federal action is inspired by a desire to avoid multiple and conflicting state regulation, or to circumvent the parochial attitude of local authorities, the context strongly suggests that the states should not be allowed to continue to govern matters subject to federal regulation.” *Id.* at 215-16. See also note 19 *supra*.

23 Occupation of the field preemption is the most comprehensive type of preemption because a state law can be preempted although it does not actually conflict with the federal law in any way. See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497, 504, *reh’g denied*, 351 U.S. 934 (1956) (The Court concluded that Congress had occupied the field of sedition and “[t]herefore, a state sedition statute is superceded regardless of whether it purports to supplement the federal law.”).

24 See *Reid v. Colorado*, 187 U.S. 137, 148 (1902) (“It should never be held that Congress intends to supercede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.”). See also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (preemption of state law should not occur unless there are persuasive reasons for doing so); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (police power of the states is not to be superceded by the federal law “unless that was the clear and manifest purpose of Congress”); *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940) (congressional intent to preempt is not to be inferred unless clearly indicated). The presumption against preemption is not limited to occupation of the field preemption. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

II. Burger Court Preemption Decisions

The Burger Court has decided numerous preemption cases during its fifteen year term. While weaving its way through a maze of diverse statutes and subject matters, the Court has sought to maintain a balanced system of federalism. The Court's goal has been to permit the *legitimate* exercise of congressional power while curbing abuses of that power.²⁵ The decisions exhibit the tension inherent in attempting to protect the states from congressional excesses while simultaneously prohibiting them from interfering with legitimate federal regulatory schemes.

An analysis according to the type of preemption and the subject matter involved demonstrates that, in attempting to achieve a balanced federalism, the Burger Court preempts state law more readily in cases involving conflict preemption and a subject matter that is traditionally a federal concern. Conversely, the Court is less willing to preempt state law in occupation of the field cases—where it must infer congressional intent—and when the subject matter is local in nature.²⁶ This pattern emerges through an examination of the pertinent decisions.

A. Conflict Preemption

In the majority of conflict preemption cases the Burger Court has considered, it has held that the federal law preempted state law.²⁷ The Burger Court has occasionally upheld the state law, however, especially when the subject matter of the case involved particularly local interests.²⁸

1. The Actual Conflict Situation

In *Douglas v. Seacoast Products, Inc.*,²⁹ the Court struck down two Virginia statutes which limited the rights of nonresidents and aliens to fish within the state's territorial waters.³⁰ The statutes actually conflicted with a federal statute which, according to the Court,

²⁵ It has long been recognized that unauthorized acts of Congress are mere usurpations of power and not the supreme law of the land. See note 4 *supra*.

²⁶ One author argues that preemption decisions are dependent upon the protection afforded by the state law. The author concludes that state laws which protect "vital state interests" are generally not preempted. See Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 389 (1978).

²⁷ See, e.g., *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 104 S. Ct. 2518, 2520 (1984); *Southland Corp. v. Keating*, 104 S. Ct. 852, 861 (1984); *Aloha Airlines, Inc. v. Director of Taxation*, 104 S. Ct. 291, 292 (1983); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 108-09 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 184 (1983); *Toll v. Moreno*, 458 U.S. 1, 17 (1982); *Edgar v. Mite Corp.*, 457 U.S. 624, 635, 639 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).

²⁸ See, e.g., notes 35, 45, and 52 *infra*.

²⁹ 431 U.S. 265 (1977).

³⁰ *Id.* at 267, 286.

granted not only the right to navigate in state waters but also "the right to fish in Virginia waters on the same terms as Virginia residents."³¹ In addition to this actual conflict, the Court identified a strong federal interest: "Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent."³² Thus, although the states had a valid interest in preserving their marine life and natural resources,³³ this combination of an actual conflict and an area traditionally regulated by the federal government³⁴ left the Court little choice but to hold the state laws preempted.

The existence of an actual conflict requires the preemption of state law under the supremacy clause. The Court, however, can mold the preemption decision by varying the extent of the conflict necessary to label the situation an "actual conflict." For example, in *Rice v. Norman Williams Co.*,³⁵ the Court upheld a California statute which permitted liquor distillers to designate which wholesalers could import the distiller's products into the state, despite challenges that the state law was preempted by both the Sherman Antitrust Act and the Federal Alcohol Administration Act.³⁶

The Court stated that a hypothetical conflict would not suffice to preempt a state law. Rather, preemption requires "an irreconcilable conflict between the federal and state regulatory schemes."³⁷ Thus, the Court held that the California statute was not preempted on its face by the antitrust laws because it did not authorize conduct which constituted a violation of the antitrust laws in all situations.³⁸ The statute also was not preempted by the Federal Alcohol Admin-

31 *Id.* at 281. The Court utilized the historic decision of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to illuminate the meaning of the federal Enrollment and Licensing Act. 431 U.S. at 275. The Court noted that "[t]he federal licenses granted to Seacoast are . . . identical in pertinent part to *Gibbons*' licenses except that they cover the 'mackerel fishery' rather than the 'coasting trade.'" *Id.* at 280.

32 431 U.S. at 286.

33 The Court recognized that "States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." *Id.* at 277. *See also* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

34 431 U.S. at 272. "The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since." *Id.*

35 458 U.S. 654 (1982).

36 *Id.* at 656. The state statute provided that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." *Id.* at 656-57 (quoting CAL. BUS. & PROF. CODE ANN. § 23672 (West Supp. 1982)).

37 458 U.S. at 659.

