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NOTES

THE PREEMPTION DOCTRINE: SHIFTING PERSPECTIVES ON FEDERALISM AND THE BURGER COURT

Federal and state governments have committed intensified concern and energy toward finding cooperative solutions to the common problems confronting them. The notion of cooperative federalism¹ has emerged from these efforts to reconstruct intergovernmental relations. Administratively, it long has been manifested in program coordination and formal and informal exchanges of information. Legislatively, it stands behind federal grants-in-aid for education, urban renewal and housing.² The innovation of revenue-sharing, with its removal of all but minimal restrictions upon state expenditures,³ has left to the states and municipalities a greater share of policymaking responsibility over federally financed programs.⁴

This movement in areas once subject to federal centralization⁵ is reflected in several recent Supreme Court decisions. The Burger Court has upheld state action in areas such as public education, apportionment and obscenity to which the Warren Court had vigorously applied federal policies. The Court has displayed a considerable receptivity to maintaining the diversity of state and local institutions and interests.⁶

These developments have also worked an influence on one of the primary judicial vehicles for shaping federalism—the preemption doctrine. Federal preemption is invoked under the directive of the supremacy clause,⁷ either to

1. Cooperative federalism regards federal and state governments as "mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand." Wright, *The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientation*, 25 PUB. AD. REV. 193, 199-200 n.26 (1965).

2. See Grad, *Federal-State Compact: A New Experiment in Co-operative Federalism*, 63 COLUM. L. REV. 825, 830-32 (1963); cf. Comment, *The Impact of Preemption on Federal State Co-operation*, 1967 U. ILL. L.F. 656, 656-57 (1967).

3. See 31 U.S.C. §§ 1221-63 (Supp. II, 1972).

4. Cf. Grad, *supra* note 2, at 833.

5. See Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973).

6. Substantive rules affecting the states under the equal protection clause reflect the change. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972), for example, demonstrated the state action requirement of the fourteenth amendment to be a real limitation. The Court has also established flexible equal protection standards to govern the apportionment of state legislatures. See *Mahan v. Howell*, 410 U.S. 315, 328-29 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 737, 740-41 (1973). Deference to the value of local control over public education underlies the Court's rulings in opposition to multi-district desegregation orders, see *Milliken v. Bradley*, 94 S. Ct. 3112, 3125-26 (1974), and in support of school district property tax financing, see *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 48-50 (1973). Similarly, the Court's decisions in the obscenity area bespeak a respect for local community standards. See *Miller v. California*, 413 U.S. 15, 30 (1973).

7. This constitution and the Laws of the United States which shall be made

effectuate a congressional occupation of a particular field, even where there are gaps in the federal regulatory scheme, or to nullify state regulation in conflict with federal legislation.⁸ The doctrine thus serves to define spheres of governmental authority within the federal system. It has been utilized extensively since the federal regulatory advances of the New Deal period to mediate the frictions that have attended the steady extension of detailed federal regulation into formerly exclusive provinces of the states.⁹ The Supreme Court, however, has not developed a uniform approach to preemption; its decisions in this area take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis. It is the purpose of this Note to survey the preemption decisions for strands of doctrinal consistency and to examine the impact of the Burger Court's favorable disposition to concurrent state-federal regulation on the preemption doctrine.

I. THE PREEMPTION DOCTRINE: ITS ROOTS AND ITS CONTEMPORARY DEVELOPMENT

A. *The Prevailing Formulation of the Doctrine*¹⁰

Preemption occurs when a state statute obstructs the "accomplishment and execution of the full purposes and objectives of an Act of Congress."¹¹ More specifically, either a congressional design to "occupy the field" or a conflict between federal and state statutes¹² is needed to place a state statute in an unconstitutionally obstructive position.

in Pursuance thereof; and all Treaties made, or which shall be made, under 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, § 2. For the view that the necessary and proper clause, *id.* art. I, § 8, imposes a duty upon the Supreme Court to allocate power within the federal system independent of congressional directives, see Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630, 638-39 (1972).

As used in this Note, preemption is the invalidation of state legislation under the supremacy clause for incompatibility with a federal regulatory scheme. Because preemption implies the existence of federal *legislation*, a determination invalidating a state law under a clause of the Constitution, in the absence of a statute in the manner of a traditional commerce clause case, see, e.g., *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), falls outside of the definition.

8. Cf. Freeman, *supra* note 7, at 630; see also C. MCGOWAN, *THE ORGANIZATION OF THE JUDICIAL POWER IN THE UNITED STATES* 48 (1969).

9. C. MCGOWAN, *supra* note 8, at 40.

10. Certain inherent characteristics of the preemption cases contribute to the need for a broad overview of the doctrinal development. The traditional technique of deriving law by reconciling decisions is not entirely appropriate in this context. This problem can be ascribed in part to the subsidiary questions of statutory interpretation and the variant questions of federal policy inevitably involved in each case. Cf. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 535.

Beyond the aspects unique to the individual case, internal consistency among the preemption cases as a whole is prevented by the coexistence of fundamentally different approaches to the doctrine. This difficulty is the principal concern of the present section of this Note.

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

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

1. *The Occupation Ground.* A congressional design to occupy the field supersedes the operation of state law on federally regulated subject matter whether or not state regulation impairs the actual operation of the federal law. A finding of congressional occupation requires a showing that it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated.¹³ In ascertaining the preemptive scope of federal legislation under the occupation ground, however, the Supreme Court has not relied exclusively upon expressions of congressional purpose or specific intent. In *Rice v. Santa Fe Elevator Corp.*¹⁴ Justice Douglas stated that other objective factors may establish the requisite preemptive intent:

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 an 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. . . .¹⁵

In addition, considerations completely extrinsic to the federal legislation at issue may weigh heavily in the preemptive determination. The nature of the regulated subject matter, for example, may reveal an inherent need for nationwide uniformity and federal primacy.¹⁶ This approach, stemming from the early commerce clause cases,¹⁷ denominates certain subject matter as national in character, and hence preemptive without regard to congressional action,¹⁸ and other subject matter as inherently local, and hence admitting of diverse regulation. This approach is problematic, however, for the cases have not uniformly treated subject matter as a preemptive ground independent of any congressional action or intent; often, it has been treated as only one index of a congressional design to occupy a field.¹⁹

13. *Id.* at 146.

14. 331 U.S. 218 (1947).

15. *Id.* at 230.

16. *See, e.g.,* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

17. It can be traced to *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298, 319-20 (1851).

18. The Court's transplant of the subject matter approach from the early commerce clause cases to the statutory preemption context in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), is somewhat anomalous. When the Court characterizes certain subject matter as local in character for commerce clause purposes, Congress can always correct it by entering the field. *See generally* Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 MICH. L. REV. 407, 418-19 (1955). In the preemption context, however, Congress has acted, although it may not have completely covered the field, and for the Court to find against preemption it must disregard the congressional determination that the subject matter is national in character.

19. Thus in both *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963), and *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 430 (1963), the Court characterized the subject matter as local but then went on to determine whether Congress intended occupation of the fields at issue.

Where the Court has found the subject matter to be national in character, it may

2. *The Conflict Ground.* Under the conflict ground²⁰ of preemption, the Court first construes the state and federal statutes in question and then determines whether a true conflict exists.²¹ The clearest conflict case arises when a federal law mandates action forbidden by state law, or vice versa. As the scope of state interference with a federal legislative scheme diminishes, however, the presence of conflict becomes progressively more subtle.²² Federal and state laws that operate in completely unrelated spheres obviously present no constitutionally cognizable conflict.

3. *Shifting Presumptions as Doctrine.* Although the preemption doctrine, as thus summarized, appears to be both principled and neutral in application, it has been the object of considerable political manipulation during the past forty years. For a period of time, the Supreme Court's preemption decisions consistently supported state interests, sacrificing federal legislative objectives in the process. This state-directed view of preemption dominated the Court's thinking in the 1930's, cresting in the succeeding decade. In the 1940's, a federal-directed formulation of the preemption doctrine—in which federal legislative interests were regarded as paramount—emerged. Federal-directed preemption dominated the Court's jurisprudence in the 1950's and early 1960's, but as will be seen,²³ several recent decisions of the Burger Court presage a return to a state-directed preemption doctrine. This doctrinal inconsistency merely manifests the Court's vacillating perspective on federalism. At the risk of overstating the dichotomy's pervasiveness, the following general discussion of preemption will consider the state-directed and federal-directed doctrines separately.

B. *The Period of Judicial Solicitude of State Interests*

1. *The Clear Intent Standard for Occupation of the Field.* For many years, the mere fact of congressional regulation in a particular field precluded

appear to be relying on the subject matter approach as dispositive of the preemption issue, but it usually seizes upon that characterization after concluding from an inquiry into congressional intent drawing from the federal statute at issue that there is a need for national uniformity. See *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 720-21 (1972); *Campbell v. Hussey*, 368 U.S. 297, 300-02 (1961).

20. Although the Court's convention of distinguishing between occupation of the field and conflict will be honored here, an absolute distinction between the two concepts should not be inferred. Occupation of the field implies that any state regulation would conflict either with the federal statute's terms or operation, or with congressional intent. The Court on occasion omits to categorize a case as involving one or the other ground before proceeding with its analysis. See, e.g., *Chicago v. Atchison T. & S.F. Ry.*, 357 U.S. 77, 87-89 (1958).

21. *Perez v. Campbell*, 402 U.S. 637, 644 (1971). The term "conflict" covers considerable stretches of semantic territory. The Court uses conflict, interference, repugnance, irreconcilability, inconsistency, and similar words more or less interchangeably. See Hirsch, *supra* note 10, at 525.

22. The most difficult conflict question arises when federal and state statutes apply to entirely different areas of subject matter but meet at a common point. See, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971) (conflict between federal regulation of bankruptcy and state restrictions on automobile negligence judgment debtors); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (federal maritime safety requirements and municipal pollution regulation).

23. See notes 108-224 and accompanying text *infra*.

concurrent state legislation.²⁴ In the 1930's, however, the Supreme Court abandoned expansive judicial assessments of federally regulated subject matter, transferring to the Congress primary responsibility for accomplishing preemption. Absent an "actual conflict" between federal and state law, preemption could only occur if congressional intent to occupy the field was "definitely and clearly" shown.²⁵ Although the evidentiary burden necessary to satisfy this standard remained obscure, it was apparent that the Court preferred an expression of specific intent to occupy the field. Yet notwithstanding this high threshold requirement, the Court did permit inferential demonstration of preemptive congressional purpose in the proper case.²⁶

The clear intent requirement for occupation found a correlative in the actual conflict standard.²⁷ As with the inclusion of purpose under the occupation ground, actual conflict went beyond the context of provisions expressly mandating different action to encompass the more flexible concept of frustration of purpose. The Court would ascertain the purposes "necessarily implied" in a federal statutory scheme, and strike down any state law that inhibited their accomplishment.²⁸

These standards, however, did not provide the Court with self-sufficient decisional bases. Fields of subject matter and conflicts were not absolutes to be established and imposed without regard to the interests at stake. The amount of ground occupied beyond a federal statute's terms²⁹ and the evidence of

24. See, e.g., *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (Holmes, J.). Under this formulation, the sole question had been whether Congress had reached the subject matter dealt with by the state law, and therefore only concerned the size of the field occupied. The view was that the very exercise of federal power inherently excluded concurrent regulation by the states even where the operation of the state statute was entirely compatible with the federal scheme. See *id.*, Engdahl, *supra* note 5, at 52-55.

