REGULATION, DEREGULATION, FEDERALISM, AND ADMINISTRATIVE LAW: AGENCY POWER TO PREEMPT STATE REGULATION†

*Richard J. Pierce, Jr.**

States have the power to regulate almost all forms of conduct. Sometimes, however, states impose regulations that advance state interests at the expense of national interests. While the federal courts and Congress limit state power to harm the national interest, judicial and congressional restraints on state regulation are inadequate, particularly in the important new context of federal deregulation. In this Article, Dean Pierce argues that federal agencies can play a valuable role in checking state regulation that is harmful to the national interest. He suggests a spillover model which provides an analytical framework for resolving federalism disputes and which reflects the advantages and disadvantages of local versus national regulation. Dean Pierce recommends (1) that each federal agency consider the need to preempt harmful state regulation in the areas of regulatory responsibility delegated to that agency by Congress; (2) that when a federal agency foresees the possibility of conflict between a state regulation and the national interest, it engage, when practicable, in informal dialogue with state authorities to avoid such conflicts; and (3) that when a federal agency proposes to act through agency adjudication or rulemaking to preempt a state regulation, it provide all affected states notice and an opportunity to participate in the proceeding. These three recommendations provide a procedural framework for federal agency considerations of actions which preempt a state law or regulation.

TABLE OF CONTENTS

I. Introduction to the Problem 611
II. Survey of the Law Concerning Nation-State Regulatory Conflicts 613
A. Judicial Invalidation of State Regulatory Actions Under the Commerce Clause 613
1. State Actions that Discriminate Against Interstate Commerce 615
2. State Actions That Further Economic Interests . 619
3. State Actions That Further Health, Safety, or Environmental Interests 622
4. Summary of Commerce Clause Jurisprudence ... 628

* Dean and Professor of Law, University of Pittsburgh. B.S. 1965, Lehigh University; J.D. 1972, University of Virginia. This Article is based on a consultant report made by the author for the Administrative Conference of the United States. That report gave rise to a recommendation by the Conference. However, the views expressed in this Article are those of the author and bear no approval from the Administrative Conference.

B. Congressional Invalidation of State Regulatory Actions Under the Supremacy Clause 629
C. Federal Agency Invalidation of State Regulatory Actions Under the Supremacy Clause 636
D. Limits on Congressional Power to Affect the Permissible Scope of State and Federal Regulation . 641
E. Summary of Legal Framework for Resolving Issues of Federalism in Regulatory Decisionmaking 643
III. Determining the Appropriate Relationship Between Regulation and Federalism 645
A. National versus Local Regulation 645
B. A Model for Resolving Federalism Disputes 646
1. Geographic Spillover 647
2. Additional Factors: Expertise, Bureaucracy, and Experimentation 654
3. Refining the Spillover Model 657
IV. Choosing the Institution Best Suited to Resolve Conflicts Between State and Federal Regulation 661
A. The Federal Courts 662
B. The Congress 663
C. Federal Agencies 664
V. Application of the Spillover Model 665
A. Three Regulatory Disputes 665
1. Chemical Labeling Standards 666
2. Intrastate Rail Rates 667
3. Municipal Taxi Service 668
B. Federal Deregulation 668
VI. Conclusion 671

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.
>
> Justice Oliver Wendell Holmes[1]

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.
>
> Justice Louis Brandeis[2]

These famous statements by two of the finest jurists in American history reflect two of the most important values embodied in the United States Constitution. Justice Brandeis refers to the importance of allowing each state to select its own methods of regulating conduct. Justice Holmes refers to the need for the national government to preclude states from taking regulatory actions that advance parochial interests at the expense of the national interest. This Article begins with the premise that both Justice Holmes and Justice Brandeis identify values too fundamental and enduring to sacrifice in a wholesale manner. Rather, the inquiry in each case must be whether the national interest in adopting a particular regulatory policy is so great and so much in conflict with the interests of a state that the virtues of federalism extolled by Justice Brandeis should be compromised in order to further the national interest that Justice Holmes recognized as paramount.

Conflicts between the values of federalism and the value of the nation as a single economic unit arise in many contexts. This Article will focus on the process most appropriate for the resolution of such conflicts. That process orientation requires inquiry in two areas: identification of the factors that should be evaluated in resolving nation-state regulatory conflicts and identification of the government institutions best suited to resolve such conflicts.

Part I of the Article introduces the problem. Serious conflicts between state and federal regulations are emerging in virtually every important area of conduct today. If these conflicts are not resolved in a careful and principled manner, the nation may discover that it has

1. O. W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).
2. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

carelessly and needlessly discarded either the constitutional value heralded by Justice Holmes or the equally important value praised by Justice Brandeis.

Part II is an analysis of the existing legal framework for resolving issues of federalism in regulatory decisionmaking. Both Congress and the courts have the power to limit the ability of each state to further its interests at the expense of the nation. Because of their institutional characteristics, however, neither can be relied upon as a sufficient source of constraints on parochial state regulatory actions that cause significant harm to the nation.

Part III is a discussion of the factors that should be evaluated in the process of identifying and resolving conflicts between national and state regulatory programs. The national interest is served by allowing states to determine and to implement their own regulatory policies whenever those policies do not have substantial spillover effects on other states. States should not be allowed to regulate in a manner that creates substantial interstate spillovers. Thus, the issue of whether regulation should be imposed on a national level or on a state level should be resolved primarily by determining whether, and to what extent, state regulation would create interstate spillovers.

Part IV is an assessment of the advantages and disadvantages of assigning primary responsibility for resolving such conflicts to one of three institutions—Congress, regulatory agencies, and the courts. Federal regulatory agencies have institutional characteristics that give them significant advantages over Congress and the courts as potential sources of limits on state regulation that harms the national interest. Agencies have far more time to devote to consideration of specific preemption issues than Congress. Agencies have available procedures that are far more efficient and effective than the procedures available to courts for purposes of conducting the empirical research that is often essential to the resolution of preemption issues. Moreover, agencies have a comparative advantage over both Congress and the courts because of their better understanding of the effects of state regulations involving their specialized areas of competence and responsibility.

In Part V, the approach derived in Parts III and IV is applied to three representative regulatory conflicts in an effort to determine the manner in which federal agencies should approach preemption controversies. Agencies should be sensitive to the fact that any potential exercise of preemptive power by a federal agency implicates the fun-

damental values of federalism. Agencies should evidence this heightened sensitivity to the importance of the issue through the procedures they adopt to resolve jurisdictional conflicts and through the substantive approach they take to preemption issues. An agency should provide each state potentially affected by its action notice and an opportunity to participate effectively in any proceeding in which the agency is considering a preemptive action. An agency should not preempt a state regulation unless it finds that the state regulation creates substantial interstate spillovers. Moreover, a federal agency should use informal methods to encourage states to regulate in a manner that minimizes interstate spillovers before the agency considers formal preemption of a state regulation. A finding that a state regulation harms in-state interests should not be sufficient to justify preemption.

Section B of Part V extends the analysis to conflicts between state and national interests created by a federal decision to deregulate an area of conduct and ensuing attempts by states to regulate that conduct. A federal agency with residual regulatory authority in the field should take the same substantive and procedural approach in deciding whether to preempt such state regulations as it takes when the conflict is between a state regulation and a federal regulation.

I. Introduction To The Problem

Federalism issues in regulation arise in many ways. If the federal government decides to regulate an area of conduct, should it permit supplementary state and local regulation of that conduct? If the federal government decides that an area of conduct should be regulated at some level, should the regulation be imposed at the national level or should the federal government instead encourage or acquiesce in state and local regulation? If the federal government decides that some types of conduct should not be regulated, should it also prohibit state and local regulation of that conduct? Federalism issues arise in the context of economic regulation, health and safety regulation, and environmental regulation. Some of the most difficult problems involve conflicts between state regulation based on one rationale and federal regulation based on a different rationale.

In recent years, federalism controversies have begun to dominate many areas of regulation. The Interstate Commerce Commission has preempted all the power of the Texas Railroad Commission to regu-

late intrastate rail rates.[3] The Occupational Safety and Health Administration has preempted most state authority to determine the information that must be provided to workers concerning the hazards posed by chemicals in the workplace.[4] The Federal Trade Commission is attempting to preempt the power of cities to regulate taxis.[5] Congress has, in effect, preempted state authority to establish the minimum age for purchasing alcoholic beverages.[6]

At the same time, states are struggling to obtain regulatory control over types of conduct that were long believed to be subject to exclusive federal regulation. States have obtained control over the rates charged for some interstate wholesales of electricity,[7] and Congress is considering giving states much greater control over such interstate transactions.[8] States have wrested from the federal government a good measure of its previously exclusive control over nuclear power plants.[9]

In every forum—judicial, legislative, and administrative—battles rage over the allocation of regulatory power between federal and state authorities. The principal focus, in each case, is on the immediate political and economic effects of a resolution of the issue in favor of state or federal authority: which interests will win or lose in the short run as a result of a decision allocating regulatory control to state or federal authorities? Yet, the resolution of each of these intense, specific disputes is likely to affect the fundamental nature of the nation's economy and its system of government for decades. Thus, in resolving each of these specific disputes, the focus must shift to the larger question of how to allocate regulatory power in a way that will permit the nation to preserve both the values of a national market and the values of decentralized, government decisionmaking.

The nature of the institution with primary responsibility for resolving a federalism issue varies depending upon the legal context in which the issue arises. If Congress has not acted in the area, the courts must resolve arguable conflicts through application of the com-

3. State Intrastate Rate Authority-Texas, I.C.C. Decision, *Ex Parte* No. 388 (Apr. 13, 1984).

4. 48 Fed. Reg. 53,280 (1983) (to be codified at 29 C.F.R. § 1910.1200).

5. *See* N.Y. Times, May 10, 1984, § A, at 25.

6. Highway Safety Amendments, Pub. L. No. 98-363, § 158, 98 Stat. 435, 437-39 (1984).

7. *See* Arkansas Elec. Power Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983).

8. *See* The Regional Conservation and Electric Power Planning and Regulatory Coordination Act of 1984, H.R. 5766, 98th Cong., 2d Sess. (1984).

9. *See* Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

merce clause. Congress has the power, however, to resolve virtually any federalism issue if it chooses to do so. Alternatively, Congress can delegate its authority to resolve a federalism conflict to an administrative agency.

The judiciary always plays some role in resolving a nation-state regulatory conflict. If Congress has not acted in the area, the judiciary must take initial responsibility for resolving the dispute. If Congress has acted, a court must determine the intent and effect of the congressional action. If an administrative agency has acted under authority delegated by Congress, a court must determine whether the agency's action is within the scope of its delegated authority and whether the agency action is otherwise lawful. Since nation-state regulatory conflicts invariably reach the courts through one of these routes, it is useful to begin this Article with a survey of the current judicial treatment of federalism issues that arise in a variety of legal and factual situations.

II. Survey of the Law Concerning Nation-State Regulatory Conflicts

This survey will describe the present judicial method of resolving the four general issues that dominate the law of federalism in the regulatory context. First, under what circumstances will a federal court hold a state regulatory action invalid under the commerce clause when Congress has not acted in the area? Second, under what circumstances will a court hold state regulatory action preempted by a federal statute? Third, under what circumstances will a court hold state regulatory action preempted by an action of a federal agency taken pursuant to authority delegated in a federal statute? Finally, under what circumstances will a court limit Congress' power to determine the allocation of regulatory responsibilities between federal and state authorities?

A. Judicial Invalidation of State Regulatory Actions Under the Commerce Clause

Justice Holmes was not alone in emphasizing the need for federal courts to limit the power of states to interfere with interstate commerce in areas where Congress has not chosen to act. Professor Tribe describes the general attitude of jurists and scholars to this form of judicial intervention in his fine treatise on constitutional law: "Even judges and commentators ordinarily hesitant about federal judicial in-

tervention into legislative choice tend to support a relatively active role for the federal judiciary when the centrifugal, isolating or hostile forces of localism are manifested in state legislation."[10] This general receptivity toward judicial activism in protecting interstate commerce from unwarranted burdens imposed by states is based on three beliefs. First, national economic welfare is maximized by free trade among the states. Second, states frequently perceive their best interests to lie in erection of barriers to free trade in some commodities or by some means. Third, Congress' agenda is too crowded to rely on it as the sole source of limitations on state barriers to interstate commerce.

Courts and commentators also recognize, however, that states sometimes have interests important enough to justify some types of state action that impair interstate trade. In 1949, Justice Jackson described the tensions between state and national interests and the Supreme Court's differing attitudes toward those tensions in language that remains a good summary of the jurisprudence under the commerce clause:

> [The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy . . . has as its corollary that the states are not separable economic units . . . .
>
> The material success that has come to inhabitants of the states that make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens . . . .[11]
>
> [The] distinction between the power of the state to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.[12]

The traditional distinction alluded to by Justice Jackson persists today. The Court is willing to resolve conflicts between the economic goals of the nation and the economic goals of a state when such conflicts appear in the form of state regulatory actions. If the Court concludes that a state action furthers parochial economic interests at the expense of national economic interests, it will invalidate the state action under the commerce clause. The Court is much more deferential to state actions with a plausible rationale other than protection of lo-

10. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 319 (1978).
11. H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 537-39 (1949).
12. *Id.* at 533.

cal economic interests. Thus, the Court almost invariably upholds any state action based on a plausible need to protect health, safety, or the environment, even if that action imposes a substantial burden on interstate commerce. It is useful to divide the commerce clause cases into three categories that illustrate the distinction drawn by Justice Jackson: (1) cases involving state actions that discriminate against interstate commerce; (2) cases involving state actions that protect local economic interests from outside competition; and, (3) cases involving state actions that further health, safety, or environmental goals with the "incidental" effect of burdening interstate commerce.

1. State Actions that Discriminate Against Interstate Commerce

State actions that discriminate facially against interstate commerce present the easiest case for invalidation by federal courts. If a state action treats interstate commerce in a manner less favorable than intrastate commerce, the Supreme Court almost invariably holds the action unconstitutional.[13] This prohibition on facially discriminatory state action applies in all contexts, including natural resources,[14] taxes,[15] and even environmental protection.[16]

There are two reasons for the Court's prohibition of state actions that discriminate against interstate commerce. First, the existence of discriminatory treatment implicitly contradicts any claim by the state that its action is intended to serve a legitimate state interest, since no valid reason for the state action can have a logical relation to the interstate or intrastate nature of the activity regulated. Thus, for instance, consumers in the state can cause as much "waste" of natural resources as consumers outside the state. Activities in the state can impose the same burden on the state's revenues whether those activities ultimately benefit residents of the state or residents of other states. Or, waste dumped in a state can have the same adverse effect on health and environment in the state whether the waste originates in the state or in another state. A state action that discriminates against interstate commerce gives rise to the inescapable inference that the state is trying to help its citizens to the detriment of citizens of other states no matter what justification the state relies upon as a basis for

13. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982); Maryland v. Louisiana, 451 U.S. 725, 760 (1981); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

14. Hughes v. Oklahoma, 441 U.S. 322 (1979).

15. Maryland v. Louisiana, 451 U.S. 725 (1981).

16. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

its action. Second, there is no political check on state actions that discriminate against out-of-state interests. When a state takes an action that adversely affects the interests of both its residents and residents of other states, the Court assumes that the burden imposed will not be excessive because the adversely affected state residents can be expected to participate in the political process leading to the state action. When a state singles out nonresidents for adverse action, there is no internal, political check on unreasonably burdensome regulation, so the need for judicial protection of the unrepresented, out-of-state interests is apparent.[17]

The Court's prohibition on state actions that discriminate against interstate commerce protects interstate commerce only from the most obvious and least justified state burdens on interstate commerce. Its protection is limited by the difficulty of identifying state actions that effectively single out interstate commerce for particularly burdensome regulation when those state actions do not discriminate facially against interstate commerce. States are adept at imposing facially evenhanded regulatory requirements that purport to serve valid state interests, but whose adverse effects are felt almost entirely by out-of-state interests. The Court attempts to limit state authority to take actions that produce de facto, as well as facial, discrimination against interstate commerce. Thus, it occasionally invalidates a state action that has a clear discriminatory effect even if the stated purpose of the action is not discriminatory.[18] The Court has experienced great difficulty in this effort, however. Two cases illustrate the problems the Court has encountered in its attempts to distinguish between state actions that constitute prohibited, de facto discrimination against interstate commerce and state actions that further valid state interests with only incidental burdens on interstate commerce.