38 *Id.* at 661. The Court, however, noted that:

upholding the validity of the designation statute will not insulate a distiller's invocation of the statute from scrutiny under the Sherman Act. The manner in which a

istration Act, which prohibited a distiller from establishing exclusive retail outlets, because the state law did not require exclusive retail outlets, but merely exclusive wholesalers.³⁹

Perhaps due to the lack of a strong federal interest in the area,⁴⁰ the Court did not find the requisite "irreconcilable conflict" and therefore permitted the state law to operate. The Court preserved the balance of federalism by not preempting the state law until such time as an irreconcilable conflict arose. By adopting this approach, the Court also deferred to Congress' ability to act if it wanted to preempt state regulation in the field, rather than acting legislatively itself.⁴¹

2. The Obstacle Conflict Situation

a. *The Early Cases*

Unlike the actual conflict situation, obstacle conflict cases require the Court to ascertain the federal law's objectives.⁴² In determining whether the state law poses an obstacle to those objectives, the Court generally considers the state and federal interests involved.⁴³ In two of the Burger Court's early obstacle conflict

distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason.

Id. at 662.

³⁹ *Id.* at 663-64.

⁴⁰ California had a legitimate interest in preventing liquor importers from frustrating a distiller's distribution chain by buying liquor from out-of-state wholesalers. *Id.* at 657.

⁴¹ This reluctance to legislate for Congress is a recurring theme in the Burger Court's preemption decisions. See, e.g., note 119 *infra* and accompanying text.

⁴² In *Perez v. Campbell*, 402 U.S. 637 (1971), the Burger Court articulated a two-step analysis for deciding when an obstacle conflict exists. The Court's job is to "first ascertain the construction of the two statutes and then determin[e] the constitutional question whether they are in conflict." *Id.* at 644.

⁴³ For example, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), the Court preempted a California statute which required the net weight label on food packages to accurately state the actual net weight of the food. When applied to packaged flour, the Court found that the statute posed an obstacle to the objective of the federal Fair Packaging and Labeling Act ("FPLA") which was "to facilitate value comparisons among similar products." *Id.* at 541.

The California statute did not permit variations between the stated and actual net weights while the FPLA (through the Federal Food, Drug and Cosmetic Act) allowed reasonable variations in weight due to the gain or loss of moisture. *Id.* at 531-33. The Court concluded that the state statute would induce the overpacking of flour (manufacturers had to be concerned only with short weighted packages, since the state did not prosecute for over weighting), while manufacturers operating under the federal statute would not need to overpack. Thus, consumers would be comparing flour packages with the same stated net weights but different actual net weights. *Id.* at 542-43.

Congress' exercise of power in the area was legitimate under the Constitution. In the absence of any strong local interest, however, the Court refused to uphold the state law when it might frustrate the federal law's objective. Justice Rehnquist, however, argued in dissent that "[t]his latter pre-emption is founded in unwarranted speculations that hardly

cases,⁴⁴ the Court permitted state statutes to operate where the state interest was strong and either no conflict or only a potential conflict existed.

In *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ware*,⁴⁵ a California statute permitted wage earners to sue and recover unpaid wages regardless of contrary private agreements.⁴⁶ The federal law, a New York Stock Exchange ("NYSE") rule promulgated pursuant to the Securities Exchange Act of 1934, compelled the arbitration of wage disputes.⁴⁷ The Court determined that the federal law's objectives were to insure fair dealing and to protect investors from unfair trading practices.⁴⁸ The NYSE rule did not affect fair dealing or investor protection and thus was subject to state regulation.⁴⁹

According to the Court, the state interest involved "a strong policy of protecting its wage earners from what it regard[ed] as undesirable economic pressures affecting the employment relationship."⁵⁰ In upholding the state law, the Court focused on this strong state interest and the lack of any strong federal interest. The Court found that the state law posed no real obstacle to the aims of the federal law.⁵¹

rise to that clear demonstration of conflict that must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field." *Id.* at 544.

The Court subsequently classified the preparation of foodstuffs for marketing as a particularly local concern in *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. and Bargaining Bd.*, 104 S. Ct. 2518, 2523 (1984). The Court nevertheless preempted a Michigan statute which established a state-administered system certifying certain producers' associations as collective bargaining agents for all producers of a particular commodity. Individual producers were not required to join the association. They were required, however, to pay a service fee to the association and were bound by contracts which the association negotiated whether or not they were a member of the association. The Court found that the Michigan law frustrated the purpose of the federal law by denying the individual producers the choice of whether or not to join a producers' association. *Id.* at 2520-27. Thus, the Court demonstrated how solicitous it can be towards exercised federal power. Again the federal government had legitimately regulated in the area and the Court refused to protect the state from that power, despite the presence of a "local" interest.

44 See Note, *supra* note 16, at 651-53. The author theorizes that during its early years, 1970-1975, the Burger Court maintained a state-directed bias in its preemption decisions.

45 414 U.S. 117 (1973).

46 *Id.* at 131.

47 *Merrill Lynch*, a broker-dealer firm, employed Ware as a registered representative. Ware quit his job to work for one of *Merrill Lynch's* competitors. Because of this competitive activity, he was found to have forfeited his rights (vested and unvested) to benefits from a noncontributory profit sharing plan. Ware filed a class action suit based on the California law. *Merrill Lynch* defended on the ground that Ware, who had been registered by the NYSE, by signing the necessary NYSE forms, had agreed to arbitrate any disputes arising from the termination of employment. *Id.* at 119-24.

