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Preemptive Strikes  
on State Autonomy  
The Role of Congress

*By The Honorable Roger J. Miner*



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# PREEMPTIVE STRIKES ON STATE AUTONOMY: THE ROLE OF CONGRESS

by The Honorable Roger J. Miner

Exactly two hundred years ago this week, on February 21, 1787, the Continental Congress adopted a resolution calling for a Convention to revise the Articles of Confederation. The work of the Convention was completed at Philadelphia seven months later, on September 17, 1787. On that day, the Framers signed the enduring document we celebrate and re-examine during this Bicentennial Year. It was no easy task to convince the citizens of the several states, during the ratification process, that the new Constitution did not pose a threat to their newly won independence. Fearing that a powerful central government merely would replicate the arbitrary ways of the British Crown, many saw greater detriment than benefit in the formation of a "more perfect Union."<sup>1</sup>

One of the provisions of the proposed Constitution that caused the citizenry some concern was the portion of Article VI that has come to be known as the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.<sup>2</sup>

Writing as Publius in No. 33 of the Federalist Papers, Alexander Hamilton sought to dispel the people's fears that the Supremacy Clause would lead to an erosion of their rights as citizens of the several states. Hamilton wrote that a larger political society composed of a number of smaller political societies would amount to nothing if its laws were not supreme; he pointed out, however, that the larger society should be treated as a usurper when it acts in excess of its constitutional powers and invades the residuary authority of the smaller societies.<sup>3</sup> According to Hamilton, only those laws based on "the enumerated and legitimate objects" of federal jurisdiction would be accorded the dignity of "SUPREME LAW of the land."<sup>4</sup>

Obviously, Hamilton's assurances were based on his concept that the national government was to be one of limited powers, that all other governmental authority remained in the states, and that any incursion into the residual authority of the states would

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1. U.S. Constitution Preamble.
2. U.S. Constitution art. VI, cl.2.
3. The Federalist No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961).
4. The Federalist No. 27, at 177 (A. Hamilton) (C. Rossiter ed. 1961).

be considered an illegal encroachment. James Madison used these words to describe his view of the division of responsibility: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>5</sup> The Federalists clearly were confident that the enumerated powers, specific and defined, would serve as a significant limitation on the exercise of federal jurisdiction. What they did not foresee, of course, was the expansive interpretation of the enumerated powers that would be provided by the third branch of government.

It was in fact the Anti-Federalists who anticipated that the Judiciary would be called upon to referee the frequent disputes that inevitably would arise under the Supremacy Clause. The Anti-Federalists predicted that the federal courts, by reason of their authority to decide when state law is preempted by federal law under the Supremacy Clause, would be the instruments by which state power would be reduced to naught. An article in the Essays of Brutus series published on February 14, 1788, urging rejection of the proposed Constitution, anticipated that ratification would spawn the following developments: adoption of federal laws duplicative of state laws in areas where state and federal jurisdiction is concurrent; extension of central government operations into those areas; and federal court condonation of these enlarged activities by liberal construction of the powers of the central government. As a result, according to Brutus, the rights of the states to act would be diminished to the point of "becoming so trifling and unimportant as not to be worth having."<sup>6</sup> It is generally thought that Brutus was Robert Yates, a New York judge who was a delegate to the Constitutional Convention. Yates left the convention before the Constitution was completed and later wrote to Governor Clinton that he opposed "the consolidation of the United States into one government."<sup>8</sup>

Although the dire predictions of the Anti-Federalists have not entirely come to pass, some of the problems they foresaw two hundred years ago are with us today. Certainly, the Supreme Court has approved the exercise of broad-ranging federal authority, despite the limited powers envisioned by the Framers. This, of course, has allowed the central government to act in many areas originally thought to be primarily of state concern. Accordingly, the Supreme Court increasingly has been called upon, in cases where state and federal legislation affect the same subject matter, to decide whether the state activity has been preempted under the Supremacy Clause. I propose in this lecture to reveal the confusion and inconsistency of the courts when faced with issues of statutory preemption. I also propose to show the consequent need for Congress to play a more active role in defining the scope of permissible state activity and in preserving the constitutional framework of federalism. It seems to me that the obligation of Congress to assure the states a proper range of governmental operations is implicated in the duty of the legislative branch recently described by the Attorney General--the duty to interpret the Constitution in the course of performing its official functions. Actually, the Attorney General said that

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5. *The Federalist* No. 45, at 292 (J. Madison) (C. Rossiter ed. 1961).