Raymond Motor Transportation, Inc. v. Rice[19] involved a challenge to a Wisconsin statute that barred trucks over fifty feet long and double trailer trucks from Wisconsin highways. The Court considered a massive amount of evidence concerning the amount of burden imposed on interstate commerce and the alleged relationship between the length limits and highway safety. The Court invalidated the state length limits under the commerce clause "because they place a sub-

17. *See* J. ELY, DEMOCRACY AND DISTRUST 84 (1980). *See also* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 250 (1978).

18. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

19. 434 U.S. 429 (1978).

stantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."[20] The Court was influenced in part by inclusion in the statute of a series of facially neutral exemptions that, as applied, seemed to exempt most local users from the length limits.[21] The Court emphasized that its decision was unique to the Wisconsin statute and particularly to Wisconsin's failure to present any credible evidence that its length limits furthered highway safety.[22] The Court's many caveats in *Raymond*, as well as its decisions in similar cases, suggest that it would have reached a different conclusion in *Raymond* based on only slight differences in statutory language or in the evidence presented at trial.

South Carolina State Highway Department v. Barnwell Brothers, Inc.[23] involved an unsuccessful challenge to a South Carolina statute remarkably similar to the Wisconsin statute invalidated in *Raymond*. The statute at issue in *Barnwell* limited trucks to a width of ninety

20. *Id.* at 447.

21. *Id.* at 446-47.

22. *Id.* at 447. The Court's decision in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), underlines the extreme difficulty courts experience in determining the constitutional validity of state statutes that putatively further interests in health or safety on the basis of either: (1) the evidence purporting to show a link between the statute and health or safety; or (2) the motives of the legislature when it enacted the statute. In *Kassel*, the Court invalidated an Iowa statute that limited trucks to a length of 60 feet. The decision to hold the statute unconstitutional under the commerce clause was made by a 6-3 vote of the Justices, but no theory was supported by a majority of the Court.

A four Justice plurality held the length limit unconstitutional principally on the basis of their belief that Iowa's interest in safety was "illusory" because the evidence presented at trial was not sufficient to establish a link between the 60 foot limit and highway safety. *Id.* at 667-71. Two Justices concurred with the result reached by the plurality but explicitly rejected the basis for decision set forth in the plurality opinion. The concurring Justices rejected the theory that the state of the evidentiary record with respect to the safety rationale is dispositive because such an approach makes the constitutionality of statutes turn on the "vagaries of litigation." *Id.* at 680. The concurring Justices held the statute constitutional based solely on their belief that the interaction between the legislature and the governor that produced the 60 foot limit indicated that the legislation was motivated by an impermissible desire to divert interstate trucks to other states, rather than by a sincere desire to further safety interests. *Id.* at 681-85.

Three dissenting Justices disagreed with both the theory of the plurality and the theory of the concurrence. The dissenting Justices disagreed with the plurality on the basis that the state presented sufficient evidence to establish a relationship between truck length and highway safety and on the basis that safety benefits resulting from small increments in length never can be established clearly in evidence. *Id.* at 696-98. They disagreed with the concurrence on the basis that it is impossible to determine the "actual purpose" of a legislative body because legislative action is always motivated by many reasons and different legislators vote for a variety of different reasons. *Id.* at 702-03.

23. 303 U.S. 177 (1938).

inches and a weight of ten tons. The Court sustained the statute even though it effectively excluded eighty-five to ninety percent of all interstate trucks from South Carolina highways.[24] The Court based its decision on three factors: (1) the state was able to establish a credible relationship between the statute and highway safety; (2) the statute did not discriminate against interstate commerce, so internal political forces could be relied on to produce a proper balance between benefits and burdens; and (3) Congress has the power to change that balance if it disagrees with the state.[25]

In *Raymond*, the Court distinguished *Barnwell* only on the basis of the dearth of evidence presented by Wisconsin to link its statute with highway safety, contrasted with the evidence presented by South Carolina establishing some relationship between its statute and highway safety.[26] The Court in *Raymond* did not mention at all the second and third stated bases for its holding in *Barnwell*—for good reason. The third basis—Congress can change the balance between burden and benefits if it disagrees with the state—was equally true in *Raymond* and, indeed, is true in all cases involving challenges to state actions under the commerce clause.[27] The second basis for the Court's decision in *Barnwell*—the statute did not discriminate between interstate and intrastate commerce, so internal political forces can be relied upon to produce a proper balance of burdens and benefits, is only partially true. The weakness of the reasoning implicit in that conclusion reveals a major limitation on the efficacy of all the Court's efforts to preclude states from unduly burdening interstate commerce.

Two groups were the major beneficiaries of South Carolina's action—state taxpayers who paid slightly lower taxes because of diminished highway maintenance costs and users of South Carolina highways other than large trucks. All of the first group and most of the second group undoubtedly consisted of state residents in the 1930's when the statute was at issue. Thus, the benefits of the state regulation went almost entirely to state residents. By contrast, almost all the burden was imposed on residents of other states. Truckers trying to transport goods from the industrial Northeast to the agricultural areas of Georgia and Florida or vice versa had a choice of three

24. *Id.* at 182.

25. *Id.* at 190-96.

26. 434 U.S. at 445 n.20.

27. *See infra* text accompanying notes 113-21.

expensive alternatives: bypass South Carolina, use a much smaller truck than was economically optimal for the entire trip, or shift cargo from truck to truck at the South Carolina borders. Truckers operating only within South Carolina felt very little of the burden of the statute, since the advantages of larger trucks are much greater for long hauls than for short hauls.

While the Court was accurate in its observation that some of the benefits and some of the burdens of the state action were felt by South Carolina interests, its conclusion that the existence of *some* burden on state residents is sufficient to justify reliance on the internal political process of the state to produce a rational balance of total benefits and burdens is suspect. South Carolina can be expected to regulate in a manner that balances the benefits to its citizens and the burdens to its citizens. Since almost all the benefits of the statute in *Barnwell* accrued to South Carolina residents and almost all the burdens fell on residents of other states, it is fair to assume that South Carolina adopted width and weight limits that equated the benefits and burdens to its citizens while simultaneously yielding a gross disproportion between the total benefits and burdens of the regulation on a national level. Thus, while the flat prohibition on state actions that discriminate against interstate commerce allows the Court to invalidate a few, particularly clumsy state barriers to interstate trade, it leaves considerable room for states to erect more subtle but substantial barriers.

2. *State Actions That Further Economic Interests*

A second class of disputes involves state actions that are expressly designed to further state economic interests at the expense of national economic interests. If the Court concludes that a state action fits this description, it almost invariably invalidates the state action under the commerce clause. States have the power, concurrent with that of the federal government, to regulate commerce,[28] but they cannot exercise that power in a manner that favors local economic interests over national economic interests. Two classic Supreme Court decisions illustrate this principle.

Baldwin v. G.A.F. Seelig, Inc.[29] involved a challenge to a New York statute prohibiting retail milk dealers from purchasing milk from out-of-state sources at prices below the minimum price applica-

28. Cooley v. Board of Wardens, 53 U.S. (1 How.) 229 (1851).
29. 294 U.S. 511 (1935).

ble to milk produced in New York. The purpose of the statute was to protect New York milk producers, who were precluded by another regulatory statute from selling milk below a specified minimum price, from losing markets to out-of-state milk producers.[30] The Court invalidated the statute under the commerce clause, holding that a state cannot obstruct interstate commerce "when the avowed purpose of the obstruction, as well its necessary tendency, is to suppress or mitigate the consequences of competition between the states."[31]

H. P. Hood & Sons, Inc. v. Du Mond[32] involved a challenge to another New York action affecting milk. A New York statute authorized a state agency to grant or deny an application for a license to operate a milk distribution facility. H. P. Hood applied for a license to operate a facility to purchase and process New York milk for ultimate consumption in other states. The state agency denied the license on the bases that there were adequate milk distribution facilities in the region and that the proposed new facility would harm New York consumers by allowing New York milk to be diverted to consumers in other states.[33] Again, the Court had no difficulty holding the New York action invalid under the commerce clause as an impermissible attempt to obstruct interstate trade in order to protect state economic interests from out-of-state competition.[34]

Baldwin and *H. P. Hood* stand for the salutory proposition that states cannot erect barriers to nationally advantageous free trade when the sole justification for the state action is to protect internal economic interests from external competition. As with the prohibition on facially discriminatory state actions, however, this rule filters out only the most blatant and clumsy state efforts to impair interstate commerce. If a state provides a plausible rationale for its action independent of economic protectionism, the Court must attempt to determine the true purpose and dominant effect of the state action. If the Court concludes that the state action furthers a valid state interest in health or safety, for instance, it is much more likely to defer to the state's judgment and to uphold the state action.[35]

The Court experiences considerable difficulty determining the

30. *Id.* at 519-20.

31. 294 U.S. at 522.

32. 336 U.S. 525 (1949).

33. *Id.* at 527-29.

34. *Id.* at 545.

35. *See* L. TRIBE, *supra* note 10, at 340-42. Professor Tribe states: "State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair

primary purpose and effect of the many state actions that have multiple purposes and effects. *Dean Milk Co. v. City of Madison*[36] illustrates this recurrent problem. Madison passed an ordinance prohibiting the sale of milk that was pasteurized more than five miles from the city on the basis that the city's milk inspectors could not practically inspect pasteurization plants greater than five miles away.[37] The ordinance had the effect of precluding Illinois milk producers, who previously supplied a high proportion of the milk purchased in Madison, from serving the Madison market.[38] A six Justice majority of the Court held the Madison ordinance invalid under the commerce clause.[39] The majority recognized that Madison had a legitimate, health-related reason for enacting its ordinance,[40] but found the ordinance invalid because: (1) it imposed a substantial burden on interstate commerce; and (2) Madison could easily have furthered its public health purpose without imposing such a burden simply by charging remote pasteurization facilities for the cost of inspections.[41]

The *Dean* basis for invalidating state actions remains a useful tool for striking down a state action putatively based on a health and safety rationale when the state action obviously is a poorly disguised attempt to benefit the state's citizens at the expense of the general welfare of the nation. Many parochial state actions are veiled by more credible claims of health and safety than the action at issue in *Dean*, however, and three Justices voted to uphold even the obviously protectionist ordinance in *Dean*.[42]

In many cases, the Court finds it impossible to determine the dominant motivation and effect of a multipurpose state action. In such cases, it simply accepts the state's characterization of the rationale for its action.[43] As a result, two state actions with precisely the

---

trade practices, are less likely to be perceived as 'undue burdens on interstate commerce' than are state regulations evidently seeking to maximize the profits of local business." *Id.* at 340.

36. 340 U.S. 349 (1951). *See also* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976).

37. 340 U.S. at 350.

38. *Id.* at 352-53.

39. *Id.* at 356.

40. *Id.* at 353.

41. *Id.* at 354-56.

42. *Id.* at 375 (Justice Black was joined in his dissenting opinion by Justices Douglas and Minton).

43. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983); C.A. Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933).

same effect can produce opposite judicial reactions when they are challenged under the commerce clause. In *Buck v. Kuykendall*,[44] for instance, the Court invalidated a state agency's order refusing to permit an interstate trucking company to operate on a route because the order was based on the need to protect state economic interests.[45] In *C.A. Bradley v. Public Utility Commission*,[46] by contrast, the Court upheld an identical state agency order because the agency denied permission on the stated basis that the interstate trucking company's operations would impair highway safety by producing traffic congestion. It is impossible to determine even today the actual reason for the state agency's order in *Bradley*. It is fair to speculate, however, that the state agency read the Court's decision in *Buck* and decided to achieve the protectionist result it sought by characterizing the basis for its action in a disingenuous way that caused the Court to defer to the state agency. In any event, the important point is that the Court has limited ability to determine the reasons for a state action. As a result, if the state action has a plausible relationship to health, safety, or the environment, the Court usually acquiesces in the state's characterization of the rationale for its action.

3. *State Actions That Further Health, Safety, or Environmental Interests*

Most modern conflicts between state and federal interests resolved under the commerce clause involve state actions that putatively further state interests in health, safety, or the environment. To some extent, this is attributable to the fact that states have acute interests in these areas, and almost any state action in these areas is likely to impose some burden on interstate commerce. To some extent, however, this phenomenon undoubtedly is linked to recognition by state authorities that the same state action has a much better chance of withstanding constitutional attack if it is based on a health or safety rationale than if it is based on an economic rationale.

In considering a challenge to a state action under the commerce clause, the Court most frequently refers to the general standard announced in *Pike v. Bruce Church, Inc.*: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld

44. 267 U.S. 307 (1925).
45. *Id.* at 316.
46. 289 U.S. 92 (1933).

unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[47] The cases interpreting and applying this standard to state actions that putatively further health or safety interests emphasize two features of the standard. First, any state action that does not clearly discriminate against interstate commerce and that has a plausible relationship to a health or safety goal will be characterized as an "evenhanded" exercise of state authority with only "incidental" effects on interstate commerce.[48] Once so characterized, its validity is determined by balancing the state's putative interest against the national interest in unobstructed interstate trade.[49] Second, this balancing test is tilted heavily toward the state's interest.[50] Indeed, this tilt is so extreme that it seems inaccurate to characterize the test as one involving balancing at all. The Court defers to the state's balance of its health or safety goals against the nation's economic goals unless the resulting burden on national economic goals is "clearly excessive."[51] Thus, the term "incidental" used to modify burden does not refer only to slight burdens on interstate commerce. Rather, "incidental" means that the burden on interstate commerce occurs without the explicit intent of the state to impose such a burden. A state action putatively based on a health or safety rationale can impose a substantial burden on interstate commerce that still fits the Court's definition of "incidental" and, therefore, is permissible unless it is "clearly excessive." Three landmark decisions illustrate that the Court is willing to use a balancing test to invalidate state health or safety rules only when the national burden of such rules is demonstrable and substantial and the state benefits are virtually nonexistent.