48 *Id.* at 130. The Securities and Exchange Commission achieved this goal by supervising the self regulation of the securities exchanges. *Id.* at 128-29.

49 *Id.* at 138. The "housekeeping affairs" of the securities exchanges did not require uniformity. *Id.* at 136.

50 *Id.* at 139-40.

51 *Id.* The Court noted "that the proper approach [when dealing with preemption] is to

Subsequently, in *Kewanee Oil Co. v. Bicron Corp.*,⁵² the Court held that an Ohio trade secrets law was not preempted by the federal patent laws.⁵³ The federal patent laws sought to encourage invention and disclosure.⁵⁴ The state trade secrets law, conditioning protection on the fact that the trade secrets remain secret, sought to encourage invention and business fair dealing.⁵⁵ Despite this possible obstacle to the disclosure objective of the patent laws, which involve an area traditionally of federal concern, the Court upheld the state law as long as it posed no substantial risk that people with patentable discoveries would rely on the state law rather than a federally granted patent.⁵⁶

The Court emphasized that Congress' failure to prohibit the states from enacting trade secrets laws.⁵⁷ Accordingly, the Court found that no obstacle which would prevent the state law's operation yet existed. Unless the state law created a conflict with the federal law, the Court refused to preempt it and upset the existing balance of federalism in a situation where Congress had not yet exercised its power.⁵⁸

b. *Ray and de la Cuesta: Balancing Interests?*

The Court's balancing of state and federal interests in the conflict area apparently peaked in *Ray v. Atlantic Richfield Co.*,⁵⁹ a case involving both types of conflict preemption. The Court applied conflict preemption analysis to each provision of a Washington state law which regulated oil tankers in Puget Sound, rather than

reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Id.* at 127 (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)).

52 416 U.S. 470 (1974).

53 *Id.* at 474. The Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8.

The Court determined that this clause did not grant *exclusive* power to Congress. Therefore, "[t]he only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress" 416 U.S. at 479.

54 *Id.* at 480-81.

55 *Id.* at 481, 484.

56 *Id.* at 489.

57 *Id.* at 493. "Until Congress takes affirmative action to the contrary, States should be free to grant protection to trade secrets." *Id.*

58 Justice Douglas, dissenting, concluded that "[t]he conflict with the patent laws is obvious" and would have upheld the lower court's preemption of the state law. *Id.* at 496, 499 (Douglas, J., dissenting). The discretion of the Court to determine whether or not the state law poses an obstacle is apparent from the fact that the dissent's conclusion is the polar extreme of the majority decision. See also note 43 *supra*.

59 435 U.S. 151 (1978)

holding the entire statute preempted.⁶⁰ Thus, a portion of the statute which required state licensed pilots was preempted because it actually conflicted with the federal statute mandating federally licensed pilots.⁶¹ The Court preempted other provisions requiring particular design standards because they posed obstacles to the federal objective of a uniform national standard for tanker design.⁶² The Court, however, permitted the operation of the state law provision requiring tug escorts for substandard design tankers because the federal law was silent on the matter.⁶³ In preempting that part of the state law which conflicted with the federal law, the Court recognized both the legitimacy of the federal regulations and the importance of the federal interest in uniform tanker design.⁶⁴ At the same time, the Court accommodated the substantial state interest in protecting the marine environment from possible oil spill damage, noting that a state was free to pass "reasonable, nondiscriminatory conservation and environmental protection measures."⁶⁵

Ray epitomizes the Burger Court's concern for permitting the legitimate exercise of federal power without encroaching unnecessarily upon the states' reserved power. The Court preempted no more of the state law than necessary, thus reaching a decision which preserved federalism to the greatest extent possible.

The Court, however, did not follow this restrained balancing approach in *Fidelity Federal Savings & Loan Association v. de la Cuesta*.⁶⁶ In *de la Cuesta*, the Court preempted a California law which drastically limited the ability of federal savings and loan associations to

60 *Id.* at 159-61, 173-74. A three judge panel of the United States District Court for the Western District of Washington had preempted the state law in its entirety. *Id.* at 156.

61 The federal law, 46 U.S.C. §§ 215, 364 (1982) (repealed 1983), preempted that part of the state law requiring enrolled vessels to take on a state-licensed pilot while navigating through Puget Sound. Section 215 prohibited the states from requiring that federally licensed pilots obtain state licenses. Section 364 required such pilots to be licensed by the Coast Guard. 435 U.S. at 158-59.

62 The federal law, 46 U.S.C. § 391(a) (1982) (repealed 1983), imposed minimum design standards to ensure vessel safety and protect the marine environment. *Id.* at 160. The federal law thus preempted the state tanker design requirements because, according to the Court, the federal objective was to achieve uniformity in tanker design by "foreclos[ing] the imposition of different or more stringent state requirements." *Id.* at 163.

63 The state law provided that if its design standards were not met, a tug escort could be utilized. The Court upheld this provision because the Secretary of Transportation had neither promulgated his own requirement nor decided that such a requirement could not be imposed. *Id.* at 160, 171-72.

64 *Id.* at 166 n.15.

65 *Id.* at 164 (quoting *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 277 (1977)). But the Court also noted that the state could not impose a substantive rule which had the same objective as the federal law. 435 U.S. at 164. See also *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445-46 (1960) (The Court found that a Detroit ordinance aimed at reducing air pollution was not preempted by federal ship inspection laws. The Court concluded "that there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved."). *Id.* at 446.