6. *The Essays of Brutus*, N.Y. Journal, Feb. 14, 1788, reprinted in 2 *The Complete Anti-Federalist* 427 (H.J. Storing ed. 1981).

7. See C. Drinker Bowen, *Miracle at Philadelphia* 426 n.\*(1966).

8. *Id.* at 311; see *id.* at 225.

9. See Lecture by Attorney General Edwin Meese III, *The Law of the Constitution*, Tulane University Citizens' Forum on the Bicentennial of the Constitution 11 (Oct. 21, 1986); see also Meese, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21, col. 3.

this interpretive function is vested in all three branches, and I certainly do not mean to say that the executive and judicial branches have no part to play in the preservation in our federal system. My contention is that Congress, by being alert to preemption problems, can play a vitally important role in the protection of state autonomy. Indeed as the branch of government closest to the people, Congress has a positive duty in this regard. I shall have some suggestions and recommendations on how that duty can best be fulfilled at the conclusion of this discussion.

The Supremacy Clause was tested early on in a case arising out of the War of 1812. The State of Pennsylvania had enacted a statute providing for a state court-martial of members of the militia who failed to obey a call to service by the President of the United States. The penalties provided were those prescribed by federal law for the same offense. In upholding the jurisdiction of the state court-martial, Justice Bushrod Washington, writing for the Supreme Court majority, found it sufficient that the concurrent exercise of jurisdiction by the state and federal governments was authorized by the laws of the state and not prohibited by the laws of the United States.<sup>10</sup> Although he found no repugnance between the two statutes in the case before him, he speculated that the will of Congress could be "thwarted and opposed" even if it were possible to comply with state law without violating the requirements of a federal statute.<sup>11</sup> Justice Story, in dissent, declared the narrower rule that in cases of concurrent authority, state laws would yield to federal laws on the same subject only in cases of "direct and manifest collision" and then only to the extent that they were incompatible.<sup>12</sup> Curiously, Story found the Pennsylvania Militia Act wholly incompatible with federal statutes relating to the same subject.

When Aaron Ogden sued Thomas Gibbons to enjoin the operation of steamboat service between Elizabethtown, New Jersey, and New York City, he relied upon his ownership by assignment of the exclusive rights of navigation originally granted to Robert R. Livingston and Robert Fulton by the New York legislature. In defense, Gibbons contended that his ships were duly enrolled and licensed for the coastal trade under an Act of Congress adopted in 1793, and that his rights to navigate the waters in question overrode the exclusive franchise granted by the state legislature. The Supreme Court agreed with Gibbons and reversed a judgment by New York's highest court in favor of Ogden. In an opinion written by John Marshall in 1824 echoing the Story dissent in the militia case, the Court held that its inquiry was limited to the question of "whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an Act of Congress, and deprived a citizen of a right to which that act entitles him."<sup>13</sup> Having found such a collision, the Court perceived no difficulty in concluding that the Act of Congress was supreme and that "the law of the state, though enacted in the exercise of powers not controverted, must yield to it."<sup>14</sup> In the opinion, the great Chief Justice wrote that "the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it."<sup>15</sup>

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10. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 29 (1820).

11. *Id.* at 22.

12. *Id.* at 49-50 (Story, J., dissenting).

13. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210(1824).

14. *Id.* at 211.

15. *Id.* at 210.