Southern Pacific Co. v. Arizona ex rel. Sullivan[52] involved a challenge to a statute limiting train lengths to fourteen cars. The Arizona Superior Court conducted a trial in which it received massive eviden-

47. 397 U.S. 137, 142 (1970).

48. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

49. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

50. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

51. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

52. 325 U.S. 761 (1945).

tiary submissions concerning the economic burden of the statute on interstate commerce and the relationship of the statute to the state's interest in safety.[53] The state trial court found that the statute imposed a serious burden on interstate commerce. Specifically, it found that: (1) ninety-three to ninety-five percent of all rail traffic through Arizona is interstate; (2) the statute requires thirty percent more trains through the state to haul the same amount of freight and passengers; and (3) the statute forces trains to stop at the borders of the state to break up and to remake long trains.[54] By contrast, the trial court found that the statute did not further the state's interest in safety at all. Indeed, it found that the Arizona law made train operation more dangerous.[55] Based on these extremely strong findings of fact, the Court held the Arizona law invalid under the commerce clause.[56] Even in these circumstances, one Justice dissented on the basis that the Court was improperly interfering with policy decisions that should be the exclusive domain of legislatures.[57]

Bibb v. Navajo Freight Lines[58] involved a challenge to an Illinois law requiring all trucks to have "contour" mud flaps. As in *Southern Pacific*, a trial court had conducted an extensive evidentiary hearing and had found that the law imposed a substantial burden on interstate commerce while it did not further the state's interest in safety at all.[59] The Court accepted these findings, but declined to make them the basis for a holding of invalidity.[60] Indeed, it stated in dicta that it "would have to sustain the law" if it were faced only with a decision to sustain or overturn based on a showing of a substantial burden on interstate commerce resulting from a state law with a poorly documented relationship to safety.[61]

The Court invalidated the Illinois law on another basis, however. It found the Illinois law hopelessly in conflict with an Arkansas law requiring "straight" mud flaps. Since it was physically impossible for an interstate truck to comply with the mudflap laws of both states, the Court felt justified in overturning the idiosyncratic and empirically

53. *Id.* at 763, 771-72.
54. *Id.* at 771-72.
55. *Id.* at 775.
56. *Id.* at 783.
57. *Id.* at 784 (Black, J., dissenting).
58. 359 U.S. 520 (1959).
59. *Id.* at 523.
60. *Id.* at 525-26.
61. *Id.* at 526.

unsupported Illinois law.[62] The conflict between state laws that formed the basis for the holding in *Bibb* can arise in the case of any state law that affects interstate commerce. The Court has made it clear, however, that the *potential* for conflicting state regulation of interstate commerce is not sufficient to invalidate a state law; rather, the Court will overturn a state law burdening interstate commerce only when it finds an actual, present conflict between that law and the law of another state that affects the same instrumentalities of commerce.[63]

In *Raymond Motor Transportation, Inc. v. Rice*,[64] the Court again overturned a state safety regulation because of its adverse impact on interstate commerce. *Raymond* involved a challenge to a Wisconsin statute limiting truck lengths to fifty-five feet. The Court found, based on massive uncontradicted evidence presented by the parties challenging the law, that the law substantially increased the cost of moving goods in interstate commerce while it made absolutely no contribution to safety.[65] Both the majority opinion of five Justices and the concurring opinion of four Justices emphasized, however, the unusual features of the case. The majority characterized Wisconsin as having "virtually defaulted in its defense of the regulations as a safety measure."[66] Thus, the majority stated that the holding did not even extend to identical laws of other states if such other states presented evidence on the safety issue less "overwhelmingly one-sided."[67] The five Justices who joined in the majority opinion indicated their willingness to balance state safety purposes against burdens on interstate commerce, but they described their attitude toward this balancing process as one of extreme deference to the judgment of state officials. Thus, they stated that they were "most reluctant to invalidate" state safety regulation.[68] According to the majority, the opponents of a state safety rule must "overcome a 'strong presumption of . . . validity.' "[69] The four concurring Justices expressed an attitude of even

62. *Id.* at 529-30.

63. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); *see also* L. TRIBE, *supra* note 10, at 339 ("In recent cases, the Supreme Court has refused to invalidate otherwise nondiscriminatory and nonexclusively local regulations absent a showing of *actual* conflict among the rules of different states . . . ." (emphasis in original)).

64. 434 U.S. 429 (1978). *See supra* text accompanying notes 19-22, 26-27.

65. 434 U.S. at 447.

66. *Id.* at 444.

67. *Id.* at 447.

68. *Id.* at 443.

69. *Id.* at 444 (quoting *Bibb*, 359 U.S. at 524).

greater deference to state authorities. They characterized the safety interests underlying the Wisconsin regulation as "illusory," and stated that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."[70]

South Carolina State Highway Department v. Barnwell Brothers, Inc.[71] illustrates the extreme limits of the Court's deference to state authorities when health and safety interests are at stake. In *Barnwell*, the Court upheld a South Carolina law prohibiting trucks wider than ninety inches and heavier than ten tons because the statute had a credible relationship to safety, even though the effect of the law was to exclude from South Carolina's highways between eighty-five and ninety percent of all interstate trucks.[72] *Barnwell* was decided over forty years ago, but the Court continues to refer to it as a viable precedent in its modern decisions applying the commerce clause.[73]

Courts have had only a few occasions to date to consider challenges to state environmental regulations under the commerce clause. The relative dearth of case law in this area probably is attributable to a combination of the fact that most states have recognized the importance of environmental interests only in the past two decades and the fact that most arguable conflicts between state environmental interests and federal economic interests arise in areas that are subject to extensive federal regulation and, therefore, are resolved under the supremacy clause rather than the commerce clause. The few environmental cases decided so far indicate that the courts will give at least as much deference to state legislative or administrative efforts to balance state environmental interests against national economic interests as they do when the balance is between state health and safety interests and national economic interests.

The two major Supreme Court decisions involving commerce clause challenges to state environmental regulation seem precisely analogous to the decisions involving state health and safety regulation. In *City of Philadelphia v. New Jersey*,[74] the Court held invalid a New Jersey statute that prohibited all in-state disposal of waste with an out-of-state source. The only mildly surprising feature of the deci-

70. *Id.* at 449 (Blackmun, J., dissenting).

71. 303 U.S. 177 (1938). *See supra* text accompanying notes 23-27.

72. 303 U.S. at 182.

73. *E.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445 n.20 (1978).

74. 437 U.S. 617 (1978).

sion was the fact that two Justices dissented from this seemingly routine application of the prohibition against state actions that discriminate facially against interstate commerce.[75] *Huron Portland Cement Co. v. City of Detroit*,[76] by contrast, is analogous to nondiscriminatory safety regulation cases like *Barnwell*. Detroit passed an ordinance establishing air quality standards applicable to ships in Detroit harbor.[77] The Court upheld the standards even though they imposed a substantial burden on interstate commerce by requiring many ships to make structural modifications to their boilers.[78]

The most interesting case involving a conflict between state environmental interests and national economic interests never reached the federal courts. The opinion of the Oregon Court of Appeals in *American Can Co. v. Oregon Liquor Control Commission*,[79] is particularly helpful both as an indication of the dominant judicial approach to conflicts between state environmental interests and national economic interests and as an explication of the judicial deference accorded to all state actions that credibly further interests in health, safety, or the environment.

The Oregon court was presented with a commerce clause challenge to an Oregon statute requiring soft drinks to be sold in reusable containers. The statute was justified as a means of reducing environmental harm created by littering. The court upheld the statute despite its finding that the state action burdened interstate commerce by forcing substantial changes in the entire national distribution system for beverages.[80] The court interpreted the United States Supreme Court decisions under the commerce clause to require judicial balancing of state and national interests where the interests are "comparable" (i.e., state economic interests versus national economic interests) but to prohibit judicial balancing of interests where the interests are "incomparable" (i.e., national economic interests versus state interests in health, safety, or the environment).[81] The Oregon court may have overstated slightly the degree of judicial deference accorded to state actions that purport to further health, safety, and environmental interests. The Court has invalidated such actions if they discriminate

75. *Id.* at 629 (Justice Rehnquist, joined by Chief Justice Burger, dissented).
76. 362 U.S. 440 (1960).
77. *Id.* at 618-19.
78. *Id.* at 629.
79. 15 Or. App. 618, 517 P.2d 691 (1973).
80. 517 P.2d at 695, 705.
81. 517 P.2d at 698.

facially against interstate commerce,[82] if they amount to poorly disguised attempts to protect state economic interests from outside competition,[83] or if the state presents no evidence whatsoever that they actually further interests in health, safety, or the environment.[84] The Oregon court's analysis of the cases seems reasonably accurate, however, since the Supreme Court seems to accord total deference to any nondiscriminatory state action that has any credible factual link to state interests in health, safety, or the environment. The Oregon court made explicit the reasons for the extreme judicial deference to state legislatures in these areas—courts are reluctant to make the policy decisions implicit in balancing "incomparables."

4. Summary of Commerce Clause Jurisprudence

This analysis of the limits on state regulatory authority created by judicial application of the commerce clause can end where it began, with the distinction drawn by Justice Jackson in *H. P. Hood*.[85] The Court will invalidate a state action under the commerce clause that clearly favors state economic interests over national economic interests, but it will not invalidate a facially neutral state regulation with a credible link to state interests in health, safety, or the environment no matter how much burden that regulation imposes on interstate commerce.[86] The Court will defer to state legislative judgments concerning the proper balance between such state interests and the national interest for two reasons. First, the Court does not feel it is the appropriate institution to balance objectively incomparable values like economic costs versus safety benefits. Second, when a state regulation applies both to residents and to nonresidents of the state, the Court assumes that it can rely on the state's own political processes to produce an appropriate balance of regulatory costs and benefits.

As the previous analysis of the impact of the statute at issue in *Barnwell* illustrates,[87] this judicial assumption that internal political forces can be relied upon to produce a proper balance when state regulation applies evenhandedly is unwarranted in many circumstances. Nondiscriminatory state regulations often produce benefits that accrue primarily to in-state interests and burdens felt primarily by out-

82. *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
83. *E.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
84. *E.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).
85. *See supra* text accompanying note 12.
86. L. TRIBE, *supra* note 10, at 329-31, 340.
87. *See supra* text accompanying notes 23-27.

of-state interests. In addition, states frequently disguise regulations designed to protect local economic interests at the expense of national interests by basing those regulations on superficially plausible health, safety, or environmental rationales. Thus, judicial application of the commerce clause can be relied upon to filter out only the most crude state attempts to elevate parochial interests over national interests.

B. Congressional Invalidation of State Regulatory Actions Under the Supremacy Clause

Most arguable conflicts between state regulation and national interests arise today in areas in which Congress has acted in some manner. As a result, most modern cases require judicial application of the supremacy clause as well as the commerce clause. The Court frequently can choose which constitutional provision to use as the principal basis for its decision upholding or invalidating a state action. In such circumstances, the Court usually bases its decision on the supremacy clause because: (1) a decision based on the supremacy clause involves less apparent conflict between the Court and states; and (2) a decision based on the supremacy clause sends a clear message to Congress that it has the power to reallocate regulatory power between federal and state authorities if the Court misinterprets the intent of Congress.[88]

Under the supremacy clause, if the federal government and the states have concurrent power to regulate a subject and both exercise that power, the state exercise is void if it "collides" with the federal exercise.[89] Thus, the question raised by preemption analysis is always one of statutory interpretation. Unfortunately, Congress rarely addresses issues of preemption of state law explicitly or in detail, so the Court usually must determine congressional intent based on its analysis of the general purposes of the federal statute and the relationship between those general purposes and the state action at issue.[90] The Court has explained its approach to preemption issues using many different formulations, not all of them consistent. The formulations most frequently cited today appeared first in *Rice v. Santa Fe Elevator Corp.*:[91]

88. *See* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 13 STAN. L. REV. 208 (1959).

89. Gibbons v. Ogden, 22 U.S. (1 Wheat.) (1824).

90. *See* L. TRIBE, *supra* note 10, at 386; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 17, at 267-68; M. FORKOSCH, CONSTITUTIONAL LAW 263 (1969).

91. 331 U.S. 218 (1947).

> The question in each case is what the purpose of Congress was.
>
> . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it. Or the Act of Congress may touch a field in which the federal system will be assumed to preclude enforcement of state laws on the same subject. [Or] the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.[92]

In its recent decisions, the Court has divided the many complicated strands of preemption analysis into three categories—federal occupation of the field, direct conflicts, and obstacles to accomplishment of congressional goals.[93]

Congress can occupy an entire field of regulation to the exclusion of all state regulation, but the Court will not conclude that Congress has done so unless it finds either an explicit intent to preempt all state authority or a federal regulatory scheme so pervasive that it demonstrates an implicit congressional intent to occupy the field.[94]

Direct conflicts between federal and state regulatory requirements present the easiest case for preemption. A conflict sufficient to invalidate a state regulatory requirement can exist in either of two cases: (1) when it is impossible to comply with both federal and state law; or (2) when the objectives of state and federal requirements conflict.[95]

Finally, the most difficult class of cases involves claims that a state regulatory action frustrates policies underlying federal regulation. In these cases, the Court must consider carefully the purposes of federal regulation and the degree of impact of the state regulation on the federal government's ability to further those purposes. Sometimes, for instance, a major purpose of federal regulation is to achieve uniform regulation that is not possible if states can supplement federal regulation.[96]

---

92. *Id.* at 230 (citations omitted).

93. *E.g.*, Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 621 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

94. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 83 (1963). *See also* L. TRIBE, *supra* note 10, at 384-85.

95. *See, e.g.*, FPC v. State Corp. Comm'n, 363 F. Supp. 522, *aff'd*, 415 U.S. 961 (1974). *See also* L. TRIBE, *supra* note 10, at 377-78.

96. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). *See also* L. TRIBE, *supra* note 10, at 386-87.

Three recent Supreme Court decisions resolving preemption controversies illustrate two important points. First, the Court seems increasingly reluctant to hold state regulation preempted by federal law. Second, absent explicit indications of congressional intent to preempt all state regulatory power over a subject matter, the Court's approach to preemption issues provides states considerable latitude to impose regulatory requirements in areas involving extensive federal regulation even when the state regulation conflicts with the goals of federal regulation.

Arkansas Electric Power Cooperative Corp. v. Arkansas Public Service Commission[97] involved a challenge to Arkansas' attempt to regulate wholesales of electric power by rural electric cooperatives financed by the Rural Electrification Association (REA). Arkansas' action arguably was preempted by the Federal Power Act, which gives the Federal Energy Regulatory Commission (FERC) power to regulate wholesales of electricity, and the REA Act, which authorizes REA to finance rural electric cooperatives. Prior to the Court's decision in *Arkansas Electric*, its decisions under both the commerce clause and the supremacy clause suggested strongly that it would have held impermissible any state regulation of wholesales of electric power.[98]

The seven Justice majority in *Arkansas Electric* recognized that the wholesale rates charged by AECC would be subject to exclusive regulation by FERC if AECC were not a cooperative.[99] FERC had earlier held, however, that it had no jurisdiction over such sales because, as among federal agencies, Congress had given all power over cooperatives to REA.[100]

The majority then considered the government's argument that state regulation of cooperatives was preempted by the REA Act. The majority recognized that state regulation of wholesale rates charged by cooperatives financed by REA has the potential to conflict with REA's interests as a lender to cooperatives.[101] It found no inherent

97. 461 U.S. 375 (1983).

