COMMENTS

PREEMPTION DOCTRINE IN THE ENVIRONMENTAL CONTEXT: A UNIFIED METHOD OF ANALYSIS

State regulatory legislation is frequently subject to invalidation by federal judges applying the doctrine of preemption.[1] The preemption doctrine invalidates state legislation when it conflicts[2] or is incompatible with[3] the legitimate exercise of federal authority. The Supreme Court's application of preemption standards has fluctuated unpredictably over the last three decades.[4] Uncertainty as to the manner in which the federal judiciary will apply the doctrine precludes state legislators from enacting legislation that will provide optimal protection of state interests while not encroaching on significant federal interests.

State legislation enacted for the purpose of environmental protection is particularly susceptible to the challenge that the exercise of state authority has encroached on federal interests. Erratic application of preemption standards in general[5] has led to inconsistent results in this area.[6] Such inconsistency and uncertainty frustrate both state and national environmental policy.

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[1] *E.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977); Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

[2] *See* text accompanying notes 29-43 *infra.*

[3] *See* text accompanying notes 44-55 *infra.*

[4] *See* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977); Note, *The Preemption Doctrine: Shifting Perspectives*, 75 COLUM. L. REV. 623, 624 (1975) [hereinafter cited as *Shifting Perspectives*] (Supreme Court's erratic approach to preemption challenges has an "unprincipled quality, seemingly bereft of any consistent doctrinal basis."); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) [hereinafter cited as *Preferential Ground*].

[5] *Compare* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) and New York Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973) *with* Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) *and* Jones v. Rath Packing Co., 430 U.S. 519 (1977).

[6] *Compare* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) *with* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Palladio Inc. v. Diamond, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971); A.E. Nettleton Co. v. Diamond, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118 (1970), *appeal dismissed sub nom.* Reptile Prod. Ass'n, Inc. v. Diamond, 401 U.S. 969 (1971).

This Comment proposes a new method of analyzing preemption challenges to state environmental legislation. The purpose of this proposed method is to enable the judiciary rationally and coherently to dispose of environmental preemption challenges, and thereby to clarify the boundaries of legitimate state environmental regulation that is more stringent than federal legislation. The method requires inquiry not only into congressional intent, but also into the ramifications of the state legislation in fields in which federal interests are exclusive or dominant.[7] In close cases federal interests and costs will have to be weighed against state interests and costs to determine whether state regulation is preempted; but in most cases it will be presumed that state environmental standards more stringent than their federal counterparts will be held not preempted.[8] In order to illustrate the utility of the proposed method, the Comment will use it to analyze the recent case *Ray v. Atlantic Richfield Company*.[9] The new method will be applied to the facts of *Ray* and

[7] Most courts and commentators have articulated the principle that a preemption challenge may be disposed of by inquiring only into whether Congress consciously intended to occupy the specific area affected by state legislation. *E.g.*, Perez v. Campbell, 402 U.S. 637 (1971); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947); *Shifting Perspectives, supra* note 4, at 624 n.7. This position, however, fails to consider those situations in which state legislation is "preempted" by federal authority which, though not necessarily exercised in the form of enacted federal legislation, exists as a result of national sovereignty and the division of powers between state and federal governments. When the implementation of state legislation intrudes into an area such as foreign affairs or interstate commerce, which is entrusted by the Constitution to the control of either Congress or the President, such legislation is "preempted" by the actual or potential exercise of federal authority. Zschernig v. Miller, 389 U.S. 429, 436, 440 (1968); Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954). *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941); Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630 (1972) [hereinafter cited as *Dynamic Federalism*].

A comprehensive preemption analysis must consider not only congressional intent to supersede state legislation and the narrow purposes motivating the enactment of a specific piece of federal legislation, but also the effect state legislation has on significant federal interests. Although traditional interpretations of preemption doctrine have focused on whether Congress intended to exercise authority in an exclusive manner, logic and *Zschernig* would suggest that a state regulatory scheme should be held preempted if it directly or indirectly hinders the federal government's ability to exercise sovereign authority. *See* text accompanying notes 12-22 *infra*.

For discussions of judicial doctrines dealing with the division of authority between state and federal governments, *see generally* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); *Dynamic Federalism, supra; Shifting Perspectives, supra* note 4; *Preferential Ground, supra* note 4.

For a discussion of the allocation of authority in the environmental context between the states and the federal government, see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

[8] *See* text accompanying notes 103-04 *infra*.

[9] 435 U.S. 151 (1978).

contrasted with the Supreme Court's reasoning in that case.[10] Although this Comment focuses primarily on the environmental field, it should be added that the method of analysis proposed herein could usefully be applied to other regulatory fields provided that the character of federal-state relations in each field is taken into account.

I. Fundamental Principles of Preemption Doctrine

A. *Preemption Based on Exclusive Federal Authority and the Supremacy Clause*

The various principles traditionally employed in preemption analysis have never been treated as a coherent unit. It is partly for this reason that issues are erratically and unpredictably adjudicated. In criticizing the many formulae courts have espoused in this area, Justice Black once concluded that none provided an "infallible constitutional test or an exclusive constitutional yardstick," and that "there can be no one crystal clear distinctly marked formula." [11] The absence of a unified structure of preemption principles frequently leaves the impression that the justices espouse those principles that support the result they seek.[12] This situation produces disingenuous, unreliable legal reasoning and precludes states from enacting the best legislation possible.

The preemption doctrine invalidates state legislation that is in conflict or incompatible with the legitimate exercise of federal authority. The breadth of the doctrine and its relationship to complex principles of federalism hinder the creation of overarching principles. At the most fundamental level of federal-state relations, preemption doctrine limits state regulation because such regulation intrudes into an area that the Constitution or the federal system has entrusted to Congress or the President.[13] At this level the federal government has exclusive authority over the subject matter and

[10] *See* text accompanying notes 157-210 *infra.*

[11] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (opinion of the Court). Justice Black noted that among the terms used to test the validity of state legislation were: "conflicting; contrary to; occupying the field; repugnance; difference; irreconciliability; inconsistency; violation; curtailment; and interference." *Id.* (citation omitted).

[12] *See Shifting Perspectives, supra* note 4, at 632 n.54, 639 n.107 and accompanying text. For examples of the fluctuations of individual Justices stemming from particular subject matter, *see id.* 652 n.212 and citations contained therein.

[13] *Dynamic Federalism, supra* note 7, at 632, 633, 646 (preemption doctrine invalidates state legislation by reason of the inherent nature of modern federalism, even if the case is not covered by express constitutional requirements or does not involve a treaty or congressional legislation). *See* Zschernig *v.* Miller, 389 U.S. 429, 436, 440 (1968); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941); note 7 *supra.*

states may not enact legislation adversely affecting it.[14] This will be referred to as the "intrusion principle."

At the level of federal-state relations in which the two governmental systems possess concurrent power, the preemption doctrine invalidates state legislation pursuant to principles stemming from the supremacy clause.[15] The judiciary must uphold the supremacy of federal law, "the laws of any state to the contrary notwithstanding."[16] The supremacy clause requires the judiciary to invalidate

[14] *See* Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); *Dynamic Federalism, supra* note 7, at 632-34; note 16 *infra.*

[15] *Shifting Perspectives, supra* note 4, at 623-24; *Dynamic Federalism, supra* note 7, at 635, 640; *see Preferential Ground, supra* note 4, at 209-10.

[16] U.S. CONST. art. VI, cl. 2. In its entirety the supremacy clause reads:

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

Alexander Hamilton explained the need for the supremacy clause in *The Federalist:*

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for *Political Power and Supremacy.* . . . Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a federal government.

THE FEDERALIST No. 33 (A. Hamilton) 193 (H. C. Lodge ed. 1888) (1st ed. 1788) (emphasis in original). Hamilton, however, distinguished exclusive federal power arising from the Constitution and the creation of a national sovereign from power either exercised concurrently by the states, or reserved to the states under the tenth amendment. This distinction is apparent in No. 32:

> An entire consolidation of the states into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.*

Id. No. 32 (A. Hamilton) 186 (emphasis in original). In Hamilton's third example, the judiciary would be required to find the federal exercise of authority supreme when concurrent state authority was contradictory to or in direct conflict with its federal counterpart. Authority that is a function of national sovereignty would not be included in conflict analysis under the supremacy clause because such authority has been exclusively delegated to the national government and state intrusion into the area of such authority is invalid regardless of conflicts.

The tenth amendment preserves for exercise by the states authority which the Constitution, either by express delegation or implicit delegation pursuant to the

state legislation when it conflicts with federal legislation in the same field. Courts tend first to inquire whether Congress has consciously chosen to occupy a field.[17] If Congress has expressly provided for the exclusive exercise of federal authority within a field, state legislation in the field will be preempted under the supremacy clause.[18] A second supremacy clause principle is that even in the absence of express congressional intent to dominate a field, such an intention will be inferred if state regulation may produce a result in conflict or inconsistent with the federal legislation.[19] A third principle is that an inference of congressional intent exclusively to occupy the field will be made if the federal scheme is so pervasive as to indicate that Congress left no room for the states to supplement it[20] or federal interests are so dominant as effectively to preclude state legislation.[21] The latter standard is similar to the intrusion principle articulated above. In the absence of a finding of preemption, the tenth amendment preserves a state's right to exercise traditional police powers.