25. *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933). Variations in phrasing can be found in *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940) ("clearly indicated"), and *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) ("definitely expressed").

26. See, e.g., *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940). See also Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959).

27. For an early case requiring actual conflict, see *Savage v. Jones*, 225 U.S. 501, 533 (1912).

28. *Id.*; see also *David v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896). For more recent "frustration of purpose" conflict cases, see *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238-39 (1967) (state statute refusing compensation for unemployment due to labor disputes as applied to an employee filing a charge with the National Labor Relations Board held to frustrate congressional purpose in encouraging such filings); *Hill v. Florida*, 325 U.S. 538, 541-42 (1945) (state statute conditioning the functioning of a union's collective bargaining representative upon the fulfillment of certain state requirements held to frustrate congressional guarantee of "full freedom" to select representatives).

Although frustration of purpose permits considerable flexibility in finding preemptive conflicts, it remains grounded in subjective congressional intent. Later criteria, which disregarded the intent limitation, permitted even greater flexibility. See text accompanying notes 80-83 *infra*.

29. The field's extent frequently is the point of contention, but precise bounds usually must be derived by inference from purpose interpretation. The difficulty of such inquiry stems from the fact that

[f]ederal law is generally interstitial in nature. It rarely occupies a legal field completely. . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. . . .

intent required to demonstrate that occupation, or the degree of conflict necessary to invalidate a state statute, were evaluated by reference to the nature of the state law challenged; and the Court paid great deference to the state interests at stake.

The decisions during this period involved federal statutes under the commerce power and state police power enactments.³⁰ The Court generally sustained concurrent state legislation in federally regulated fields, declaring itself especially reluctant to infer congressional intent to preempt "when public safety and health are concerned."³¹ In effect, the Court created a presumption favoring the validity of state laws in exercise of the police power.³² Once the state presumption was triggered, only a strong showing of congressional intent to occupy the field could effectively rebut it. Absent such conclusive evidence,³³ the Court tended to uphold state regulation in fields not specifically embraced by federal statute.³⁴

2. *The Actual Conflict Standard and Flexible Federal Supremacy.* In occupation cases, a strict intent standard restricts the federal sphere to ex-

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 470-71 (2d ed. 1973).

30. See *Maurer v. Hamilton*, 309 U.S. 598 (1940) and *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939) (Motor Carrier Act of 1935, 49 U.S.C. §§ 301-27 (1970)), and state highway safety regulations; *Kelly v. Washington*, 302 U.S. 1 (1937) (Motor Boat Act of 1910, ch. 268, 36 Stat. 462, and state provision for inspection and regulation of vessels); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (Cattle Contagious Diseases Act of 1903, 21 U.S.C. §§ 120-22 (1970)), and state animal quarantine laws).

31. *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940).

32. Even in redefining the criteria to be used in ascertaining congressional intent in *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947), see text accompanying note 15 *supra*, Justice Douglas observed that "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." *Id.* at 230.

33. In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), for example, the Court held that a clause in a federal regulatory statute stating federal jurisdiction to be exclusive over all persons licensed thereunder expressed a specific intent to preempt state jurisdiction.

34. In *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939), for example, the Court held valid a state statute limiting commercial drivers to a maximum number of hours more restrictive than an enacted but unimplemented maximum in a pervasive federal statute. In the absence of a clearly expressed congressional intention to preempt, the Court found controlling New Hampshire's interest in protecting life and property by regulating motor vehicles.

Similarly, in *California v. Zook*, 336 U.S. 725 (1949), Congress had legislated against the sale or arrangement of transportation by carriers possessing no interstate commerce permit. Although the concurrent legislative schemes exposed violators to multiple criminal prosecutions, the Court drew no inference of intent to preempt, so long as preemption was unnecessary to the accomplishment of Congress' purposes. See *id.* at 737-38.

The state-directed balancing prevalent in *Welsh* and *Zook* also characterized the first preemption cases involving the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168 (1970). In *Electrical Workers Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) (the *Allen-Bradley* case), the police power presumption was invoked to sustain a prohibition of mass picketing. The Court held that the NLRA was not preemptive, viewing the Act's failure to expressly address the problem as evidence of a congressional design to leave the field open. *Id.* at 741-42, 748-50. The *Allen-Bradley* rule was reapplied to support a state statute prohibiting intermittent, unannounced work stoppages in *Local 232, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949). The NLRA again having neither legalized nor forbidden the activity, the state's police power was not superseded. *Id.* at 248-50, 264-65.

press congressional coverage, allowing states to vindicate their interests without impinging upon the principle of federal supremacy. The federal reach is delimited by the absence of a clear congressional directive for extension. Actual conflict, on the other hand, exists irreducibly on the facts, and absolute federal supremacy requires preemption without regard to the strength of the state interests. To balance federal and state interests in the conflict context, then, impinges upon absolute supremacy.

In *Huron Portland Cement Co. v. City of Detroit*³⁵ and *Kesler v. Department of Public Safety*³⁶ the Court applied the state presumption to conflict situations, and proved willing to leave vital state interests undisturbed. But it could not do so, as it had done in occupation-of-the-field cases, by simply requiring greater proof of congressional intent. Rather, it was forced to overlook minor conflicts, which were only peripheral to the federal statutes' purposes.³⁷ In *Huron*, the Court managed to bypass the absolute supremacy issue by overlooking the express terms of the federal and state statutes, and restricting its inquiry to their dominant purposes. Because the purposes were totally unrelated, it found no conflict.³⁸ But in *Kesler*, the Court directly considered whether even minor conflicts between the federal and state legislative schemes mandated preemption. Finding that conflicts bearing on peripheral concerns of the federal scheme were tolerable under the supremacy clause, Justice Frankfurter enunciated a principle of federal supremacy flexible enough to allow the magnitude of the conflict to be balanced against the interests at stake.

In taking this step, Justice Frankfurter reached the conclusion dictated by the concept of federalism that underlies a preemption doctrine constructed around state interests. The concept of flexible supremacy in conflict cases, like

35. 362 U.S. 440 (1960).

36. 369 U.S. 153 (1962).

37. In *Huron* a municipal smoke abatement ordinance prohibited action which was implicitly permitted by federal ship licensing requirements. The Court refused to find conflict, for to do so "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exist." *Id.* at 446. But as Justices Douglas and Frankfurter pointed out in dissent, the federal license provided credentials, good in any port, for the very equipment forbidden by the ordinance. *Id.* at 450-53. A more defensible rationale for the majority's result would have been to acknowledge the existence of conflict but find that the strength of the state's concern with air pollution outweighed the minimal harm to the federal regulatory scheme.

Such an approach was taken in *Kesler*, where the Court emphasized the divergent purposes of the state and federal statutes to minimize the extent of an admitted conflict. The Court upheld a statute suspending a motor vehicle negligence defendant's driver's license at his judgment creditor's behest, despite the former's discharge in bankruptcy. The statute was held to be pursuant to the state police power, and not for the mulcted creditor's relief. That power, wrote the Court, should be respected "unless there is a clear collision with a national law which has the right of way. . . ." *Id.* at 172. The Court concluded that conflict between the statutes did not rise to the level of a supremacy clause "collision," since "the bearing of the (state) statute on the purposes served by bankruptcy legislation is essentially tangential." *Id.* at 174. *Kesler* was overruled in *Perez v. Campbell*, 402 U.S. 637 (1971); see notes 97-99 and accompanying text *infra*.

38. The Court will no longer sustain state legislation conflicting in terms, but not in purpose, with federal law. The *Kesler-Huron* result was expressly repudiated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), and again in *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971); see notes 97-99 and accompanying text *infra*.

the rigorously construed intent standard in occupation-of-the-field cases, insulates from preemptive attack many state laws vulnerable under preexisting theory. The test for impermissible conflict that emerges from the cases—"an obvious and unavoidable conflict"³⁹—was not, however, without precedent. Indeed, Alexander Hamilton espoused such a theory in the *Federalist Papers*, noting that because

concurrent jurisdiction was "clearly admitted by the whole tenor" of the Constitution . . . "[i]t is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preëxisting right of sovereignty."⁴⁰

To sum up, during the decades of solicitude for state interests state diversity as well as federal uniformity were safeguarded under a restrained approach to federalism. The preemption doctrine went only so far as to protect the operative sphere of federal legislation specified by Congress. Otherwise, its mechanisms were designed to serve state interests.

C. *The Period of Judicial Solicitude of Federal Interests*

1. *Hines v. Davidowitz and an Altered Constitutional Framework.* The state-directed scheme of preemption developed in the service of legislation in exercise of the commerce power. In its 1941 decision in *Hines v. Davidowitz*,⁴¹ the Supreme Court considered for the first time the preemptive force of congressional legislation deriving from other than the commerce power.⁴² The issue was whether the Alien Registration Act of 1940,⁴³ which required aliens to register with the federal government and carry identification cards, preempted a Pennsylvania act with a similar registration procedure but carrying more extensive criminal sanctions.⁴⁴ Under the state-directed view, a showing of intent to occupy the field or actual conflict would have been a necessary prerequisite to a finding of preclusion. Yet notwithstanding the absence of either index, Justice Black, relying upon the statute's genesis in Congress' foreign affairs power,⁴⁵ erected a presumption in favor of the federal law's preemptive capability. The statute belonged "to that class of laws which concern the exterior relation of this whole nation with other nations"⁴⁶ and was

39. *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 541 (1959) (Frankfurter, J., dissenting).

40. THE FEDERALIST No. 32, at 200 (Van Doren ed. 1945), quoted in *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 546 (1951) (Frankfurter, J., dissenting).

41. 312 U.S. 52 (1941).

42. See note 48 *infra*.

43. Ch. 439, 54 Stat. 670. The statute was repealed by the Act of June 27, 1952, 8 U.S.C. §§ 1301-06 (1970).

44. 312 U.S. at 59. The federal act imposed criminal sanctions only upon failure to register, while the Pennsylvania act did so upon the alien's failure to have the registration card in his possession. *Id.*

45. See generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 67-88 (1972).

46. 312 U.S. at 66, quoting *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875).

