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Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking

Judicial determinations that federal statutes have pre-empted otherwise valid state laws\(^1\) raise issues of great practical interest to parties subject to both federal and state regulation. Such determinations also present theoretical issues relating to the separation of powers between the national and state governments. The focus of this note is the impact of federal regulatory agency\(^2\) rules and policies on the judicially established standards of pre-emption. This note contends that courts, when deciding whether a state law is pre-empted, have increasingly deferred to the position taken by the federal agency most directly involved, where Congress has delegated broad regulatory powers to an agency without expressly addressing the pre-emption issue. To test this hypothesis this note will first sketch the pre-emption doctrine as articulated by the courts. Secondly, it will review some of the literature on the theoretical and practical aspects of the pre-emption doctrine. Finally, this note will test the hypothesis that courts have deferred to federal agencies on pre-emption questions by focusing on four recent decisions of the United States Supreme Court and federal appellate courts.

**The Supreme Court's Articulated Standards**

Pre-emption problems arise when a state law, legitimately enacted under the state's general police or welfare power, is challenged as having been "pre-empted" by federal law operating on the same subject matter. If there is a direct conflict between state and federal law, the federal must prevail. Federal law is the supreme law of the land, state law to the contrary notwithstanding.\(^3\) On the other hand, it is equally clear that while states cannot legislate in areas of exclusive federal jurisdiction, they may pass laws in areas of concurrent power.

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\(^1\) The scope of this note is limited to the resolution of apparent statutory conflicts between federal and state laws.

\(^2\) The term "regulatory agency" refers to any federal government agency, including an executive department, which has either the quasi-legislative power to make and enforce rules, or the quasi-judicial power to adjudicate disputes. Cf. the Administrative Procedure Act's definition of "agency," 15 U.S.C. § 551(1) (1970).

\(^3\) U.S. Const. art. VI, para. 2; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), sets out the broad areas of dominant authority of the federal government under the commerce clause, and the corresponding limits on state regulatory powers.
where Congress has the power to displace them but has not yet done so.* The question is what standards the courts should apply in determining the validity of state law, when Congress has acted in the same general area as the state, and when it is not impossible to enforce both sets of laws. Is the state law invalidated by implication because of the congressional legislation, and if not, does the federal law affect the state law at all? This is the problem of pre-emption.

There is no question that the federal courts must act to prevent the purposes of Congress from being frustrated by state activity. A frequently used standard of pre-emption is that of Mr. Justice Douglas in *Rice v. Santa Fe Elevator Corp.*:

> It is clear that since warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain . . . . Congress may, if it chooses, take unto itself all regulatory authority over them . . . , share the task with the States, or adopt as federal policy the state scheme of regulation. . . . The question in each case is what the purpose of Congress was.

Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute. . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the

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* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) [hereinafter cited as *Pre-emption as a Preferential Ground*].

Some workable solution must be found, however, since—as opposed to Congress—the courts cannot constitutionally neglect the pre-emption problem. Article VI, section 2 requires that the judiciary maintain the supremacy of federal law, "the laws of any State to the contrary notwithstanding." When faced with the issue, a court must decide the constitutional question whether it is necessary to invalidate a given state law to preserve federal supremacy . . .

Id. at 209-10 (footnote omitted).
States undisturbed except as the state and federal regulations collide. It has been suggested that these standards are unduly vague, general, and conclusory and lack analytical standards for determining conflict. The Rice standards also require a correct interpretation of legislative intent, often an impossible task. Legislative saving clauses framed in the language of the Court—that pre-emption is not lightly to be inferred—are rarely helpful. Some critics have gone so far as to suggest that the Court decides pre-emption cases with more attention to ad hoc policy considerations than to the intent of Congress. An alternate theory is that pre-emption has served as a "preferred ground" for decisions that might have been as easily reached on other substantive constitutional grounds.