The confusion created by the multiplicity of principles is compounded when Supreme Court Justices apply different standards of intrusion, express intent, conflict, pervasiveness, and dominance. The strictness of these standards often is dependent on the theory of federalism[22] espoused by individual Justices.[23] This confusion

creation of national sovereignty, has not granted to the federal government. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In those preemption cases not involving express constitutional delegation of power or conscious expressions of intent by the federal government, it is the duty of the judiciary to determine whether the authority the state seeks to exercise is preserved under the tenth amendment, or whether it is within exclusive control of the federal government. *E.g., Dynamic Federalism, supra* note 7, at 635. *Cf.* Zschernig v. Miller, 389 U.S. 429, 432, 441 (1968) (although state legislation did not directly contradict federal law, treaty or executive policy, it intruded into federal domain of foreign affairs and was therefore invalid).

17 *See* note 13 *supra* & accompanying text. *See generally Preferential Ground, supra* note 4, at 208.

18 *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947).

19 *See, e.g., id.* 230; Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945); Hodgson v. Cleveland Mun. Court, 326 F. Supp. 419, 434-36 (N.D. Ohio 1971).

20 *See, e.g.*, Guss v. Utah Labor Relations Bd., 353 U.S. 1, 10-12 (1957); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 612-13 (1926).

21 *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497, 504-05 (1956) (sedition laws); Hines v. Davidowitz, 312 U.S. 52 (1941) (alien registration laws).

22 As used here, theory of federalism is any theory concerning the proper allocation of power between state and federal governments. It is assumed that an advocate of maximum state power would employ strict standards of intrusion, express intent, inconsistency, pervasiveness and dominance and thereby make fewer findings of preemption than would an advocate of federal power.

23 *See* note 12 *supra* & accompanying text.

can be alleviated if preemption principles are integrated into a coherent whole and based on common presumptions concerning the division of authority between state and federal governments. Part II of this Comment will propose such a unified approach. The following four subsections outline in greater detail the Supreme Court's application of supremacy clause principles.

B. *The Express Preemption Principle*

When statutory language expressly states that federal authority is to occupy a field to the exclusion of concurrent state authority, the federal judiciary must invalidate state legislation within that field under the supremacy clause.[24] The test is whether Congress enacted statutory language clearly expressing its intention to terminate concurrent state control and to vest exclusive power in the federal government.[25] If the congressional legislation covers a field that state police powers have traditionally regulated, preemption should not occur unless exclusive control "was the clear and manifest purpose of Congress." [26] Congressional intent is most clearly manifested in statutory language, either allocating dominant control of the field to the federal government [27] or maintaining concurrent state jurisdiction.[28]

Because Congress can clearly express an intent to preempt, the question arises whether the absence of such a clause necessarily implies an intent not to preempt, or whether it merely implies no

[24] *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); H.P. Welsh Co. v. New Hampshire, 306 U.S. 79, 85 (1939); Charleston & W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915). In *Rice*, for instance, the 1931 amendments to the United States Warehouse Act, 7 U.S.C. §§ 241-273 (1976), terminated concurrent jurisdiction and implemented a system of exclusive federal regulation of federally licensed warehouses. The amendments stated that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." Pub. L. No. 772, § 9, 46 Stat. 1465 (1931) (codified at 7 U.S.C. § 269 (1976)); *see* 331 U.S. at 223-24.

Strictness of intent standards has fluctuated over the years. *See, e.g., Shifting Perspectives, supra* note 4, at 626-28 and cases cited therein.

[25] *See* cases cited in note 24 *supra.*

[26] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Allen-Bradley Local 111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926)).

[27] *See, e.g.*, The Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (Supp. V 1975), which states in § 1416(d) that "no State shall adopt or enforce any rule or regulation relating to any activity regulated by this subchapter."

[28] These provisions are often called "savings clauses." *See, e.g.*, § 1370 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1370 (Supp. V 1975).

intent whatever. The question can also be expressed in reverse: because Congress can explicitly express an intent to reserve authority to the states, does the absence of such a clause imply congressional intent to preempt? As one can pose the question from either perspective, and thereby obtain opposite results from the same legislation, no inference should be drawn merely from congressional failure to include a preemption provision within the federal statute. Hence the issue whether state legislation is preempted should not depend only on the absence of an explicit federal statutory provision articulating congressional intent.

C. *The Conflict Principle*

Since no reasonable inference as to congressional intent to occupy a field can be made from the absence of a statutory provision alone, the effect of the federal legislation and the nature of the regulated field must be analyzed. The courts have supplemented the express preemption principle by using the conflict and the occupation of the field principles as grounds for inferring a congressional intent to preclude the states from exercising concurrent jurisdiction.

The conflict principle requires the judiciary to invalidate a state law that will produce a result inconsistent with the federal statute.[29] Although seemingly predictable and straightforward on its face, application of the conflict principle depends upon the conflict standard employed by the bench. A distinction must be drawn

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Some statutes include both types of provisions, relating to different aspects of the field Congress has undertaken to regulate. The Clean Air Act, 42 U.S.C. § 1857 (Supp. V 1975), for example, provides in § 1857d-1 that,

> [e]xcept as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

§ 1857f-6a(a) provides, however, that no state may "adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or . . . engines subject to this part."

[29] *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 541-42 (1945).

Under this principle the court infers that Congress intended to occupy the field of regulation to the extent state legislation is inconsistent with federal policies. In *Hill*, for example, a Florida statute required a business agent of a labor union to i) have been a United States citizen for more than 10 years, ii) not have been convicted of a felony, and iii) be a person of good moral character. The Supreme Court held the state legislation preempted by the National Labor Relations Act because its provisions circumscribed the "full freedom of choice" employees were intended to have when passing on an agent's qualifications. 325 U.S. at 541-47.

between an "actual conflict" and a "potential conflict" standard. The strict "actual conflict" standard operates in favor of the validity of state legislation: state statutes have rarely been voided when it was employed by the courts.[30] The potential conflict standard, however, works in the opposite direction, favoring federal supremacy, and has been used to void state legislation.[31]

The actual conflict standard requires that there be "such actual conflict between the two schemes of regulation that both cannot stand in the same area," [32] and has been said to be found only when compliance with both schemes would be a "physical impossibility," [33] when the "repugnance or conflict [is] direct and positive, so that the two acts could not be reconciled or consistently stand together," [34] or when the two schemes are "contradictory and repugnant." [35]

It is not quite so clear what the potential conflict standard requires, since potential conflict is amorphous. Usually it involves the determination that the state law frustrates an implied congressional intent [36] or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [37] It may, however, amount to no more than the finding of a "danger of conflict," [38] or simply a "potential conflict." [39] Thus the potential conflict leads to the invalidation of state legislation in cases in

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[30] *See Shifting Perspectives, supra* note 4, at 629. No conflict was found when the "actual conflict" standard was applied in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Goldstein v. California, 412 U.S. 546 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Reid v. Colorado, 187 U.S. 137 (1902). In *Merrill Lynch* the Supreme Court refused to find preemption despite an arguable conflict, which was said to be "extremely attenuated and peripheral, if it exists at all." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. at 135.

[31] *See, e.g.*, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[32] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

[33] *Id.* 143.

[34] Reid v. Colorado, 187 U.S. 137, 148 (1902). *See* Kelly v. Washington, 302 U.S. 1 (1937).

[35] Goldstein v. California, 412 U.S. 546, 553 (1973) (quoting THE FEDERALIST No. 32, *supra* note 16) (emphasis in original).

[36] Ray v. Atlantic Richfield Co., 435 U.S. 151, 165-68 (1978).

[37] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Although the language quoted was not originally used to find a potential conflict, it has been frequently cited for this purpose, most recently in Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

[38] Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956).

[39] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

which concurrent authority may possibly lead to conflict, while the actual conflict standard invalidates state regulation that will necessarily cause a conflict to arise.[40]

In applying the conflict principle, the Court thus has access to different standards and its choice clearly affects the disposition of the preemption challenge. In discussing state laws that are complementary to the federal scheme, for example, the Court has said that "coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go," [41] and that "complementary state regulation is as fatal as state regulations which conflict with the federal scheme." [42] At another time, however, the Court said that coincidence is only one factor to be considered, and that the fact of identity does not require automatic invalidity.[43] The confusion that exists in such cases is further increased by the fact that the Court's grounds for decision are unclear. The cases contain language both of potential conflict and occupation of the field.

D. *The Occupation of the Field Principle*

Courts usually undertake analysis of the functional qualities of a field of regulation when Congress has not expressed its intention to exclude the states or when there is no finding of actual or potential conflict between the federal and state schemes. Occupation of the field analysis focuses on the peculiar regulatory problems of the field, the extent to which existing federal regulation controls the field,[44] and the presence of dominant federal interests within the field,[45] to decide whether Congress implicitly intended to exercise preeminent authority.

Federal occupation of the field analysis is similar to that employed in cases where state legislation burdens interstate commerce and is held invalid under the commerce clause.[46] The relevant commerce clause analysis originated in *Cooley v. Board of Wardens,*[47] which broke congressional power under the commerce clause into

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[40] *See* Goldstein v. California, 412 U.S. 546, 554 (1973).

[41] Charleston & W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).

[42] Campbell v. Hussey, 368 U.S. 297, 302 (1961).

[43] California v. Zook, 336 U.S. 725, 730 (1949).

[44] *See* note 20 *supra* & accompanying text.

[45] *See* note 21 *supra* & accompanying text.

[46] "[The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. CONST. art. I, § 8, cl. 3. *See Preferential Ground, supra* note 4, at 219-20.