"so intimately blended and intertwined with the responsibilities of the national government"⁴⁷ as to present on its face "a complete scheme of regulation" in the field, precluding the states from conflicting or interfering with, curtailing or complementing it.⁴⁸

Although the *Hines* result was undoubtedly influenced by the nature of the regulated subject matter, the Court did not hold the foreign affairs power to be a self-sufficient basis of preemption. Consistent with prior authority, it recognized that the enactment of a federal statute, without more, did not preclude all state legislative efforts. Rather, some measure of intent was necessary for Congress to accomplish preemption. In retreating from a rigorous intent standard, however, *Hines* broke new constitutional ground. The Court redefined the judicial function in preemption cases, demanding a determination whether the state statute under scrutiny "stands as an obstacle to the full purposes and objectives of Congress."⁴⁹ This approach substituted a purportedly objective assessment of the needs attending a statute's operation for the practice of defining the occupied field through total reliance upon Congress' subjective will.⁵⁰ It amounted to a judicial assumption of competence to find preemption, notwithstanding the absence of clear congressional intent to occupy the field or actual conflict, when the nature of the federal regulation called for exclusive operation.

47. *Id.*

48. *Id.* at 66-67. The *Hines* foreign affairs power-based presumption resembled the approach taken to preemption as a whole during the late nineteenth and early twentieth centuries. Under the early view of the Court, federal entry into a field served to foreclose state regulation entirely, without regard to congressional intent or the statute's actual scope. See note 24 *supra*.

Justice Black's reading of the foreign affairs power's preemptive capability, however, did not command the entire Court's acquiescence. Justice Stone, with Chief Justice Hughes and Justice McReynolds, dissented, holding fast to a presumption favoring the state's police power. 312 U.S. at 75. The majority stressed the importance of legislation on immigration, naturalization and deportation, taken as a whole, in the broader scheme of the nation's foreign relations. *Id.* at 62-64. The dissenters refused so to extend the reach of the foreign affairs power into aspects of the maintenance of internal order. *Id.* at 76-77.

If one ascribes greater preemptive force to the foreign affairs power than to the commerce power, then *Hines* may be reconciled with prior doctrine. In one case, the Supreme Court acknowledged that such a difference may exist. In *Electrical Workers Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942), which concerned the commerce power-based NLRA, Justice Douglas distinguished *Hines* as a case in which "we were more willing to conclude that a federal Act in a field that touched international relations superseded state regulation. . . ." *Id.* at 748-49. One obvious difference between the two bases of congressional power bears mention. The commerce power tends to unite the nation and the states in relation to subject matter of internal relevance. Statutes in exercise of the foreign affairs power necessarily include an additional factor—the nation's external relations. Therefore, even though a matter within the federal foreign affairs power affects a state's internal affairs, the federal interest is necessarily greater than in the commerce clause context because of the external relations factor. Later foreign affairs cases indicate that the federal interest may be so strong as to preclude the balancing of state interests altogether. See note 85 and accompanying text *infra*.

49. 312 U.S. at 67 (emphasis supplied).

50. Justice Black enumerated several factors to be considered in preemption cases: "[t]he nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law. . . ." *Id.* at 70. The first two were hardly innovative, but the third entailed scrutiny of the statute's provisions with a view toward an independent decision of how best to implement them.

This activist judicial role enabled the Court to free itself from the confines of earlier occupation and conflict analyses. Departing from the intentions or purposes immediately inferable from the Alien Registration Act and its legislative history, the Court substituted its own views on the desirability of the conflicting statutes' coexistence. Justice Black imputed to the federal statute the design of collecting information on aliens while simultaneously protecting their individual liberties. He then concluded that the state statute might lead to abuses of the latter purpose.⁵¹ The conflict thus deduced was a potential, if not purely hypothetical, one.⁵² In effect, the Court was engaging in policymaking. The protection of individuals was in no way at the center of congressional purposes,⁵³ and even then, the conflict ground had to be expanded to encompass potential conflicts to render it a preemptive ground.

Although the foreign affairs-civil liberties context gives *Hines* the character of a limited, result-oriented decision, the Court subsequently extended the doctrinal approach of *Hines* beyond its facts and constitutional foundation. *Hines* led to a reformulation of the preemption doctrine and the principles of federalism that undergird it. A scheme fundamentally irreconcilable with the state-directed model of the 1930's decisions emerged as a competing approach, and the long period of uneasy coexistence between these two conflicting frameworks has resulted in considerable doctrinal confusion and variability.⁵⁴ An examination of the developments traceable to *Hines* illustrates this development.

2. *The Intent Standard and Judicial Preemptive Authority.* Although *Hines* was a foreign affairs power case, and hence distinguishable from prior and subsequent preemption cases involving commerce power-based legislation,⁵⁵ its principles influenced the intent standard applicable in occupation of the field cases generally. The first indication that *Hines*' relaxed intent requirement applied outside the realm of foreign affairs appeared in *Cloverleaf Butter*

51. *Id.* at 74.

52. The finding of conflict in *Hines* suggests areas of vital federal interest may be present even in the case of a non-pervasive federal regulation. See Hirsch, *supra* note 10, at 532.

53. The Court relied primarily upon objections voiced against stricter requirements in previous unsuccessful bills, and a statement of one of the 1940 Act's sponsors to the effect that any controversial features of previous attempts had been omitted. 312 U.S. at 71-72 nn. 31-32. Note Chief Justice Stone's criticism of this argument from the legislative history. *Id.* at 80-81 (dissenting opinion).

54. This uneasy coexistence can be seen by comparing the doctrinal positions taken in majority and dissenting opinion of the same case. See, e.g., *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959); *California v. Zook*, 336 U.S. 725 (1949); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

The contradictions extend to positions taken by the same Justice in different cases. See note 221 *infra*. This, in turn, points to the result-orientation that characterizes the Court's approach to preemption. See note 107 and accompanying text *infra*. The discussion below will largely overlook this element and focus instead upon broader trends in the development of the doctrine itself in the hope of ascertaining what independent force it has had in the decisions.

55. See note 48 *supra*.

Co. v. Patterson,⁵⁶ where the Court invalidated a state regulation coming within a federally regulated field but occupying an aspect untouched by the congressional scheme.⁵⁷ Speaking of the doctrine generally, the Court said that a "clear implication" of intent sufficed to accomplish preemption.⁵⁸ With respect to the federal statute before it, the Court found an expansive preemptive scope: once the federal government has taken the regulation of a substantial industry in hand, isolated state-based additions were impermissible.⁵⁹

In *Rice v. Santa Fe Elevator Corp.*⁶⁰ the Court sought to flesh out the vague contours of the intent standard articulated in *Cloverleaf*.⁶¹ The intent factors enumerated in *Rice*⁶² incorporated the considerations decisive in *Hines* and *Cloverleaf*: pervasive regulation, dominant federal interest and unhampered operation. Although these factors appear to comprise a comprehensive "test" for occupation of the field, they have applied in such a manner only once.⁶³ Rather, they have been invoked on an ad hoc basis to justify particular preemptive decisions.⁶⁴

56. 315 U.S. 148 (1942).

57. Section 2325 of the Internal Revenue Code provided for the inspection of renovated butter factories. An Alabama statute required inspection of the product's principal constituent, packing stock butter. In addition, the state law authorized confiscation of non-conforming packing stock butter, whereas the Secretary of Agriculture possessed no parallel authority in the federal regulatory scheme. This latter state provision spurred the litigation.

Although the federal statute at issue in the case was grounded in the taxing power, U.S. CONST. art. I, § 8, cl. 1, the Court viewed its regulatory features to be based on the commerce clause. 315 U.S. at 163.

58. *Id.* at 157.

59. *Id.* at 167-68.

It should be noted that although the Court stated *Cloverleaf's* issue in conflict terms, *id.* at 168-69, the analysis upon which the result was founded bears a closer relation to occupation of the field. For example, the Court reasoned:

Since there was federal regulation of the materials and composition of the manufactured article, there could not be *similar* state regulation of the *same* subject. *Id.* at 169 (emphasis supplied).

60. 331 U.S. 218 (1947).

61. Because the *Rice* Court found a specific congressional intent to preempt concurrent state regulation, its discussion of the broadened intent standard was dictum. The Court's willingness to gratuitously clarify *Cloverleaf* confirmed the demise of the state-directed preemption doctrine.

62. See text accompanying note 15 *supra*.

63. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), where the Court held that the federal prohibition in the Smith Act of 1940, 18 U.S.C. § 2385 (1970), of knowing advocacy of the overthrow of the government of the United States by force and violence preempted state prohibition of the same conduct. The Court emphasized the federal statute's pervasiveness, the national proportions of the sedition problem and administrative difficulties attending concurrent prohibitions. *Id.* at 502-07.

The decision elicited a strongly negative response. See C. MCGOWAN, *supra* note 8, at 48. Because forty-two states had similar provisions, a bill was proposed in Congress to limit federal preemption, in the absence of explicit congressional directives, to fields involving exclusive federal power. See J. SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789-1957*, at 191 (1958).

Perhaps in response to the furor, the Court defused the issue in *Uphaus v. Wyman*, 360 U.S. 72 (1959), by holding that *Nelson* did not prohibit states from prosecuting seditious conduct directed against them.

64. The pervasive nature of federal labor legislation has persuaded the Court to preempt state law. See, e.g., *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1961). Federal regulation of air commerce has produced the same result. See *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624

Although bearing only a tenuous relation to the traditional notion of congressional intent, the *Rice* factors do manifest one eminently practical conclusion. Congressional intent, strictly defined as it had been, is an inadequate source for the decision of preemption questions. Preoccupied with the business of legislating, Congress turns its sights inward to the formulation of its own policies, and does not, as a rule, anticipate ramifications with respect to state law.⁶⁵ To draw the negative inference from congressional silence—intent *not* to occupy a field—necessarily leads to a result in the state's favor, which may not be the most desirable one considering the totality of circumstances attending the operation of a federal regulatory scheme.

By discounting intent as an absolute limitation on the permissible sources of preemptive findings, *Hines* and *Rice* expanded the judicial role in occupation-of-the-field cases. This development inevitably resulted in more findings of preemption than during the period of ascendancy of the state-directed doctrine.⁶⁶

While the Court often expressly or implicitly relied on *Hines'* constitutional imperative⁶⁷ or the *Rice* factors⁶⁸ to justify preemption, the activist era witnessed the birth of additional preemptive bases premised on considerations of extrastatutory policies which the Court imputed to Congress. In *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*,⁶⁹ for example, the Court held that provisions of the Federal Communications Act⁷⁰ prohibiting censorship of political broadcasts clothed broadcasters with immunity from state libel laws. Although intent to occupy the field could not be readily inferred from the Act's scrambled legislative history, and a finding of conflict proved similarly elusive, considerations of fairness to broadcasters persuaded the Court to preempt state law.⁷¹ The most consistent and extensive resort to policy rationales occurred in the labor law cases—*San Diego Building Trade*

(1973); but see *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722-25 (1963) (federal aviation statute's ban on racial discrimination in hiring held not to preempt similar state provisions in the absence of further evidence of either intent or frustration of purpose).