66 458 U.S. 141 (1982).

exercise due-on-sale clauses in mortgages.⁶⁷ The Federal Home Loan Bank Board had issued a regulation, pursuant to the Home Owners' Loan Act of 1933,⁶⁸ which permitted, but did not require, federal savings and loan associations to include and exercise due-on-sale clauses.⁶⁹ The federal regulation's purpose was to ensure the financial soundness of the savings and loan associations through the use of the due-on-sale clauses.⁷⁰

In determining that the federal law preempted the California statute, the Court applied an obstacle conflict preemption analysis. It found that the California law posed an obstacle to the federal regulation's objective because it inhibited the free exercise of the due-on-sale clause and therefore impeded the ability of the savings and loan associations to deal with special situations.⁷¹

The *de la Cuesta* Court's reasoning differs from the traditional preemption analyses in several respects. First, the Court began with an occupation of the field preemption analysis and then expressly declined to decide that question.⁷² Second, the presump-

67 *Id.* at 170. A due-on-sale clause is "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." *Id.* at 145. The California Supreme Court had held that a lender could enforce a due-on-sale clause only to protect itself against the risk of default. See *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943, 953, 582 P.2d 970, 977, 148 Cal. Rptr. 379, 385-86 (1978).

68 The Board could prescribe rules and regulations "to provide for the organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 458 U.S. at 145 (quoting 12 U.S.C. § 1464 (a)). Since "mortgages are a central part of any savings and loan's 'operation,'" the Court concluded that the Board could issue regulations governing mortgages. 458 U.S. at 161.

69 *Id.* at 155. The Superior Court of California for Orange County found that the federal law occupied the field regarding savings and loan associations such that the California law could not operate. *Id.* at 149.

The Court of Appeals for the Fourth Appellate District reversed. That court identified several reasons why the state law was not preempted: 1) Congress had expressed no intent to preempt state due-on-sale law; 2) Congress had not occupied the field of regulation regarding savings and loan associations; 3) federal savings and loan associations traditionally were operated under state real property law; 4) congressional intent was not equal to the Board's intent to preempt; 5) no conflict existed between the state law (a substantive property and mortgage law) and the federal regulation (regulating savings and loan associations); and 6) the Board's regulation authorized, but did not require the due-on-sale clauses. *Id.* at 149-50.

70 *Id.* at 155-56.

71 *Id.* at 155. The Court also rejected an argument that since Congress had explicitly preempted or incorporated some state laws in the Home Owners' Loan Act ("HOLA"), the Board could not issue other regulations displacing state law. *Id.* at 162.

72 *Id.* at 154-55. The Court attempted to ascertain Congress' intent to preempt California's due-on-sale law by equating congressional intent with that of the Board. Because the Court found that the Board's intent to preempt was unequivocal and that it had acted within its authority, the federal regulation had the same preemptive effect as a federal statute. *Id.* at 158. The Court, however, expressly declined to decide "whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation." *Id.* at 159 n.14. Normally, an inquiry into congressional intent to preempt is only necessary in occupation of the field preemption cases. A conflict

tion against preemption which normally accompanies an occupation of the field analysis is absent from the Court's opinion. Additionally, the Court dismissed the state's interest in the integrity of its real property and contract laws although such areas traditionally have been respected as being within the state's domain.⁷³

The Court's failure to consider the state's interest in its property law and the decision that the state law was preempted⁷⁴ disrupted whatever balance of federalism existed in the area. Arguably, the Board's exercise of power was outside its authority. The Court could have upheld the state law until Congress expressed its desire to preempt. The Court, however, believed the Board acted within its authority and that the regulation was a legitimate exercise of federal power. As such, the state law posed an obstacle to the federal law's objectives. To maintain the division of power between the state and federal governments, the Court held the state law preempted.⁷⁵

The Court returned to a more restrained preemption approach in *Capital Cities Cable, Inc. v. Crisp*.⁷⁶ The *Crisp* Court held that Federal Communications Commission ("FCC") regulations⁷⁷ prohibiting cable television operators from deleting or altering out-of-state signals preempted an Oklahoma statute requiring operators to delete wine advertisements in the out-of-state signals which they re-

preemption analysis normally focuses on the federal law's objectives. See notes 24 and 42 *supra*. The Court also found no impossibility of performance situation and therefore no actual conflict. *Id.* at 155.

73 The Court found that preemption

principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

Id. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Justice Rehnquist disagreed on this point. He noted, in dissent, that "[d]ischarge of its mission to ensure the soundness of federal savings and loans does not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law that Congress has left to the States." *Id.* at 175 (Rehnquist, J., dissenting).

74 Justice Rehnquist, dissenting, argued that if the Board found that the California law "endanger[ed] the soundness of the system established by the HOLA and the [Federal Home Loan Bank Act], then the response contemplated by Congress is for the Board to 'withhold or limit the operation' of the system in California." *Id.* at 173 (Rehnquist, J., dissenting).

75 Congress subsequently preempted all state regulations regarding the enforceability of due-on-sale clauses by passing the Garn-St. Germain Depository Institutions Act, 12 U.S.C. § 1701j-3 (1982). For a discussion of *de la Cuesta* and the Garn-St. Germain Act, see Note, *Garn-St. Germain: Congress Preempts Due-On-Sale—Fills Void Left by De La Cuesta*, 12 STETSON L. REV. 461 (1983).

76 104 S. Ct. 2694 (1984).