[47] 53 U.S. (12 How.) 299 (1851).

distinct fields of application: some "imperatively demanding a single uniform rule," others imperatively demanding the existence of similar power in the states to achieve the "diversity, which alone can meet . . . local necessities." [48]

One standard that is used to determine whether Congress implicitly intended to occupy the field is the pervasiveness of the federal regulatory system. When Congress or a federal agency has established a complex scheme that appears to cover all possible aspects of a given area, the courts have inferred a congressional intent to occupy the entire field to the exclusion of the states.[49]

A second significant standard is that of the dominance of the federal interests involved. In some areas, such as immigration [50] and labor relations,[51] the nature of the federal interest is held to be so dominant that congressional intent to exercise exclusive authority is inferred. Where Congress has articulated, or where the nature of the field engenders, the necessity of national uniformity in regulating a field, the court will find the state regulation preempted.[52]

The dominance and pervasiveness standards are not mutually exclusive, and both may be applied to the same case.[53] Furthermore, "pervasiveness," "dominance," and the relevant "field of

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[48] *Id.* 319.

[49] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Campbell v. Hussey, 368 U.S. 297 (1961); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926). This test was rejected, however, in New York Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973). In *Dublino*, the court observed that the "subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress," *id* 415, but that Congress does not necessarily intend such complex schemes to be the exclusive means of meeting the target problem. A detailed statute need not compel the inference that Congress intended to occupy the field. *Id.*

[50] *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956). *Cf.* De Canas v. Bica, 424 U.S. 351 (1976) (not every state enactment dealing with aliens is a regulation of immigration and per se preempted).

[51] *See* Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

[52] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Campbell v. Hussey, 368 U.S. 297 (1961); Hines v. Davidowitz, 312 U.S. 52 (1941). Inquiries into the necessity of national uniformity have been traced to the Court's approach in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[53] Alternatively, the court might not find it necessary to apply either of them. In Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), the Court said that in cases where the state legislation could be viewed as supplementary to the federal regulation, the question is "whether the matter on which the State asserts the right to act is *in any way* regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* 236 (emphasis added).

regulation" are all sufficiently indeterminate to allow wide variations in their application. If the field is defined broadly, for example, the result will favor preemption; [54] if defined narrowly, the presumption will run in favor of the state legislation.[55] This flexibility facilitates the result-oriented approach that has typified the preemption cases.

E. *Summary*

Examination of preemption principles applied by courts leads to the conclusion that preemption analysis has required an examination of more than statutory language and congressional intent.[56] When Congress has not expressed its intention to exclude the states,[57] the courts have inferred congressional intent by applying the conflict and occupation of the field principles. The results of conflict analysis, however, hinge on whether an "actual" or "potential" conflict standard is applied, and this, in turn, often depends on the doctrinal proclivities of individual members of the bench.[58] Similarly, the results of federal occupation of the field analysis depend upon the strictness of the pervasiveness and dominance standards used and upon the definition of the field itself.[59] The strictness of preemption standards is thus often a function of the reviewing court's interpretation of the proper allocation of authority between state and federal governments.[60] The resulting unpredictable application of the preemption doctrine prevents rational develop-

[54] *See id.*

[55] *See, e.g.*, Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Skiriotes v. Florida, 313 U.S. 69 (1941); Maurer v. Hamilton, 309 U.S. 598 (1940); Kelly v. Washington, 302 U.S. 1 (1937); Savage v. Jones, 225 U.S. 501 (1912); Reid v. Colorado, 187 U.S. 137 (1902).

[56] Some commentators assume that preemption doctrine requires no more than statutory construction. *See, e.g.*, Comment, *Constitutional Law: Congressional Preemption Held to Prevent State from Enforcing Stricter Pollution Standards Against Nuclear Electrical Power Plant*, 55 MINN. L. REV. 1223, 1224 (1971) ("[p]reemption is a doctrine of statutory construction").

[57] Even when the statutory language is clear and unambiguous a court's interpretation of statutory language can be unpredictable. Courts often rely on legislative history to support interpretations of legislative intent at odds with the statutory language. The Supreme Court has vacillated on the proper role legislative history plays in making findings on legislative intent. *Compare* Cass v. United States, 417 U.S. 72, 76-79 (1974) *and* United States v. American Trucking Ass'ns, Inc. 310 U.S. 534, 545 (1940) *with* Tennessee Valley Authority v. Hill, 98 S. Ct. 2279 (1978) *and* Caminetti v. United States, 242 U.S. 470, 490 (1917). *See generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

[58] *See* notes 29-43 *supra* & accompanying text.

[59] *See* notes 44-55 *supra* & accompanying text.

[60] *See Shifting Perspectives, supra* note 4, at 630-46.

ment of the federal system and vitiates the goal of reconciling "the operation of both statutory schemes with one another rather than holding one completely ousted." [61]

II. Preemption Analysis in the Environmental Context: A Unified Approach

States would be better able to protect their own interests and to avoid intrusion on those of the nation if courts were to apply preemption doctrine in a coherent and predictable manner. Congress could alleviate much of the confusion in this area if it were to pass a provision forbidding the inference of congressional intent exclusively to occupy a field in the absence of a federal statute that contains an express provision to that effect.[62] Until such congressional guidance is given, however, the burden of clarifying preemption analysis must remain on the judiciary. It is the purpose of this Comment to suggest a principled method for such analysis.

The combination of a comprehensive federal environmental policy and intense state interests makes the field of environmental regulation a particularly fruitful one for illustrating how coherent preemption analysis could work. Furthermore, the Supreme Court decided a preemption case in this area during its last term: *Ray v. Atlantic Richfield Company*.[63] This case provides a concrete opportunity for contrasting the recommended approach with that of the Court.

A. *Federal Environmental Policy*

The National Environmental Policy Act of 1969 [64] (NEPA) states that "it is the continuing policy of the Federal Government, in cooperation with State and local governments, . . . to use all practicable means and measures, . . . in a manner calculated to foster

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[61] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (citing Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).

[62] Such a bill was reported out of committee in 1958. H.R. 3, 85th Cong., 2d Sess., 104 Cong. Rec. 11390 (1958). The House of Representatives passed the bill, 104 Cong. Rec. 14162 (1958), which, in part, provided:

> No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field . . . unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together.

Id. 13993. The Senate version, S. 654, 85th Cong., 2d Sess., 104 Cong. Rec. 16127 (1958), failed to pass by one vote. 104 Cong. Rec. 18928 (1958).

[63] 435 U.S. 151 (1978).

[64] 42 U.S.C. §§ 4321-4347 (1970).

and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony . . . ." [65] As broadly interpreted by the courts, NEPA has made environmental protection a fundamental consideration in the decisionmaking processes of federal agencies.[66]

The comprehensive and cooperative nature of federal environmental policy is evident in other statutory schemes. These statutes utilize a variety of cooperative mechanisms joining federal, state, and local entities in the implementation and enforcement of environmental policy. The Clean Air Act,[67] for example, encourages cooperative efforts for the prevention and control of air pollution; [68] although the federal Environmental Protection Agency is charged with the responsibility of establishing national air quality standards,[69] each state carries the primary responsibility for developing and implementing a plan to achieve and maintain those standards.[70] The Federal Water Pollution Control Act Amendments of 1972 [71] follow a similar pattern. The Coastal Zone Management Act of 1972 [72] provides federal financial incentives for the development of state programs to preserve coastal areas. Furthermore, it makes agreement to comply with state coastal management plan requirements a precondition to issuance by federal agencies of licenses or permits for activities involving land or water uses in coastal areas.[73] The Deepwater Port Act of 1974,[74] which regulates the location, construction, and operation of deepwater ports and provides for the protection of the marine and coastal environment, lists among its purposes the protection of the rights and responsibilities of states to regulate growth, determine land use, and otherwise protect their environment.[75] More significantly, the governor of an adjacent

[65] *Id.* § 4331(a). NEPA requires a series of procedural steps, including the preparation of environmental impact statements, as part of any "major" federal action "significantly affecting the quality of the human environment." *Id.* § 4332(2)(C).

[66] *See, e.g.*, Scientists' Inst. for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

[67] 42 U.S.C. § 1857 (1970).

[68] *Id.* § 1857a(a).

[69] *Id.* § 1857c-4.

[70] *Id.* § 1857c-2.

[71] 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

[72] 16 U.S.C. §§ 1451-1464 (1976).

[73] *Id.* § 1456(c)(3).

[74] 33 U.S.C. §§ 1501-1524 (Supp. V 1975).

[75] *Id.* § 1501(a)(4).

coastal state is given veto power over the construction of any offshore deepwater port facility.[76] Finally, the Estuarine Areas Act of 1968 [77] declares a congressional policy to "recognize, preserve, and protect the responsibilities of the States in protecting, conserving, and restoring the estuaries in the United States." [78]

Although these statutes are only some of those within the environmental context, they manifest an explicit congressional policy to provide comprehensive environmental protection through a cooperative effort with the states. Three corollaries pertinent to preemption analysis can be drawn from this federal environmental policy. First, congressional intent is to have the states play a creative role in environmental regulation. Second, the paramount congressional purposes of environmental legislation should be considered when courts define the purposes of a particular environmental statute. Third, a finding of pervasive occupation of a field should be established only if the federal regulatory scheme is complex and exhaustive at the levels of formulation, implementation or enforcement. If there is no strong showing of pervasiveness on any of these levels, the legitimacy of concurrent state authority should be presumed.

B. *The Problem of Stricter State Standards*

Ray v. Atlantic Richfield Co.[79] presented the question whether state design standards and size limitations that were stricter than their federal counterparts were preempted.[80] The validity of stricter state standards has been challenged in other environmental contexts, and disposition of the issue by courts has been both unpredictable and inexplicable. For example, although municipalities may not impose airport curfews because exclusive control of airspace is vested in the federal government,[81] local airport proprietors are responsible for establishing permissible noise levels for the

[76] *Id.* § 1503(c)(9). "Adjacent coastal state" is defined narrowly in § 1502(1).

[77] 16 U.S.C. §§ 1221-1226 (1976).

[78] *Id.* § 1221.