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6 331 U.S. 218, 229-31 (1947) (citations omitted) (emphasis added).
7 E.g., in Hines v. Davidowitz, 312 U.S. 52 (1941), Mr. Justice Black commented: 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. 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 expressions: 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.
8 Id. at 67 (footnote omitted).
9 Pre-emption as a Preferential Ground, supra note 5, notes:
   By framing the pre-emption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining which Congress' and which congressman's intent is relevant, this manner of stating the issue suggests that the pre-emption question was consciously resolved and that only diligent effort is needed to reveal the intended solution. But Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law. Like the conflict of laws questions which are inherent in state statutes but seldom articulated, pre-emption questions are implicit in many federal statutes but remain for the courts to answer.
10 See Wham & Merrill, supra note 9; Hirsch, supra note 8, at 521-22; Powell, Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II, 22 COLUM. L. REV. 28, 48-49 (1922).
The Practical Impact of Pre-emption Standards

Regardless of the actual motivation for Supreme Court decisions based on pre-emption, there can be no doubt about the practical importance of the pre-emption doctrine in nearly all areas of law. A simple listing of the broad areas where state laws have been challenged or overturned as pre-empted by federal law—labor law, antitrust law, agricultural marketing, auto safety, government procurement, state taxation, pollution standards, and patents—should impress upon the practitioner the potential impact of pre-emption on any area of activity subject to both state and federal regulation. It should also warn the legislative draftsman, whether he works in Washington or in a state capital, of one area of potential difficulty. Given the expansion of state regulatory law, it is important to understand pre-emption as it relates to those subject to conflicting rules emanating from national and state sources.

regulation). For a discussion of pre-emption and double jeopardy, see Grant, The Scope and Nature of Concurrent Power, 34 Colum. L. Rev. 995 (1934).


For an excellent survey of this complex area of pre-emption law, see J. Flynn, Federalism and State Antitrust Regulation 138-200 (1964).


See, e.g., Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969); see text accompanying notes 65-78 infra.


See Wham & Merrill, supra note 9, at 189-90.


United's problem was one that has become increasingly common with the steady expansion of administrative regulation by the states. Federal regulation having been extended to its constitutional limits in many fields, the system of federalism is now being put to the test with unprecedented frequency as state regulatory power is being pushed to its constitutional limits.

Id. at 234 (footnote omitted) (emphasis in original).

The proper remedy to federal-state regulatory conflicts is sought from a three-
Problems of Public Policy

Despite agreement in the literature with regard to pre-emption's importance and the difficulty of interpreting the Supreme Court's articulated standards, there is relatively little agreement on the proper standard for pre-emption. This uncertainty reflects the lack of unanimity over the constitutional sources of the doctrine. The conventional view holds that the power of pre-emption is based on the supremacy clause. Therefore, the pre-emption question is one of legislative and statutory intent, for which a clearer standard of judicial analysis is needed.

On the other hand, some commentators have challenged the supremacy theory. For these commentators, the source is not the supremacy clause, which only voids state law when there is a clear conflict. Rather, the source of pre-emption lies in the nature of con-
current state-federal power. In this concurrent power theory, the issue is more broadly stated: pre-emption occurs only when the area is such that it cannot be adequately regulated by the states.\(^{27}\) It is said that the supremacy clause theory, by framing the question in terms of congressional intent, so weights the scales in favor of national uniformity that the states may be deprived of powers that are reserved to them.\(^{28}\)

And, while the supremacy theory stresses national uniformity and clarity of standards,\(^{29}\) the concurrent power theory stresses decentralization and the advantages of a federal system.\(^{30}\)

The concurrent power theory, however, poses its own problems. First of all, it is as yet unclear how to balance federal and state interests while giving proper deference to federal policies in cases where direct conflict cannot be found. Secondly, proponents of the concurrent power theory would be opposed or controlled.” This is the approach taken by some of the more recent supremacy clause cases that can be read as establishing an incompatibility doctrine.

However, Hamilton made it clear that the federal powers, although to be supreme \textit{when exercised}, were intended to exist \textit{concurrently} with the states in many, if not all, of the enumerated areas.\(^{1}\)


\(^{27}\) There is a recognized doctrine of dynamic federalism which may be summarized as follows: Although the Constitution confers powers on the national government, reserves powers to the states, and to some degree restricts both, such power definition is not the sole source for determining the proper federal-state relation at any given time. There are some problems which are of such a nature and dimension that they cannot adequately be handled by the states. These should be dealt with by the national government and by it only, state action being “preempted.” It is believed that it is in this area that the doctrine of preemption must and will be developed.