98. *See* FPC v. Florida Power & Light Co., 404 U.S. 453 (1972); FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964); Public Utilities Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). *See also* Flax, *Has the Supreme Court Pulled the Rug from Under the FERC's Electric and Natural Gas Regulation?*, 4 ENERGY L.J. 251 (1983); Anderson, *The Role of States in Energy Regulation*, 4 ENERGY L.J. 255 (1983).

99. 461 U.S. at 381.

100. *Id.* at 381-82.

101. *Id.* at 385, 389.

conflict in the present case, however, and cited statements in the legislative history of the REA Act suggesting that Congress was willing to tolerate the potential for conflicts between state rate regulation and federal financing.[102] As the two dissenting Justices pointed out, however, those statements in the legislative history did not and could not have referred to state regulation of *wholesale* rates, because Congress was well aware of the Court's prior holdings prohibiting *all* state regulation of wholesale rates when it passed both the Federal Power Act and the REA Act.[103]

Thus, in *Arkansas Electric* the Court held that the federal government did not "occupy the field" to the exclusion of all state regulatory authority despite the extensive involvement of two federal agencies. It also did not find a fatal conflict between federal and state regulation despite its recognition that such a conflict could arise at any time once federal and state agencies are free to regulate the conduct of cooperatives. In addition, it interpreted ambiguous statements of congressional intent in a manner that permitted state regulation of conduct Congress believed to be beyond the reach of state power when it passed the statutes in question.

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission[104] involved a challenge under the supremacy clause to a California statute prohibiting construction of nuclear power plants until a state agency determines that the federal government has resolved the problem of nuclear waste disposal. Pacific Gas and Electric Company (PG&E) argued that the California statute was preempted by the Atomic Energy Act based on each of the three recognized approaches to preemption analysis.

The Court first rejected PG&E's argument that Congress had occupied the field of regulation of nuclear power. Based on the language and legislative history of the Act, the Court concluded that Congress intended to create a dual regulatory structure—while it had "occupied the field" of nuclear safety, it had permitted the states to continue to regulate nuclear power plants for economic purposes.[105] Thus, the Court distinguished between a prohibited state moratorium based on safety concerns and a permissible state moratorium based on

102. *Id.* at 386-87.

103. *Id.* at 396-400.

104. 461 U.S. 190 (1983).

105. *Id.* at 211-12.

economic concerns.[106] The Court concluded that the California statute was valid if it had any relationship to the state's economic interests. Because failure to solve the nuclear waste disposal problem could lead to soaring electric rates resulting from idled nuclear plants, the Court found a sufficient economic rationale to support the state moratorium.[107]

The Court then rejected PG&E's argument that the state moratorium based on the state agency's failure to find the existence of a solution to the nuclear waste disposal problem conflicted with Nuclear Regulatory Commission (NRC) findings that the nuclear waste disposal problem was not an impediment to construction of nuclear plants. The state and federal rulings did not conflict because: "The NRC's imprimatur . . . indicates only that it is safe to proceed with such plants, not that it is economically wise to do so."[108]

PG&E's final argument was that the California moratorium frustrated Congress' stated purpose to develop the commercial use of nuclear power. The Court rejected this argument because, even though Congress intended to further that purpose, it did not intend to do so "at all costs."[109] Thus, despite the congressional purpose to develop nuclear power, states remain free to slow or even stop that development "for economic reasons."[110]

Pacific Gas & Electric is a well-reasoned decision that seems to represent a prudent resolution of a difficult regulatory conflict. Still, the Court's approach highlights two significant limitations of preemption analysis. First, it is relatively easy in many cases for a state to base a regulation on a plausible rationale different from the state's dominant reason for regulating the conduct at issue and different from the federal government's regulatory rationale and thereby to avoid a holding of preemption. It is not a well-kept secret that California's moratorium on nuclear plants was based primarily on nuclear safety concerns, even though it obviously relates to economic issues as well. A regulatory requirement putatively based on a permissible rationale has exactly the same effect as would a requirement based on an impermissible rationale. Thus, *Pacific Gas & Electric* illustrates the

106. *Id.* at 213.
107. *Id.* at 214-16.
108. *Id.* at 218.
109. *Id.* at 222.
110. *Id.* at 223.

potential for states to avoid preemption through clever characterization of the reason for imposing a regulation that has several effects.

Second, *Pacific Gas & Electric* shows the weakness of the "frustration of federal purpose" branch of preemption analysis. When Congress enacts a statute to further a purpose, it rarely indicates an intent to further that purpose "at all costs." Yet, *Pacific Gas & Electric* seems to permit state actions that stand as a complete bar to accomplishment of a federal purpose unless Congress has indicated such an intent.

The Court's dictum in *Pacific Gas & Electric* that the federal government had "occupied the entire field of nuclear safety concerns"[111] proved accurate for less than a year. The Court qualified that statement significantly in *Silkwood v. Kerr-McGee Corp.*[112] *Silkwood* involved the validity under the supremacy clause of an award of $5,000 in compensatory damages and $10,000,000 in punitive damages authorized by Oklahoma law. The punitive damages award was based on a jury finding that Kerr-McGee was "grossly negligent, reckless and wilful" in allowing plutonium to escape from its facility.[113] By contrast, NRC investigated the Silkwood incident and found that Kerr-McGee had complied with all federal regulations except for a relatively minor lapse in maintaining Ms. Silkwood's medical records.[114]

Kerr-McGee argued that the award of punitive damages under state law was preempted based on each of the three branches of preemption analysis—the federal government had occupied the field, the state action conflicted with federal regulation, and the state action frustrated congressional purposes. As in *Pacific Gas & Electric*, the Court rejected all three bases for application of the supremacy clause.

The five Justice majority began by qualifying the Court's previous statement that "the federal government has occupied the entire field of nuclear safety concerns" by holding that the federal occupation did not extend to preemption of state tort law.[115] It recognized that: "Congress' decision to prohibit the states from regulating the safety aspects of nuclear development was premised on the belief that the Commission was more qualified to determine what type of safety

111. *Id.* at 212.
112. 104 S. Ct. 615 (1984).
113. *Id.* at 620.
114. *Id.* at 619.
115. *Id.* at 622.

standards should be enacted in this complex area."[116] Yet, it declined to hold state regulation through awards of punitive damages preempted because Congress was silent concerning the preemptive effect of the Atomic Energy Act on traditional state tort law.[117]

The Court then rejected the argument of Kerr-McGee and the government that state awards of punitive damages conflict with NRC's exclusive power to regulate nuclear safety and its remedial scheme of penalties much more modest than the $10,000,000 award granted in *Silkwood*. The Court recognized that: "No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability."[118] The Court concluded that Congress through its silence concerning traditional state tort law had indicated its acquiescence in this tension, however.[119] It found no fatal conflict because: "Paying both federal fines and state-imposed punitive damages . . . would not appear to be physically impossible."[120]

Finally, the Court rejected the argument that state awards of punitive damages would frustrate the congressional purpose to further commercial development of nuclear power on the same basis relied upon in *Pacific Gas & Electric*—Congress did not intend to further that purpose "at all costs."[121]

The four dissenting Justices emphasized two points. First, as the majority recognized, Congress intended to preempt all state regulation of nuclear hazards. Second, the sole purpose and effect of *punitive* damages is to regulate conduct.[122] It follows that Congress' arguable acquiescence in the continued availability of compensatory damages is of no consequence to the determination of whether Congress intended to preempt punitive damages.

Taken together, the Court's decisions in *Arkansas Electric, Pacific Gas & Electric*, and *Silkwood* indicate a growing reluctance by the Court to hold state regulation preempted by federal law using each of the three principal methods of analysis under the supremacy clause. *Arkansas Electric* suggests that pervasive federal involvement

116. *Id.*
117. *Id.* at 623.
118. *Id.* at 625.
119. *Id.*
120. *Id.* at 626.
121. *Id.*
122. *Id.* at 628, 635.

in the regulated conduct and the clear potential for future conflicts between federal and state agencies no longer are sufficient to support a holding that state regulation is preempted. *Pacific Gas & Electric* illustrates the ability of states to impose regulations that frustrate completely efforts to further a federal purpose as long as the stated basis for the state regulation differs from the basis for federal involvement. *Silkwood* demonstrates that the Court will not hold a state regulatory action preempted even in an area "occupied by" the federal government if the state regulation is accomplished through a method traditionally available to states, absent an explicit indication of Congress' intent to forbid that specific method of regulation. *Silkwood* also suggests that the Court is reluctant to hold a state regulatory action preempted as in conflict with a federal regulatory scheme unless the conflict involves a literal impossibility of compliance with both regulatory requirements.

The rapidly changing state of the law of preemption seems to permit states increasing flexibility to regulate in ways that conflict with national goals even in areas of conduct with extensive federal involvement. Unless Congress has explicitly preempted the particular form of state regulatory action at issue or the state regulatory requirement conflicts literally with a federal regulatory requirement, the Court will uphold the state action. Thus, while judicial application of the supremacy clause provides an alternative to the commerce clause as a mechanism for restraining states from furthering parochial interests at the expense of national interests, its efficacy for that purpose depends on the existence of a clear indication of congressional intent to preempt. In the many cases in which Congress has not explicitly preempted the specific type of state action challenged, the Court is likely to uphold the action even if it harms national interests.

C. *Federal Agency Invalidation of State Regulatory Actions Under the Supremacy Clause*

Congress can preempt state regulatory action itself or it can delegate that power to a federal agency. *Ray v. Atlantic Richfield Co.*[123] illustrates the second option. Washington passed a statute imposing a variety of regulatory requirements on tankers traversing Puget Sound.[124] Congress passed a statute authorizing the Secretary of

123. 435 U.S. 151 (1978). *See also* NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

124. 435 U.S. at 158-60.

Transportation to regulate all tanker traffic in United States waters.[125] Congress stated that one of the purposes of federal regulation of tankers was to obtain uniformity,[126] so there was little doubt that any state regulatory requirement different from a requirement imposed by the Secretary was preempted. The Court analyzed each of the regulatory requirements imposed by the Washington statute separately to determine whether it was preempted either by the federal statute itself or by regulatory actions taken under that statute.[127]

The Court held invalid Washington's exclusion of all tankers over 125,000 DWT from Puget Sound on the basis that such a total prohibition was inconsistent with the Secretary's regulation that limited the size of tankers operating in the Sound only in certain locations and conditions. The Court reasoned that:

> "[W]here failure of . . . federal officials to affirmatively exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. We think that in this case the Secretary's failure to promulgate a ban on the operations of oil tankers in excess of 125,000 DWT in Puget Sound takes on such a character.[128]

By contrast, the Court upheld Washington's requirement that tankers use tugs in certain circumstances because, while the Secretary had the power to regulate the use of tugs, he had not yet exercised that power.[129] The Court emphasized that Washington's regulation of tug assistance for tankers also would be preempted if and when the Secretary exercises his power to require tugs or concludes "that no such requirement should be imposed at all."[130]

The Court has long recognized federal agency power to preempt state regulatory requirements.[131] In some circumstances, that power clearly provides advantages to the nation. The famous dispute in the early part of the century that resulted in the Court's decision in *The Shreveport Rate Case*[132] is a good illustration of the potential national

125. *Id.* at 161.
126. *Id.* at 163.
127. *Id.* at 172-80.
128. *Id.* at 178.
129. *Id.* at 171-72.
130. *Id.*
131. *See* The Minnesota Rate Cases, 230 U.S. 431 (1912); Second Employers' Liability Cases, 223 U.S. 51 (1911).
132. 234 U.S. 342 (1914). This case decided suits brought by three railroads to set aside an order of the ICC. *Id.* at 345.

benefits that can result from federal agency preemption of state regulatory power.

Dallas, Houston, and Shreveport competed as rail terminals serving the needs of Texas communities in the triangle formed by the three cities. The Texas Railroad Commission set rates for traffic between Dallas, Houston, and the Texas communities near Shreveport much lower than the rates established by the Interstate Commerce Commission (ICC) for traffic between Shreveport and those communities. The effect of the Railroad Commission's action was to funnel all rail service to north Texas communities through Dallas and Houston even though the actual cost of providing service to many such communities was less through Shreveport. ICC investigated the situation and found the rate relationships resulting from the Railroad Commission's orders unduly discriminatory. It ordered the railroads to adjust their rate relationships to eliminate the undue discrimination against Shreveport.[133] The Texas Railroad Commission challenged the portion of the ICC order requiring an increase in some rail rates for routes within Texas on the basis that ICC did not have authority to regulate intrastate rates.[134] The Court held that ICC had the power to adjust intrastate rates when that action was necessary to eliminate undue discrimination.[135] It concluded that: "Interstate trade was not left to be destroyed or impeded by the rivalries of local governments."[136] Professor Black has characterized the action of the ICC in *The Shreveport Rate Case* as an ideal governmental response to problems of parochialism that threaten national interests.[137]

Agencies have only those powers granted by Congress, and it is not always clear that an agency has the power to preempt state regulation. In the late 1970's, for instance, there was considerable debate concerning the Federal Trade Commission's (FTC) power to preempt state regulation. Dean Verkuil argued that FTC has such power.[138] He referred to studies by Professors Stigler and Benham[139] demonstrating that FTC preemption of a few state regulatory barriers to

133. *Id.* at 345-47.

134. *Id.* at 349.

135. *Id.* at 350.

136. *Id.*

137. Black, *Perspectives on the American Common Market*, in REGULATION, FEDERALISM AND INTERSTATE COMMERCE (A. Tarlock ed. 1981).

138. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225.

139. Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. L. & ECON. 337 (1972); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

competition could save the national economy billions of dollars.[140] He recognized that some federal statutes, like the Sherman Act, are so broad that giving them preemptive effect could have two undesirable consequences: (1) significant potential erosion of the values of the federal system; and (2) potential active judicial review of substantive economic decisions of states akin to the Court's troublesome attempts to limit state economic regulation under the due process clause.[141] He argued, however, that the statutes administered by FTC do not pose these serious problems if FTC uses self-restraint in exercising its power to preempt state laws and courts review carefully all preemptive actions taken by FTC.[142] He suggested that FTC should decide whether to preempt a state regulation through use of a standard similar to the Supreme Court's standard for reviewing state regulation under the commerce clause.[143] In reviewing preemptive action by FTC, courts should "consider closely the rationality of the rule in terms of the appropriateness of preemption."[144] With these two important safeguards, Dean Verkuil argued that FTC power to preempt state regulations that interfere with the pursuit of national economic goals has the potential to provide considerable benefit without undue sacrifice of the values of federalism and state autonomy.