There you have it--a succinct statement of the doctrine of preemption as dictated by the Supremacy Clause. The elements necessary to invoke the doctrine were made clear: a state law enacted in the exercise of the sovereign powers reserved to the states; a federal law enacted by Congress within the enumerated legislative authority granted by the Constitution; and an actual, not theoretical, collision between the two. Simply put, state and federal statutes, though both be otherwise valid, cannot occupy the same space at the same time and the state provision must yield.

Despite the elegance and lucidity of the Gibbons opinion and the clear rule it established, some actual collision cases continue to be litigated and to find their way to the Supreme Court. In 1962, the Court was presented with a clear collision between a state community property rule and federal provisions governing joint ownership of U.S. Savings Bonds.<sup>16</sup> The federal provisions of course prevailed. And in 1977, one hundred fifty-three years after Gibbons, in a case involving issues virtually identical to those confronted in Gibbons, federal licenses covering mackerel fishery were held to prevail over Virginia statutes limiting the fishing rights of non-residents.<sup>17</sup> These later cases may be more of a tribute to the fact that nothing can forestall litigation or impair the tenacity of lawyers in our nation than to the enigmatic nature of the precedent.

Unhappily, preemption jurisprudence no longer is confined to questions of actual collision. The wide-ranging inquiry proposed by Justice Washington now has become the standard. In the name of the Supremacy Clause, the Supreme Court now examines state law to determine whether it is somehow inconsistent with the purposes of federal law or is incompatible with a federal regulatory scheme or interferes in some way with federal policy. In a case holding that the Pennsylvania Alien Registration Act of 1939 was preempted by the Federal Alien Registration Act of 1940, the Court described the expanded scope of its inquiry as follows:

This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.<sup>18</sup>

The lack of a clear yardstick or formula has fostered the development of preemption jurisprudence on a case by case, statute by statute basis, devoid of analytic consistency and lacking in doctrinal intelligibility. It is difficult to disagree with the commentators who have written that the Supreme Court's preemption decisions "have often produced

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16. See Free v. Bland, 369 U.S. 663 (1962).

17. See Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977).

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

considerable confusion and criticism"<sup>19</sup> and that "[p]erhaps the most troublesome aspect of the doctrine of federal preemption has been its historically inconsistent application."<sup>20</sup>

The confusion and inconsistency are especially troublesome in light of the fact that preemption litigation has involved so many diverse areas of law and therefore has resulted in the displacement of numerous state regulations clearly adopted in the pursuit of legitimate state objectives. In the Alien Registration case I referred to earlier, the Court held that a state statute requiring aliens to register and to carry a card to exhibit to police on demand was preempted by a federal statute requiring registration but not the carrying of a card. While there obviously was no collision in the Gibbons v. Ogden sense, or even an actual conflict between the two statutes, the Court held that Congress had occupied the field of alien registration, advertent to the supremacy of national power in the general area of foreign affairs, including power over immigration and naturalization.<sup>21</sup> The Court saw the state law as an obstacle blocking the achievement of congressional goals, although it is difficult to see how this was so. At any rate, there was no question that the state statute represented a proper exercise of the state's police power.

The occupation of the field test, as applied in the Alien Registration case and in other cases, has been criticized for leaving open a number of questions: What standards should be applied in determining whether Congress has in fact occupied a field? Are there good reasons for finding exclusive federal occupancy? What are the boundaries of the specific field under examination?<sup>22</sup> It seems to me that in applying the occupation of the field test and some of the other tests it developed to decide preemption issues, the Supreme Court has involved itself unnecessarily with policy problems whose solution is best left to the other branches. Whether it is preferable that there be national uniformity in one area or another is not for a court to determine.

It seems quite unexceptional to say that when it is not physically impossible for one engaged in interstate commerce to comply with both state and federal regulations, the state regulation is not preempted. This, in fact, was the principle underlying the decision upholding different maturity standards established by the state of California and the federal government to keep prematurely harvested avocados from the market. The Court found that there was no preemption because there was "no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards."<sup>23</sup> The fact that the two schemes had the same objectives was not held to be controlling.