\(^{28}\) It is submitted that the Supreme Court abdicates its duty as arbiter of the federal system when it makes the test of preemption the intent of Congress, and no construction should be given to the necessary and proper clause which would diminish even further the Court’s function in allocating power in the federal system. First, it is questionable whether the action of the Congress should be allowed to conclusively preclude state action in any given area, unless that preclusion is justified in terms of modern federalism. It is equally doubtful whether Congress should have the sole power to decide to preclude or not preclude. The framers intended the Supreme Court, not the Congress, to determine where the demands of federalism should require the line to be drawn.

Freeman, \textit{supra} note 8, at 638.

\(^{29}\) \textit{See}, e.g., Schwarzer, \textit{supra} note 22.

\(^{30}\) If the states are to reassume their part in the maintenance of that balance of power which the Constitution seems to have contemplated, they must undertake a responsibility which they have heretofore shunned, and, in doing so, they must receive the support of the Supreme Court among whose duties is the defense of “the states from the exaggerated claims of the Union.”

Kurland, \textit{supra} note 27, at 283–84 (footnotes omitted). \textit{See also} Comment, \textit{Air Pollution, Pre-emption, Local Problems and the Constitution—Some Pigeonholes and Hatracks}, 10 Ariz. L. Rev. 97 (1968).
theory claim that it provides a necessary restraint on the pre-emptive power of Congress, there being no other limits on the commerce power.\(^8\)

This need not be the case. Some have claimed that limits to congressional power remain, and that these, not the pre-emption doctrine, are the proper means of protecting the reserve powers of the states.\(^9\)

**Recent Decisions of the Federal Courts and a "New" Approach**

The purpose of this note is to gauge the effects of the intrusion of federal regulatory agency rules, standards, and attitudes into the already existing tangle of congressional intent, state legislation, and doctrinal theory. The notion that the federal courts should take notice of administrative policies is hardly a new idea. Professor Hirsch has asserted a "one master" theory of pre-emption:

Since the Court purports to be seeking and applying congressional intent in these cases, it appears to use the theory as a means of determining congressional intent. But this intent is a legal fiction; the theory itself is the real ground of decision. When Congress delegates broad regulatory power to a federal agency without addressing itself to the question of preemption in any detail, the Court infers that the agency will make all of the regulations which it deems to be required in the field. As a corollary of this principle, the Court generally infers that supplementary state regulations are to be preempted either because of an inference that the federal agency's failure to establish similar regulations represents an agency judgment that they are not

\(^8\) There is today little left for Supreme Court decision so far as the extent of congressional power is concerned. Though Professor Schwartz deplores the result, apparently because the Court has gone beyond even the Marshall conception of federal power, he depicts it accurately when he says: "there are really no limitations other than Congressional self-restraint upon the federal commerce power." He does not, of course, mean that action taken under the commerce power is not subject to the other limitations on federal authority contained in the Constitution. He means simply that by reason of opinions such as *Wickard v. Filburn* [317 U.S. 111 (1942)], Congress is now free to read any economic activity as coming directly within the definition of interstate commerce or as affecting commerce so that it may be subjected to federal regulation. In short, the Court has read out of the commerce clause the qualifying phrase: "with foreign Nations, and among the several States, and with the Indian Tribes . . . ." Or it may be that the interdependence resulting from the advances of technology, rather than the Court, has made the qualifying phrase obsolete.


\(^9\) See, e.g., Engdahl, *Preemptive Capability of Federal Power*, 45 U. Colo. L. Rev. 51 (1973), which stresses the "necessary and proper" clause as the real limit to pre-emptive power. Comment, *supra* note 30, suggests that the due process clause or the ninth amendment might be used to combat uniform standards that threaten vital local needs (e.g., thermal inversions due to overly permissive national auto emission standards).
needed or because of the operation of other presumptive considerations such as the need for national uniformity.\textsuperscript{83}

If it is true that a broad grant of authority does raise a negative presumption with regard to state regulation, it would seem logical that the agency's own stated position\textsuperscript{84} would influence the court. Although this has not been the uniform practice in the past,\textsuperscript{85} the cases explored in this note suggest that courts have relied increasingly on agency policies toward pre-emption when the intent of Congress is not clear. This reliance may take two forms: (1) no finding of pre-emption when there is a history of state-federal cooperation or when there is acquiescence by the agency to state regulation, or (2) a finding of pre-emption when the stated policy of the agency is hostile to state regulation.