65. See Comment, *supra* note 26, at 209. See also Hirsch, *supra* note 10, at 542-43. On occasion, however, Congress has expressly excluded or permitted state regulation. See, e.g., 7 U.S.C. § 269 (1970) (exclusive federal jurisdiction over licensed warehouses); 15 U.S.C. §§ 1011-15 (1970) (with stated exceptions, no act of Congress shall "be construed to invalidate, impair, or supersede" any state law regulating insurance).

66. Cf. G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 673 (8th ed. 1970). See generally the statistical compilation of decisions in R. ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM* 195-206 (1957).

67. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971), and *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (foreign affairs); *Sears, Roebuck & Co. v. Steffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (patents).

68. See text accompanying note 15 *supra*.

69. 360 U.S. 525 (1959).

70. 47 U.S.C. § 315(a) (1970).

71. 360 U.S. at 531-35.

Council v. Garmon,⁷² its immediate predecessors⁷³ and its progeny.⁷⁴ In these cases, a judicially perceived need to leave to the National Labor Relations Board the adjudicative development of the law controlling labor relations has resulted in extensive preemption of legislative and judicial state action in the field.

Although the Court purportedly abided by congressional intent in these cases,⁷⁵ its occasional references to "congressional design"⁷⁶ to occupy the field suggest that these efforts were strained at best.⁷⁷ The fact of congressional action alone rendered federal law presumptively preemptive.⁷⁸ The change occurred when the Court in deciding preemption cases departed from the terms

72. 359 U.S. 236 (1959). The *Garmon* rule, that both state and federal courts must defer to the exclusive competence of the NLRB "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA]," was formulated to avert the danger of state interference with national policy. *Id.* at 245. The policy enunciated by the Court stressed the avoidance of conflict both between federal and state law enforcement authorities and between inconsistent standards of substantive law, *id.* at 242, with particular emphasis placed upon protecting the unifying role of the centralized administrative agency, *id.* at 241-43.

73. For example, despite identity between Pennsylvania labor law and the NLRA, judicial concern for the uniformity of substantive and procedural law controlling labor relations preempted the state's jurisdiction over an unfair labor practice in *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953).

74. In *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), the Court restated the policies supporting preemption of state jurisdiction over labor relations. It again stressed the development of uniform substantive law through action by a single agency. *Id.* at 288-89. Significantly, it defended *Garmon* by emphasizing the necessity of formulating a general rule to govern adjudication in an area for which Congress itself has not determined the extent of state law's displacement. *Id.* at 289.

Other notable applications of the *Garmon* rule include *Longshoreman's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *Marine Eng'rs Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173 (1962). See generally Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972).

In recognition of overriding state interests, the Court has carved out a few exceptions to the *Garmon* rule. See *Vaca v. Sipes*, 386 U.S. 171, 180-82 (1967) (union duty of fair representation regarded as touching deeply rooted local interests of only peripheral concern to federal labor law); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 57, 61 (1966) (state responsibility to protect its citizens from the injury of defamation accommodated with federal interest in uniform regulation of labor relations); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962) (NLRB does not have exclusive jurisdiction over violations of provisions in collective bargaining agreements).

If the exceptions are read together with the rule, the labor field can be seen as falling under an overall division between subjects requiring uniform national treatment through the NLRB, and permitting local regulation. In effect, the Court has sought to achieve an overall balance of federal and state interests with regard to a subject matter which is deemed to trigger the federal presumption.

75. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 179 (1967); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104 (1961).

76. *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 430 (1963), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

77. It has been suggested that the Court draws the line between the federation and the states where it thinks it wise without significant regard to congressional intent. The Court's reaction to the state legislation's desirability possesses greater influence than the "metaphorical sign-language of 'occupation of the field.'" See *Crampton, Pennsylvania v. Nelson: A Case Study in Federal Pre-emption*, 26 U. CHI L. REV. 85, 87 (1958). See also Powell, *Supreme Court Decisions on the Commerce Clause and the State Police Power, 1910-1914*, pt. II, 22 COLUM. L. REV. 28, 48 (1922).

78. See also Hirsch, *supra* note 10, at 549.

of the statutes and legislative histories, to add inferences drawn from other sources, and to independently articulate policies based upon the resulting aggregate of factors. Ruminating in *Garmon* on the meaninglessness of an intent standard in the labor context, Justice Frankfurter aptly explained the reason for its abandonment:

Many of these problems probably could not have been, at all events were not, foreseen by Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.⁷⁹

3. *The Emergence of a Potential Conflict Standard.* Although the *Hines-Rice* line of cases had its greatest impact on occupation-of-the-field decisions, it also influenced the law in conflict cases. Whereas the Court had previously restricted the preemptive reach of the conflict ground to state laws in actual conflict with federal regulatory schemes,⁸⁰ on several occasions subsequent to *Hines* and *Rice* it voided state law by perceiving a *potential* conflict with federal legislation. In *Pennsylvania v. Nelson*,⁸¹ a case involving concurrent anti-sedition laws, the Court relied in part upon the possibility of incompatible adjudications resulting from multiple tribunals and diverse procedures to preempt state law.⁸² The potential conflict ground has also figured prominently in a number of labor preemption cases.⁸³

The adoption of a potential conflict standard accented the drift toward a federal-directed preemption doctrine, by beckoning judicial consideration of a federal statute's operational requirement and inviting preemption on speculative assessments of conflict.

4. *The Federal Presumption and Absolute Supremacy: An Overview.* Even before the state presumption lost its force generally, concepts certain to undermine it appeared in *Hines* and *Rice*. *Rice*, for example, drew a sweeping correlation between a statute's pervasiveness and the likelihood of occupation of the field. By factoring out intent, this aspect of *Rice* attached inherent preemptive capability to the federal statute itself. Attaching decisive preemptive effect to the solitary fact of congressional action bears comparison with pre-1930's preemption decisions.⁸⁴ This newly rediscovered preemptive capability,

79. 359 U.S. at 240.

80. See text accompanying notes 25 and 27-28 *supra*.

81. 350 U.S. 497 (1956); see note 63 *supra*.

82. *Id.* at 509.

83. In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), for example, Justice Frankfurter rejected state regulation of activities falling under sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157-158 (1970), in part because the resulting danger of federal-state conflict would create a "potential frustration of national purposes." *Id.* at 244; see also *Smith v. Evening News Ass'n*, 371 U.S. 195, 202-03 (1962) (Black, J., dissenting); *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953).

84. See Comment, *Goldstein v. California, Breaking Up Federal Copyright Preemption*, 74 COLUM. L. REV. 960, 967 (1974); note 24 *supra*.

the concomitant lowering of the intent barrier and the Court's increasingly solicitous spirit with respect to federal interests combined to break down the state presumption and facilitate the erection of a federal replacement.

The cases demonstrate the mechanics of the process. *Hines*, once again, provides a point of departure. There, the national interest embedded in the foreign affairs power generated the strongest possible presumption in favor of preemption, short of an outright declaration of constitutionally mandated exclusivity.⁸⁵ Like *Hines*, succeeding cases under the aegis of foreign affairs,⁸⁶ brushed over the intent barrier and preempted state regulation on the strength of the federal presumption. Read together, their recognition of a strong federal interest not only overpowers, but seems to foreclose any recognition of corresponding state interests.

The exceptional constitutional backing of the foreign affairs power permitted a federal presumption to operate without necessarily impugning the state's presumption's general validity.⁸⁷ But the Court, more ignoring than rejecting the state presumption, raised the federal one in fields lacking foreign affairs' constitutional imperative.⁸⁸ The extension did not go unprotested. Dissenting in *Pennsylvania v. Nelson*,⁸⁹ Justice Reed called the finding of a compelling national interest in sedition an application of *Hines* bereft of its constitutional basis.⁹⁰ But the protest came too late. By 1956, when *Nelson* was decided, *Hines*' substantive approach was well along the way toward general applicability.⁹¹

Undoubtedly, the development of the federal presumption can be ascribed

Professor Engdahl, on the other hand, has argued that a sharp break occurred in the 1930's from a theory of incompatible concurrent power to an intent-dominated inquiry. Engdahl, *supra* note 5, at 52-55. But the Court's subsequent return to a more vigorous conception of the preemptive power of federal law has made the intent requirement a nominal one, resulting in a federal-directed doctrine which is remarkably similar to the pre-1930's approach.

85. In the later cases, the Court continued to imply an independent constitutional basis. See note 86 *infra*. The Court altogether left behind the statutory base in *Zschernig v. Miller*, 389 U.S. 429 (1968), where it struck down a state restriction on foreign heirs' right to take under its intestate succession laws not because of any conflict with policy derived from treaties but as a state intrusion into foreign affairs in general. *Id.* at 432, 441. See *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 238-45 (1968).

86. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *United States v. Pink*, 315 U.S. 203 (1942).

87. State interests also passed largely unconsidered in two patent cases for which a constitutional imperative—the copyright clause—analogueous to that of the foreign affairs power can be hypothesized. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); see note 123 *infra*.

88. See, e.g., *Townsend v. Swank*, 404 U.S. 282 (1971) (welfare grants in aid); *Free v. Bland*, 369 U.S. 663 (1962) (treasury regulations); *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (communications regulation). In *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 169 (1942), the Court implied that even where state law neither conflicts nor coincides, the pervasiveness of the statutory scheme may be preemptive of all state regulation. See notes 56-59 and accompanying text *supra*.

89. 350 U.S. 497 (1956).

90. *Id.* at 515-16.