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19. Note, A Framework for Preemption Analysis, 88 Yale L.J. 363, 363(1978).

20. Catz & Leonard, The Demise of the Implied Federal Preemption Doctrine, 4 Hastings Constitution L.Q. 295, 295(1977).

21. Hines, 312 U.S. at 62.

22. See generally Hirsch, Toward a New View of Federal Preemption, 1972 U. Ill. L.F. 515, 530.

23. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143(1963).

Yet a California labelling statute, imposing requirements more stringent than those imposed by federal law with respect to weight variations due to moisture loss in flour, was found to be preempted.<sup>24</sup> The rationale there was that the purposes and objectives of Congress could not be accomplished and executed unless packages bearing the same indicated weight contained the same quantity of the product. The purpose of the federal statute, according to Justice Thurgood Marshall, who authored the opinion, was to facilitate value comparisons by consumers throughout the country. It is difficult to discern just how there would be a problem with value comparisons when the state regulation was more strict than the federal. It is especially difficult to reconcile this case with the avocado case, since compliance with both flour labelling schemes was not a "physical impossibility." Despite the dissimilarity of standards, there was no inevitable collision between them because flour manufacturers, knowing where their product is to be shipped, could pack and label to comply with state law as well as federal. The physical impossibility test, certainly, has not been consistent in its application.

According to another test developed by the Supreme Court, state regulation is preempted where Congress has legislated so comprehensively that no room remains for the states to supplement federal law. This rule controlled the disposition of a case known as Rice v. Santa Fe Elevator Corp.<sup>25</sup> and later Supreme Court cases have cited Rice as authority of the rule. A close examination of Rice, however, reveals that there was perhaps some room the Court overlooked and that the displacement of state regulation there was another instance of policy choice. The case involved the regulation of grain warehouses under the Federal Warehouse Act and under certain provisions of Illinois law governing grain storage and storage charges. Although the federal regulatory scheme was a generalized one, revolving around the authority of the Secretary of Agriculture to issue and suspend warehouse licenses, and the state scheme was a particularized one, establishing specific warehouse standards and providing for rate regulation, the federal scheme was held to displace the state's entirely. The Court found that the federal Act had been amended specifically to remedy past problems arising from a system of dual regulation. Having so found, the Court ignored the areas apparently open to state regulation and leaped to the conclusion that "the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."<sup>26</sup>

Justice Frankfurter, in a compelling dissent, disagreed with the proposition that Congress could, by merely touching a subject matter, render it untouchable by a state "though there is neither paper nor operating conflict between federal and State spheres of authority."<sup>27</sup> Accordingly, he rejected the Court's conclusion that the federal Act inferentially deprived Illinois of a rate-fixing authority exercised over a period of seventy years while not conferring such authority on any federal agency. Frankfurter declared that the authority of states under the reserved powers always should survive "unless Congress has clearly swept the Boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered."<sup>28</sup> It seems that the "no room available" test is open to interpretation as well.

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24. See Jones v. Rath Packing Co., 430 U.S. 519(1977).

25. 331 U.S. 218 (1947).

26. Id. at 236.

27. Id. at 242 (Frankfurter, J., dissenting).

28. Id. at 241.



The Supreme Court has taught us that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."<sup>29</sup> The confusing the inconsistent rules and tests I have been discussing all were designed to divine congressional intent, express or implied. The word "divine" seems appropriate here, because its dictionary definitions include: to guess; to know by inspiration, intuition or reflection; and to locate water with a divining rod.<sup>30</sup> All these synonyms are applicable to the manner in which the Court attempts to ascertain congressional intent to preempt. An expression of intent in explicit statutory language, however, should be conclusive. Unfortunately, it is not.