\textbf{The Social Security Agency and Welfare Law}

The most recent Supreme Court decision to support this hypothesis is \textit{New York Department of Social Services v. Dublino}.\textsuperscript{86} The pre-emption issue was whether the eligibility requirements of the Work Incentive Program (WIN) of the Social Security Act's Aid to Families with Dependent Children (AFDC) provisions\textsuperscript{87} nullified state attempts to put additional restrictions on eligibility.\textsuperscript{88} Mr. Justice Powell's opinion placed great emphasis on determining the intent of Congress and found that the legislative policies favored state supplementation. Congress' goal of promoting adequate job training could not be achieved through the WIN program alone, so state supplemental programs had been anticipated by Congress and were essential to pro-

\begin{footnotes}
\textsuperscript{83} Hirsch, \textit{supra} note 8, at 549-50 (footnote omitted).
\textsuperscript{84} \textit{Pre-emption as a Preferential Ground}, \textit{supra} note 5, at 216-17, suggests that agency views may be manifested in any of the following ways: (1) filing of an amicus brief in the proper court, (2) by the attitudes demonstrated by its formal regulations, or (3) by a history of cooperation between state and federal authorities. But sketchy case law indicates the need for more time to allow the case law to develop. \textit{E.g.}, Note, \textit{"Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism}, 60 Harv. L. Rev. 262 (1946), which found that the attorney general appeared only seven times in the period studied.


\textsuperscript{86} 413 U.S. 405 (1973).

\textsuperscript{88} \textit{New York Soc. Serv. Law} § 131 (McKinney Supp. 1973), required biweekly certification from local employment office that there was no work available.
\end{footnotes}
moting federal aims. The Court viewed WIN as a cooperative federal-state attack on unemployment.

However, the cooperative nature of the program did not resolve the question whether the states could set down standards of eligibility in a joint federal-state program. A previous line of cases had established that state law could not exclude from AFDC benefits persons the Social Security Act expressly held eligible. The Court distinguished Dublino from this line of cases on the grounds that the Department of Health Education and Welfare (HEW) had approved the New York State program and had never considered the WIN program to be pre-emptive. "In interpreting this statute, we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .""

The Court also noted that New York had always applied its work rules so as to avoid friction and overlap with WIN. For instance, a person eligible for WIN was referred to HEW first, and only if there was not any room in WIN was he admitted to the state program." The Court concluded its analysis with the statement: "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."

Therefore, Dublino must mean that the approval of the agency involved may allow states to set down restrictions on cooperative programs, where without such approval the restrictions might be prohibited. Agency approval of the state policy seemed controlling in

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89 413 U.S. at 418-22.
40 Id. at 421.
42 413 U.S. at 420-22.
43 Id. at 421, citing Red Lion Broadcasting v. FCC, 395 U.S. 367, 381 (1969), and Dandridge v. Williams, 397 U.S. 471, 481-82 (1970). This shows that deference to administrative agency interpretation of statutes is to be applied to pre-emption cases as well. After taking note of the history of cooperation between New York and federal officials, the Court found such compelling indications of error in agency interpretation of the statute "wholly absent." 413 U.S. at 421.
44 413 U.S. at 421.
45 Id.
46 See Hirsch, supra note 8, at 551-52, urging courts to hold such cooperation a block to pre-emption; Comment, The Impact of Pre-emption on Federal-State Cooperation, 1967 U. Ill. L.F. 656.
FEDERAL PRE-EMPTION

The FAA and Noise Pollution

In City of Burbank v. Lockheed Air Terminal, Inc., the Supreme Court, after an extended argument based on legislative intent, granted the FAA exclusive jurisdiction to regulate aircraft noise pollution. The City of Burbank, California, had passed an ordinance making it unlawful for jet aircraft to take off between 11 p.m. and 7 a.m. The district court found the ordinance unconstitutional on both commerce clause and pre-emption grounds. The court of appeals affirmed, holding that the ordinance conflicted with FAA preference orders to the Hollywood-Burbank Airport. The Supreme Court held only that the local ordinance was invalid on pre-emption grounds, and did not reach the commerce clause issue. There was intensive exploration of congressional intent through an examination of the Noise Control Act of 1972 as it affected the Federal Aviation Act of 1958. The analysis included a listing of the broad powers granted to the EPA and FAA under the 1972 Act. The Court concluded that this broad grant of power pre-empted state law, a conclusion in keeping with the Hirsch “one master” theory. An inquiry was also made into the hearings on the bill, which indicated to the Court that state law was pre-empted.