91. See note 88 *supra*.

in part to the Court's implicit assumption of independent preemptive authority. The accompanying relaxation of the intent standard permitted recognition of, and action upon, federal interests formerly unreachable in the absence of clear congressional expression. But the federal presumption acquired a force of its own. In the labor cases, for example, it took shape in the idea that the scheme of federal statutes regulating labor relations had achieved a balance between the competing interests of unions, management, employees and the public, which would be endangered by any entry of state law into the field.⁹² To rebut the federal presumption and vindicate state interests, the Court required an affirmative congressional indication of tolerance of concurrent state regulation.⁹³

No less than with the rigidly applied state-directed formulation, however, preemption under the federal presumption tended to prevent a flexible response to interrelated federal and state interests. The difficulty was aggravated in conflict cases, where the very existence of the federal statute raises a claim of exclusivity under the supremacy clause. Thus, when the issue of balancing federal and state interests in the face of an actual conflict arose during this period, the Court rejected the notion of flexible supremacy introduced in *Huron* and *Kesler*.⁹⁴ Chief Justice Warren reestablished the absolute supremacy principle in *Free v. Bland*.⁹⁵

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.⁹⁶

In *Perez v. Campbell*,⁹⁷ the Court specifically overruled *Kesler*, rejecting its "aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration."⁹⁸ The case forcefully reaffirmed the *Hines* rule—the supremacy clause invalidates any frustration of federal law's full effectiveness.⁹⁹

The Court's recognition of the principle of absolute supremacy owes much to its desire to meet needs perceived in the subject matter at hand. Whether in labor law,¹⁰⁰ communications,¹⁰¹ civil liberties,¹⁰² civil rights,¹⁰³ welfare

92. See Cox, *The Supreme Court and the Federal System*, 50 CALIF. L. REV. 800, 809 (1962); cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 104 (1961).

93. See, e.g., *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297 (1971).

94. See notes 35-39 and accompanying text *supra*.

95. 369 U.S. 663 (1962).

96. *Id.* at 666.

97. 402 U.S. 637 (1971).

98. 402 U.S. at 651-52.

99. *Id.* at 652.

100. See notes 71-73, 83 and accompanying text *supra*.

101. See *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959), discussed at notes 70-71 and accompanying text *supra*.

102. Cf. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), discussed at note 63, and text accompanying notes 81-82 *supra*; *Hines v. Davidowitz*, 312 U.S. 52 (1941), discussed at notes 41-53 and accompanying text *supra*.

103. See, e.g., *Ham v. Rock Hill*, 379 U.S. 306 (1964).

entitlement,¹⁰⁴ foreign affairs,¹⁰⁵ or criminal law,¹⁰⁶ the Court's invocation of the federal presumption finds justification in the merits of the individual cases.¹⁰⁷ But the Court's result orientation tended to rigidify into a reflexive protection of federal interests with little regard for countervailing state concerns. By its very nature, this aggressive mode of assessing the preemptive capacity of federal law came to impair a genuine balancing of state and federal interests.

II. BURGER COURT DEVELOPMENTS

In 1973, just as the federal presumption had acquired the veneer of doctrinal permanence, the Court abruptly began to change direction. In a series of decisions—*Goldstein v. California*,¹⁰⁸ *New York State Department of Social Services v. Dublino*,¹⁰⁹ *Kewanee Oil Co. v. Bicron Corp.*¹¹⁰ and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*¹¹¹—the Court once again incorporated a solicitude of state interests into its preemption inquiry.

A. *The Constitutional Issue in Goldstein v. California and the Court's Response to State Interests*

In *Goldstein v. California*¹¹² Chief Justice Burger, writing for a five-to-four majority, aggressively protected the states' right to prohibit the reproduction of phonograph records from misappropriated copies by narrowly construing the preemptive scope of the copyright clause.¹¹³ In affirming petitioner's conviction under a California statute making record piracy a criminal

104. See, e.g., *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971).

105. See notes 85-86 and accompanying text *supra*.

106. See, e.g., *Ham v. Rock Hill*, 379 U.S. 306 (1964); *California v. Zook*, 336 U.S. 725 (1949), discussed at note 34 *supra*.

107. To some extent, the rise of the federal presumption may be correlated with congressional entry into nontraditional subject matter areas, where the Court may have felt a greater solicitude of federal interests than in the traditional commerce power areas. But the correlation is far from perfect. Thus, although some relatively recent cases concerning more traditional commerce clause topics, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (interstate flow of produce) and *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (licensing of interstate shipping), have state-directed results, a countervailing number involved preemption on expansive assessments of federal policies, see, e.g., *Campbell v. Hussey*, 368 U.S. 297, 302 (1961) (classification of commodities); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 63-64 (1954) (federal licensing of interstate trucking).

The tension lies not between the doctrine and tight compartments of subject matter, but between the doctrine and the Justices' reactions to the merits of the individual case. While the Court is never explicit as to the point where the doctrine impresses itself upon the facts, or the facts upon the doctrine, the Court's reliance on presumptions embody perspectives of federalism that tend to influence its approach to the cases' merits. The phenomenon becomes apparent, not in the isolated case, but in aggregates of cases decided over long periods.

108. 412 U.S. 546 (1973).

109. 413 U.S. 405 (1973).

110. 416 U.S. 470 (1974).

111. 414 U.S. 117 (1973).

112. 412 U.S. 546 (1973). For more extensive discussions of the case see generally Comment, *supra* note 84.

113. U.S. CONST. art. I, § 8, cl. 8.

offense, the Court considered but rejected the constitutional claim that the federal copyright power by its own force, notwithstanding the absence of any federal regulation of the matter, precluded concurrent state legislation.¹¹⁴

The copyright clause question, although strictly speaking not one of preemption,¹¹⁵ nonetheless merits examination, for the Court in *Goldstein* utilized the analytical tools of the preemption doctrine and its resolution bears broader implications for the present Court's approach to federal-state relations. On this threshold issue, the Court narrowly construed the preemptive capability of the copyright clause by holding the federal copyright power to be exclusive only when a similar exercise by the states would be "absolutely and totally contradictory and repugnant."¹¹⁶ Relying on early commerce clause precedents¹¹⁷ which distinguished national, preemptive subject matter from subject matter essentially local in character, and hence nonpreemptive,¹¹⁸ the Court fashioned a test for ascertaining "repugnancy": exclusive federal power exists over "matters which are necessarily national in import."¹¹⁹ Moreover, even with respect to "necessarily national" matters, permissible situations in which conflicts from concurrent federal and state regulation "may possibly arise" must be distinguished from impermissible situations, mandating preemption, in which such conflicts "will necessarily" arise.¹²⁰

In place of this commerce clause analysis, the Court could have analogized from the foreign affairs model of *Hines* to accord the constitutionally based federal copyright power a preemptive capacity amounting to federal exclusivity even in the absence of congressional action.¹²¹ In contrast to the nebulous commerce power grant, the "specific" character¹²² of the copyright power invites an analogy to the relatively circumscribed subject matter of foreign affairs.¹²³ Chief Justice Burger, however, declined to draw the analogy.

114. 412 U.S. at 548.

115. The statutory preemption issue in *Goldstein* is discussed at notes 128-136 and accompanying text *infra*.

116. 412 U.S. at 553. The Court's use of the "repugnancy" standard for determining the preemptive force of the copyright clauses tracks Alexander Hamilton's analysis in THE FEDERALIST No. 32, at 200 (Van Doren ed. 1945); see text accompanying note 41 *supra*.

117. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

118. 412 U.S. at 553.

119. *Id.* at 554 (emphasis in original). The "necessity" element derives from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

120. 412 U.S. at 554.

121. See notes 48, 67 and 85 and accompanying text *supra*.

122. See Comment, *supra* note 84, at 966.

123. The Court appears to have seized upon this analogy in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). The two cases held that when an article is unprotected by a patent or copyright, state unfair competition law may not forbid copying. To allow the prohibition would interfere with federal policy grounded in the copyright clause and implementing federal legislation in favor of competition outside the time-limited federal patent and copyright monopolies. *Id.* at 237. Since the federal patent statute clearly did not reach unpatentable articles, see *Sears, Roebuck & Co. v. Stiffel Co.*, *supra* at 226, 230-31; text accompanying note 131 *infra*, the Court may have been drawing its policy inferences from the copyright clause itself.

In enunciating a "repugnancy" standard, the Court favored a flexible conception of federal-state relations rather than one of absolute federal supremacy. Since the local-national distinction embodied in commerce clause principles restrained the preemptive scope of federal power and permitted extensive concurrent jurisdiction,¹²⁴ the requirements of effective copyright regulation could be balanced against the competing demands of the states for recognition of their interests in local regulation.

The Court, however, went beyond merely articulating a flexible preemption test. By adding a strongly state-directed standard for measuring "repugnancy"—the requirement of "necessarily national" character and "necessary" conflict—the Court erected a bar with an impact analogous to that of the specific intent to preempt requirement.

To decide the constitutional permissibility of state protection of recordings from piracy, the Court measured the regulated subject matter against its newly formulated standard. Given the standard's strictness, the majority evidently felt no need to detail its argument that because of the "enormous diversity" of the American people's "backgrounds, origins and interests" from region to region, the subject matter to which the copyright clause is addressed may be of local importance.¹²⁵ Remaining difficulties—possible prejudice to one state's interests due to the actions of another, or possible conflict with federal authority—fell away under the "necessary" conflict requirement.¹²⁶

Considering the nature of the modern communications industry, however, the viability of local copyright regulation is doubtful. The promotion, distribution and marketing of sound recordings can hardly be deemed an "intrastate" activity. If the "necessarily national" character leg of the Court's test is to have any practical applicability, recordings should have come within it. The Court therefore seems to have extended protection to questionable state interests and in the process ignored potential federal interests in uniform regulation of a subject matter which does not admit of local treatment.

The Court's state-directed standard for federal exclusivity and its problematic treatment of the subject matter of sound recordings may best be explained by the Court's unwillingness to find in the Constitution a directive preventing the states from regulating in an area wholly ignored by Congress.¹²⁷ *Goldstein* posed a choice between providing blanket protection against all contingencies likely to obstruct the potential exercise of federal power, or

124. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-45 (1963). See generally note 18 *supra*. For a suggestion that the commerce clause analogy is a long-standing one, see 19 VILL. L. REV. 496, 497 (1974).

125. 412 U.S. at 557-58. The Court's use of the local-national test for copyright has been criticized. Nimmer contends that the diversity of taste and interest in works of authorship in the nation rests on more subtle factors, such as age and education, that are not distinguishable by geographic reason. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.1, at 1 (1963); see also 15 B.C. IND. & COM. L. REV. 636, 640 (1974).

126. 412 U.S. at 558-59.

127. See notes 132-133 and accompanying text *infra*.

encouraging state regulation subject to correction by congressional intervention in the field. By choosing the latter course, the Court essentially rejected the federal presumption in order to give recognition to declared state interests in the absence of any congressional declaration of federal concern.

Goldstein marks the reemergence of a state presumption. The Court has begun to apply the state-directed view of federalism embodied in *Goldstein's* determination of the copyright clause's preemptive capability to the statutory context.

B. *The Occupation Ground*

1. *Return to the State Presumption.* In denying the constitutional exclusivity of the federal copyright power, *Goldstein* addressed a question only preliminary to the preemption inquiry. There remained to be resolved the traditional preemption question—whether California's penal statute was incompatible with the federal legislative scheme.