An express provision for the maintenance of state jurisdiction was defeated in Pennsylvania v. Nelson,<sup>31</sup> a celebrated case in preemption jurisprudence. In that case a state's Sedition Act was held to be displaced by the federal Smith Act, which prohibited the overthrow of the United States government by force or violence. That determination was made in the face of a specific savings clause prohibiting the impairment of the criminal jurisdiction established under the laws of the several states.<sup>32</sup> It is also noteworthy that Congressman Howard Smith, sponsor of the Smith Act, wrote a vehement denial "that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states."<sup>33</sup> The preemption determination in Nelson was bottomed on the conclusion that the Smith Act was intended to "occupy the field of sedition."<sup>34</sup>

Having previously written of my apprehensions regarding the nationalization of criminal law,<sup>35</sup> I pause here to note that, in addition to the general savings provision ignored in Nelson, several statutes defining federal crimes include their own provisions saving state jurisdiction.<sup>36</sup> One commentator expressing a concern for double prosecution and punishment, suggests that unless the Supreme Court decision holding double jeopardy inapplicable in the case of state and federal prosecutions for the same conduct<sup>37</sup> is re-examined, or legislation is adopted to provide that a state or federal trial bars prosecution in the other jurisdiction, "a finding of congressional intent to pre-empt is the only way to protect the defendant from the rigors of double prosecution."<sup>38</sup> I do not know

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29. Louisiana Pub. Serv. Comm'n v. FCC, 106 S. Ct. 1890, 1899 (1986).

30. The American Heritage Dictionary of the English Language 385 (1976).

31. 350 U.S. 497 (1956).

32. 18 U.S.C., Section 3231 (1982).

33. Letter from Congressman Howard W. Smith to Pennsylvania Attorney General Frank Truscott (February 5, 1954), reprinted in Commonwealth v. Nelson, 377 Pa. 58, 90 n.8, 104 A.2d 133, 148 n.8 (1954) (Bell, J., dissenting), aff'd, 350 U.S. 497 (1956); see Note, Preemption as a Preferential Ground: A New canon of Construction, 12 Stan. L. Rev. 208, 208 (1959) (citing Smith letter).

34. Nelson, 350 U.S. at 504.

35. See Miner, Federal Courts, Federal Crimes, and Federalism, 10 Harv. J.L. & Pub. Pol'y 1301 (1987).

36. E.g., 18 U.S.C., Section 896 (1982) (extortionate credit transactions); id. Section 927 (firearms offenses); id. Section 1084(c) (transmissions of wagering information); 21 U.S.C. S 903 (1982) (drug abuse prevention and control).

37. See United States v. Lanza, 260 U.S. 377 (1922).

38. Note, Pre-emption by Federal Criminal Statutes, 55 Colum. L. Rev. 83 (1955).

how such a finding is possible when there is an express savings clause, although the Supreme Court certainly overcame that problem in Nelson. My own view is that the federal government generally should get out of the business of defining and prosecuting crimes primarily of state and local concern. Federal criminal prosecution should be limited to misconduct affecting clearly defined national interests.

Just as there are explicit savings clauses in federal legislation expressing the intent of Congress to preserve state jurisdiction, so are there explicit supersedure clauses expressing the intent to preempt state jurisdiction. I have given an example of how the former has been ignored, and I now present an example of the disregard of the latter. The Employee Retirement Income Security Act of 1974 includes a provision that the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employment benefit plan"<sup>39</sup> described in the Act. There was no dispute that "employee benefit plan" included any plan, fund or program established to provide vacation benefits. The plaintiffs in a case known as California Hospital Association v. Henning<sup>40</sup> sought a declaration that the clear preemption provision superseded a California state policy barring forfeiture of vacation benefits and requiring payment of a pro rata share of such benefits upon termination of employment. The plaintiffs maintained benefit plans in contravention of the California policy. In denying preemption, the Ninth Circuit Court of Appeals interpreted the Act to apply only to funded vacation plans and not to traditional payroll payments of vacation wages from general funds. The decision has been criticized, of course, on the ground that it was for Congress, not the courts, to restrict the coverage provided by the Act.<sup>41</sup>