The inquiry into the hearings particularly centered on a letter from

47 See also Pre-emption as a Preferential Ground, supra note 5. If pre-emption is a preferred ground for substantive constitutional doctrine, such substantive grounds were clearly absent in Dublino. The district court rejected the welfare recipients’ constitutional arguments out of hand, 348 F. Supp. 297 (1972), and the state had complied with the order to inform recipients of their rights, 413 U.S. at 412 & n.11. The Court had already upheld state standards in general in Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 56 (1971); and Dandridge v. Williams, 397 U.S. 471 (1970). There were no hard issues in Dublino to make pre-emption a preferred ground.


51 457 F.2d 667 (9th Cir. 1972).

52 411 U.S. at 626 n.2. Once again, the “preferred grounds” issue exists, as there are other substantive constitutional issues. See note 47 supra. Since there were commerce clause grounds, the Court may have turned to pre-emption to prevent the decision from prohibiting localities as airport proprietors from making regulations. The decision did not affect these powers. 411 U.S. at 635 & n.14. Ironically, Hollywood-Burbank is the only major airport in the country not owned and operated by a local governmental unit. 22 Kan. L. Rev. 319, 321 (1974).


56 411 U.S. at 628–33.

57 See note 33 supra & text accompanying.

58 411 U.S. at 634–38.
the Secretary of Transportation to the Senate committee in which the Secretary claimed that federal law already pre-empted state law on aircraft noise, and that the proposed legislation did not change the FAA's authority. The majority may have found the Secretary's position decisive despite the contrary position of the Solicitor General and the well-reasoned dissent by Mr. Justice Rehnquist. Both produced much legislative evidence that pre-emption had not been the intent of Congress.

Beyond the "intent of Congress," the Court considered the position of the FAA, which had consistently opposed local curfews because of the FAA's interest in complete management of navigable airspace. This position in favor of pre-emption, adopted by the federal agency most directly involved, also gave force to the majority's conclusion. Thus Lockheed serves as an example of agency hostility influencing the Court to overturn a state law.

The conclusion that the Lockheed Court determined congressional intent by reference to the attitude of the agency most directly involved is buttressed by the Court's distinguishing Lockheed from Huron Portland Cement Co. v. Detroit. It is also consistent with the Court's recent decision in Askew v. American Waterways, Inc. In Huron and Askew, both pre-emption cases under federal maritime jurisdiction, there was no equivalent to a federal regulatory agency operating in the field.

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59 Id. at 635 & n.14. The Court adopted the view expressed in that letter—that states and municipalities could not control aircraft flights, except as proprietors of airports. See Berger, Nobody Loves an Airport, 43 S. Cal. L. Rev. 631, 705-25 (1970), for a summary of pre-Lockheed cases, which support this position taken by the Secretary.

60 411 U.S. at 627-28.

61 Id. at 640-54.

62 Id. at 628. See 15 B.C. Ind. & Com. L. Rev. 848, 854-55, 858 (1974). See also Berger, supra note 59, at 723-25, for a critical view of the FAA's role in noise pollution.

63 Comment, State Versus Federal Regulation of Commercial Aeronautics, 39 J. Air. L. & Com. 521 (1973), views Lockheed as consistent with diminishing local authority over air carriers, id. at 537, 555, and that Lockheed might also be explained by the Court's consistent protection of any FAA authority dealing with safety, id. at 537.

Both 22 KAN. L. REV. 319, 334-35 (1974), and 15 B.C. Ind. & Com. L. Rev. 848, 858-59 (1974) worried about the lack of representation of local interests at the FAA level; see also Berger, supra note 59, at 703, 724. One commentator states that the Court's decision may affect localities' ability to use even their proprietary powers, 15 B.C. Ind. & Com. L. Rev. 848, 856-57 (1974) and destroy the possibility of local regulation with FAA approval, id. at 858-59. 22 KAN. L. Rev., 1319 (1974) suggests that some property law possibilities exist to aid localities in limiting overflight noise pollution. Id. at 333-34. See Berger, supra note 59, at 636-81.