Despite expressions of contrary views by some state officials,[145] the courts seem to have adopted Dean Verkuil's suggested approach. In *Katherine Gibbs School, Inc. v. FTC*,[146] the Second Circuit was confronted with a challenge to the validity of an FTC rule that purported to preempt state law. FTC prohibited "abusive practices" engaged in by vocational and home study schools and preempted broadly any state regulation " 'which is inconsistent with or otherwise frustrates the purpose of . . . this . . . rule.' "[147] The Second Circuit held the FTC rule invalid because it prohibited vaguely defined practices and its preemptive effect was similarly broad and vague.[148] The court recognized in dicta, however, the power of FTC to preempt state regulations through more specific rules with correspondingly

140. Verkuil, *supra* note 138, at 225.

141. *Id.* at 230-31, 243.

142. *Id.* at 231-33, 243-47.

143. *Id.* at 243-46.

144. *Id.* at 246.

145. *See, e.g.*, Troy & Young, *Federal Trade Commission Preemption of State Regulation: A Reevaluation*, 12 SUFFOLK U. L. REV. 1248 (1978).

146. 612 F.2d 658 (2d Cir. 1979), *reh'g en banc denied*, 628 F.2d 755 (1980).

147. 612 F.2d at 666-76.

148. *Id.* at 667.

more narrow preemptive effect.[149]

There is reason to believe that the Supreme Court is increasingly receptive to federal agency actions preempting state regulations when the preemptive effect of the agency action is narrow and the benefits of preemption are well documented. In its recent cases applying the supremacy clause, the Court seems to have combined an increasingly conservative approach to finding that Congress intended broadly to preempt state regulation with an implicit invitation to federal agencies to determine whether specific state regulations so conflict with federal policy that they should be invalidated.

In *Arkansas Electric*,[150] for instance, the Court refused to find that Congress intended to preempt state regulation of wholesales by rural electric cooperatives through passage of either the Federal Power Act or The Rural Electrification Act. The Court emphasized, however, that its holding said nothing about the power of either of the federal agencies potentially affected by such state regulation to preempt that regulation in whole or in part. Thus, the Court acknowledged that it "would obviously be faced with a very different preemption question" if FERC were to reverse its earlier holding that it did not have jurisdiction to regulate wholesales by rural electric cooperatives.[151] Similarly, it recognized REA's continuing authority to preempt a particular state regulatory requirement imposed on a REA-financed cooperative by enacting a valid rule supported by evidence of a conflict between REA's interests and the state regulation.

Preemption of state regulations by federal agencies has the potential to supplement the increasingly ineffective checks on state regulations that harm national interests available through judicial application of the commerce clause and through judicial interpreta-

149. *Id.* Similarly, in American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980), the D.C. Circuit reviewed an FTC rule purporting to prohibit virtually all state law restrictions on advertising prescription glasses and eye examinations. The court remanded the rule because the Supreme Court's decisions in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976) (holding that state prohibitions on advertising prescription glasses violate the first amendment) and Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that state prohibitions on advertising professional services violate the first amendment) had dramatically reduced the need for the FTC's preemptive rule. The court saw no need to address the serious issues of federalism and the scope of FTC's preemptive authority raised by the rule without first providing FTC an opportunity to reassess the need for the rule on remand. The court emphasized that a preemptive rule cannot be broader than evidence of need supports. *Id.* at 911-13.

150. *See supra* text accompanying notes 98-104.

151. 461 U.S. 375, 383 n.7 (1983).

tion of typically ambiguous congressional expressions of intent concerning preemption.

D. Limits on Congressional Power to Affect the Permissible Scope of State and Federal Regulation

The final step in this survey of the legal environment in which arguable conflicts between state and federal regulation are resolved is to determine the extent to which Congress is limited in its power to resolve such conflicts unilaterally. The short answer is that Congress has almost total discretion to allocate regulatory responsibilities between state and federal agencies.

The commerce clause presents no impediment to congressional allocation of regulatory power between state and national governments. Even if the Court has drawn an initial line allocating federal and state regulatory power over an activity through judicial application of the commerce clause, it will defer to any congressional reallocation of that power.[152]

Similarly, the supremacy clause is a grant of power to Congress rather than a restriction on congressional power. Indeed, the supremacy clause empowers Congress to preempt state regulation of an area of conduct completely or to delegate to an agency its preemptive power without imposing any federal regulation on that area of conduct.[153] Such an action reflects a decision by Congress or by a federal agency that the national interest is best served by permitting the conduct to take place in an environment free of regulation imposed at any level of government.

The only potential constraint on congressional power in this context is the tenth amendment's reservation of some powers to the states. The Court's holding in *National League of Cities v. Usery*[154] initially was interpreted by some commentators as a broad limitation on federal power to regulate conduct where states traditionally had

152. South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938). *See generally* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 352-57 (10th ed. 1980). *See also* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 17, at 243-44.

153. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 383-84 (1983); Ray v. Atlantic Richfield Co., 735 U.S. 751, 178 (1978); NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

154. 426 U.S. 833 (1976). As this Article was going to press, the Supreme Court overruled *Usery* in Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (No. 82-1913).

exercised a dominant regulatory role.[155] The post *Usery* cases indicate, however, that the tenth amendment limits federal power only when the federal government purports to regulate under the commerce clause state conduct that is inextricably linked to the concept of state sovereignty.[156] In particular, *Federal Energy Regulatory Commission v. Mississippi*[157] suggests that the tenth amendment does not limit Congress' flexibility to allocate regulatory control over private conduct to any meaningful degree.

FERC v. Mississippi involved a challenge under the tenth amendment to certain provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA). That Act required each state's utility commission to "consider" adoption of each of several standards for regulating electric utilities and to use specified procedures in considering the adoption of such standards. Thus, PURPA established a mandatory agenda for each state commission and the procedural framework within which each item on that agenda was to be considered. Mississippi challenged these provisions of PURPA on the basis that they interfered with the state's sovereignty in violation of the tenth amendment as interpreted in *Usery*.

By votes of five to four and six to three, the Court upheld all challenged provisions of PURPA. Since the federal government can preempt state regulation of utilities completely[158] and since state tribunals can be compelled to apply federal law,[159] the majority reasoned that the federal government can condition each state's exercise of its power to regulate utilities on the state's willingness to consider federal standards using procedures mandated by the federal government.[160] In short, the federal government can "use state regulatory machinery to advance federal goals."[161]

FERC v. Mississippi stands for two propositions important to this Article. First, unless it is attempting to regulate the conduct of a state in its capacity as a sovereign, Congress can reallocate regulatory

155. *See* Schwartz, National League of Cities v. Usery *Revisited—Is the Quondam Constitutional Mountain Turning Out To Be Only A Judicial Molehill?*, 52 FORDHAM L. REV. 329-30 (1984); *see also* Rotunda, *The Doctrine of Conditional Preemption And Other Limitations On Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 290-91 (1984).

156. *See* Gelfand, *The Burger Court and the New Federalism*, 21 B.C.L. REV. 763 (1980).

157. 456 U.S. 742 (1982). *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

158. 456 U.S. at 759.

159. *Id.* at 760.

160. *Id.* at 765.

161. *Id.* at 759.

power between state and federal governments without concern for constitutional limitations. Second, Congress is not limited to a choice between allocating all power to regulate an area of conduct to state or federal agencies. It can combine federal and state regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation.

E. Summary of Legal Framework for Resolving Issues of Federalism in Regulatory Decisionmaking

If Congress has not acted with respect to an area of regulation, the courts must determine initially whether state regulation interferes with national goals to such an extent that it conflicts with the commerce clause. Courts accomplish this task by enforcing an almost complete prohibition on state regulation that discriminates facially against interstate commerce and on state regulation that is clearly designed to protect state economic interests from outside competition. With respect to other forms of state regulation, courts purport to balance a state's interests in a regulation against the national interest in unobstructed trade between the states. In fact, courts defer almost completely to state governments when an evenhanded state regulation has any credible relationship to state interests in health, safety, or the environment even if that regulation imposes a substantial burden on interstate commerce. The extreme judicial deference accorded state officials in these circumstances is premised on two strongly held views. First, the judiciary should avoid making policy decisions that require it to balance "incomparables" such as safety benefits versus economic burdens. Second, internal political checks can be relied upon as means of assuring a reasonable balance between regulatory burdens and benefits when a state regulation applies evenhandedly to in-state and out-of-state interests.

Because of this judicial deference to each state's pursuit of its interests in health, safety, and the environment, judicial application of the commerce clause can be relied upon only to invalidate the most crude and blatant efforts to further state interests at national expense. States remain free to interfere with national goals through two types of actions. First, states can impose regulatory requirements putatively based on credible health, safety, or environmental goals but which actually further parochial or protectionist economic interests. Courts attempt to detect and invalidate such measures, but they are understandably reluctant to second guess a state's stated reasons for

imposing a regulatory requirement that furthers several purposes simultaneously. Second, states can impose putatively evenhanded regulations whose benefits accrue principally to in-state interests and whose burdens are felt primarily by out-of-state interests. Internal political forces are unlikely to produce a reasonable balance of regulatory benefits and burdens in this situation.

If an arguable conflict between state regulation and national goals arises in an area in which Congress has acted, the Court usually resolves the conflict through application of the supremacy clause rather than the commerce clause. This requires the Court to determine whether Congress intended to preempt the state regulation at issue. Congress rarely addresses preemption issues explicitly, and even more rarely does it address those issues in detail. As a result, the Court usually must make an educated guess at congressional intent by determining the general scope and purpose of the federal statute and the effect that the state action at issue has on the federal government's efforts to further the general purposes underlying the congressional enactment. The Court will invalidate a state regulation if: (1) federal involvement in the field is so pervasive that the federal government has occupied the field; (2) state and federal regulations conflict either literally or in their purposes; or, (3) state regulation poses an obstacle to accomplishment of congressional goals. The Court's recent decisions applying preemption analysis indicate a continued trend to tolerate state regulation of conduct that is heavily regulated by the federal government unless Congress has explicitly preempted the particular form of state regulation at issue or it is literally impossible for a regulatee to comply with federal and state requirements. Since both explicit preemption of all forms of state regulation and literal conflict between state and federal regulatory requirements are rare, states have considerable power consistent with the supremacy clause to impose regulations that frustrate national goals identified by Congress.

Congress can delegate to a federal agency its power to preempt state regulation. Any agency attempt to exercise preemptive power raises two questions. Did Congress delegate preemptive power to the agency? Has the agency lawfully exercised that power? Courts are reluctant to affirm broad agency preemptions of state regulation because of judicial concern that exercise of broad preemptive power by federal agencies could undermine the values of the federal system. Courts generally affirm narrow agency exercises of preemptive power where the agency has tailored its preemption to a demonstrable na-

tional goal the pursuit of which has been delegated to the agency. Some of the Court's recent decisions under the supremacy clause seem to combine an increasing reluctance to hold a state regulation preempted by bare enactment of federal legislation with an implicit invitation to federal agencies to exercise their power to preempt those state regulations they find inconsistent with the regulatory goals Congress assigned them.

Finally, Congress has virtually unlimited power to allocate regulatory power between state and federal agencies. It can reallocate power initially allocated through judicial interpretation of the commerce clause. It can preempt state authority under the supremacy clause, and it can authorize federal agencies to preempt state authority. It also can blend state and federal regulatory authority into virtually any combination of cooperative or creative federalism, as long as it does not attempt to regulate a state's own conduct in its capacity as a sovereign.

III. Determining the Appropriate Relationship Between Regulation and Federalism

A. National versus Local Regulation

Many of the advantages and disadvantages of federal versus state regulation were identified in the opening quotations from Justice Holmes and Justice Brandeis. Over the past two centuries of the American political experiment, many distinguished jurists, political scientists, philosophers, and economists have contributed to the rich literature on federalism.[162] Boyden Gray recently summarized the relative advantages of placing regulatory decisions in state or federal hands.[163] His summary provides a convenient starting point for analysis.

Gray identified as the major disadvantage of federal regulation the fact that it is implemented by a massive, inefficient bureaucracy remote from the needs of the people in each locality.[164] By contrast, he argued that state and local regulation provides three significant advantages: (1) it produces programs tailored to local needs with cor-

162. *See, e.g.*, Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23 (1983); Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. Pol. Econ. 152 (1981); A. Hirschman, Exit, Voice, and Loyalty (1970); Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

163. Gray, *Regulation and Federalism*, 1 Yale J. Reg. 93 (1983).

164. *Id.* at 94.

respondingly greater ability to respond promptly to changes in local needs; (2) it permits experimentation with a variety of approaches to regulation; and (3) it provides for greater political accountability and legitimacy.[165] Gray recognized, however, that federal regulation sometimes can provide benefits that more than offset the advantages of permitting regulatory power to be exercised primarily at the state and local level. Specifically, he argued that federal regulation sometimes is superior to state regulation for one of four reasons: (1) federal regulation can prevent burdens on interstate commerce; (2) some socially beneficial programs are easier to adopt as a political matter on the federal level; (3) states may compete on the stringency of regulation to the detriment of the nation; and (4) the federal government usually has greater access to sources of the relatively scarce expertise essential to some types of regulatory programs.[166]

B. A Model for Resolving Federalism Disputes

I will attempt to construct an analytical framework for resolving federalism disputes that reflects the advantages and disadvantages identified by Holmes, Brandeis, and Gray. The model is based on a combination of the prisoner's dilemma familiar to students of economics[167] and the political science reasoning that underlies the Supreme Court's dichotomous attitude toward "evenhanded" state regulation versus state regulation that discriminates on its face against out-of-state interests.[168] The model ignores entirely a variety of serious imperfections in the political and regulatory process that exist at all levels of government.[169] These imperfections often produce regulation that departs substantially from any normative standard of welfare economics. The model ignores these problems not because they are trivial, but because there is no reason to believe that they produce regulation more distorted on one level of government than another. Compare, for instance, the decisions of many states to restrict advertising of prescription glasses when such regulation costs the citizens of

165. *Id.* at 95.

166. *Id.* at 96-110.

167. *See* C. GOETZ, LAW AND ECONOMICS: CASES AND MATERIALS 8-32 (1983); A. RAPPOPORT, N-PERSON GAME THEORY (1970); H. RAIFFA & R. LUCE, GAMES AND DECISIONS 94-102 (1967); A. RAPPOPORT & A. CHAMMAH, PRISONER'S DILEMMA (1965).

168. *See* South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938); J. ELY, *supra* note 17, at 84; J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 17, at 243-44, 250.

169. *See, e.g.*, E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1195-1219 (1981); Levine & Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561 (1977).

those states hundreds of millions of dollars annually[170] with the decision of the federal government to regulate natural gas producer prices when that decision costs the citizens of the nation billions of dollars annually.[171]

1. Geographic Spillover

The Supreme Court prohibits virtually all state regulation that discriminates against out-of-state interests and upholds the bulk of state regulation that treats interstate and intrastate interests in the same manner. It assumes that it can rely upon a state's internal political process to assure a reasonable balance of regulatory benefits and burdens in the latter case but not in the former. As long as the Court compels the state to regulate evenhandedly, the in-state interests benefited by the regulation and the in-state interests burdened by the regulation have no choice but to represent similarly situated out-of-state interests in the political process leading to imposition of the state's regulation. It follows from this theory that the state's political process will produce a reasonable balance of regulatory benefits and burdens from a national perspective if, but only if, there is at least a rough equivalence between the proportion of total benefits that accrue to in-state interests and the proportion of total burdens that are imposed on in-state interests.