[79] 435 U.S. 151 (1978).

[80] *See* text accompanying notes 150-210 *infra.*

[81] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). *Burbank* triggered a plethora of comment: *See, e.g.*, Warren, *Airport Noise Regulation: Burbank, Aaron, and Air Transport*, 5 ENVT'L AFF. 97 (1975), *reprinted in* 8 TRANSP. L.J. 403 (1976); Note, *Federal Preemption of Local Airport Noise Regulation*, 25 CATH. U.L. REV. 580 (1976); Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?*, 60 CORNELL L. REV. 269 (1975); Note, *Federal Preemption in Airport Noise Abatement Regulation: Allocation of Federal and State Power*, 26 ME. L. REV. 321 (1974); Comment, City of Burbank v. Lockheed Air Terminal, Inc.: *Federal Preemption of Aircraft Noise Regulation and the Future*

facility and the surrounding area.[82] New York may prohibit the importation of certain wild animal products not included on the federal endangered species list,[83] but Maryland may not ban the importation of sealskins because the relevant federal statute "purposely" refrained from prohibiting such action.[84] The federal government has exclusive authority to regulate the construction and operation of nuclear power plants, including protection from radiation hazards,[85] but it is possible that states retain authority over nuclear power plant siting or non-radiation-oriented health and safety regulations.[86]

Challenges and discussion of potential challenges have also arisen with respect to air pollution control,[87] pipeline siting,[88] the

of Proprietary Restrictions, 4 N.Y.U. REV. L. & SOC. CHANGE 99 (1974); Comment, *Federal Pre-emption and Airport Noise Control*, 8 URB. L. ANN. 229 (1974); 40 J. AIR L. & COM. 341 (1974); 20 N.Y.L.F. 165 (1974); 5 RUT.-CAM. L.J. 566 (1974); 22 U. KAN. L. REV. 319 (1974); 13 WASHBURN L.J. 118 (1974).

[82] British Airways Bd. v. Port Authority, 558 F.2d 75 (2d Cir. 1977); National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976). *British Airways* concerns the right of the Port Authority of New York and New Jersey to ban landings by the British-French Concorde supersonic transport. The Second Circuit held that a reasonable, non-discriminatory noise regulation by the airport proprietor banning particularly noisy aircraft would not be preempted. 558 F.2d at 82-83. Secretary Coleman, then Secretary of Transportation, emphasized that he had not intended his order allowing experimental flights by the Concorde to preempt local noise regulations. President Carter and Secretary Coleman's successor, Brock Adams, reiterated that position. *Id.* 81.

On remand, the district judge found that the Port Authority's 17 month delay in establishing proper noise standards constituted an excessive and unjustified delay, 437 F. Supp. 804 (S.D.N.Y. 1977). The Second Circuit agreed that the ban on Concorde flights, in the absence of uniform regulations, was unreasonable and discriminatory, 564 F.2d 1002 (2d Cir. 1977).

[83] Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971).

[84] Fouke Co. v. Mandel, 386 F. Supp. 1341 (D. Md. 1974). *See* Note, *Federal Preemption: A New Method for Invalidating State Laws Designed to Protect Endangered Species*, 47 U. COLO. L. REV. 261 (1976).

[85] Northern States Power Co. v. Minn., 447 F.2d 1143 (8th Cir.), *aff'd*, 405 U.S. 1035 (1971).

[86] *See* Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392 (1976); Comment, *Federal Preemption of State Laws Controlling Nuclear Power*, 64 GEO. L.J. 1323 (1976); Note, *Nuclear Power Plant Siting: Additional Reductions in State Authority?*, 28 U. FLA. L. REV. 439 (1976). *See also* England, *Recent Regulatory Developments Concerning the Transportation of Nuclear Fuel and other Radioactive Materials*, 7 ENVT'L L. 203 (1977).

[87] *See* Exxon Corp. v. City of New York, 548 F.2d 1088 (2d Cir. 1977); Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120 (S.D.N.Y.) *aff'd*, 468 F.2d 624 (2d Cir. 1972); *cf.* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (municipal smoke ordinance can be applied to federally registered vessels). *See also* Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-emption*, 68 MICH. L. REV. 1083 (1970).

[88] *See* Hershman & Fontenot, *Local Regulation of Pipeline Sitings and the Doctrines of Federal Preemption and Supremacy*, 36 LA. L. REV. 929 (1976).

development of offshore mineral resources,[89] pesticide use,[90] solid waste management,[91] hazardous substance labelling,[92] liability for oil spill cleanup costs,[93] energy development,[94] and, inevitably, federal compliance with legitimate state regulation.[95] It is true that cases in all of these categories must turn in part on the particular wording and congressional history of the statute involved, as do all preemption decisions. Nonetheless, judging from past experience, inconsistencies are likely. The resulting lack of predictability as to what state legislation will be permissible certainly must discourage the best possible cooperative effort by the states, and ultimately may frustrate national environmental policy as a whole.

C. *A Unified Method of Preemption Analysis in The Environmental Context*

Significant progress toward the goal of consistent adjudication of preemption challenges can be made if the federal policy of compre-

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[89] *See* Beeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107 (1976); Swan, *Remembering* Maine: *Offshore Federalism in the United States and Canada*, 6 CAL. W. INT'L L.J. 296 (1976); Note, *Right, Title and Interest in the Territorial Sea: Federal and State Claims in the United States*, 4 GA. J. INT'L & COMP. L. 463 (1974); Comment, *Jurisdiction Over the Seabed: Persistent Federal-State Conflicts*, 12 URB. L. ANN. 291 (1976).

[90] *See* Megysey, *Governmental Authority to Regulate the Use and Application of Pesticides: State vs. Federal*, 21 S.D.L. Rev. 652 (1976).

[91] The "Oregon Bottle Case," American Can Co. v. Oregon Liquor Cont. Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973), was decided on a commerce clause theory, but much of the rationale is analogous to a preemption theory. *See* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974).

[92] Chemical Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973). For relief from the tedium of law review articles, see Chief Judge Brown's punladen concurring opinion.

[93] Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). *See* Maloof, *Oil Pollution: Cleaning Up the Legal Mess*, 43 INS. COUNSEL J. 605 (1976); Case Comment, *Federal Maritime Jurisdiction and State Marine Pollution Legislation: The Florida Act Not Preempted Per Se*, 28 U. MIAMI L. REV. 209 (1973).

Askew held that state laws providing for oil spill damage compensation were not preempted by federal legislation. A number of bills have been introduced in Congress that would serve to overturn *Askew*. According to the Department of the Interior, federal preemption of such state laws is essential to the effective application of any comprehensive oil spill legislation. *See* [1977-78] 8 ENVIR. REP. (BNA) 359.

[94] *See* White & Barry, *Energy Development in the West: Conflict and Coordination of Governmental Decision-Making*, 52 N.D.L. REV. 451 (1976).

[95] E.P.A. v. California, 426 U.S. 200 (1976); Hancock v. Train, 426 U.S. 167 (1976); People v. Dep't of Navy, 431 F. Supp. 1271 (N.D. Cal. 1977). *See* Niehaus, *Federal Compliance with State Environmental Procedures*, A.F.L. REV., Fall 1976, at 1; Walston, *State Control of Federal Pollution: Taking the Stick Away from the States*, 6 ECOLOGY L.Q. 429 (1977).

hensive environmental protection is viewed as requiring that federal standards be treated as the minimum necessary.[96] Health and safety statutes, as well as others that can be classified as protecting the "general welfare," have traditionally been held to be within the scope of the police power reserved to the states under the tenth amendment of the Constitution.[97] State environmental legislation has traditionally been treated as stemming from the same authority.[98] Such forms of police power have received special treatment in preemption doctrine. Even during periods when uniform federal regulation was favored and a presumption existed in favor of federal preemption,[99] persuasive reasons were necessary to overcome the presumption that such exercises of traditional police power were valid.[100] Furthermore, while standards of general applicability can certainly be established on a national basis, each area of the country has its own particular needs and priorities, "imperatively demanding that diversity [of regulation] which alone can meet the local necessities." [101]

The federal government, on the other hand, has articulated the primary policy of using "all practicable means and measures" [102] to avoid environmental harm. Comprehensive federal environmental authority overlaps with the states' authority to protect its citizens' health and welfare. The potential conflict entailed in such overlap is reduced when states join the effort to protect the environment under the cooperative federal framework.[103] It would, however, frustrate the basic congressional purpose to provide comprehensive environmental protection if states enacted legislation which provided less protection for the environment.

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[96] If Congress expresses its intention to the contrary, this presumption is rebutted.

[97] *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977); Maurer v. Hamilton, 309 U.S. 598 (1940); Kelly v. Washington, 302 U.S. 1 (1937); Savage v. Jones, 225 U.S. 501 (1912).

[98] *See, e.g.*, Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); American Can Co. v. Oregon Liquor Contr. Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973).

[99] *See Shifting Perspectives, supra* note 4, at 630-39.

[100] When Congress legislates in a field traditionally occupied by the states, the court starts "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[101] Cooley v. Board of Wardens, 53 U.S. 299, 319 (1851). At least one commentator has suggested that there is a strong case for local environmental jurisdictions. Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193 (1974).

[102] 42 U.S.C. § 4331(a) (1970). *See* text accompanying note 65 *supra.*

[103] *See* text accompanying notes 64-78 *supra.*

This potentially discordant interface of federal and state authority can be harmonized if federal environmental standards are treated as minimum standards and equally or more stringent state regulations are presumed valid. The presumption of validity could be overcome if preemption analysis revealed that Congress or national interests required it. Such a presumption does not frustrate the primary purpose of federal environmental legislation, preserves a role for states in exercising their police power, and is consistent with the ideal that concurrent authority be construed with a view toward maintaining both and ousting neither.[104] Integregation of these conceptions of the proper relation of federal and state authority with fundamental preemption principles will lead to a more consistent analytic process in the environmental context. The following structure of analysis provides such an integration.