There was no finding of pre-emption in either case. Conflict with an interested federal agency could not arise, and a finding of pre-emption would have created a gap between federal and state regulation, with no federal agency to fill the void.\footnote{66}

The Department of Transportation and Auto Safety

Two important Court of Appeals decisions also support the hypothesis that agency attitudes heavily influence pre-emption decisions. The first case, \textit{Chrysler Corp. v. Tofany},\footnote{67} is an example of administrative acquiescence in a state regulation that might otherwise have been pre-empted by the broad grant of power Congress had given the administrative agency. The action by Chrysler was to enjoin the Vermont and New York Commissioners of Motor Vehicles from banning the sale of 1969 model cars equipped with the “Super-Lite” auxiliary headlight system. The pre-emption claim was based on the National Traffic and Motor Vehicle Safety Act of 1966\footnote{68} and Federal Motor Vehicle Safety Standard No. 108,\footnote{69} which, it was claimed, gave the Department of preliminary letter from the Federal Highway Safety Bureau informed Chrysler that “Super-Lite” apparently was not precluded by Standard 108,\footnote{70} it was the opinion of the Director that the states might “interpose restrictions.”\footnote{71} New York and Vermont officials, concerned with glare effects on hilly two-lane roads and the alleged fact that “Super-Lite” gave off a blue flashing reflection that could be mistaken for emergency flashers, banned “Super-Lite” from their state highways.\footnote{72}

The Second Circuit’s opinion began with an evaluation of section 1392(d) of the Act, which prohibited state action where (1) there

\footnote{66}Normally the Court abhors “gaps” between federal and state regulation. \textit{E.g.}, \textit{Head} v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963) (noting lack of FCC power to police minor infractions). \textit{See} \textit{O’Neil, Television, Tort Law and Federalism}, 53 \textit{CALIF. L. REV.} 421, 457-61 (1965). \textit{But cf. Guss} v. Utah Labor Rel. Bd., 353 U.S. 1 (1957), which held state labor relations board powerless to act on unfair labor practices despite NLRB failure to assert jurisdiction. In ignoring the amicus brief of the NLRB, which would have allowed the state to intervene, the Court created “a no-man’s land of lawless conduct which no government could reach.” \textit{Hirsch supra} note 8, at 547. \textit{See also Petro, supra} note 9, for a detailed analysis of \textit{Guss}. The \textit{Guss} approach has been followed as to state court jurisdiction in \textit{Amalgamated Ass’n of Street Employees v. Lockridge}, 403 U.S. 274 (1971), following \textit{Guss’s} companion case, \textit{San Diego Bldg. Trades Council v. Garmon}, 353 U.S. 236 (1957).
\footnote{67}419 F.2d 499 (2d Cir. 1969).
\footnote{69}49 C.F.R. § 571.108 (1974).
\footnote{70}419 F.2d at 503-04.
\footnote{71}Id. at 504.
\footnote{72}Id. at 503.
was a federal standard already covering an item of equipment, (2) where the state safety standard was not identical with the federal, and (3) where there were federal and state standards affecting the same aspect of performance. This portion of the Act ran counter to the position of the Federal Highway Commissioner that the states could make additional restrictions if "Super-Lite" did indeed meet federal standards. However, the court held that the state regulation did not regulate the same aspect of performance. To reach the conclusion that "the same aspect of performance" should be read narrowly, in favor of state regulation, the court explored the legislative history of the Act. It concluded that reduction of accidents rather than national uniformity was the goal of Congress. This goal would not be met by pre-emption of state law because (1) the Act did not require pre-distribution approval of safety factors by the Federal Highway Safety Bureau, (2) there would be no federal regulation for several months after distribution due to procedural delays, and (3) there was a manifest interest of the states in preventing accidents in the interim. Furthermore, the court stressed the desirability of letting the states regulate to meet their particular local conditions rather than the policy of uniform national standards suggested by the phrase "same aspect of performance." In addition to these considerations the court showed some inclination to allow the agency to control the scope of pre-emption. It noted that pre-emption would create a gap between federal and state law, while state regulation would not frustrate a national purpose because pre-emption could easily be accomplished by amending the agency standards to eliminate the state law. A further example of deference to agency control is the court's reliance upon the statement in the amicus brief of the Federal Highway Safety Bureau that Standard No. 108 was never intended to be pre-emptive. It is doubtful that the court would have read "the same aspect of performance" so narrowly had the agency been of a different view. indicates that a federal agency may