77 As in *de la Cuesta*, this case involved a federal agency's regulations. The Court quoted the language from *de la Cuesta* which held that federal regulations had the same preemptive effect as federal statutes subject only to the determination of whether the agency had exceeded its authority. *Id.* at 2700.

transmitted to their customers.⁷⁸

Because the state law regulated cable signal transmission, an area which the FCC had claimed as federal territory, the Court found a "generalized federal pre-emption of state regulation of cable signal carriage."⁷⁹ The Court could have held the state law preempted on an occupation of the field analysis because the FCC's intent was to preclude the states from regulating signal carriage. Nevertheless, the Court decided to examine the specific federal regulations involved.⁸⁰ The Oklahoma statute negated the federal objective of providing widespread availability of diverse cable services⁸¹ by forcing the operator either to drop the programming or face criminal charges under the state law.⁸² The Court's utilization of an obstacle conflict analysis rather than an occupation of the field analysis demonstrates its hesitancy to use this more comprehensive type of preemption absent compelling necessity.

The Court first found that the federal regulation preempted the state law. Then, because the twenty-first amendment was involved,⁸³ the Court balanced the state interest in discouraging alcohol consumption through a ban on its advertisement against the federal interest in a uniform, national cable communications policy.⁸⁴ Because the state ban on alcohol advertising did not extend

78 *Id.* at 2709. Violation of the state statute resulted in criminal prosecution. *Id.* at 2698.

The FCC had also set up a compulsory licensing system which permitted retransmission of distant broadcast signals without requiring the cable operator to obtain permission from the copyright owner. Instead, the operator paid a percentage of its gross income into a central royalty fund. The operator's inclusion in the licensing system was predicated on the nondeletion, nonalteration of commercial advertising. By complying with the Oklahoma statute, the operator lost the protection of the licensing system and was subject to liability for copyright infringement. To avoid this consequence the operator had to abandon the transmission, thus frustrating the federal objectives. *Id.* at 2706-07.

79 *Id.* at 2703.

80 The FCC had "must carry" rules requiring the transmission of broadcast signals of local television stations within a certain area around the cable operator. Nondeletion rules applied to the signals which the cable operators were required to carry. The FCC also exclusively regulated the transmission of "pay cable" signals. The "must carry" and nondeletion rules did not apply to pay cable, but the Court concluded that the Oklahoma statute also interfered with the federal objective of diverse programming as regarded pay cable. To delete all wine commercials from the pay cable signal would be prohibitively burdensome, and the choice for the operator again would be to forego the programming or face criminal prosecution for not deleting the commercials. *Id.* at 2703-04.

81 *Id.* at 2705. The Court would not disturb the FCC's judgment that this goal could only be achieved through federal preemption of state and local regulation.

82 The *Crisp* Court could have used an actual conflict analysis because the state law required the operator to delete wine commercials while the federal law forbade such deletion. Therefore, an impossibility of performance situation existed.

83 The twenty-first amendment states, in part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

84 104 S. Ct. at 2707.

to print and broadcast advertisements for beer or to advertisements for any alcohol in magazines and newspapers published outside Oklahoma, the Court found that the state's interest was less substantial than the federal interest. According to the Court, the selectivity of the ban indicated the limited nature of the state interest. Thus, the twenty-first amendment did not save the state statute from preemption.⁸⁵

The Court engaged in this balancing test in part because Oklahoma asserted a constitutional ground for its actions and because the regulation of the flow of alcohol into a state is a particularly local concern.⁸⁶ However, when viewed as a preemption decision with a perspective toward maintaining the balance of power between the state and federal governments, the Court had to find the state law preempted. The FCC had legitimately exercised its power. The state law could not be reconciled with the objectives of the federal regulation. The twenty-first amendment did not save the state law from the preemptive effect of the federal regulation; therefore the state law had to fall.⁸⁷

Conflict preemption provides the Court with some discretion in determining whether a state law is preempted. The strict standard for an actual conflict situation and the Burger Court's willingness to dissect a state law and apply a preemption analysis to each provision enhances the chance that at least part of the state law will survive a preemption attack. On the other hand, the Court's willingness to ignore a particularly local concern, as in *de la Cuesta*, decreases the likelihood that a state law can survive a preemption challenge. Despite these incongruities, the Court has been consistent in attempting to preserve federal power where it has been legitimately exercised while simultaneously preserving the state law when the federal law is silent on the matter.⁸⁸

B. *Occupation of the Field*

Occupation of the field is the most comprehensive type of preemption and affords state law little chance of survival. Accordingly, the Court has been hesitant to find that the federal legislation occupies the field. In fact, a majority of the Burger Court's cases involving occupation of the field preemption have upheld the state law.

⁸⁵ *Id.* at 2709.

⁸⁶ The Court noted that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." *Id.* at 2707.

⁸⁷ When a state's direct regulation of the sale or use of alcohol is not involved, the Court has stated that "a conflicting exercise of federal power may prevail." *Id.* at 2708.

⁸⁸ Although the Burger Court has found that Congress' silence may itself preclude the operation of state law, *see* note 4 *supra*, the Court generally preserves state law in such a situation. *See* note 63 *supra* and accompanying text.

Nevertheless, as with conflict preemption, the Court has indicated that it will examine the subject matter of each case and will consider, perhaps more carefully than in conflict cases, the state interest involved.

1. The "Clear and Manifest" Intent Requirement

One of the few cases where the Burger Court has held a state law preempted based upon an occupation of the field analysis is *City of Burbank v. Lockheed Air Terminal, Inc.*⁸⁹ *City of Burbank* involved a city ordinance prohibiting jet takeoffs during the late evening and early morning hours.⁹⁰ The Court found that the federal scheme of regulating aircraft noise was so pervasive that it preempted the ordinance.⁹¹ According to the Court, Congress, by passing the federal regulations, intended to preclude the states from passing their own regulations.