1. The Express Preemption Principle

The first inquiry of preemption analysis should be whether the clear and manifest purpose of Congress was to exclude state authority in the particular sub-field of environmental regulation.[105] The strict standard of proof required at this stage stems from the judicial deference paid to traditional state police authority.[106] A showing of exclusive intent is dependent on express statutory language: no inference of congressional intent to exclude state authority should be made in the absence of such language.[107]

2. The Conflict Principle

The next step of the analysis entails inquiry into whether the state legislation stands as an obstacle to the general federal objective of comprehensive environmental protection and the narrower objectives of the relevant federal statute.[108] Given the federal policy of cooperation in the field,[109] complementary state regulation should be treated favorably, and state standards as restrictive as or more restrictive than their federal counterparts should be presumed

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104 *See* note 61 *supra* & accompanying text.

105 *See* note 26 *supra* & accompanying text.

106 *See* text accompanying notes 24-28 *supra.*

107 *Id.* No finding of an express congressional intent to leave an area unregulated is permissible absent a specific statutory provision. For an example of such congressional intent *see, e.g.*, the Clean Air Act, 42 U.S.C.A. §§ 7543(a), 7545 (c)(4)(A) (Supp. Nov. 1977).

108 *See* text accompanying notes 29-43 *supra.*

109 *See* text accompanying notes 64-78 *supra.*

valid.[110] An "actual conflict" standard[111] should be applied. To be in "actual conflict" the state statute must stand as an impediment to compliance with the federal statute or compliance with the two schemes must be a "physical impossibility."[112] Put simply, no conflict should be found unless there is an "impossibility of dual compliance."[113] Since federal standards are to be treated as minima, actual conflict will exist only when the regulatee would be subject to an action for noncompliance with federal regulations after complying with state regulations.

It will be recalled that traditional preemption analysis uses the conflict principle more broadly than this. Beyond the "actual conflicts" described above, "potential conflicts" are said to be found where it is anticipated that the state law may frustrate some federal interest that Congress implicitly sought to protect.[114] The enterprise of locating such potential conflicts, however, really requires the courts to determine the importance of the federal interests involved. This is so because the courts are not likely to infer that Congress intended to protect unimportant federal interests to the exclusion of states. For this reason, such potential conflicts are more appropriately considered under the dominance standard of the occupation of the field principle.

3. The Occupation of the Field Principle

If the state legislation in question has survived the express preemption and conflict stages of the proposed analysis,[115] the next inquiry should be whether the nature of federal involvement in the field warrants the conclusion that state authority has been effectively excluded.[116]

The first step is to establish whether congressional control of the field is pervasive. Pervasive occupation is established if Congress or a federal agency has established a complex scheme which entails promulgation of standards, their implementation, and enforcement, and covers all aspects of the pertinent environmental

110 *See* text accompanying notes 103-104 *supra.*

111 *See* text accompanying notes 30-35 *supra.*

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

113 *Id.* The Supreme Court pointed out that such impossibility of compliance would exist if "federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avacado measuring less than 8% oil content." *Id.*

114 *See* text accompanying notes 36-40 *supra.*

115 If the challenged statute is deficient under either express preemption or conflict analysis, there is no reason to proceed to the third stage.

116 *See* text accompanying notes 44-55 *supra.*

sub-field.[117] A strong showing of pervasiveness should be necessary to support preemption, since Congress has expressed its intention that the states play a creative role in environmental regulation.[118] Application of the pervasiveness standard should rarely result in preemption within the environmental context.

The second step in this stage of the analysis is to establish whether federal interests are dominant within the pertinent field.[119] This entails a meticulous itemization of the federal interests affected by the state legislation and the state interests served by it. If i) the federal interests have national significance, ii) the federal interests clearly predominate over those served by the state legislation, and iii) the nature of federal involvement in the field requires uniform standards, dominance of federal interests has been shown.

The balancing process implicit in applying the dominance standard requires the court to consider the particular regulatory problems inherent in the environmental sub-field. If effective control is possible only through consistent nationwide enforcement, the weight of federal interests increases. The court should inquire whether "Balkanization" [120] will serve as a substantial impediment to realization of federal goals. The court should, however, attribute additional weight to the state's interests if its regulatory scheme responds to environmental problems peculiar to the geographic region and is narrowly tailored to deal with those problems. Furthermore, little weight should be attributed to the state regulatory scheme if it is overbroad or is not rationally related to its avowed purposes.

The court must also consider the subject matter of the state regulation and determine how state control of this subject matter will affect federal authority to conduct foreign policy, defend national borders, and perform other acts of national sovereignty. Direct and indirect impact on federal regulation of foreign commerce and the national economy must be evaluated. If state legislation disrupts the interaction of federal regulatory schemes in non-environmental fields, federal interests should be found dominant. Even if Congress has not enacted legislation in a particular field, state legislation that encroaches on authority primarily entrusted

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117 *See* text following note 78 *supra.*

118 *See* text accompanying notes 44-55 *supra.*

119 *See* note 21 *supra* and text accompanying notes 50-52 *supra.*

120 "Balkanization" is the process by which states enact diverse and conflicting legislation within the same field. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265, 286 (1977).

to the federal government by the Constitution [121] must be held outweighed by dominant federal interests. It is at this point that the dominance standard merges into the intrusion principle: if the state regulatory scheme has intruded into an area of exclusive federal authority, it should be held preempted.[122]

Application of the occupation of the field principle therefore requires inquiry into the interaction between the state regulatory scheme and federal authority. If federal interests equal or outweigh the local interests served by the state statute, preemption doctrine requires uniform national standards to prevail over state standards.

The Supreme Court was recently confronted with typical environmental preemption issues in *Ray v. Atlantic Richfield Company*.[123] In order to illustrate how the recommended approach to preemption analysis differs from that which the Court now employs, this case will be examined in detail.

III. *Ray v. Atlantic Richfield Co.*[124]

On September 8, 1975, the State of Washington's new Tanker Law [125] became effective. On the same day, Atlantic Richfield Company filed suit in the United States District Court for the Western District of Washington seeking an injunction barring enforcement of the statute on the grounds that it was preempted by the federal Ports and Waterways Safety Act of 1972,[126] that it was invalid under the commerce clause,[127] and that it additionally interfered with federal control of foreign affairs and treaty-making.[128] In order properly to analyze the issues in the case, the state and federal statutes involved need to be described in some detail.

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121 Generally, the federal powers referred to here are those enumerated in the Constitution, article I, section 8, U.S. CONST. art. I, § 8.

122 The Supreme Court rested its holding on such an analysis in Zschernig v. Miller, 389 U.S. 429 (1968). Probate provisions enacted by Oregon were held to be "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* 432.

123 435 U.S. 151 (1978).

124 *Id.*

125 WASH. REV. CODE ANN. §§ 88.16.170-.190 (Supp. 1977).

126 33 U.S.C. §§ 1221-1227 (Supp. V 1975); 46 U.S.C. § 391a (Supp. V 1975). Also involved were federal vessel registration, enrollment, and licensing laws. *See* 46 U.S.C. §§ 319, 263, 251 (1970).

127 U.S. CONST. art. I, § 8, cl. 3.

128 This comment will discuss only the preemption challenge.

A. *The Tanker Law*

The Washington Tanker Law[129] (Tanker Law) involved was passed in response to a legislative finding that "the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the state and to jobs and income dependent on these resources."[130] The legislature further concluded that the configuration of Puget Sound is such that a greater likelihood of long-term damage from any large oil spill exists there than elsewhere, and that areas of the Sound have limited maneuvering space and contain many natural navigational obstacles. The Washington legislature therefore announced its

> intent and purpose . . . to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.[131]

Thus Section 2 of the Tanker Law required any oil tanker of 50,000 deadweight tons (DWT) or more to take a Washington state licensed pilot while navigating Puget Sound and adjacent waters.[132] Section 3(1) totally prohibited tankers of more than 125,000 DWT (so-called "supertankers") from entering the sound. Section 3(2) permitted passage of tankers between 40,000 and 125,000 DWT only if they either met enumerated safety design criteria, which no existing tanker met,[133] or took on a tug escort when entering Puget Sound.[134]

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129 WASH. REV. CODE ANN. §§ 88.16.170-.190 (Supp. 1977).

130 *Id.* § 88.16.170. Puget Sound is a large body of inland water in northwest Washington, with more than 2,500 square miles of inlets, channels, and bays. More than 200 islands populate the Sound's waters, and its 2,000 miles of shoreline contain numerous marshes, tidal flats, wetlands, and beaches. 435 U.S. at 154 n.1. The Sound and its adjacent shores provide spawning and nursing areas for over 2,000 marine species, migratory habitats for waterfowl, as well as employment, recreational, scientific, and educational opportunities for the people of Washington. Brief of Appellants at 11, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) [hereinafter Brief for Appellants]. The fishing industry in Puget Sound contributes $170 million annually to the state's economy, and it is estimated that in 1975 tourists in the counties adjacent to the Sound, where two-thirds of the state's population resides, spent more than $92 million. *Id.* 11 & 12 n.17.

131 WASH. REV. CODE ANN. § 88.16.170 (Supp. 1977).

132 *Id.* § 88.16.180.