Examining the statutory issue, the Court first excluded recordings from the "writings" category of the Act of 1909,¹²⁸ and then distinguished *Sears, Roebuck & Co. v. Stiffel Co.*¹²⁹ and *Compco Corp. v. Day-Brite Lighting, Inc.*,¹³⁰ which nullified state unfair competition laws protecting federally unpatentable articles, as involving an undisturbable congressional balance between innovation within patentable areas and competition outside of them.¹³¹ As the technological modernity of record piracy precluded not only intent to preempt but any sort of coverage in the 1909 Act, the Court found the field to be unattended.¹³² It then held the congressional silence to have left the field open to state regulation.¹³³

The holding implicitly relies upon the state presumption. In dealing with congressional silence, the Court might have followed *Sears* and *Compco* and invoked the federal presumption.¹³⁴ Those cases had stated a policy favoring competition in the absence of specific congressional instruction, and would have required an affirmative showing of congressional permission for state regulation inconsistent with free competition.¹³⁵ The policy underlying the *Sears-Compco* federal presumption was not, however, a mere inference from but an elaboration upon the statutes, grounded in judicial preemptive authority. By appearing to reimpose the clear intent standard, the Court thus indi-

128. 17 U.S.C. § 4 (1970).

129. 376 U.S. 225 (1964).

130. 376 U.S. 234 (1964).

131. 412 U.S. at 569. For a fuller analysis of the *Goldstein* Court's treatment of *Sears* and *Compco*, compare Comment, *supra* note 184, at 973-76 with 19 VILL. L. REV. 496 (1974).

132. Legislation effective after the events of *Goldstein* has extended federal copyright protection to recordings. See 17 U.S.C. §§ 1(f), 5(n) (Supp. II, 1972).

133. 412 U.S. at 571.

134. See, *id.* at 574 (Douglas, J., dissenting); *id.* at 578 (Marshall, J., dissenting). See also note 123 *supra*.

135. *Id.* at 578 (Marshall, J., dissenting).

cated a disinclination to maintain a preemptive policymaking role in the copyright area.¹³⁶

The favorable disposition toward state interests that undergirded both the constitutional and statutory holdings of *Goldstein* similarly led to a departure from precedents in the welfare field in *New York State Department of Social Services v. Dublino*.¹³⁷ The issue was whether the Work Incentive Program (WIN) of the Aid to Families with Dependent Children (AFDC) section of the Social Security Act¹³⁸ preempted the New York Work Rules'¹³⁹ requirement that individuals accept employment as a condition to receipt of federal AFDC assistance.¹⁴⁰ New York's rules, promulgated pursuant to its participation in the AFDC grants-in-aid program, terminated payments more summarily and at an earlier stage¹⁴¹ than the WIN guidelines.¹⁴² The Court held that WIN did not occupy the field,¹⁴³ but remanded¹⁴⁴ on the issue of whether the Work Rules' termination penalty conflicted with the AFDC requirement that aid be furnished "with reasonable promptness to all eligible individuals."¹⁴⁵

In sustaining the Work Rules, the Court affirmed the state's legitimate interest in promoting self-reliance and assuring "that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need. . . ."¹⁴⁶ To build this state interest into a presumption against preemption, the Court relied upon the principle of cooperative federalism embodied in grants-in-aid programs like AFDC.¹⁴⁷ It accordingly concerned itself less with protecting the inviolability of the federal scheme than with preventing the potential impairment of the state's ability to handle its citizens' increasing dependency and mounting welfare costs and presumably to participate in the AFDC program.¹⁴⁸ Emphasizing New York's effort to administer its welfare program

136. A comparable treatment of congressional silence in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), sustained state trade secret law as against the copyright clause and federal patent law. See notes 175-180 and accompanying text *infra*.

137. 413 U.S. 405 (1973).

138. 42 U.S.C. §§ 630-44 (1970).

139. N.Y. Soc. SERVICES LAW § 131 (McKinney Supp. 1974).

140. 413 U.S. at 406-07.

141. The Work Rules require employable welfare recipients to pick up their checks in person, certify the unavailability of employment, and report for public works employment, job interviews, and any employment obtained therefrom. N.Y. Soc. SERVICES LAW § 131 (McKinney Supp. 1974). Failure to comply with these requirements is deemed a refusal of aid and results in termination. *Id.* § 131(4)(a).

142. While having the same purpose of promoting self-sufficiency among welfare recipients, 413 U.S. at 409-10, WIN's periodic certification requirements, see 42 U.S.C. § 602(a)(8) (1970), are less strict than the Work Rules; and the federal program both omits the termination penalty, see *id.* § 602(a)(8), and incorporates extensive procedural safeguards, see *id.* §§ 602(a)(4), 602(a)(19)(F), 633(g), not present in the state scheme.

143. 413 U.S. at 422.

144. 413 U.S. at 422-23.

145. 42 U.S.C. § 602(a)(19) (1970).

146. 413 U.S. at 413.

147. The Court pointed out that because the Work Rules were implemented as part of AFDC and WIN, the case did not involve the usual preemption pattern of independent federal and state statutes converging on common subject matter. *Id.* at 414 n.9.

148. *Id.* at 413.

free from friction with WIN, the Court then fashioned a presumption against preemption:

Where co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.¹⁴⁹

Having placed the burden of demonstrating incompatibility on the challengers to the Work Rules, the Court summarily found them not to have met it.¹⁵⁰

As in *Goldstein*, the Court's single-minded emphasis on state interests in *Dublineo* can be questioned. Only the state's AFDC recipients would have been affected by extending the WIN provisions in place of the Work Rules. Moreover, job placements both under WIN and the Work Rules have been negligible,¹⁵¹ suggesting that it is unlikely that the state's interest in efficient, solvent welfare administration would have been sacrificed by such extension. In effect, the Court accorded to this minor impairment of New York's scheme greater weight than both the federal government's interest in the integrity of the conditions attached to its expenditures, and the congressional purpose to preserve the family unit through aid.¹⁵² As with *Goldstein*'s constitutional discussion, *Dublineo* went some distance to secure a state interest, and in the process may have ignored countervailing federal interests.¹⁵³

Dublineo cannot be squared completely with the precedents it failed in terms to overrule. In *Townsend v. Swank*¹⁵⁴ the Court had established a general rule for preempting differing terms of state implementations of the AFDC program. Absent "clearly evidenced" congressional authority to exclude individuals otherwise eligible for aid under the federal statute, exclusionary state

149. *Id.* at 421.

150. The Court dismissed the challengers' argument as based in a legislative history too "fragmentary" to evidence congressional intention to supersede state work programs. *Id.* at 415-16.

151. In New York, from January to June, 1972, there were 2,657 job placements under WIN and 5,323 under the Work Rules (including those not receiving AFDC assistance). *Id.* at 420 n.5.

152. 413 U.S. at 423, 427-28 (Marshall, J., dissenting).

153. The Court's renewed emphasis on state interests and underestimation of federal interests is further illustrated by a recent decision in the well entrenched federal subject matter of labor relations. In *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), the Court held that the reasonableness of disciplinary fines imposed by unions on their members was not a matter for NLRB unfair labor practice determination but was a question to be left entirely to state courts. *Id.* at 75.

While not strictly a preemption case, *Boeing* accomplishes a form of "reverse preemption." Craver, *The Boeing Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556, 593 (1974), by foreclosing NLRB jurisdiction. The Court rejected the well-settled grounds of labor preemption: the need for national uniformity of decisions and the expertise of the NLRB. *Id.* at 76-77. It thereby commenced to erode the preemptive policy underlying the *Garmon* rule. See notes 72-73 and accompanying text *supra*. Here also the Court protected state interests, while minimizing the importance of justifiable and previously decisive federal interests in uniformity and expert agency control over the development of the law.

154. 404 U.S. 282 (1971).

provisions were invalid.¹⁵⁵ State discretion extended only to the level of benefits and the standard of need.¹⁵⁶ Dissenting in *Dublino*, Justice Marshall contended that the additional conditions of the Work Rules constituted an exclusion within the *Swank* rule, and therefore required an affirmative showing of congressional intent to be sustained.¹⁵⁷ The majority, however, distinguished the state regulations involved in *Swank* and like-holding cases¹⁵⁸ as lacking the Work Rules' support in the congressional legislative history.¹⁵⁹ The legislative history supporting the state in *Dublino*, however, was little more compelling than that in preceding cases.¹⁶⁰ As between *Sears-Compco* and *Goldstein*, the points of distinction between *Dublino* and its predecessors are negligible. In essence, the Court has switched the burden of proof to the federal side, and has reinterpreted congressional silence in the state's favor.

2. *The Doctrine Restated.* *Dublino* more than paralleled *Goldstein*. What the Court in *Goldstein* merely implied as to the requirement of specific congressional intent for occupation and its predisposition toward a state presumption, it made explicit in *Dublino*. The Court's drift back to the state presumption was unmistakably discernible in its revival of a moribund, somewhat extreme statement of the state-directed formula:

If 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 supersede 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.¹⁶¹

Dublino's test for occupation of the field is tantamount to a specific intent requirement. The Court noted that because twenty-one states had AFDC programs at the time of WIN's enactment, any intention to supersede existing work rules "would in all likelihood have been expressed in direct and unambiguous language."¹⁶² For possibly the first time in a preemption case, the Court in effect implemented the hoary maxim of construction: that had the legislature intended the result requested, it explicitly would have provided for it. Although the precise contours of the test are in doubt, *Dublino* has resurrected the strictly construed intent requirement that obtained during the ascendancy of the state-directed approach.¹⁶³ *Dublino's* intent standard implicitly

155. *Id.* at 286.

156. *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *King v. Smith*, 392 U.S. 309, 318-19 (1968).

157. 413 U.S. at 423-24.

158. *See Carleson v. Remillard*, 406 U.S. 598 (1972); *King v. Smith*, 392 U.S. 309 (1968).

159. 413 U.S. at 421-22. The Court relied on the limited number of recipients accommodated by WIN, and HEW's policy of approving state plans containing work requirements which were not arbitrary or unreasonable. *Id.* at 418-20.

160. *Compare id.* at 416 with *Townsend v. Swank*, 404 U.S. 282, 288-90 (1971), and *King v. Smith*, 392 U.S. 309, 320-25, 332 (1968).

161. 413 U.S. at 413, quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

162. 413 U.S. at 414.

163. There is some evidence in *Dublino* to rebut this inference. The Court's allusion

rejects the assumption upon which the *Rice* factors were based—that Congress cannot be assumed to have concerned itself with the preemption of existing state law when preoccupied with formulating its own program.¹⁶⁴

The Court's rejection of the preemptive significance of the comprehensive character of the federal program cast further doubt upon the continuing validity of *Rice*. The pervasiveness point was regarded as outmoded in the context of contemporary legislative practice:

The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . . .¹⁶⁵

Like the Court's supposition of congressional consciousness of preemption problems, this observation mandates a search for specific intent as the sole determinant of federal occupation of the field.