73 Id. at 506.
74 Id. at 510.
75 Id. at 508–11.
76 Id. at 511.
77 Id. at 506–07.
78 Id.
79 Id. at 509–11. While this meets the standards of those who see the issue of pre-emption as correct allocation of state-federal power. see note 27 supra, the "gap" issue and federal regulatory acquiescence are also present.
80 See text accompanying note 66 supra.
81 419 F.2d at 511–12.
be able to delegate authority to a state agency even when there is a broad grant to the agency to create uniform rules.\textsuperscript{82}

\textit{The Atomic Energy Commission and Pollution}

In \textit{Northern States Power Co. v. Minnesota},\textsuperscript{83} the Eighth Circuit held that Atomic Energy Commission standards for radioactive emissions were exclusive controls and that the state could not set additional standards pursuant to its own policy. Northern States Power was engaged in the production, transportation, and sale of electric power in Minnesota, North Dakota, South Dakota and Wisconsin and, therefore, indisputably in interstate commerce.\textsuperscript{84} Construction of the plant was approved by the AEC,\textsuperscript{85} but when Northern States applied to the Minnesota Pollution Control Agency for a waste disposal permit, the permit was issued but subject to certain conditions more stringent than the federal standards.\textsuperscript{86} The court, after a summation of the Supreme Court's articulated pre-emption standards,\textsuperscript{87} considered the major issue—whether the states could add more stringent regulations on radioactive pollution to the federal standards, it not being physically impossible to comply with both the federal and state laws.\textsuperscript{88} In holding that the states could not impose additional regulations, the court made

\textsuperscript{82} Note however the caustic "concurrence" of Judge Friendly, which stated:

My most important objection is to the basic assumption that the preemption clause, § 1392(d), of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 et seq., should be narrowly construed. Such an approach seems to me to fly in the face both of the language of the Act and of the legislative history. The very existence of an express preemption clause is somewhat unusual. Moreover, this one was worded in the strongest possible terms. The prohibition is not simply against a state standard in conflict with the federal standard; Congress prohibited any state standard "applicable to the same aspect of performance which is not identical to the federal standard. . . ."

It is no answer that the overall objective of the Safety Act was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." Congress meant not simply to do this but to do it in a particular way, namely, by promoting national standards that would preempt any differing state ones, whether lower or higher, in order to assure manufacturers that if they met federal requirements, they could market their cars throughout the Union. Congress knew how much the topography of Vermont differs from that of Kansas as well as we do. . . .

What these cases show above all is the need for the National Highway Safety Bureau to move swiftly to implement Congress' manifest intention and eliminate the scholastic distinctions and waste of effort which litigations such as these necessarily entail. One can only hope the majority's indication that the preemption clause is to be narrowly construed will not tempt the Bureau to rely on the false assumption that the duties Congress entrusted to it can be largely left with the states.

419 F.2d at 512-13, 515.

\textsuperscript{83} 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972).
a rigorous study of the federal statutes in question, particularly 42 U.S.C. § 2021, which permits the AEC to relinquish control over certain nuclear materials and turn the authority over to the states. The AEC was forbidden to relinquish control over "construction and operation" of a nuclear power plant by section 2021(c), and the court accepted the AEC view that since discharges were included in "construction and operation" the AEC had exclusive control over discharges.

The legislative history and the joint committee report tended to support the court's reading of "construction and operation." However, even when the court considered legislative history, the opinion of the AEC was important. "Moreover, the intent of Congress clearly spelled out in the committee report takes on even more significance in light of the fact that this expression of pre-emption was consistent with the intention of the sponsor of the legislation, the AEC." Finally, the court turned to the administrative interpretation of the statute and noted AEC regulations providing that the states lacked authority to regulate discharges from nuclear power plants.