133 Ray v. Atlantic Richfield Co., 435 U.S. 151, 173 n.24 (1978). For a description of the design requirements *see* note 167 *infra.*

134 WASH. REV. CODE ANN. § 88.16.190 (Supp. 1977).

B. *The Ports and Waterways Safety Act*

The Ports and Waterways Safety Act of 1972 [135] (PWSA) was enacted in response to a series of major oil spills,[136] and was designed to protect United States navigable waters and shorelines from damage resulting from maritime accidents. The PWSA is comprised of two titles. The vessel traffic provisions of title I "can be likened to providing safer surface highways and traffic controls for automobiles," while the vesel design requirements of title II "can be likened to providing safer automobiles to transit those highways." [137] Title I of the PWSA [138] was intended to prevent

> damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or loss. . . .[139]

Accordingly, it gives the secretary of the department in which the Coast Guard is located (the Secretary) authority to establish and require compliance with vessel traffic systems for congested waters; to control vessel traffic in areas determined to be especially hazardous in certain circumstances (such as inclement weather) by specifying scheduling, routing, and size and speed limitations, and by restricting operation to vessels with particular operating capabilities that he considers necessary for safe operation under the circumstances; to direct anchoring when necessary to prevent damage; to require pilots; to establish unloading procedures; to prescribe minimum safety equipment requirements for structures; to establish waterfront safety zones; and to establish inspection procedures.[140]

A number of title I subsections are of particular relevance to preemption challenges. First, the Secretary's authority over pilotage is extremely limited as to vessels engaged in foreign trade, extending only to situations "where a pilot is not otherwise required by State

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[135] 33 U.S.C. §§ 1221-1227 (Supp. V 1975) and 46 U.S.C. § 391a (Supp. V 1975).

[136] *See* S. REP. No. 92-724, 92d Cong., 2d Sess. 10 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2766, 2769 (hereinafter referred to as "S. REP.").

[137] S. REP., *supra* note 136, at 9-10, [1972] U.S. CODE CONG. & AD. NEWS at 2769.

[138] 33 U.S.C. §§ 1221-1227 (Supp. V 1975).

[139] *Id.* § 1221.

[140] *Id.*

law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved.[141] Second, in conjunction with the requirement that the Secretary consult with other federal agencies, the Secretary is given authority to "consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities." [142] Third, one factor the Secretary is to consider in establishing regulations is "local practices and customs." [143] The Secretary is also required to provide an opportunity for consultation and comment to state and local governments.[144] Finally, the Act provides that "[n]othing contained in this chapter . . . prevent[s] a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this chapter." [145]

Title II of the PWSA [146] authorizes the Secretary "to establish comprehensive regulations for the design, construction, maintenance, and operation of vessels carrying certain cargos in bulk for the purpose of protecting the marine environment." [147] It thus supplements title I "by also requiring that vessels be built to higher standards of design and construction, and subject to higher standards in their operation." [148] The Secretary's regulatory power is broad, and applies to foreign flag as well as United States vessels entering our navigable waters. The Secretary may deny entry to any vessel not in compliance.[149]

C. *Preemption Analysis in* Ray v. Atlantic Richfield Co.

In response to Arco's suit, a three judge district court decided that the Ports and Waterways Safety Act preempted the field and held that Washington's Tanker Law was invalid in its entirety.[150]

141 *Id.* § 1221(5). Other federal provisions do, however, preclude state pilot requirements in addition to those imposed by the federal government for vessels engaged in domestic trade and federal pilots are required for these vessels. 46 U.S.C. §§ 215 & 264 (1970).

142 33 U.S.C. § 1222(c) (Supp. V 1975).

143 *Id.* § 1222(e)(7).

144 *Id.* § 1224.

145 *Id.* § 1222(b).

146 46 U.S.C. § 391a (Supp. V 1975).

147 S. REP., *supra* note 136, at 7, [1972] U.S. CODE CONG. & AD. NEWS at 2767.

148 *Id.*

149 46 U.S.C. § 391a(13) (Supp. V 1975).

150 Atlantic Richfield Co. v. Evans, No. C75-648 (W.D. Wash. Sept. 24, 1976). The court did not reach the commerce clause or foreign treaty power issues. It also declined to comment on Washington's sovereign immunity challenge

On appeal,[151] the Supreme Court agreed with the district court in its judgment that the pilot requirement for "enrolled vessels," [152] the design standards,[153] and the size limitations [154] were preempted, but held, contrary to the lower court, that the pilot requirement for "registered vessels" [155] and the tug escort provision [156] were not.

1. Pilot Requirement

On appeal, the state of Washington conceded that the pilot requirement was in conflict with federal law insofar as it applied to tankers "enrolled in coastwise trade," [157] and appellees conceded that no conflict existed as to the registered vessels.[158] The Court agreed with these concessions, reversing the lower court only as to the pilot requirements for registered vessels.[159] Justice White, expressing the opinion of all nine Justices, relied on two statutory provisions to conclude that "these two statutes read together give the Federal Government exclusive authority to regulate pilots on enrolled vessels and . . . they preclude a State from imposing its own pilotage requirements upon them." [160] On the other hand, he noted

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to jurisdiction. The three-judge court initially refused to order injunctive relief, apparently assuming Washington would not attempt to enforce the law. When it became apparent in November that the state did intend to enforce it pending appeal, injunctive relief was granted, but at the request of appellants was stayed until December 15th. A continuation of the stay was granted by Mr. Justice Rehnquist, 429 U.S. 1334 (December 9, 1976), and by the full court on January 10, 1977, 429 U.S. 1035 (1977).

For discussions of *Ray* written before the Supreme Court disposed of the case *see, e.g.*, Note, Ray v. Atlantic Richfield: *A Case for Preemption*, 5 HASTINGS CONST. L.Q. 563 (1978); Note, *Pre-emption and the Commerce Clause Revisited: The 1975 Washington Tanker Law*, 17 NATURAL RESOURCES J. 691 (1977).

151 Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

152 *Id.* 158-59. The entire court believed that pilot requirements were preempted insofar as they applied to enrolled vessels. *See* note 158 *infra.*

153 *Id.* 168. Six Justices believed the district court should be affirmed in this respect. *See* note 168 *infra.*

154 *Id.* 174-78. *See* note 198 *infra.*

155 *Id.* 159-60. The entire court found the invalidation of the pilot requirement for registered vessels overbroad, and reversed on this point.

156 *Id.* 171-72. Seven Justices believed the district court's judgment should be reversed on this point. *See* note 183 *infra.*

157 435 U.S. at 159. "Enrolled" vessels are those "engaged in domestic or coastwide trade or used for fishing," whereas "registered" vessels are those engaged in trade with foreign countries. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 272-73 (1977).

158 *Id.* 160.

159 *Id.*

160 *Id.* 159. The Court relied on 46 U.S.C. §§ 364 & 215 (1970), which in part provide, respectively, that "every coastwise seagoing steam vessel subject

that one provision expressly authorizes and another allows for state pilot requirements for non-enrolled vessels.[161] Accordingly, the pilot requirement for enrolled vessels was preempted and that for non-enrolled vessels was not.

The Court's analysis of the pilot requirements was the only part of the opinion consistent with the approach proposed in this Comment. Federal law contains an express requirement of federally licensed pilots for enrolled vessels [162] and an express declaration that "[n]o State . . . shall impose upon pilots . . . any obligation to procure a State . . . license in addition to that issued by the United States . . . ." [163] The Washington Tanker Law had imposed just such an obligation on pilots for enrolled vessels. This was express preemption, and eliminated any need to look beyond the statute.

The federal law involved, however, also states that this prohibition is not to "affect any regulation . . . requiring vessels . . . *other than coastwise steam vessels,* to take a pilot duly licensed or authorized by the laws of such State . . . ." [164] The Court found that this provision left the state free as to pilotage requirements for vessels not enrolled in the coastwise trade.[165] Under the methodological approach of this Comment, it would ordinarily have been necessary for the Court to further consider whether there was an actual conflict between the state pilot requirement for non-enrolled vessels and other federal law, and, if not, whether the federal government so occupied the field as effectively to preempt the state requirement. The appellees, however, had conceded that this requirement was not preempted. In this circumstance, the recommended presumption of validity to be accorded more stringent state laws [166] should become operative and no attempt need have been made to question further the validity of this part of the state provision.

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to the navigation laws of the United States . . . not sailing under register, shall when under way . . . be under the control and direction of pilots licensed by the Coast Guard" and that "[n]o *state* or municipal government *shall impose upon pilots* of steam vessels any obligation to procure a state or other license in addition to that issued by the United States . . . ." (emphasis added).

161 *Id.* 159-60.

162 46 U.S.C. § 364 (1970) (quoted *supra* note 160).

163 46 U.S.C. § 215 (1970).

164 *Id.* The PWSA also explicitly allows state pilotage requirements for foreign vessels. *See* 33 U.S.C. § 1221(5) (Supp. V 1975).

165 435 U.S. at 159-60.

166 *See* text accompanying notes 96-104 *supra.*

2. *Design Standards*

Washington's design standards[167] for all oil tankers of from 40,000 to 125,000 DWT were invalidated by six Justices applying occupation of the field and conflict principles.[168]

Justice White first applied the pervasiveness standard to title II of the PWSA and concluded that a comprehensive statutory pattern warranted the inference that Congress intended the creation of "uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements."[169] He attempted to support this inference further by referring to the legislative history. Unfortunately the legislative history does not explain why Congress enacted the statutory language "comprehensive *minimum* standards"[170] and could just as easily be used to show that all Congress sought to enact were uniform minimum standards.