Assume, for instance, that three hypothetical regulations are under consideration by a state. The proportion of benefits and burdens within the state resulting from imposition of each regulation under consideration is shown in the following table.

	Regulations		
	A	B	C
In-state benefits as a percentage of total benefits	80	80	20
In-state burdens as a percentage of total burdens	80	20	80

Now assume that the total benefits of each regulation are $10,000,000.

170. *See* Benham, *supra* note 139; *see also* Stigler, *supra* note 139.

171. *See, e.g.*, Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983); Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63 (1982).

A rational state would impose each regulation if, but only if, the benefits to state interests equal or exceed the burden on state interests. Thus, the state would impose regulation A if but only if its total burden is $10,000,000 or less,[172] the "reasonable" result. It would impose regulation B if its total burden is $40,000,000 or less,[173] a situation in which the risk of irrational overregulation is clear. It would impose regulation C only if its total burden is $2,500,000 or less,[174] a situation in which irrational underregulation is inevitable.

Using the same three sets of assumptions, it follows that the state considering the regulations and one or more other states are in a prisoner's dilemma. Purely for simplicity, assume that the out-of-state interests affected by the state's regulatory decisions all exist in a single other state. Label the state considering the regulations state Y and the other state affected by the regulations state Z. Assume further that state Y regulates each of the areas under consideration at exactly the level that equates regulatory burdens and benefits within state Y. The resulting benefits to and burdens on the interests of states Y and Z are shown in the following table.

	Benefits to Y	Benefits to Z	Total Benefits	Burdens to Y	Burdens to Z	Total Burdens
A	8,000,000	2,000,000	10,000,000	8,000,000	2,000,000	10,000,000
B	8,000,000	2,000,000	10,000,000	8,000,000	32,000,000	40,000,000
C	2,000,000	8,000,000	10,000,000	2,000,000	500,000	2,500,000

In each case, state Y has achieved "reasonable" regulation from its perspective, but only in case A is that regulatory result also reasonable either from the perspective of state Z or from the perspective of the states' joint interests. In case B, the net welfare of both state Z alone and the two states together would be increased by $30,000,000 if state Y relaxed its regulation. In case C, the net welfare of both state Z alone and the two states together would be increased by $7,500,000 if state Y increased its regulation. In the language of economics, state Y's decision to impose strict regulation of B imposes spillover costs on state Z of $30,000,000, and state Y's decision to forego strict regulation of C imposes spillover costs on state Z of $7,500,000. To complete the illustration, assume that state Z is con-

172. $\frac{0.8 \times \$10,000,000}{0.8} = \$10,000,000$

173. $\frac{0.8 \times \$10,000,000}{0.2} = \$40,000,000$

174. $\frac{0.2 \times 10,000,000}{0.8} = \$\ 2,500,000$

fronted with regulatory decisions D, E, and F that are precisely analogous to state Y's decisions concerning A, B, and C, respectively. If each state makes its regulatory decisions independently, each will impose spillover costs on the other of $37,500,000, with a resulting loss of social welfare of $75,000,000.

Based on the facts assumed, states Y and Z are highly likely to realize that their joint welfare is maximized by decreasing regulation of B and E and increasing regulation of C and F. As a result, if they were private parties, they almost certainly would agree contractually to decrease regulation of B and E and increase regulation of C and F.[175]

In the real world of relationships between states, however, most geographic spillover problems are not likely to be resolved through agreements between states for two reasons. First, the Constitution prohibits states from entering into compacts with other states without first obtaining Congress' consent.[176] Secondly, and more importantly, the transaction costs of mutually beneficial agreements between states are prohibitive in the case of most actual geographic spillovers. In almost all cases, the spillover occurs in several states, and the amount of the spillover effect in each state is subject to considerable uncertainty. Bargaining between the affected states is not likely to prove effective in these circumstances.

Regulation of areas A and D at the state level will produce satisfactory results from the perspective of both the state and the nation. Regulation of areas B, C, E, and F at the state level will produce highly unsatisfactory results for the nation. It follows that B, C, E, and F should be subject to regulation only at the federal level. Notice that states should not have the power either to impose less stringent regulation or more stringent regulation in these areas, since either state action will impose substantial spillover costs on other states.

At this point, it may be helpful to translate the abstract regulatory decisions described in the hypothetical into more concrete examples that roughly correspond to the abstractions in the hypothetical in terms of the extent of their spillover costs. Regulatory decisions A and D are the most difficult to correlate with a clear concrete example, simply because almost any regulation creates some geographic spillovers, and it is difficult to identify a regulation with positive spillover precisely equal on a percentage basis to its negative spillover.

175. *See* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

176. U.S. CONST., art. I, § 10, cl. 3.

Indeed, some areas of regulation involve benefits and burdens that are difficult to assign geographically. It is easy to imagine, for instance, a lively debate over the question of whether loss of caribou in Alaska costs only Alaskans or instead costs the citizens of all states. The following illustrations will focus on regulatory contexts in which the existence of spillovers is less debatable.

To illustrate cases A and E, assume that the manufacture of a particular product unavoidably produces a form of liquid waste that destroys all fish of a particular common species in any body of water in which the waste is disposed. Assume that the product can be manufactured at about the same cost at any of thousands of sites around the nation. Assume further that *federal* law prohibits disposal of the waste in question in any body of water except isolated ponds and lakes within the state. The only regulatory decision presented to any state in these circumstances is whether to allow disposal of the liquid waste in a lake or pond solely within the boundaries of the state, thereby permitting the product to be manufactured in the state, or to prohibit such disposal, thereby precluding manufacture of the product in the state.

This is close to a zero geographic spillover case. States should be free to make this type of regulatory decision. As long as a state's regulatory decision has no potential to produce positive or negative geographic spillovers, states should be free, in effect, to compete with other states for activities, including industrial plants, by adjusting their regulatory requirements to the level necessary to make them attractive to those activities. If, for instance, California decides to prohibit disposal of the liquid waste by-product, that decision reflects an implicit judgment by the citizens of California that they place a greater value on retaining in all lakes and ponds of the state the fish population that would be eliminated by the liquid waste by-product than they do on the benefits, in the form of tax payments and jobs, that the manufacturing facilities would provide the state. If Mississippi, for instance, decided to permit disposal of the liquid waste by-product in some of its lakes or ponds, that decision would reflect implicitly a judgment by its citizens that they place a greater value on the jobs and tax benefits resulting from allowing the new plants to locate in the state than on the fish populations that would be eliminated in some lakes and ponds as a result of disposal of the by-product.

The divergence in the assumed value judgments of the people of

California and Mississippi could be based on differences in the relative availability of jobs or tax base in the two states, differences in the abundance of the fish population in the two states, differences in the subjective values of the citizens of the two states, or any combination of these three factors. As long as all the costs and benefits of a regulatory decision fall within the states that have the power to make the decision, these are the only three factors that can explain a divergence in regulatory decisions between the states. In a large, pluralistic country like the United States, considerable divergence in state regulatory decisions can be expected solely as a result of differences in the relative scarcity of "goods" like jobs, tax base, and fish populations, and differences in tastes. No matter what combination of differences of this type explains the hypothetical divergent decisions of California and Mississippi in this situation, it is fair to assume that Mississippi's decision is best for its citizens and California's decision is best for its citizens. As long as each state's decision has no potential to create spillovers into other states, each state's decision necessarily also increases national social welfare.[177]

A state's decision whether to permit a permanent nuclear waste storage facility to be located in the state provides a good illustration of situations B and E. Without attempting to engage in precise quantification, it seems apparent that most of the burdens of a decision to permit such a facility to be located in a state would fall on state residents, while most of the benefits would accrue to out-of-state residents. The national benefits of locating a permanent nuclear waste storage site in *some* state quite obviously are enormous. Such a facility would reduce the present risks attributable to temporary on-site storage, reduce the much greater future risks associated with continued reliance on temporary on-site storage, and avoid the economic risk that inadequate future storage may require shutdown of present nuclear power plants. Yet, the benefits to any particular state are modest, since no single state contains a significant proportion of nuclear waste in temporary storage or of nuclear generating capacity. By contrast, the burdens of placing a permanent storage facility in any state will fall disproportionately on the citizens of that state because of their geographic proximity to the nuclear waste.

The decision to locate a permanent nuclear waste storage facility in a state is a classic example of a regulatory decision with the potential for very large positive spillover to other states. If states are al-

177. *See* Easterbrook, *supra* note 162, at 33-40, 43-45.

lowed to make this decision, there is a high probability that no state will choose to permit such a facility. The result would be loss of the positive spillover to other states and a very large resulting loss of total social welfare to the nation.[178] States should not be permitted to make regulatory decisions when those decisions have the potential to create or to eliminate large positive spillover to other states.

Situations C and F can be illustrated reasonably well by reference to regulatory decisions concerning some types of air pollution controls. Sulfur dioxide causes environmental damage both directly and indirectly. The indirect harm caused by sulfur dioxide emissions is greater than the direct harm. The indirect harm occurs as a result of the combination of sulfur dioxide with elements in the atmosphere, such as hydrogen, to form sulfates. The sulfates then precipitate in the form of acid rain, which causes considerable damage to vegetation and water bodies by changing the Ph of soil and water.[179]

Sulfur dioxide concentrations can be controlled in several ways. One basic regulatory decision is between tall stacks and stack scrubbers on fossil fuel burning plants. Stack scrubbers reduce the amount of sulfur dioxide emitted from a plant, but scrubbers are very expensive and produce solid waste that must be disposed of at or near the plant site. Tall stacks, by contrast, reduce the concentration of sulfur dioxide in the atmosphere proximate to the plant by allowing a high percentage of the sulfur dioxide to disperse in upper air currents.

It is relatively safe to predict that most, or perhaps all, states would choose tall stacks over stack scrubbers if each was given the power to make this decision. Since sulfur dioxide is highly transportable in upper air currents, tall stacks permit a state to transform most of its burden of sulfur dioxide into a negative spillover imposed on downwind states at very little cost to in-state interests. If a state chose stack scrubbers instead of tall stacks, it would increase the burden of sulfur dioxide control on in-state interests substantially in two ways—dramatically increased production costs to in-state manufacturers and increased solid waste disposal problems in the state. Yet,

178. Judge Breyer and Dean MacAvoy identify another good example of a state regulatory decision that frequently has the potential to create or eliminate positive geographic spillovers less extreme than those implicated by the decision to permit a permanent nuclear waste storage facility in a state—the decision whether to permit an electric generating plant that will serve one state to be located in another state. S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 93 (1974).

179. *See, e.g.*, Brady & Maloley, *Acid Rain: Science, Politics, Economics*, 31 FED. BAR NEWS & J. 59 (1984).

stack scrubbers almost certainly provide greater net benefits to the nation than tall stacks.

This is an example of the kind of state regulatory competition for industries that formed the basis for passage of most of the federal pollution control legislation.[180] The effect of permitting this kind of regulatory competition between states is dramatically different from the effect of permitting regulatory competition between states when there is no potential for geographic spillover. States should not be allowed to make regulatory decisions when those decisions have the potential to impose substantial negative spillovers on other states.

Up to this point, the decisionmaking model is conceptually simple—states should be allowed to make regulatory decisions with no geographic spillover (or with negative spillover equal in percentage to positive spillover), but they should not be allowed to make regulatory decisions with either positive or negative geographic spillover (or, more accurately, with disproportionate positive or negative spillover). It is necessary at this point to introduce two important qualifications—(1) spillovers are not the only factor that should be evaluated in deciding whether to allow regulation on the state or federal level and (2) spillovers are difficult to measure.

If federalism/regulation controversies were resolved solely on the basis of the presence or absence of *any* potential interstate spillover effects, almost all such controversies would be resolved summarily in favor of regulation imposed at the national level. In a physically and economically integrated country, there probably is not a single regulatory decision that affects only interests in one state. If the mere existence of any spillover were sufficient to require uniform, preemptive federal regulation, states probably could not even decide whether to place a stop sign at an intersection. No one would be pleased with that result and for good reason. Uniform, exclusive federal regulation of all conduct would eliminate the potential for state and local governments to tailor regulation to local conditions and local tastes. In addition, this monolithic approach would eliminate the potential for decentralized regulatory experimentation applauded by Justice Brandeis and would spread into all areas of regulation the problem of federal bureaucratic rigidity identified by Boyden Gray.

The task in all such cases cannot be merely to determine whether state regulation has the potential to create spillovers—virtually any

180. *See, e.g.*, Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1042 (D.C. Cir. 1978).

state regulation will have that effect. Rather, the critical inquiry is whether state regulation has so much interstate spillover potential that preemptive federal regulation is justified despite the disadvantages of federal regulation. The next logical question is: How much spillover potential is too much to tolerate state regulation? The answer depends in part on the strengths or weaknesses of the other advantages and disadvantages of federal regulation previously identified but not captured in the spillover model.

2. *Additional Factors: Expertise, Bureaucracy, and Experimentation*

The spillover model reflects all but three of the tradeoffs between state and federal regulation identified by Holmes, Brandeis, and Gray. The unaccounted for factors can be summarized as superior access to expertise, inefficient bureaucracy, and restriction of regulatory experimentation. Initially, it is tempting to say that the spillover model also fails to incorporate the most important advantage of state and local regulation—ability to reflect local conditions and tastes. The model automatically reflects that value, however, since the national welfare will be enhanced by permitting state regulatory autonomy only to the extent that state regulatory actions affect in-state interests. To the extent that state actions affect out-of-state interests, state autonomy does not further national social welfare, since the preferences of out-of-state interests are not reflected in a state's internal political process leading to a regulatory decision. Thus, the values underlying state regulatory autonomy are sacrificed in inverse relation to the amount of spillover effect. If the only tradeoffs were between the value of permitting states to reflect local conditions and tastes and the value of precluding states from creating negative interstate spillover, the balance could be struck in each case solely through use of the spillover model. The decisional rule could be stated as: States should have the power to regulate conduct unless such regulation has the potential to create *substantial* disproportionate positive or negative interstate spillovers.

Of the three decisional factors not captured by the spillover model, one—superior access to expertise—tilts the balance in favor of federal regulation. The importance of this factor depends on the nature of regulatory decisionmaking and the relative scarcity of the talent necessary to make the regulatory decisions at issue. The federal government obviously has an enormous comparative advantage with

respect to the expertise required to make technologically complex regulatory decisions, such as standard setting for nuclear power plants and for air and water quality. Few states have sufficient resources and need for access to relevant expertise to justify employment of the many scientists and engineers required to perform these regulatory tasks.

The federal government's comparative advantage is much less in more traditional, less technologically complex areas such as utility regulation. Even in these areas, however, the extent of the federal government's advantage depends critically on the state with which it is compared. States like New York, California, and Wisconsin have employed highly skilled economists, rate analysts, accountants, engineers, and utility law specialists whose aggregate expertise may equal that of the federal government. Many smaller states, however, do not have access to sources of expertise sufficient even to attain minimal competence in traditional areas like utility regulation. Louisiana, for instance, has no economists, one lawyer, one auditor, and part-time commissioners whose full-time jobs include running a large chain of supermarkets and who meet in the same city only one or two days a month. Thus, in any area of regulation, the federal government is likely to have some comparative advantage in access to expertise vis a vis smaller states. As the technological complexity of regulatory decisions increases, the federal government's comparative advantage in access to expertise increases in comparison with both large and small states.