Clear expressions of intent found in the legislative history also have been ignored by the courts. In Burbank v. Lockheed Air Terminal,<sup>42</sup> the Court found that a city ordinance prohibiting the take-off of pure jet aircraft during certain hours was preempted by federal statutes regulating aircraft noise. The Court relied upon what it referred to as the "pervasive nature" of the regulatory scheme.<sup>43</sup> The dissenting opinion, however, referred to specific legislative history demonstrating congressional intent to restrict the applicability of the federal legislation to overflying aircraft and to permit local control of the type established by the City of Burbank.<sup>44</sup> The legislative history argument in the dissent was bolstered by the required assumption that the historic police powers of the states are not to be superseded by a federal Act, unless such displacement is the clear and manifest purpose of Congress.<sup>45</sup> It never has been contended that noise control is not encompassed within the traditional police powers.

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39. 29 U.S.C. Section 1144(a)(1982).

40. 770 F.2d 856 (9th Cir. 1985), amended, 783 F.2d 946 (9th Cir.), cert. denied, 106 S. Ct. 3273 (1986).

41. See, e.g., Casciani, ERISA Regulation of Employee "Payroll Practices": California Hospital Association v. Henning, 17 Loy. U. Chi. L.J. 585, 615 (1986).

42. 411 U.S. 624 (1973).

43. Id. at 633.

44. Id. at 649 (Rehnquist, J., dissenting).

45. Id. at 643 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

Legislative history also was ignored in the determination of an action brought by franchisees of 7-Eleven convenience stores against their franchisor for violation of the California Franchise Investment Act. The action was commenced in the California Superior Court, and the franchisor sought arbitration of the controversies under the terms of an arbitration clause in the franchise agreements. The Supreme Court ultimately made a determination of preemption, holding that the Federal Arbitration Act established a national policy favoring arbitration and deprived the states of the authority to provide a judicial forum when the parties had agreed to arbitrate their differences.<sup>46</sup> The dissenting opinion, however, provided persuasive historical evidence that the Federal Arbitration Act was intended to be enforced only in the federal courts.<sup>47</sup> The majority found such a direct and irreconcilable conflict between state and federal law that the Supremacy Clause was needed to resolve it. The dissent, relying on legislative history, found the federal law wholly inapplicable. That's what I call a difference of opinion!

Courts have employed many strange modes of analysis, as we have seen, in pursuit of the elusive congressional intent. I think that the outer limits of preemption analysis were reached last December, when a court found that the absence of federal gasoline regulation manifested the intention of Congress to leave the field unregulated. The court was the Temporary Emergency Court of Appeals, which is charged with the enforcement of the Emergency Petroleum Allocation Act of 1973. When Congress decided to deregulate gasoline prices and to permit free market forces to control, Puerto Rico reinstated its own price regulations. Several oil companies challenged these regulations and prevailed.<sup>48</sup> The Court of Appeals drew its rationale for a finding of implied intent to preempt from a Supreme Court case in which the following statement was made: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate."<sup>49</sup> The logical dissenter in the Puerto Rico case found it "paradoxical" that the expiration of temporary emergency federal measures should have the effect of permanently constraining the exercise of the police powers of state governments.<sup>50</sup> Preemption jurisprudence indeed has entered the twilight zone!

As the shadow of federal regulation has lengthened, supremacy problems have found their way into such diverse legal fields as torts,<sup>51</sup> civil procedure,<sup>52</sup> antitrust,<sup>53</sup> patents,<sup>54</sup> and

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46. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

47. *Id.* at 26-27 (O'Connor, J., dissenting).

48. *Isla Petroleum Corp. v. Puerto Rico Dept. of Consumer Affairs*, No. 1-16 (Temp. Emer. Ct. App. Dec. 29, 1986) (LEXIS, Genfed Library, USApp file).

49. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 106 S. Ct. 709, 717 (1986) [quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)].

50. *Isla Petroleum*, No. 1-16 (Christensen, J., dissenting).

51. *See, e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

52. *See generally* Note, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634 (1984).