Justice White's second argument employed the language of potential conflict analysis. He reasoned that because a ship complying with federal standards might be denied entry to the waters of a state with stricter standards, this would frustrate the implied congressional intention to establish uniform national[171] and international design standards.[172] An earlier case, however, had upheld state safety standards stricter than the relevant federal law for certain vessels.[173] This case was distinguished on the ground that it

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[167] WASH. REV. CODE ANN. § 88.16.190(2) (Supp. 1977), requires enrolled and registered oil tankers of from 40,000 to 125,000 DWT to possess all of the following "standard safety features":

> (a) Shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons;
>
> (b) Twin screws;
>
> (c) Double bottoms, underneath all oil and liquid cargo compartments;
>
> (d) Two radars in working order and operating, one of which must be collision avoidance radar;
>
> (e) Such other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners.

[168] Justices Marshall, Brennan and Rehnquist believed the design standards should be treated as an optional alternative to the tug escort requirement, and that in light of the Court's approval of Washington's tug requirement there was no need to speculate on the validity of the design standards. 435 U.S. at 181 (Marshall, J., dissenting). Implicit in this argument is the application of the actual conflict standard and the view that state legislation should not be invalidated if the regulatee can comply with both regulatory schemes.

[169] 435 U.S. at 163.

[170] 46 U.S.C. § 391(a) (Supp. V 1975).

[171] 435 U.S. at 165.

[172] *Id.* 168.

[173] Kelly v. Washington, 302 U.S. 1 (1937).

involved a state statute touching on different matters [174] than the federal provisions, whereas in the instant case "[t]he federal scheme . . . aims precisely at the same ends as" the Tanker Law.[175]

Under the approach suggested by this Comment, it would have first been necessary to decide whether the state design standards had been expressly preempted. No PWSA provision expressly requires exclusive federal authority in the field of tanker design. The Court was therefore correct in moving on to the question of conflict.

Its reasoning in this area, however, is incompatible with the proposed approach. Using that approach, the Court would have inquired whether the Tanker Law stood as an impediment to general federal environmental policy or to the specific policies of title II of the PWSA. Since section 391 (a) [176] speaks of preventing harm to "the marine environment," it is unlikely that a state law enacted to realize the same goal could stand as an impediment to this general federal goal. Furthermore, "no inevitable collision between the two schemes of regulation" was apparent "despite the dissimilarity of the standards." [177] If the possibility of "dual compliance" [178] existed, no actual conflict was present and the Tanker Law design standards should not have been preempted under conflict analysis.

The next step under the proposed method would have been to consider the design standards under the occupation of the field principle. Although the Court did argue that the federal regulation here was pervasive, the argument is hardly convincing. The statutory language "comprehensive minimum standards of design" and the vague, ambiguous legislative history do not suggest that Congress established a complex, all-encompassing framework regulating design. Rather than relying on such a strained finding of pervasiveness and its earlier finding of a hypothetical conflict with an implied congressional intent, the Court should have frankly considered whether federal interests dominated the field. The relationship of the particular PWSA design provisions to the Act as a whole and to comprehensive federal environmental policy should

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174 435 U.S. at 165. The federal statute involved in *Kelly* did not include provision for "inspection of . . . motor-driven tugs in order to insure safety or determine seaworthiness," Kelly v. Washington, 302 U.S. 1, 8 (1937), where these tugs were of the type covered by the state law as applied. *Id.*

175 435 U.S. at 165.

176 46 U.S.C. § 391(a) (Supp. V 1975).

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

178 *Id.* Dual compliance was especially likely if the Tanker Law design provisions were considered as an alternative to the tug escort requirement. The Court chose to analyze the design standards "standing alone." 435 U.S. at 160-61.

have been articulated. If these federal interests were seriously jeopardized by the enforcement of the Tanker Law, then federal authority should have been found to preempt the state provision. This conclusion would not have been automatic in *Ray*: the fundamental federal goal of protecting the marine environment was not threatened and national regulations of tankers would hardly be affected since the Tanker Law covered only Puget Sound.

Even if these considerations did not indicate preemption, however, such a determination would not have ended dominance standard analysis. State authority in a field can be excluded if it adversely affects federal interests in an indirect manner. For example, if Washington's design standards proved to be a substantial burden on the national economy, the Court should have weighed these costs to the federal system against the benefits provided by the standards to the state. If impediments to the exercise of federal authority outweighed state benefits, the law should have been held preempted for this reason. Hence if the federal government's ability to conduct foreign policy or regulate international commerce were significantly impeded by the Tanker Law design standards, the dominance of federal interests should have been held to have excluded state regulation of tanker design.[179]

3. *Tug Escort Requirement*

An oil tanker of from 40,000 to 125,000 DWT not complying with Tanker Law design standards could nonetheless enter Puget Sound if it submitted to tug escort.[180] Seven Justices agreed that the tug escort requirement was severable from the alternative Tanker Law design standards.[181] In light of federal tug regulation as it then stood, no actual conflict existed[182] between the Washington tug escort requirement and the Secretary's authority to operate "vessel traffic services and systems."[183] The majority chose not to rely on the potential conflict standard applied to the design stand-

[179] In this context the legislative history cited by the Court is more relevant. The Senate Report, S. REP., *supra* note 136, at 23, [1972] U.S. Code Cong. & Ad. News at 2789, speaks of the need for international solutions to marine pollution.

[180] WASH. REV. CODE ANN. § 88.16.190(2) (Supp. 1977).

[181] 435 U.S. at 171-72.

[182] *Id.*

[183] 33 U.S.C. § 1221 (Supp. V 1975). Justices Stevens and Powell believed that since Washington's design standards were preempted, no burden on noncompliance could be imposed. 435 U.S. at 188-90. Applying a potential conflict standard, they further believed that Congress' goal of uniform standards might be thwarted by disparate state regulations. *Id.* 189.

ards.[184] No principled reason was given for the shift in conflict standards.

Title I of the PWSA merely authorizes the Secretary to issue regulations governing vessel traffic; [185] it does not expressly forbid states to require tankers to use tug escorts. There was therefore no express preemption of this state requirement. Furthermore, the Secretary has not yet exercised his authority to promulgate tug regulations.[186] No impossibility of dual compliance exists. Thus, the Court properly applied the actual conflict standard.

The next step, however, should have been to analyze the occupation of the field problems presented by the tug escort requirement. Justices Stevens and Powell argued, in dissent, that the tug requirement was "a special penalty for failure to comply with" [187] the design requirements and should have been preempted because of the same federal interests invoked against those requirements. The majority did not really respond to this argument. The proposed approach would have required it to do so under occupation of the field analysis.

The Court should have discussed the implications of the tug escort requirement for fields in which federal interests are preeminent. Given the absence of tug regulations, federal law could hardly be found pervasive. But the question of dominance of federal interests should also have been addressed.

In recent years the federal government has attempted to create a coherent energy policy. Over half of the crude oil consumed by the United States is imported,[188] and the federal government has a strong interest in seeing that the consumer pays the lowest price possible for imported crude oil. Use of tug escorts raises the price of crude oil [189] and for that reason the benefits of the tug escort

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184 *Id.* 171-73. The Court acknowledged that a potential conflict with legitimate exercise of federal authority existed, but argued that such a conflict could serve as a basis for tug escort requirement preemption only when it became an actuality. *Id.* 172.

185 33 U.S.C. §§ 1221(1) & (2) (Supp. V 1975).

186 The Secretary has issued an advance notice of proposed rulemaking to require tug escorts in certain circumstances. 41 Fed. Reg. 18770 (1976), *proposing to amend* Navigation Safety Regulations, 33 C.F.R. § 164 (1977). In his notice of rulemaking in 1977, he stated that the proposed "rule for tug assistance in confined waters . . . . is to be the subject of a future rulemaking action." 42 Fed. Reg. 5958 (1977). If these regulations are promulgated, the possibility for actual conflict may exist.

187 435 U.S. at 189.

188 Brief for Appellees at 4 n.5, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

189 Brief for Appellants, *supra* note 130, at 19.

requirement should have been weighed against the adverse effect on federal interests.

Assuming a 120,000 DWT tanker is used, the tugboat requirement causes the transportation cost per barrel of Alaskan oil to increase from forty cents to just under forty-one cents; less than one cent is added to the per-barrel transportation cost of $1.40 for Middle Eastern oil.[190] The international and economic ramifications of such an increase would probably be small. The preventive benefits of the tug escort requirement for Washington are probably greater. Provided Washington could show that there is a reasonable relationship between the use of tug escorts and the minimization of the threat of oil spills, it would be able to show significant interests peculiar to Puget Sound. Beyond its considerable but unquantifiable value as an aesthetic resource, Puget Sound and its adjacent shores provide spawning and nursing areas for over two thousand marine species, migratory habitats for waterfowl, as well as employment, recreational, scientific, and educational opportunities for the people of Washington.[191] The fishing industry alone contributes $170,000,000 annually to Washington's economy.[192] A major oil spill would have significant potential for destruction or damage to both the Sound's marine life and the industry and jobs dependent on the Sound.

The Court should have weighed these and other interests to determine whether tugboat regulation should be subject to exclusive federal control. Given the strong state interests at stake, the Tanker Law tug escort requirement would probably have survived occupation of the field analysis.

4. *Size Limitation*

The Tanker Law prohibited the entrance into Puget Sound of "supertankers," that is, tankers in excess of 125,000 DWT.[193] Six Justices believed that the size limitation conflicted with the traffic control provisions of title I and with the design authority of title II of the PWSA.[194]

Despite the traditional rule that state exercise of police power will not be found preempted unless the "intention of Congress to

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190 *Id.* 91.

191 *Id.* 11.

192 *Id.* 12.