Dubino is therefore a completely state-directed occupation-of-the-field case, coupling a protective treatment of state interests and a state presumption with a doctrinal formulation echoing the pre-*Hines-Rice* cases.

C. *The Conflict Ground*

The Court has granted state interests compelling weight in cases raising conflict issues as well. Although ostensibly concerned with the factual problem of a conflict's existence, *Kewanee Oil Co. v. Bicron Corp.*,¹⁶⁶ found much support for its result in a state-directed balancing of interests.

The issue in *Kewanee* was whether federal patent law preempted state trade secret law. In finding no conflict,¹⁶⁷ the Court first considered the objectives of the federal and state statutes. Whereas the patent law sought to encourage invention and discovery and ultimate public disclosure, the trade secret law sought to promote commercial ethics and the development of unpatentable inventions.¹⁶⁸ Projecting the impact of uninhibited state action, the Court found no frustration of the federal purpose.¹⁶⁹ The Court failed to find a conflict in part because of the weight it attached to the states' interests in maintaining trade secret laws. In the Court's view the speculative encourage-

to appellee's failure to show preemptive intent "expressly or impliedly," *id.* at 417 (emphasis supplied), supports a contrary view. The Court's other pointed remarks about intent, however, belittle the significance of this statement.

164. See text accompanying note 65 *supra*.

165. 413 U.S. at 415; but cf. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

166. 416 U.S. 470 (1974).

167. Closely tracking its *Goldstein* analysis, the Court disposed of the copyright clause and occupation of the field issues presented. *Id.* at 478-79; notes 112-136 and accompanying text *supra*.

168. 416 U.S. at 480-82.

169. The Court stressed that the more complete protection offered by federal law would provide a sufficient attraction to owners of inventions of both doubtful and clear patentability. *Id.* at 487-90. This negated the risk that those with patentable inventions would avoid federal protection, and thus deprive the public of ultimate disclosure. *Id.* at 489.

ment to seek patents for inventions of doubtful patentability was outweighed by the harm to state interests that would attend preemption.¹⁷⁰ This protectiveness carried over to the Court's treatment of the facts. Even if the holder of a clearly patentable invention, as to whom the federal interest in ultimate public disclosure is greatest, sought state trade secret protection, pressures on the inventor from the scientific and industrial communities and the march of technological development would eventually bring the invention into the public domain.¹⁷¹ Once again, then, the Court placed the protection of state interests above certainty in the accomplishment of federal interests.

By virtue of its finding of no conflict on the facts, *Kewanee* posed no issue as to the doctrinal elements of the conflict ground. But other Burger Court decisions have cut back on the potential conflict standard of the *Hines-Rice* line of cases¹⁷² and *Perez v. Campbell's*¹⁷³ insistence upon absolute supremacy whatever the conflict's magnitude.¹⁷⁴

Albeit in a constitutional preemption context, *Goldstein's* "necessary" conflict requirement¹⁷⁵ already had indicated the Court's dissatisfaction with the potential conflict standard. In *Dublino* a similar narrowing of the conflict ground occurred in a statutory preemption context. Although the Court declined to pass directly upon the conflict,¹⁷⁶ it observed in a footnote that

[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial.¹⁷⁷

In remanding the case on the conflict issue, the Court chose not to examine the statutes for latent conflicts. Arguably then, *Dublino* presages, if not heralds, the demise of the "potential" conflict basis for preemptive findings.¹⁷⁸

Elsewhere, the *Dublino* Court reiterated the view that "[t]he exercise of federal supremacy is not lightly to be presumed."¹⁷⁹ The case, therefore, clearly revives the flexible supremacy principle of *Huron* and *Kesler*¹⁸⁰ that the Court expressly repudiated only two years previously in *Perez*. Failure to preempt in the case of a "merely trivial" conflict would seem indistinguishable from failure to preempt when the conflict is between a regulatory scheme of substantial state interest and insubstantial federal concern. For the first time since

170. *Id.* at 489.

171. *Id.* at 490-91.

172. See notes 51-53, 80-83 and accompanying text *supra*.

173. 402 U.S. 637 (1971); see text accompanying note 98 *supra*.

174. See text accompanying note 94 *supra*.

175. See note 120 and accompanying text *supra*.

176. 413 U.S. at 422.

177. *Id.* at 423 n.20. This formulation, which narrows considerably the conflict ground, may be restricted to federal statutory schemes envisioning state-federal administrative coordination. Cf. notes 147-149 and accompanying text *supra*.

178. Cf. *Askew v. American Waterways Operations, Inc.*, 411 U.S. 325 (1973).

179. 413 U.S. at 413, quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952).

180. See notes 35-39 and accompanying text *supra*.

Kesler, then, the Supreme Court intimated that a conflict may be allowed to stand. At the very least, *Dublino* questions the durability of *Perez*, and in so doing reintroduces a principle striking at the foundation of the federal presumption.

While proposing an approach supportive of flexible supremacy, *Dublino* avoided any ruling to that effect by remanding on the conflict issue—in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*¹⁸¹ a state law survived an admitted conflict.

A federal-state conflict arose when the respondent, upon leaving the petitioner's employ, forfeited under the terms of the employment contract the benefits of a noncontributory profit-sharing plan.¹⁸² A California statute voided the forfeiture, but a New York State Exchange Rule,¹⁸³ enacted pursuant to section 6 of the Securities Exchange Act of 1934,¹⁸⁴ directed arbitration of any controversy arising from employment termination. The Exchange Rule also conflicted with a California provision requiring the Court to disregard arbitration clauses in individual actions for the collection of wages. The Supreme Court affirmed the California court's judgment for the employee.

In upholding the state law, the Court relied upon several potentially independent grounds. Since section 6(c) of the 1934 Act¹⁸⁵ required that the Exchange Rules be consistent with applicable law of the state where the exchange is located as well as with the Act, the Court argued: "where the government has provided for collaboration the courts shall not find conflict."¹⁸⁶ But the Court did not rely upon this provision as a dispositive expression of specific congressional intent to permit concurrent state regulation.¹⁸⁷ The Court proceeded to examine at length the relation between the purpose of the Rules and the state law at issue. Justice Blackman's opinion for the Court relied heavily upon the analytical framework established by *Silver v. New York Stock Exchange*,¹⁸⁸ a case involving a collision between the Rules and the federal antitrust laws. As construed in *Ware*, *Silver* held that the exchange's self-regulatory rules should preempt conflicting law "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."¹⁸⁹ The congressional aim in allowing exchange self-regulation was to insure fair dealing and to protect investors.¹⁹⁰ As the Court found employee arbitration

181. 414 U.S. 117 (1973).

182. *Id.* at 120.

183. NYSE, CONSTITUTION AND RULES, Rule 345(a) (1) (CCH 1973).

184. 15 U.S.C. § 78f (1970).

185. 15 U.S.C. § 78f(c) (1970).

186. 414 U.S. at 137.

187. To dispose of the case on this basis entailed a determination whether New York, the state where the exchange is located within the meaning of the Act, would apply California law to the arbitration question. The Court posed, but declined to decide the conflict of laws issue presented. *Id.* at 138.

188. 373 U.S. 341 (1963).

189. 414 U.S. at 127.

190. *Id.* at 130.

irrelevant to these ends, it found no preemption under the stated standard.¹⁹¹ The Court also found that the 1934 Act implied no compelling need for national uniformity in New York Stock Exchange "housekeeping" rules.¹⁹² Concluding that no persuasive reason for preemption was shown, the Court held that California's strong interest in protecting its wage earners prevailed.¹⁹³

Broadly construed, the *Ware* analysis provides a successor of sorts to *Huron*.¹⁹⁴ The Rules were implicitly admitted to possess preemptive capability, but only when directly in pursuance of the 1934 Act's policies.¹⁹⁵ The limitation developed in *Silver* to deal with a conflict between two federal statutes amounts to a principle of flexible supremacy when transferred to the federal-state context. In stating arbitration's relation to fair dealing and investor protection to be "peripheral,"¹⁹⁶ the Court in effect viewed the conflict itself to be peripheral to the federal act's main purpose.

While the Court in *Ware* might have avoided finding a conflict had it drawn a distinction between the preemptive capability of a statute and that of self-regulated exchange exercising authority delegated by the statute, presumably on the ground that the Exchange Rules are not federal law within the meaning of the supremacy clause, it failed to decide the case on that ground.¹⁹⁷ *Ware* must therefore be said to have left standing an acknowledged conflict.

D. *A Principled Turn Toward the States*

The Burger Court's most recent preemption decisions again raise the question of whether the doctrine controls the subject matter, or the subject matter the doctrine. They admit of factual analyses which, if granted dispositive weight, would render the accompanying formulations of the preemption doctrine post facto rationalizations. But the doctrine, as the embodiment of the federalist perspectives shared by a majority of the Justices at a given period of the Court's history, possesses, in varying degrees, force of its own. Cumulatively considered, the Burger Court decisions show a renewed emphasis on the state-directed doctrine.

Dissenting in *Goldstein*, Justice Marshall implied that the majority was more concerned with a proper result than with the proper application of

191. *Id.* at 134-36.

192. *Id.* at 136.

193. *Id.* at 139-40.

194. 362 U.S. 440 (1960); see note 35 and accompanying text *supra*.

195. See note 206 and accompanying text *infra*.

196. 414 U.S. at 135.

197. There is some ambiguity in the opinion on this point, however. In determining the Exchange Rule's relation to the 1934 Act, the Court said that a rule outside of the Act's purpose "would not appear to fall under the . . . federal umbrella; it is instead subject to applicable state law." *Id.* at 131. Taken alone, this language suggests that preemptive capability under the supremacy clause had been denied altogether to peripheral Exchange Rules. While the Court could have decided the case on this ground, it relied instead on conventional preemption analysis.

existing principles.¹⁹⁸ Admittedly, in the absence of federal legislation, preemption of state remedies would amount to an undesirable carte blanche for the record pirate. But since Congress enacted a prohibition against record piracy effective after the events in the case, preemption at worst would entail the release of one defendant. The Court was free to follow its conceptual inclinations without concern for adverse policy ramifications.

The factual conclusion that copyright, then, may be local in character, was not the result of a strained effort to bring about a desired result; rather, it was the product of an exacting attitude toward the copyright clause's inherent preemptive capability. It was the Court's restraint in fashioning exclusive federal power out of the Constitution, rather than its analyses of the subject matter per se, which proved controlling in this case.