The inefficient bureaucracy factor tilts federalism controversies away from national regulation. It is difficult to generalize about bureaucratic inefficiency, but most observers of the regulatory process would accept Boyden Gray's assertion that federal agencies tend to require more time to make regulatory decisions than state agencies.[181] This phenomenon probably is attributable to some combination of bureaucratic diseconomies of scale, crowded agendas, and the increased number and nature of parties affected when a regulatory decision is made on a national level. The tendency of federal agencies to take longer than state agencies to make regulatory decisions increases the social costs of regulation by creating long periods of uncertainty in

181. *See* SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION vol. IV, DELAY IN THE REGULATORY PROCESS, S. Doc. No. 72, 95th Cong., 1st Sess. (1977). *See also* Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 5-14 (1979).

which parties affected by regulatory decisions have no basis for making related decisions.[182] While this cost can be great in a particular context, it cannot be characterized accurately through any generalization because it depends critically on the nature of the regulatory issue and the difference in the amount of time required for a state agency or federal agency to resolve that issue.

Measuring bureacratic efficiency simply by reference to time required to make regulatory decisions is problematic in any event. The greater amount of time required for decisionmaking by federal agencies in *some* circumstances has no relationship to the superior bureacratic efficiency of state agencies. In some circumstances, state agencies make regulatory decisions promptly because they have little choice but to approve a proposal before them without time-consuming analysis, since they lack the expertise necessary to evaluate the merits of various alternative resolutions of an issue. Such regulation without analysis can create social costs as great or greater than the social costs of regulatory delay. Thus, it is hazardous to generalize about the net social costs associated with the arguable bureaucratic inefficiency of federal regulation versus state regulation.

The final factor that mitigates in favor of local regulation is Justice Brandeis' famous reference to the benefits of permitting experimentation by states. There is less substance to this point than initially appears for two reasons. First, it is possible to experiment within the context of a regulatory scheme that is entirely federal. Indeed, limited-scope experimentation by federal regulatory agencies has become common. One of the many current examples is the two-year experimental program initiated by FERC on December 30, 1983, that authorizes six electric utilities in the Southwest to sell or exchange bulk power free of price regulation.[183] Federal regulation is not inconsistent with regulatory experimentation; it is inconsistent only with regulatory experimentation initiated on a decentralized basis by states. Still, decentralized regulatory experimentation probably does have advantages, simply because regulatory wisdom does not reside exclusively in federal agencies. At any time, state agencies may be led by more innovative officials than the federal agency with analogous regulatory authority. Thus, there is some merit to Justice Brandeis' point.

In an important sense, however, Justice Brandeis' famous state-

182. *See* Pierce, *supra* note 181, at 21-30.

183. *See* FERC Order issued December 30, 1983 in Docket No. ER84-155, summarized in Inside FERC (Jan. 9, 1984).

ment extolling the virtues of allowing state experimentation leads back to the spillover model. He referred to the value of allowing states to "try novel social and economic experiments without risk to the rest of the country."[184] To the extent that a state regulation has the potential for interstate spillover, a state's decision to experiment with that regulation imposes risks on the rest of the country.

It is necessary to qualify the spillover model slightly to incorporate each of the three factors it does not reflect—superior expertise, relative bureaucratic inefficiency, and advantages of experimentation. In a given case, careful evaluation of one or more of these factors might make enough difference to decide a close case in favor of either state or federal regulation. In most situations, however, no one of these factors should play a major part in resolving a federalism/regulation controversy. Even less frequently should the combination of all three considerations be dispositive of the outcome of such a controversy, since one usually produces a preference for federal regulation and the other two produce a preference for state regulation.

3. *Refining the Spillover Model*

The spillover model can be supplemented by some evaluation of comparative expertise, comparative efficiency, and potential benefits of decentralized experimentation, but analysis of potential spillover effects of state regulation should dominate the determination of controversies over state versus federal regulation. Thus, the standard suggested earlier remains viable even after consideration of all factors identified by Holmes, Brandeis, and Gray: States should have the power to regulate conduct unless such regulation has the potential to create substantial disproportionate positive or negative interstate spillover.

This standard requires a two-part inquiry. First, the decisionmaker must identify and quantify the potential interstate spillover in some form, for example, millions of dollars of costs or foregone economic benefits to other states, or costs to other states in the form of additional cases of emphysema, loss of fisheries resources, or loss of vegetation. This can be an extremely challenging empirical exercise that requires many hours of effort by a team of scientists, engineers, and economists. Even with those resources, the attempt to quantify spillovers is likely to produce only a rough estimate.

184. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Second, the potential interstate spillovers must be compared with the internal benefits to the state if it were allowed to impose the regulation in order to determine whether the spillover effects are so substantial that they justify federal preemption. In some cases, this second part of the analysis also is entirely empirical, for example, five million dollars in internal economic benefits does not justify ten million dollars in interstate spillover costs. In many cases, however, the second step is only partially empirical. If, for instance, the internal benefits appear in one form, say reduced economic costs, and the interstate spillover appears in another form, say loss of vegetation, the decisionmaker must place values on each that permit comparison. This is a difficult evaluative process. Congress and regulatory agencies must perform this type of task at least implicitly in making regulatory decisions today.[185] Indeed, executive branch agencies are required to compare costs and benefits of different types explicitly when they consider major regulatory actions involving health, safety, or the environment.[186]

Professor Foote argues that regulations can be divided into five classifications for purposes of determining whether they should be imposed on a national or state level.[187] She includes in the first classification product design and performance standards. These Stage One regulatory controls should be imposed through preemptive federal regulation because state standards at variance with national standards would force manufacturers either to forego economies of scale or to impose higher and more expensive standards on unwilling states. Stage Two regulation involves control of the production process (e.g., pollution and worker safety). Professor Foote argues that federal regulation should exist in this area but that states should remain free to impose higher standards where the impact of a particular production control is limited to the plant site. Thus, states should have little role in establishing pollution controls, but states should be permitted to supplement federal regulation in the area of workplace safety. Her third classification encompasses regulation of the process of exchange (i.e., information requirements). In this area (Stage Three), Professor Foote distinguishes between information requirements that affect

185. *See* Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

186. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). *See generally Symposium on Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982).

187. Foote, *Beyond the Policies of Federalism: An Alternative Model*, 1 YALE J. REG. 217, 219-221 (1984).

product packaging, which should be imposed exclusively on a national level in order to permit free flow of packaged goods in interstate commerce, and information requirements that do not affect product packaging, where states should remain free to supplement federal regulation. Stage Four regulation involves conditions of sale, such as licensing requirements and restrictions on the sale of goods like fireworks and alcohol. Professor Foote argues that states should be the exclusive source of Stage Four regulations because their impacts are entirely in-state. Finally, Stage Five regulations determine permissible conditions of use. Since regulations of this type have only in-state impacts, they too should be imposed only by state authorities.

Professor Foote's five stage approach provides a useful starting point for analyzing regulations to determine the extent of the interstate spillovers they create. As she recognizes, however, each of the five broad categories contains such a wide variety of regulatory controls that operate in such differing factual contexts that her generalizations cannot be used as a substitute for careful analysis of the effect of each specific regulatory requirement.

The danger inherent in truncating the analysis of the geographic impact of a regulation by relying solely on a general categorization of regulatory controls is apparent from consideration of a single, current regulatory controversy—the issue of whether the federal government should coerce all states into establishing a uniform minimum age for purchasing alcoholic beverages. This regulatory control falls squarely in Professor Foote's Stage Four, as a regulation affecting condition of sale that should be imposed solely by states. This particular condition of sale has significant interstate spillovers, however. Anyone who has lived near the border of two states with different minimum ages for purchasing alcoholic beverages is familiar with the common practice of young people driving from their home state to the neighboring state with a lower drinking age to consume large quantities of spirits, and then returning home by car, sometimes a hundred miles or more, in an intoxicated state. The tragic carnage that frequently results from such ventures is not confined solely to the state with the lower drinking age. Indeed, upon close analysis, establishment of a minimum drinking age is an ideal candidate for uniform national preemptive regulation. Variations among state drinking laws have an enormous adverse impact on residents of neighboring states. Just to take one example, the combination of New York's minimum age of eighteen and Pennsylvania's minimum age of twenty-one has accounted for a

large number of traffic fatalities involving Pennsylvania residents and on Pennsylvania highways every year for decades.

Up to this point, the analysis has been premised on the assumption that some federal institution must choose between state and federal regulation of an area of conduct. Regulatory authority over a field rarely is, or should be, allocated in this manner. Congress has the power to combine state and federal regulation in virtually any manner it chooses.[188]

It is often possible to divide specific regulatory powers and responsibilities between federal and state agencies based on an evaluation of the respective comparative advantages of federal and state agencies in exercising those powers and fulfilling those obligations. For instance, both the Clean Air Act[189] and Title I of the Natural Gas Policy Act[190] allocate most policymaking to a federal agency, but they allocate a high proportion of implementation and fact finding to state agencies. This type of creative or cooperative federalism can produce results superior to total federal regulation or total state regulation. A federal agency may have comparative advantages in expertise and national perspective, yet state agencies may have comparative advantages in the form of superior knowledge of local situations and ability to resolve factual controversies rapidly. This combination characteristic can make a division of authority desirable.

Because the goals of regulatory schemes vary greatly, it is not possible to generalize about the mixture of federal and state power most appropriate for a system of regulation accomplished through cooperative federalism. The best mixture can be determined only by analyzing the goals of the specific program and then allocating each element of regulatory power with considerable care to further those goals. Two principles should guide an effort of this type. First, states should not be assigned a regulatory role that permits them to make decisions that have the potential for substantial interstate spillover. This important principle limits considerably the nature of the roles that can be assigned state agencies. Enforcement, for instance, appears superficially to be a role suitable for assignment to states. Assigning the enforcement role exclusively to states can cause significant spillovers, however, since a state may find it desirable not to enforce a regulation if the effect of its failure to enforce is to lower the costs of

188. *See supra* text accompanying notes 113-21.

189. 42 U.S.C. §§ 7401-7642 (1983).

190. 15 U.S.C. §§ 3301-3432 (1982); 42 U.S.C. § 7255 (1983).

compliance to its citizens and to impose burdens on out-of-state interests. Apparently, delegation to states of federal authority to enforce industrial discharge rules is having this effect at present. If a state does not enforce the rules, its industries have no compliance costs. Yet, the primary adverse affects of the illegal discharges fall on states downstream from the state that declines to enforce the rules.[191]

Second, particular interrelationships between state and federal authority in a system of mixed state and federal power can produce unfortunate results. For instance, the present interface between federal and state regulatory control over electric utilities has placed in jeopardy one of the most promising ways of reducing electricity costs—generating plants designed to serve several different states. The solution may be to reallocate state and federal authority in that area of regulation in a way that creates different relationships between state and federal regulatory agencies.[192] Federal and state regulatory authority must be merged carefully with particular attention to the potential for the interaction between state and federal agencies to distort the decisions of the regulated industry.

IV. Choosing the Institution Best Suited to Resolve Conflicts Between State and Federal Regulation

The goal of this section is to determine which of the three federal institutions—courts, Congress, or agencies—should have primary responsibility to resolve different types of federalism controversies. Courts have primary responsibility when they apply the commerce clause. In all other circumstances, courts assume the more limited role of determining congressional intent and reviewing agency actions, with Congress or an agency undertaking primary responsibility for resolving the conflict.

A. The Federal Courts

In resolving federal-state disputes under the commerce clause, courts consistently invalidate state regulations that clearly further state economic interests and undermine national economic interests. Courts almost invariably decline to invalidate state regulations that further state interests in health, safety, or the environment, even if

191. *See* 14 Env't Rep. (BNA) 1945-46 (March 9, 1984).

192. *See* Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity*, 132 U. Pa. L. Rev. 497 (1984).

those regulations cause great harm to national interests. As a result, the judiciary invalidates only a few, blatantly parochial, discriminatory or protectionist state actions. It upholds many state regulations with substantial interstate spillovers.

The Supreme Court has chosen to limit the primary role of the judiciary in this area for very good reasons. Courts are institutionally ill suited to the task of balancing state interests of one type against national interests of another. The spillover model that should dominate resolution of federalism disputes involving conflicts between "incomparables," like safety and economics, requires a two-step decisionmaking process.

First, the decisionmaker must conduct extensive empirical research to determine the extent of potential in-state and out-of-state impact of a state regulation. Courts do not have the expertise in science, engineering, and economics necessary to conduct empirical research of this demanding nature. The only process available to courts to obtain access to the required expertise is a formal evidentiary hearing. Formal hearings have proven to be ineffective, time-consuming, and expensive mechanisms for assembling and evaluating complicated data.[193]

The second step in the decisionmaking process is to balance benefits of one type (e.g., environmental) with costs of another (e.g., economic). This is the type of balancing the Court prudently has refused to perform, characterizing it as "political." Nonconstitutional value judgments should be made by the most politically accountable branch of government, not the least.[194]

B. The Congress

Congress can determine the proper allocation of regulatory power by preempting or declining to preempt state power to regulate. Theoretically, Congress is the ideal institution to perform that task. It has virtually unlimited access to the expertise required to perform the necessary empirical studies, and its procedures are sufficiently flexible to take advantage of that expertise in a timely and cost-effective manner. As the most politically accountable federal institution,

193. *See* Boyer, *Alternatives to Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276 (1976). *See also* Pierce, *supra* note 181.

194. *See* Pierce & Shapiro, *supra* note 168.

Congress also is best suited to make the value judgments implicit in balancing benefits of one type against costs of another type. Whenever possible, Congress should decide how to allocate regulatory power between state and federal agencies, and other institutions should continue to defer completely to such congressional decisions. Congress may resolve many federalism controversies wrongly, but its institutional characteristics give it the highest probability of resolving such issues in a manner that maximizes the social welfare of the nation as perceived by the people.

Congress is subject to substantial practical limits on its ability to resolve federalism issues in regulation, however. Its agenda is so crowded that it often must delegate to agencies many of the fundamental policy decisions inherent in formulating and implementing regulatory schemes. It rarely has time to focus on preemption issues, and even when it does, it almost never addresses those issues in detail. Thus, at most, Congress can be expected only to indicate some general attitude toward state regulation of a field that is subject to federal regulation. It cannot be expected to address every form of state regulation and every type of potential tension between state and federal regulatory goals. As a result, it is inevitable that Congress will not explicitly ban many forms of state regulation that substantially compromise important national goals, including many state regulatory actions that it would prohibit if it had the time and the foresight necessary to anticipate those actions and to evaluate their relationship to national goals. Congress cannot be relied upon as a sufficient source of constraints on state regulatory actions with substantial interstate spillovers. The need for a supplemental source of constraints on such state actions is particularly acute today because of the Court's increasing tendency to hold state regulation preempted only when congressional intent to do so is clear and explicit.