193 WASH. REV. CODE ANN. § 88.16.190(1) (Supp. 1977).

194 435 U.S. at 174-78.

exclude States [is] . . . clearly manifested," [195] the Court inferred that Congress intended to occupy the field of size limitations under title I of the PWSA. Justice White reasoned that section 1222 (b), "by permitting the State to impose higher equipment or safety standards 'for structures only,' impliedly forbids higher state standards for vessels." [196] Federal authority had been exercised in the field of "safety standards" only to the extent that the Coast Guard had imposed a rule of passage for the strait leading to Puget Sound.[197] The Court held that since state standards were stricter than this federal standard, the Tanker Law size limitation was preempted.[198] Perhaps recognizing the weakness of this reasoning, the Court fell back on the alternative argument that a size limit is arguably "similar to or indistinguishable from a design requirement," [199] thus importing its arguments from that section. On either ground, the Court had returned to what amounts to a potential conflict standard.

Finally, the Court held that the Tanker Law size limitation conflicted with title II design authority because the federal agency had not promulgated any size limitations.[200] This " 'failure . . . to exercise . . . full authority takes on the character of a ruling that no such regulation is appropriate or approved . . .'." [201] This reasoning is inconsistent with that adopted by the majority regarding the validity of the tug escort requirement. There the state regulation was upheld because the federal agency had not exercised its rulemaking authority.[202] Again the Court applied pervasiveness and conflict standards at odds with those employed earlier in its opinion.[203]

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[195] Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926).

[196] 435 U.S. at 174.

[197] The rule prohibited passage of more than one 70,000 DWT tanker through the strait in either direction at any given time; during certain weather conditions the DWT limit is reduced to 40,000. *Id.* Underlying the Court's Title I argument is the assumption that federal authority to set safety standards had been pervasively exercised.

[198] *Id.* 175. Justices Marshall, Brennan and Rehnquist dissented and argued that an actual conflict standard should have been applied, and that the Secretary's rule was not broad enough to constitute pervasive exercise of federal authority. *Id.* 181-85.

[199] *Id.* 175.

[200] *Id.* 178.

[201] *Id.* (quoting Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774 (1947)).

[202] *See id.* 172.

[203] The absence of federal size limitations led the court to conclude that federal authority was preeminant in the size limitation field, while the presence of comprehensive federal control in the case of design standards supported its pervasiveness finding. *See* note 164 *supra* & accompanying text.

No design or traffic system provision of the PWSA expressly excludes the states from enacting size limitations for their harbors,[204] and the Court's opinion is consistent with the proposed approach in this regard.

The Court should, however, have acknowledged that no title II design standard was manifestly incompatible with Washington's supertanker ban. Nor was there an impossibility of dual compliance with the federal "local navigation rule." The rule only prohibits passage of more than one 70,000 DWT vessel through the strait leading to Puget Sound at any given time; during certain weather conditions the DWT limit is reduced to 40,000.[205] Compliance with the supertanker ban would not lead to a violation of the federal rule. The real issue was whether the federal government occupied the field to the exclusion of this state requirement.

As in the case of federal design standards,[206] the exercise of federal authority hardly seems complex or comprehensive enough to warrant a finding of pervasive federal control in the field of tanker size regulation. The federal local navigation rule only applied to Rosario Strait and not to Puget Sound as a whole. The title II design requirements did not explicate size standards and hence could not alone stand as an all-encompassing framework. There was, however, the difficult pervasiveness question whether the federal enrollment and licensing scheme constituted a complex, comprehensive control of coastwise shipping that should preempt states from prohibiting harbor entry to classes of tankers. Pursuant to the rule articulated in *Douglas v. Seacoast Products, Inc.*,[207] the validity of the Washington size limitation would turn on whether it was a "reasonable" environmental protection measure.

Establishing "reasonableness" would have led the court into application of the dominance standard. The Court should have decided openly whether the depth and configuration of Puget Sound

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[204] *See* 33 U.S.C. § 1221(3)(iv) (Supp. V 1975); 46 U.S.C. § 391a(1) (Supp. V 1975). States are allowed, under the statute, to establish higher safety equipment requirements "for [land] structures only." 33 U.S.C. § 1222(b) (Supp. V 1975). The Secretary is authorized to promulgate "minimum design standards." 46 U.S.C. § 391a (Supp. V 1975). In the absence of a provision expressly excluding state authority, no inference of intention to preempt should be drawn. *See* text accompanying notes 25-29 *supra.*

[205] 435 U.S. at 174.

[206] *See* text accompanying notes 178-79 *supra.*

[207] 431 U.S. 265, 277 (1977). *Douglas* held certain Virginia laws prohibiting commercial fishing in Virginia by non-residents to be preempted by federal law. At the same time, however, the Court reaffirmed the permissibility of reasonable regulations otherwise within the state's police power. *Id.* 286-87.

or the relative safety of supertankers could stand as a reasonable basis for excluding tankers in excess of 125,000 DWT.[208]

In addition to the federal interest in importation of the least expensive crude oil,[209] the federal policy of stimulating supertanker construction was also involved.[210] A finding that the size limitation tended to "Balkanize" tanker regulation would further weigh in favor of federal interests. These and other international and domestic federal interests should have been balanced against the benefits provided by the size limitation to establish whether the need for uniform national size standards warranted the preemption of the Washington size limitation. The balancing of these interests is admittedly a difficult and sensitive task. Nevertheless, it should have been undertaken frankly, without being hidden behind inconclusive statutory language and legislative history.

V. CONCLUSION

In *Ray v. Atlantic Richfield Co.*[211] the Supreme Court analyzed the extent to which provisions of Washington's Tanker Law were in conflict or incompatible with the legitimate exercise of federal authority. The unpredictable manner in which the Court applied principles of preemption doctrine is symptomatic of the type of preemption analysis used by the federal judiciary. By relying largely on alleged conflicts with congressional intent, where none was clear, the Court failed to explicate a convincing basis for finding that Congress had preempted state regulations limiting tanker size and design.[212] The Court's analysis provides little guid-

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[208] There appears to be a good faith dispute as to whether supertankers are greater risks to the environment than tankers smaller than 125,000 DWT. *See* 435 U.S. at 176 n.27.

It would appear that Alaska prefers supertankers. *See generally* Tank Vessel Traffic Regulation Act, ALASKA STAT. § 30.20.010-.060 (1977).

The Senate Commerce Committee hearings on the PWSA indicated that, while a small tanker can come to a "crash stop" in one-half of a mile in five minutes, it takes a 200,000 DWT tanker two and one-half miles and over twenty minutes. Furthermore, during such "crash stops," the vessel cannot be adequately steered. It was reported that the propulsion on a 250,000 DWT tanker is equivalent to that of a one-third horsepower motor on a forty-foot boat. S. REP., *supra* note 136, at 18, [1972] U.S. CODE CONG. & AD. NEWS at 2778.

[209] *See* 435 U.S. at 189 n.9 (Marshall, J., dissenting).

[210] As of January 31, 1976, approximately $197 million had been expended for the construction of supertankers under the Construction Differential Subsidy Program of the Merchant Marine Act, 46 U.S.C. §§ 1151-1161 (1970). An additional $314 million is under contract. Brief for the United States as Amicus Curiae at 42 n.43, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[211] 435 U.S. 151 (1978).

[212] *See* text accompanying notes 176-79 & 205-10 *supra*.

ance to state legislatures that desire to optimize environmental protection without impinging on substantial federal interests.

Nevertheless, a consistent and predictable method of preemption analysis is possible within the environmental context. Federal environmental policy is committed to comprehensive environmental protection through cooperative regulation with the states.[213] In light of this policy and the presumed validity of the exercise of traditional state police powers,[214] it is sensible to treat federal environmental standards as minimum standards and presume the validity of stricter state regulations.[215] The unified method of preemption analysis proposed in this Comment[216] combines these presumptions with a sequential application of traditional preemption principles. First, the court applies the express preemption principle: it inquires whether a federal statute expressly excludes state regulation and vests in the federal government sole authority to regulate the environmental sub-field.[217] If the state legislation survives the first test the court applies the conflict principle: [218] it inquires whether a party subject to regulation under both regulatory schemes is subject to the "impossibility of dual compliance." [219] If dual compliance is possible, the court moves to the third step and applies the occupation of the field principle.[220] The court first inquires whether federal regulation of the environmental sub-field is pervasive. Such a finding is possible if the federal government has established a complex scheme of rule promulgation, implementation and enforcement covering all aspects of the subfield.[221] If regulation is not pervasive, the court should next inquire whether the federal interests dominate the specific area so as to exclude state regulation.[222] This entails a conscientious itemization of the federal interests adversely affected by the state regulation and the interests peculiar to the state which are served by it. The court should evaluate the relative strength of these interests and determine if i) the federal interests have national significance, ii) the federal interests clearly predominate over those served by

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213 *See* text accompanying notes 64-78 *supra.*

214 *See* text accompanying notes 97-100 *supra.*

215 *See* text accompanying notes 103-04 *supra.*

216 *See* text accompanying notes 96-122 *supra.*

217 *See* text accompanying notes 105-07 *supra.*

218 *See* text accompanying notes 108-13 supra.

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

220 *See* text accompanying notes 115-22 *supra.*

221 *See* text accompanying note 117 *supra.*

222 *See* text accompanying note 119 *supra.*

the state legislation, and iii) the nature of federal involvement in the field requires uniform standards.

State environmental legislation that survives application of express preemption, conflict and occupation of the field principles should be held not preempted by the exercise of federal authority. Such legislation will protect local interests as defined by the state without impinging upon the effectiveness of the federal government.

If the courts were to employ a method of preemption analysis such as that outlined above, preemption analysis would be considerably more rational and predictable. In the environmental context, this should contribute to the achievement of optimum protection of both federal and state interests. Moreover, it should improve the often uneasy relationship between the states and the federal government.