The Court recognized that states traditionally have had an interest in noise control. Nevertheless, the Court found no room for state regulation because of the pervasiveness of the federal scheme⁹² and the dominant federal interest in uniformity of air traffic control.⁹³ The strong need for uniformity persuaded the Court that Congress had intended to preempt state regulations even though it had not specifically so stated.⁹⁴

While the Court held the city ordinance preempted to maintain a balance of federalism,⁹⁵ it has since been more hesitant to oust a state law due to an inference of congressional intent to preempt. For example, in *Goldstein v. California*,⁹⁶ the Court held that neither the copyright clause of the Constitution⁹⁷ nor the federal copyright laws enacted thereunder⁹⁸ preempted a California statute making

89 411 U.S. 624 (1973). See generally Comment, *City of Burbank v. Lockheed Air Terminal, Inc.: Federal Preemption of Aircraft Noise Regulation and the Future of Proprietary Restrictions*, 4 N.Y.U. REV. L. & SOC. CHANGE 99 (1974).

90 411 U.S. at 625-26.

91 *Id.* at 638. The Federal Aviation Act gave the Federal Aviation Administration ("FAA") broad authority to regulate navigable airspace. *Id.* at 626-27. The Noise Control Act of 1972, which amended the Federal Aviation Act, allowed the FAA (in conjunction with the Environmental Protection Agency ("EPA")) to control aircraft noise. *Id.* at 629.

92 *Id.* at 638.

93 *Id.* at 639.

94 Justice Rehnquist, joined by Justices Stewart, White and Marshall, dissented. He found no "clear and manifest" intent to preempt the city ordinance. According to Rehnquist, Congress could preempt the local regulations if it so chose, but until it did so, the city ordinance should not be preempted. *Id.* at 653 (Rehnquist, J., dissenting).

95 The Court would not legislate for Congress: "We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." *Id.* at 640.

96 412 U.S. 546 (1973).

97 See note 53 *supra*.

98 17 U.S.C. §§ 4, 5 (1970). The statute was amended in 1971 to allow federal copy-

record piracy a crime.⁹⁹

The Court noted that the states had not relinquished to the federal government all power to grant copyrights. Therefore, the states could regulate until such time as Congress decided to bring the specific material within the statutory scheme.¹⁰⁰ Congress, in passing the copyright laws in 1909, had exhibited no intent to occupy the field of copyrighting sound recordings.¹⁰¹ If Congress passed such a law, then the state law could be preempted either expressly or due to a conflict.

Although the area of copyright laws is one of traditional federal concern, California had a strong economic interest in protecting the integrity of the recording industry. The Court refused to strip the state of its regulatory power merely on an inference of a congressional intent to preempt. Rather, the Court believed that it was for Congress to pass a law which expressly included sound recordings in the statutory scheme.¹⁰² The Court maintained a balance of federalism because Congress had not yet exercised its power. The Court also refrained from performing a legislative function.

Subsequently, in *New York State Department of Social Services v. Dublino*,¹⁰³ the Court refused to find that a provision of the Social Security Act which established a federal work incentive program occupied the field. It upheld a New York statute requiring certain welfare recipients to participate in a state employment program as a condition to receiving federal aid. In reaching its decision, the Court stressed the need for federal-state cooperation in solving the welfare problem.¹⁰⁴ The Court found that the state had a legitimate interest in encouraging its citizens to work and in dealing with a local problem which had a great economic impact upon the

right protection of recordings but only those produced after Feb. 15, 1972. These sections have been recodified as 17 U.S.C. § 102 (1982).

99 412 U.S. at 571. Record piracy is "the unauthorized duplication of recordings of performances by major musical artists." *Id.* at 549.

100 *Id.* at 558. Materials which could be included under the copyright clause could "be of purely local importance and not worthy of national attention or protection . . ." *Id.*

101 The Court noted:

Since § 4 employs the constitutional term "writings," it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply. However, in the more than 60 years which have elapsed since enactment of this provision, neither the Copyright Office, the courts, nor the Congress has so interpreted it.

Id. at 567.

102 *Id.* at 559. Congress subsequently amended the copyright laws to include sound recordings. See note 98 *supra*.

103 413 U.S. 405 (1973).

104 *Id.* at 413. The Work Incentive Program ("WIN") amended the Social Security Act so that states were required to include WIN in their Aid to Families with Dependent Children programs. Under WIN, the states had to require, among other things, that employable individuals register for training and employment. *Id.* at 410.

state.¹⁰⁵ Thus, despite the pervasiveness of the federal work incentive scheme, the Court refused to infer a congressional intent to preempt absent a "clear manifestation" of that intent.¹⁰⁶

The Court has also recognized the state's interest in dealing with the problem of illegal aliens and its broad authority under the police power to protect workers by regulating employment relationships. In *DeCanas v. Bica*,¹⁰⁷ a California statute prohibited an employer from knowingly employing illegal aliens if this would adversely affect resident workers.¹⁰⁸ The Court held that Congress did not intend, by passing the Immigration and Nationality Act ("INA"), to preclude all state regulation of aliens.¹⁰⁹

The comprehensiveness of the INA, which regulated the admission of aliens into the country, did not automatically include the employment of illegal aliens. To the contrary, the Court cited evidence of Congress' intent that states could regulate such employment in ways consistent with federal laws.¹¹⁰ Although it refused to preempt under an occupation of the field analysis, the Court noted the possibility that the state law could still pose an obstacle to the federal law's objective.¹¹¹

In *Goldstein*, *Dublino*, and *DeCanas* the Court emphasized the requirement of a clear and manifest congressional intent to preempt state law. This requirement allows the Court to maintain a balance of federalism by upholding the state law until it conflicts with the federal law or is expressly preempted by it. That the Court in both *Dublino* and *DeCanas* reserved judgment on whether the state laws would be preempted if they conflicted with the federal law suggests that the Court is more concerned with federalism than with states'

105 *Id.* at 413.