C. Federal Agencies.

Federal agencies have the potential to play an essential supplementary role to the judiciary and Congress in invalidating state regulations that create substantial interstate spillovers. The Court has affirmed many federal agency actions that preempt state regulations, and its recent decisions seem to invite increased vigilance by agencies in determining whether state regulations so conflict with national goals that agency preemption is justified.

Dean Verkuil and Professor Black have identified several charac-

teristics of federal agencies that make them well suited to the task of allocating regulatory responsibility between themselves and state agencies when Congress has not explicitly allocated that responsibility by statute.[195] As long as the agency action is undertaken through informal rulemaking procedures subject to a relatively demanding standard of judicial review, federal agencies should have the power to preempt state regulations that affect their areas of regulatory responsibility based on a finding that the state regulation has the potential to create substantial, disproportionate interstate spillovers.

First, any federal agency has access to the in-house expertise required to perform the empirical analysis essential to determine whether a state regulation that affects its areas of regulatory responsibility has the potential to create substantial interstate spillover. Federal agencies also have available informal rulemaking procedures that are well suited to gathering and evaluating data from external sources.[196]

Second, while agencies are not as politically accountable as Congress, their political and constitutional legitimacy is sufficiently well established that they should be permitted to make the value judgments necessary to determine whether an interstate spillover of one type is so great that it outweighs an in-state benefit of another type. Indeed, they are entrusted to make similar value judgments regularly in the course of implementing the broad standards that usually accompany congressional delegations of regulatory power. Agencies are not directly accountable to the electorate, but agencies are indirectly accountable to the electorate because their actions are subject to regular review by both elected branches of government.[197]

Third, the procedural safeguards of informal rulemaking give states an ample opportunity to be heard when any federal agency considers a rule with preemptive effect. Each state should have notice of the proposed preemptive rule and an opportunity to present evidence that the in-state benefits of the state regulation at issue are so great and its interstate spillovers so modest that it should not be preempted.[198] Moreover, a federal agency can and should encourage state agencies through informal communications to adopt regulatory

195. Verkuil, *supra* note 138; Black, *supra* note 137.

196. *See* Pierce, *supra* note 181; Boyer, *supra* note 193.

197. *See* Pierce & Shapiro, *supra* note 168. *See also* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

198. *See* Verkuil, *supra* note 138, at 243, 245-46.

approaches that minimize interstate spillovers before it initiates formal proceedings to consider preemption of a state regulation.

Finally, federal agency power to preempt does not present a serious threat to the values of federalism. A federal agency is likely to exercise considerable self-restraint in preempting state regulations, and any preemptive rule issued by a federal agency is subject to review in a federal court. Because of the importance of the values of federalism at stake, courts should exercise heightened vigilance in reviewing preemptive agency rules to ensure (1) that the agency uses procedures that afford affected states adequate notice and opportunity to be heard; (2) that the preemptive effect of the rule is no broader than necessary; and (3) that the agency's conclusion that the state regulation has the potential to create substantial disproportionate interstate spillovers is supported by substantial evidence and an adequate statement of reasons.[199]

V. APPLICATION OF THE SPILLOVER MODEL

A. Three Regulatory Disputes

A federal agency should approach a controversy involving the potential for federal agency preemption of state regulation with particular sensitivity to the important values of federalism raised by all such controversies. This heightened sensitivity to the legitimate interests of affected states should manifest itself in two ways. First, the agency should be particularly careful to adopt procedures that permit affected states to participate effectively in the procedures leading to the resolution of the controversy. Second, the federal agency should not preempt the state regulation unless it finds that the state regulation creates substantial spillovers in other states. An analysis of three current federalism/regulation controversies will help to illustrate the nature of the procedural and substantive approach that federal agencies should take in resolving all such controversies.[200]

1. Chemical Labeling Standards

The first illustrative example is the Occupational Safety and Health Administration's (OSHA) rule establishing national standards for chemical labeling and purporting to preempt all state regulations

199. *See id.* at 246-47.

200. For additional illustrative applications of the spillover model in the antitrust context, see Easterbrook, *supra* note 162, at 46-49.

that vary from the federal rule.[201] OSHA took this preemptive action through use of informal rulemaking procedures. Since informal rulemaking provides affected states ample notice and opportunity to participate effectively in the controversy, the agency's action fulfills the requirement that federal agencies provide affected states sufficient procedural safeguards when they resolve a controversy that implicates the values of federalism.

The OSHA rule indicates, however, that the agency paid little attention to the need for careful substantive evaluation of the need for federal preemption of state regulatory authority over chemical labeling. OSHA established uniform preemptive standards in three different areas: (1) package labeling of chemical products, (2) contents of signs in plants warning workers concerning the characteristics of chemicals used in the plant, and (3) requirements for training employees to handle chemicals safely. The first of these, product labeling, involves substantial interstate spillovers. An inconsistent state regulation concerning the labels that must be affixed to products that are marketed nationally inevitably would affect adversely the cost of chemicals in other states. Thus, this area of conduct is a good candidate for preemptive federal regulation.

The other two areas of conduct covered by the OSHA rule have no apparent spillover effects in other states. If a state imposes particularly stringent requirements for in-plant warning signs or employee training programs, the burdens of its regulations will fall exclusively on in-state interests. The state rule may be foolish, in the sense that it imposes burdens on manufacturers in the state greater than the benefits derived by employees in the state, but a state's unwise decisions should be of no concern to the federal government unless those decisions have a significant adverse effect on out-of-state interests.

2. *Intrastate Rail Rates*

The second example is the Interstate Commerce Commission's (ICC) recent decision preempting the Texas Railroad Commission's (TRC) authority to regulate intrastate rail rates.[202] ICC found many of TRC's procedures and substantive standards for regulating intrastate rail rates inconsistent with the standards mandated by the Rail

201. 48 Fed. Reg. 53,280 (1983). I have borrowed much of the description and analysis of this controversy from Professor Foote. *See* Foote, *supra* note 186, at 221-24.

202. State Intrastate Rail Rate Authority—Texas, I.C.C. Decision, *Ex Parte* No. 388 (Apr. 13, 1984).

Act of 1980.[203] In many respects, TRC was impairing the ability of railroads to obtain adequate revenues and to respond rapidly to changes in market forces with flexible rate structures and special contract rates.

ICC's preemption of TRC's authority over intrastate rates is clearly justified substantively by application of the interstate spillover model. The principal reason Congress passed the Rail Act of 1980 was to permit railroads to begin earning revenues adequate to allow them to remain a viable factor in the nation's transportation policy. Congress specifically found that state regulatory policies of the type that TRC was continuing to pursue adversely affected the entire nation's rail system by denying railroads access to revenues sufficient to permit them to invest in modern equipment and to maintain their existing equipment and roadbeds.

Whether ICC was sufficiently sensitive to Texas' procedural rights presents a closer question. ICC established some of the regulatory standards that it applied against TRC in rulemaking proceedings. There can be no serious question that Texas had adequate notice and opportunity to participate in the proceedings that led to the adoption of these standards. ICC established other standards that it applied to TRC through adjudications concerning the practices of other states, however. Texas had no opportunity to participate in these proceedings.

An agency can apply a "rule" resulting from an adjudication to another party in a subsequent adjudication if that "rule" is purely a product of agency policymaking independent of any factual findings.[204] An agency cannot apply a "rule" resulting from an adjudication to a person who was not a party to that adjudication, however, if the validity of the rule depends on a specific set of facts.[205] Thus, it is not at all clear whether ICC provided TRC adequate notice and opportunity to participate in the proceedings that led to the establishment of some of the standards that had the ultimate effect of preempting TRC's regulatory authority. Federal agencies should indicate their sensitivity to the values of federalism implicated in preemption controversies both in their substantive approach to preemption issues and in the procedures they select to resolve those issues. ICC may have been remiss in failing to provide Texas an op-

203. Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. § 10101 (1984).

204. *See* NLRB v. Wyman Gordon Co., 394 U.S. 759 (1969).

205. *See* Shell Oil Co. v. FERC, 707 F.2d 230 (5th Cir. 1983).

portunity to participate in all of the proceedings in which ICC determined that TRC's regulatory practices failed to meet federal standards.

3. *Municipal Taxi Service*

The third illustrative example is the Federal Trade Commission's (FTC) recent effort to ban the arguably anticompetitive methods of regulating taxis used by New Orleans and Minneapolis.[206] Because FTC is proceeding against each city through adjudication, it has provided each adequate notice and an opportunity to participate in the proceedings leading to resolution of the controversy. It seems highly unlikely, however, that FTC will be able to establish a substantive need to preempt the regulatory controls imposed by the two cities. FTC should have little difficulty showing that restricting the number of taxis that can operate in a city harms the city's consumers of taxi service. That finding alone should not be sufficient to support federal preemption, however. FTC should be required to prove that the regulatory controls imposed by New Orleans and Minneapolis produce substantial interstate spillovers. The federal government has no legitimate stake in a state or locality's decision to adopt a regulatory policy that harms its own residents. A city's decision to limit the number of taxis it permits on its streets has no apparent interstate impact sufficient to justify federal preemption.

B. Federal Deregulation

The federal government has begun a process of reducing the extent of federal regulation of a wide variety of conduct. In particular, the federal government gradually is permitting market forces to displace pervasive federal regulation of competitive relationships in important sectors of the economy (e.g., energy, telecommunications, and transportation). This process of federal deregulation is being accomplished in each sector through a combination of legislative action directly eliminating some regulatory powers previously exercised by federal agencies[207] and administrative action declining to exercise other regulatory powers previously delegated to federal agencies on a discretionary basis.[208]

---

206. *See* N.Y. Times, May 10, 1984, § A, p. 25.

207. *See* Pierce, *supra* note 171.

208. *See* O'Donnell & Glassman, *After the EPAA: What Oil Allocation and Pricing Authorities Remain?*, 2 ENERGY L.J. 33 (1981).

A decision to eliminate federal regulation of an aspect of conduct can be motivated by either of two considerations—an intent to leave that aspect of conduct entirely free of regulatory control from any source or an intent to shift regulatory control of that aspect of conduct from federal to state agencies. The first basis for a federal deregulation decision suggests that Congress or the agency, through its decision to remove a federal regulatory control, intended simultaneously to preclude state and local agencies from exercising similar controls. The Supreme Court drew this inference in *Ray v. Atlantic Richfield Co.*[209] based on a sequence of regulatory actions and regulatory decisions declining to act by the Coast Guard. The second basis for a federal deregulation decision, however, is entirely consistent with some forms of state regulation of conduct previously regulated at the federal level. Indeed, the removal of prior federal controls in this circumstance may indicate an intent to permit states to exercise regulatory controls that previously were held to be inconsistent with federal regulation.

The initial problem in each case is to determine whether Congress or the agency intended primarily to preclude all regulation of the conduct or to transfer regulatory authority over the conduct to states when it eliminated or declined to exercise a preexisting federal regulatory power. This first step rarely should conclude the analytical process leading to a decision that a specific state exercise of regulatory power is, or is not, preempted by a federal deregulation decision, however. Even if Congress concludes that states should be free to exercise regulatory power over an area of conduct previously regulated exclusively by federal authorities, a state rarely, if ever, should have unlimited discretion to impose any regulation it perceives to be in its best interests. As Justice Holmes emphasized,[210] there are many circumstances in which a state has a powerful incentive to impose a regulation that advances its parochial interests at the nation's expense. Thus, some federal institution—Congress, the federal courts, or federal agencies—must engage in the difficult process of determining whether a specific exercise of state power in an area of federal deregulation so interferes with national goals that the state regulation should be preempted.

Congress should indicate its intent with respect to state regulatory authority clearly and explicitly when it eliminates a federal regu-

209. 435 U.S. 151 (1978). *See supra* text accompanying notes 94-96.

210. O. W. HOLMES, *supra* note 1.

latory control or authorizes a federal agency to do so. In this context, however, Congress experiences particular difficulty anticipating and providing for all of the ways in which state authorities may attempt to impose new regulatory requirements in the wake of a partial federal withdrawal from a field in which a federal agency previously exercised extensive regulatory powers.[211] If Congress does not address the issue of the preemptive effect of a federal decision to remove a regulatory control in the detailed manner necessary to determine whether a specific state regulatory power is consistent with a federal decision to deregulate, the federal agency with residual authority in that area of regulation should address that issue. Whether a state exercise of regulatory power is coincident with continued federal regulation or is undertaken in the aftermath of a partial federal withdrawal from the field, the federal agency with expertise in the area affected by that state regulation has the same set of comparative advantages over federal courts in determining if such a state regulation is consistent with the national interest. If Congress and federal agencies decline to resolve preemption issues flowing from a federal deregulation decision, they force courts to resolve a host of controversies for which courts are poorly suited.[212]

A federal agency's determination whether a federal deregulation decision is consistent or inconsistent with a specific exercise of state regulatory power should be guided by the same considerations that should govern other federal agency preemption decisions. The agency's substantive decision should be based primarily on its analysis of the extent of the potential interstate spillover effect of the state regulation. Procedurally, the federal agency should be particularly sensitive to the need to permit all states potentially affected by a preemption decision to participate effectively in the proceeding.

VI. CONCLUSION

It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such state decisions affect only, or predominantly, the interests of state residents. States should not be permitted, however, to make regulatory decisions that create substantial interstate spillovers. Federal courts have the power, through application of the commerce clause, to limit each state's ability to

211. *See, e.g.*, Pierce, *supra* note 171.

212. *See generally* O'Donnell & Glassman, *Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 ENERGY L.J. 77 (1984).

further its interests at the expense of residents of other states. This judicial power is severely limited, however, by the institutional characteristics of courts. Courts are not very efficient at conducting the careful empirical investigation that is often necessary to determine whether, and to what extent, one state's regulation has adverse effects on other states. Moreover, courts should not be asked to make the policy decisions implicit in many nation-state regulatory conflicts involving objectively incomparable goals.

Congress has the power under the supremacy clause to limit the ability of each state to adopt regulatory policies that create substantial interstate spillovers. Congress' power is also severely limited, however, by its institutional characteristics. It does not have enough time or foresight to preempt all state regulatory actions that harm the national interest.

Federal regulatory agencies have characteristics that render them suitable institutions to play an important role in supplementing the power of Congress and the courts to limit the ability of states to further their parochial interests at the nation's expense. Agencies have more time to devote to consideration of nation-state regulatory disputes than does Congress. Agencies are more politically accountable than courts, and they have available procedures for conducting careful empirical studies far superior to the procedures available to courts. Moreover, agencies have a significant comparative advantage over both Congress and courts in their ability to understand the dimensions of the regulatory disputes that arise in each of their areas of specialized knowledge and responsibility.

Federal agencies should be alert to the need to preempt state regulatory rules when those rules have a substantial adverse effect on the nation. Federal agencies also should be sensitive, however, to the important values of federalism that are at stake whenever a federal agency considers preemption of a state or local regulation. They should evidence that sensitivity through both the procedures they adopt to resolve such controversies and the substantive approach they take in deciding whether to exercise their preemptive power. A federal agency should provide each affected state notice and an opportunity to participate effectively in any proceeding in which it considers preemption of a state regulation. A federal agency should not preempt a state regulation unless the agency finds that the state regulation creates substantial interstate spillovers.