84 Id. at 1144.
85 Id. at 1145.
86 Id.
87 Id. at 1146-47.
88 See note 87 supra. This is the first time that a court has ever separated the "physical impossibility" issue, under the supremacy power, from the pre-emption issue, though the traditional analysis of pre-emption was used.
89 447 F.2d at 1148-49. Section 2021(b) allowed discontinuance of AEC authority over radiation hazards in quantities not sufficient to form critical mass when the governor of a state and the AEC had entered an agreement to that effect. However, the court said this section did not apply to radioactive discharges from power plants and, in any event, the governor of the state had not entered into an agreement with the AEC.
90 Id. at 1149 & n.6.
92 447 F.2d at 1147-54.
93 Id. at 1152.
Throughout the opinion the attitude of the AEC that it had exclusive jurisdiction over the regulation of radioactive emissions influenced the court’s interpretation of the statutes and committee hearings. Nothing in the statute denied the states the authority to regulate radioactive pollution. The very hearings so heavily relied on by the majority were also used by dissenting Judge Van Oosterhout to show that when this same Minnesota regulatory power was discussed, the AEC expressed no need for pre-emptive legislation. Therefore, where the statute was unclear on the subject of pre-emption, the majority and dissent both relied heavily on the position taken by the agency involved. *Northern States*, like *Lockheed*, indicates that agency hostility toward state legislation may influence a judicial finding of pre-emption.

**CONCLUSION**

Various decisions of the Supreme Court and the federal appellate courts in areas such as welfare rights (*Dublino*), pollution (*Lockheed* and *Northern States*), and highway safety (*Tofany*), appear to vindicate the initial hypothesis of this note, that the rules, regulations and attitudes of the federal agency most directly involved may control the outcome of a pre-emption case. If this is so, the following conclusions may be drawn: (1) Where there is a federal regulatory agency or executive department in a field, it is an almost impossible burden to show that exclusive rulemaking authority does not exist in the agency, *if the agency is opposed to the enforcement of the state law*, as it was in *Lockheed* and *Northern States*; (2) On the other hand, if the state can show a history of cooperation, as in *Dublino*, or acquiescence, as in *Tofany*, the state regulation may be saved; (3) It is also possible that where there is no federal regulatory agency with authority over the area, federal pre-emption will not be lightly presumed, thereby preventing “gaps” between federal and state regulation.

From a practical point of view, deference to the opinion of the agency on a pre-emption question engenders various policy benefits and costs. Substituting agency intent for the more elusive intent of Congress may produce more predictable results. It also protects cooperative federal-state projects from claims of pre-emption. On the other hand, it must be asked whether the power to invalidate state laws should be delegated to the agencies.

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96 E.g., 447 F.2d at 1152 n.10: “The hearings before the Joint Committee reflect that the AEC consistently maintained that the federal government had pre-empted the field regarding licensing and regulation of nuclear power reactors.”

97 447 F.2d at 1155-56.
From a theoretical point of view, taking notice of agency regulations and rules to determine a pre-emption question may be criticized. Insofar as the theoretical basis of pre-emption is the supremacy clause, pre-emption is a power of Congress and not of the agency. Hirsch's "one master" theory, although it focuses on the scope of authority of the agency, is nonetheless cast in terms of congressional intent. Recent decisions show a deference to agency attitudes beyond a concern with legislative intent. This leaves the agencies free to establish their own scope of authority vis-a-vis the states.

If pre-emption is framed in terms of the concurrent power theory, with attention not to the intent of Congress but to a correct division of power between federal and state authority, simple deference to the agency position will prove fruitless. The choice between national uniformity or decentralized decisionmaking cannot hinge on the attitude of a federal agency whose very existence is premised on promoting national uniformity. However, breaking away from a rigid reliance on "congressional intent" may make it possible to judge pre-emption cases through a balancing of federal and state interests. Framing the issue in terms of whether the job can be properly handled by the state makes the agency interest vital. A state might be denied authority in areas such as atomic energy, pollution, or regulation of air commerce unless it shows a close partnership with the federal agency most directly concerned. But the courts must act positively to protect the state's right to act independently of federal law when the state exerts reserved powers beyond the scope of federal authority, or when the state acts in areas of concurrent jurisdiction which are only partially regulated by congressional action.

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