106 *Id.* at 413, 415. The Court demonstrated its desire to maintain a balance between state and federal power and also its hesitancy to preempt using an occupation of the field analysis.

[I]f Congress is authorized to act in a field, it should manifest its intention clearly.

It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Id. at 413 (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)). The Court declined to rule on whether the New York statute conflicted in any way with the federal provision. Such a decision was to be made first by the lower court. *Id.* at 423.

107 424 U.S. 351, 356-57 (1976). See generally Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977).

108 The statute provided that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 424 U.S. at 352 (quoting CAL. LABOR CODE ANN. § 2805 (a) (1971)).

109 424 U.S. at 359.

110 *Id.* at 359, 361.

111 424 U.S. at 363-64. For a conflict preemption case dealing with aliens, see *Toll v. Moreno*, 458 U.S. 1 (1982) (preempting a state law which barred domiciled G-4 aliens from acquiring in-state status for purposes of state university tuition).

rights.¹¹²

2. Occupation of the Field—The Nuclear Power Cases¹¹³

A relatively new area in which preemption problems have arisen is that of nuclear power. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,¹¹⁴ the Court upheld a California statute conditioning the construction of nuclear power plants on a state commission finding that adequate storage and disposal facilities were available for the nuclear waste. The Atomic Energy Act of 1954, under which the federal government chose to exclusively regulate the nuclear and safety aspects of nuclear power plants, left the states free to regulate on economic questions such as generating capacity and rates.¹¹⁵

In *Pacific Gas*, the Court did not have to infer Congress' intent to preempt; that intent was clear. Rather, the Court had to decide if the state law fell within the occupied field. Under the congressionally mandated system of dual regulation, the state statute need only be preempted if it regulated the safety aspect of nuclear power plants.¹¹⁶ The Court found that the state legislation did not fall within the occupied field because it did not regulate the safety of the nuclear power plant. According to the Court, the statute served economic purposes because a waste disposal problem would lead to unpredictably high operating costs, thus making the building of the plant economically unfeasible.¹¹⁷

By not holding the state law preempted, the Court upheld the system of dual regulation which Congress had established—permitting the states to regulate aspects which were of local concern while not hindering the operation of a uniform system regarding the

112 One author contends that *Goldstein* and *Dubino* (as well as *Kewanee Oil* and *Merrill Lynch* from the conflict area) demonstrate the Court's turn toward a state-directed preemption posture. See Note, *supra* note 16, at 652.

113 See generally, Comment, *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation*: *Pacific Gas and Electric and Silkwood*, 33 CATH. U.L. REV. 899 (1984).

114 461 U.S. 190 (1983). For a discussion of the case, see *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 238-44 (1983).

115 461 U.S. at 205. Previously, the Court had summarily affirmed a lower court's invalidation of a state law which attempted to regulate radioactive releases by nuclear power plants. 405 U.S. 1035 (1972) *aff'g mem.*, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971).

116 461 U.S. at 212-13. One commentator suggests that this premise is neither reflective of congressional intent nor consistent with the state police power to protect the public health and safety. See Comment, *supra* note 113, at 931.

117 461 U.S. at 213-14. The Burger Court accepted the court of appeals' interpretation that the purpose of the statute was economic rather than safety related, because an "inquiry into legislative motive is often an unsatisfactory venture." *Id.* at 216. Such a statement is rather anomalous because the Court itself must inquire into congressional intent in determining whether occupation of the field preemption will occur.

safety of nuclear power plants.¹¹⁸ The Court realized that by finding occupation of the field preemption, it would be performing, in effect, a legislative function, and it declined to do so.¹¹⁹

Notwithstanding its decision in *Pacific Gas* which required the preemption of any state law which sought to regulate the safety of nuclear facilities, the Court in *Silkwood v. Kerr-McGee Corp.*¹²⁰ upheld an award of punitive damages under a state law tort action for injuries caused by nuclear radiation.¹²¹ The Court rejected an argument that punitive damages are imposed as a punishment and, as such, regulate conduct related to safety, which Congress had preempted.¹²²

The Court determined "[t]hat Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies" and placed the burden on the defendant to show that Congress intended to preclude the award of punitive damages.¹²³ The Court admitted that its decision created "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability."¹²⁴ Nevertheless, the Court believed it could live with this tension because it assumed that Congress was doing the same.¹²⁵

Significantly, the *Silkwood* Court abandoned an occupation of the field preemption analysis in cases of damage from radiation injury.¹²⁶ According to the Court, preemption should be based "on

118 According to one commentator, neither *Pacific Gas* nor *Silkwood* effectuates the purpose of federal occupation of the nuclear safety field. See Comment, *supra* note 113, at 934.