The ambiguity of *Dublino* lies in the very strength of the state interest at issue. Although the result may be attributed to the Court's imposition of the strict intent formulation, its abandonment of the federal presumption can also be explained as a change in its assessment of the challenged state statute. The rejected rule of *Townsend v. Swank*,¹⁹⁹ itself an extrapolation from the result of the precursing *King v. Smith*,²⁰⁰ rested on a different balance of federal-state interests. The Court in *King* struck down a state regulation which excluded from the AFDC program children whose mothers cohabited with men, relying in part upon the view that the state's interest in discouraging illicit sexual conduct was not a legitimate one in the context of AFDC policy.²⁰¹ Arguably, the invalid state exclusion of college students in *Swank* and that of children of parents absent for military service in *Carleson v. Remillard*²⁰² involved similarly questionable state interests. Given the Court's positive reaction to the state interests involved, *Dublino* presented circumstances inapposite to the *Swank* rule. To have required a showing of intent not to preempt would have foreclosed protection of a perceived legitimate state interest.

The Court in *Dublino* went beyond merely finding a failure of proof of congressional intent to preempt in the face of the strength of the state interest and the cooperative nature of the statutory scheme. The Court was interested in more than the specific result of the case. Rather than achieve the desired outcome by simply transferring the burden of proof to the supporters of the federal program, the Court sought to depart from the theoretical premises of the federal presumption by scaling down the intent standard, and rejecting pervasiveness and potential conflict as preemptive grounds.²⁰³ *Dublino* thus

198. 412 U.S. at 578-79.

199. 404 U.S. 282 (1971); see notes 154-158 and accompanying text *supra*.

200. 392 U.S. 309 (1968).

201. *Id.* at 325-27.

202. 406 U.S. 598, 599-600 (1972).

203. See notes 185-187 and accompanying text *supra*.

sought to have an impact on doctrine separable from its facts, and supports the general proposition that the preemption doctrine possesses independent influence.

In *Ware* the Court made its most concerted effort to reformulate doctrine, and in so doing indicated a possible point of departure for future changes in preemption's theoretical foundations. The Court expressed its

conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."²⁰⁴

By asserting this cooperative approach to be harmonious with preemption decisions "extending back to the turn of the century,"²⁰⁵ the Court thus incorporated it into the doctrine as a whole.²⁰⁶

Taken as a declaration of policy, Justice Blackmun's statement in *Ware* seems to indicate that the Court's reliance upon the presence or absence of explicit congressional directives, characteristic of *Goldstein* and *Dublino*, may be giving way to a more active disposition to effectuate cooperative results. He did not suggest, however, how the Court might accomplish this within the confines of article III, other than by refusing to preempt in unclear cases and by placing the burden of tying up any loose ends on Congress.²⁰⁷

E. Summary—The Present Disposition

The Burger Court's preemption decisions cannot be viewed as a doctrinal monolith. In *Burbank v. Lockheed Air Terminal, Inc.*,²⁰⁸ decided shortly before *Goldstein*, *Dublino*, *Ware* and *Kewanee*, the Court found federal aviation regulation preemptive of Burbank's curfew on late night flights. *Burbank* suggests that the return to a state-directed presumption may not be a complete reversal of prior decisions.

The *Burbank* majority, citing *Rice* to the effect that specific intent is not required, based its preemptive decision upon a fraction of a contradictory body of legislative history and the pervasiveness of federal regulation of aviation.²⁰⁹

204. 414 U.S. at 127, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). See also the inference of cooperative purpose drawn from a congressional expression of intent not to preempt in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 332, 336 (1973).

205. 414 U.S. at 127 n.8.

206. Although a cooperative objective can be inferred from previous state-directed cases, see text accompanying note 107 *supra*, *Ware* represents the Court's first explicit statement of this view.

207. Given Justice Blackmun's failure to reconcile the mandate to achieve cooperative results with the limits of judicial power under article III, the practical impact of *Ware*'s cooperative principle may be indistinguishable from that of the state-directed presumption of the present Court.

208. 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).

209. 411 U.S. at 633, 636-37, 638.

Three Justices joined Justice Rehnquist in dissent,²¹⁰ rejecting preemption founded upon implied intent, and reiterating the strict intent standard.²¹¹

Untempered generalizations have been inappropriate to preemption for at least the past fifty years. Preemption's diversity and breadth of application make abstract principles only the roughest of guides. A certain subject matter can bring Justices to an unexpected side of a controversy.²¹² Former approaches have been used contemporaneously with developing ones,²¹³ and direct overruling has been rare. What matters, along with the subject matter at hand, are dominant and long-sustained attitudes toward federalism. *Burbank*, read in conjunction with two emphatically preemptive decisions of 1971, *Perez v. Campbell*²¹⁴ and *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*,²¹⁵ constitutes a climax in the dominance of the federally protective approach. The abrupt turnabout in *Goldstein*, followed by three similarly state-directed opinions, each in turn composed by a recent appointee to the Court, presage a state protective approach in the immediate future.

Goldstein, *Dublino*, *Kewanee* and *Ware* bespeak concerted effort to return preemption to a state-directed posture. The first two overrule, and the third at least questions, existing applications of the federal presumption to their respective fields. *Goldstein* and *Dublino* carry state-directed principles outside of the commerce power and reapply them in the copyright and spending contexts. This perhaps reverses the practice begun in *Hines* of invoking the federal presumption to support federal power resting on bases other than the commerce clause. *Dublino* tailors a rule for cooperative statutory

210. They were Justices Marshall, Stewart and White. Since this leaves Justice Douglas in the majority with Chief Justice Burger, and Justices Blackmun and Powell, the authors of the *Goldstein*, *Ware* and *Dublino* opinions, respectively, it is possible that the proper formulation of preemption doctrine was uppermost only in the minds of Justices Douglas and Rehnquist. The division is best explained in terms of the regulatory issue. The majority opted against the disruption of air traffic caused by the municipality's curfew on late night take-offs. *Id.* at 628. The dissenters, on the other hand, may have considered, in the face of contradictory legislative history, *compare id.* at 632-33 (majority opinion) *with id.* at 640-41 (dissenting opinion), that the balance of interests lay with the local attempt to control noise pollution. *Cf. id.* at 643-44.

211. *Id.* at 643.

212. *Compare* Justice Marshall's dissenting opinions in *Goldstein v. California*, 412 U.S. 546, 576 (1973) and *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 423 (1973), *with* his concurrence in dissent in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 640 (1973); Justice Frankfurter's concurrence in dissent in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) *with* his opinion in *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); or his dissent in *Farmers Educ. & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) *with* his opinion in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); Justice Douglas' opinion in *Electrical Workers Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) *with* his opinion in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

213. *Compare* *Electrical Workers Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) and *California v. Zook*, 336 U.S. 725 (1949), *discussed at* note 33 *supra*, *with* *Hines v. Davidowitz*, 312 U.S. 52 (1941), *discussed at* notes 43-52 and accompanying text *supra*, and *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), *discussed at* notes 58-59 and accompanying text *supra*.

214. 402 U.S. 637 (1971); *see* notes 97-99 and accompanying text *supra*.

215. 403 U.S. 274 (1971); *see* note 74 *supra*.

schemes, and *Ware* goes beyond the state presumption entirely to state a general policy favoring cooperative solutions.

The cases touch all corners of the doctrine. *Goldstein* and *Kewanee* indicate at least a diminished inclination toward reading overwhelming national needs into subject matter, and at most an aggressiveness in arriving at local characterizations. The Court refused to infer congressional intent to preempt in any of the four cases, and in *Dublino* particularly reestablished a specific intent requirement. In all of the cases, either the absence of specific intent or the fact of congressional silence allowed the Court to protect the states' interests by filling in the gap with a presumption in their favor. Two long-standing preemptive conditions—pervasiveness and potential conflict—have been re-examined. As to the former, the Court indicated its protective attitude toward state power by depriving complex federal regulatory schemes of any prima facie preemptive implications. If the questioning of the latter leads to its permanent rejection, the conflict ground will be thrust back to being merely the correlative of specific intent to occupy the field embodied in the "actual" conflict standard.

While no single preemption case is likely to provide adequate guidance for predicting the course of future decisions, a series of cases resting on diverse subject matter, but carrying the doctrine in a common direction, is a more reliable gauge of the Court's sentiment. The Burger Court's most recent decisions suggest that where Congress has not made clear its intention to preempt, or where a conflict is unripe or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.

CONCLUSION

Divergent inferences can be drawn from the federal system's division of governmental authority between the nation and the states. These characterizations provide support for both the preemption doctrine and its counter doctrine. If one views federal and state governments as cooperative partners, action taken by one need not imply the other's displacement. Both the Court's state-directed refusal to presume preemption, and its requirement of proof of congressional preemptive intent, comport with this concept. But if one views the multi-tiered system as demanding of protection of the federal tier, preemption assumes a different form. The security of federal operations becomes the imperative, to be assured through resort to policy considerations, sensitivity to national interests and a presumption of the need for exclusivity.

Historically, the former concept and doctrine lost vitality as the latter ascended, lending in turn to each side of the doctrine the appearance of absoluteness. But the contradiction posed by the accepted coexistence of these principles cannot be avoided entirely. Differing approaches to federalism here

provide only a partial explanation. Between the philosophic poles arise cases for decision which stress the needs of the particular subject matter and regulatory scheme in question. The outcome may hinge upon the degree to which these needs recommend themselves to the federalist perspective of a majority of the Justices. The principled result, however, finds the doctrine not stated in relation to the merits, but absolutely. Unqualified preemption rules, in turn, carry the Court to undesirable extremes. Erecting a presumption in either direction, federal or state, leads to decision with diminished reference to the interests at stake.

Forceful arguments have been made in favor of a strict intent standard. To preempt where Congress is silent and has not in terms covered the field creates a gap in needed regulation and leaves the state powerless to fill it. Permitting state regulation still allows Congress the option to reverse the Court legislatively. The recurring question is whether these mutually exclusive principles need to be embodied in an absolute rule. That is the disposition of the present Court, although its desire to decide in accord with general principles is undercut by its equally basic instinct to proceed in a case-by-case fashion in this area. As adherence to a consistent principle in the form of rules seems to be impossible in this area, perhaps the most principled approach would result if consistency's very impossibility were recognized, and a case-by-case approach openly adopted. This would involve relegating the dualistic sets of rules that have developed around the occupation-of-the-field and conflict grounds to the status of variable factors, for use as aids for, but not in place of, balancing the federal and state interests. Obviously, a compelling display of congressional intent would be dispositive, but a strict intent requirement should not be applied so as to override a demonstrated, albeit unexecuted, federal interest. On the other hand, federal supremacy, always protectable by Congress, should not—despite regulatory pervasiveness, potential or peripheral conflict—constrict the Court's ability to protect important state interests. *Ware* suggests a general perspective on federalism suitable here. Rather than to protect interests and check incursions into the various governmental domains, the better conception has the Court promoting cooperation among them wherever possible.

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