53. *See generally* Note, *Preemption of Anticompetitive State Statutes by Section 1 of the Sherman Act: Is An Agreement Required?*, 54 Fordham L. Rev. 247 (1985).

54. *See, e.g.*, *Kewane Corp.*, 416 U.S. 470 (1974).

environmental law.<sup>55</sup> Supremacy questions have affected cases involving the regulation of public utilities, transportation, labor, navigation, securities and banking.<sup>56</sup> Preemption issues are on the calendar at every Supreme Court Term. During the 1985-1986 Term, the Court found that a Florida tax on aviation fuel was not preempted by the Federal Aviation Act,<sup>57</sup> that North Carolina could impose an ad valorem tax on tobacco without contravening the federal statutory scheme governing customs-bonded warehouses,<sup>58</sup> that Federal Energy Regulatory Commission power rates prevailed in a collision with rates fixed by the North Carolina Utilities Commission,<sup>59</sup> and that states may establish telephone plant and equipment depreciation rules applicable to intrastate telephone service even though those rules conflict with federal rules applicable to interstate service.<sup>60</sup> The 1986-1987 Term already has brought us an important decision holding that a California law requiring pregnancy leave and subsequent reinstatement to employment is not preempted by the Federal Pregnancy Act, which only forbids discrimination on the basis of pregnancy.<sup>61</sup>

It cannot be denied that the Supreme Court has taken on a major share of the burden of adjusting and monitoring federal-state relations by an ad hoc process of decision making in preemption cases. In my opinion, the results have been mixed and state interests often have suffered in the process. There are those who are all too willing to leave the question of societal needs for federal intervention to the federal courts as a function of preemption jurisprudence.<sup>62</sup> This is judicial policy-making at its worst, and I regard the concept as dangerous, undemocratic and violative of basic constitutional principles. Those who contend that the courts have a duty to apply the preemption doctrine to promote cooperation between state and federal governments<sup>63</sup> mistake the judicial function as fully as those who look to the doctrine as a vehicle for reconciling competing state and federal interests.<sup>64</sup> The judicial role in applying the Supremacy Clause should be a limited one--to

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55. See generally Note, Federal Preemption: Illinois v. City of Milwaukee, 60 Tul. L. Rev. 407 (1985).

56. See generally 1 R. Rotunda, J. Nowak & J. N. Young, Treatise on Constitutional Law: Substance and Procedure S 12.1, at 624 n.9 (1986); Note, Labor Law Preemption: Allis-Chalmers Corp. v. Lueck, 60 Tul. L. Rev. 1077 (1986).

57. Wardair Canada, Inc. v. Florida Dept. of Revenue, 106 S. Ct. 2369 (1986).

58. R. J. Reynolds Tobacco Co. v. Durham County, 107 S. Ct. 499 (1986).

59. Nantahala Power & Light Co. v. Thornbury, 106 S. Ct. 2349 (1986).

60. Louisiana Pub. Serv. Comm'n v. FCC, 106 S. Ct. 1890 (1986).

61. California Fed. Sav. & Loan Ass'n v. Guerra, 55 U.S.L.W. 4077 (U.S. Jan. 13, 1987).

62. See, e.g., Freeman, Dynamic Federalism and the Concept of Preemption, 21 DePaul L. Rev. 630, 648 (1972); see also, e.g., Comment, A Conceptual Refinement of the Doctrine of Federal Preemption, 22 J. Pub. L. 391, 404 (1973).