119 461 U.S. at 223. The Court also refused to preempt the state law under an obstacle conflict analysis. Although the federal law sought to encourage the development of nuclear power, Congress had granted the states enough authority to slow the development of nuclear power for economic reasons. The Court left it for Congress to remedy the problem of a state which used that authority to "undercut a federal objective." *Id.* at 221-23.

One author has noted that the trend in the Court's preemption decisions has been toward "uphold[ing] state statutes whenever possible." See Note, *California's Nuclear Power Regulations: Federal Preemption?*, 9 HASTINGS CONST. L.Q. 623, 628 (1982).

120 104 S. Ct. 615 (1984).

121 *Id.* at 626. Karen Silkwood, an employee of Kerr-McGee, and her property were contaminated by radiation from the defendant's nuclear facility. Silkwood died in an unrelated car accident, but her father, as executor of her estate, sued Kerr-McGee for damages on common law tort principles. Kerr-McGee was subject to regulations and licensing by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act. A jury awarded \$500,000 personal injury, \$5,000 property, and \$10 million punitive damages. The court of appeals reversed the award of punitive damages because of the federal statute regulating the plant. *Id.* at 617-20.

122 *Id.* at 622.

123 *Id.* at 623, 625.

124 *Id.* at 625. One author contends that both *Silkwood* and *Pacific Gas* extend broad authority to the states to regulate nuclear power, including radiation safety. See Comment, *supra* note 113, at 937-38.

125 104 S. Ct. at 625.

126 *Id.* at 626.

whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.”¹²⁷ The Court found that no such conflict existed.¹²⁸

In general, the Burger Court has been concerned with preserving legitimately exercised federal power from encroachment by state law. The Court’s decision in *Silkwood*, however, protected the states from a legitimate exercise of federal power. The federalism which the Court preserved in *Pacific Gas* it abandoned in *Silkwood*. The possibility that a victim may be left without a remedy influenced the Court’s decision to uphold the state law. Although Congress meant to preempt punitive damages because they regulated safety, Congress, for the same reason, did not intend to preempt compensatory damages. Congress did not intend to leave a victim without a remedy.¹²⁹ The combination of occupation of the field preemption and a strong state interest—the protection of citizens from injury—overrode the Court’s federalism policy.

The Burger Court’s general pattern in occupation of the field cases has been to uphold the state law. While the subject matter is important to the decision, the Court’s decisions also depend on a reluctance to preempt state law based on an inference of congressional intent. If the congressional intent is clearly expressed, the Court appears reluctant to place the state law within the occupied field.

III. Conclusion

Although the Burger Court has applied earlier Courts’ basic preemption standards, it has adapted these standards with a view to the subject matter of the case and the type of preemption involved. The Court’s reasoning in preemption cases focuses primarily upon two goals: 1) not restraining the legitimate exercise of federal power; and 2) permitting the states to regulate in areas where Congress has not yet exercised its power. These factors form the foundation of the Court’s policy of maintaining a balance of federalism. In determining whether state law is preempted, the Court also considers the subject matter involved.

The Court’s attempt to preserve a balance of federalism will

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 629. Justice Blackmun, in dissent, pointed out that the conduct which punitive damages in effect regulated was the safety procedures of a nuclear facility licensed and regulated by the federal government. *Id.* at 628. “The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims.” *Id.* at 629 (Blackmun, J., dissenting).

produce different results depending on the type of preemption. Under a conflict preemption analysis, the Court will be more willing to hold state laws preempted because Congress has in fact legislated in the particular area. The preemption of the state law serves as a recognition of the expanded powers of the federal government. The Court generally will not permit state laws to stand if they conflict with the federal law because they inhibit the legitimate exercise of federal power. Nevertheless, to the extent that Congress has not legislated, the Court will not preempt a state law, especially one involving a local interest. The Court will neither restrict Congress' legitimate exercise of its regulatory power nor expand that power for the Congress.

In occupation of the field preemption, the Court has observed a presumption against the preemption of state law by requiring that congressional intent to preempt be clear and manifest. The Court's reluctance to preempt state law based on an inference of congressional intent is consistent with the achievement of the Court's goals. State laws generally are permitted to operate until such time as Congress chooses to act, either expressly preempting the state law or creating a situation where the state law conflicts with the federal law. By requiring Congress to act first, the Court retains its judicial role and avoids a legislative role, a significant distinction in a government based upon the separation of powers.

Because of the fact specific nature of preemption, discerning a "doctrine" in the Burger Court's preemption decisions may be difficult. Nevertheless, the Court does attempt to maintain a thread of consistent reasoning in its analysis—a policy which forms a foundation for its decisions. The preemption doctrine is, in the final analysis, a product of our federalist system. The Burger Court's preemption decisions are rooted in maintaining that federalism.¹³⁰

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130 In a recent preemption decision, *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371 (1985), the Court reaffirmed its concern for maintaining a federal-state balance. The Court held that federal regulations concerning blood plasma collection from paid donors did not preempt local ordinances governing the plasma collection process. *Id.* at 2380. The federal regulations did not expressly preempt the local ordinances nor did the ordinances conflict with those regulations. *Id.* at 2375, 2379.

With regard to occupation of the field preemption, the Court refused to infer "solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Id.* at 2377. According to the Court, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Id.* at 2378. The Court also rejected the County's argument that the dominance of the federal interest in maintaining a national blood supply implied an intent to preempt local ordinances. "Nothing in [the National Blood Policy] takes plasma regulation out of the health-and-safety category and converts it into an area of overriding national concern." *Id.* The Court thus continues to maintain a balance between federal power and states' rights.