63. See, e.g., Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623, 654 (1975).

64. See, e.g., Note, The Burger Court and the Preemption Doctrine: Federalism in the Balance, 60 Notre Dame L. Rev. 1233 (1985).

declare federal legislation adopted under the powers granted to Congress by the Constitution supreme over any state law in actual collision with it. I suggest that a clear definition by Congress of the areas of regulation remaining to the states will in large part eliminate the confusion, inconsistency and burdensome caseloads that have been the hallmarks of preemption jurisprudence. I recommend the following:

1. There should be established in each chamber of Congress a Standing Committee on State-Federal Relations. The excellent report entitled "The Status of Federalism in America" by the Working Group on Federalism of the Domestic Policy Council<sup>65</sup> suggests the establishment of federalism subcommittees of the judiciary committees in each House to review all proposed legislation with potentially adverse implications for state sovereignty. I believe that the dignity of federalism issues requires the appointment of a Standing Committee to be charged, among other things, with the duty of reviewing all legislation that might in any way touch upon areas of state concern. Included would be the responsibility for coordinating state and federal legislation and for maintaining an awareness of the constitutional limitations of congressional power.

2. The Standing Committee would be required to solicit the views of the states, those representing state interests and other concerned citizens. In the course of reviewing each piece of legislation involving areas of state concern and preemption possibilities, the spotlight of public opinion would be focused on the effect of the exercise of congressional power. Input from diverse sectors would assure full consideration by the Committees of the matters under review. Although this process may be criticized for being slow and cumbersome, it will serve to deter hastily drawn and ill-conceived legislation affecting state interests. It may also reveal that existing state regulation is adequate and that entry of Congress into the field is unnecessary:

3. A detailed Report of the findings and recommendations of the Committees would be filed for each piece of legislation reviewed. The Domestic Policy Council calls for a "federalism assessment," but I think that the Committees can go much further. Their Reports should include the results of their research into existing and contemplated state legislation in the area under review and a compendium of the views expressed to the Committees through hearings and communications. Included in each Report would be specific language to be included in the legislation relative to the following matters: a statement of the outer limits of federal regulation in the area or field subject of the legislation; a clear delineation of that which remains subject to state regulations; and, if applicable, a description of specific types of existing state legislation to be displaced. The general savings clauses and the general supersedure clauses, as I have demonstrated, do not always work, and these suggestions will go a long way toward eliminating preemption problems.

4. The Committee should undertake a review of all past Supreme Court decisions applying the Supremacy Clause. Such a review will enable Congress to determine whether it disagrees with any previous preemption decision, and is not a difficult project in these days of computerized legal research. The process should follow that recommended for a study of new legislation. It is an advantage of the Supremacy Clause that Congress can overrule a Supreme Court decision on preemption by amending or repealing the federal legislation. The states, of course, have no such authority. In my own view, many of the decisions displacing state regulation were wrongly decided and have led to the extension of federal law into areas better regulated by the states. (Perhaps many of these areas are best left unregulated entirely.) Congress can do much to rectify the errors of the past.

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65. Working Group on Federalism, Domestic Policy Council, the Status of Federalism in America (Oct. 15, 1986).

5. Legislation should be enacted to deprive federal agencies of their ability to preempt state authority by regulation. The Supreme Court has held that a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.<sup>66</sup> Aside from the constitutional questions posed by preemption by administrative regulation, sound policy dictates that so-called independent federal agencies, having diverse interests and agendas, should not be allowed to displace state law. I cannot agree that administrative agencies have any role in balancing state and federal interests.<sup>67</sup> Congress must reclaim its exclusive prerogative of deciding when state law is to be preempted.

If my suggestions are adopted and greater responsibility for the preservation of federalism is shifted to Congress, I am confident that the states will once again be permitted to operate without interference in the areas in which they are most competent.<sup>68</sup> I sincerely believe that Congress can assist in restoring the balance envisioned by the Founding Fathers when they created our federal system of government. By reducing the role of the courts in preemption litigation, Congress certainly can help to overcome preemptive strikes on state autonomy. It could thereby enable us to return to the Supremacy Clause interpretations of John Marshall. He was, after all, a pretty good judge. But then, all he really had to go on was the written text of the United States Constitution.

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66. See Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982).

67. See Foote, Administrative Preemption: An Experiment in Regulatory Federalism, 70 Va. L. Rev. 1429, 1466 (1984).

68. Fein, Let the States Decide, World & I, Jan. 1987, at 183.