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Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation

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I. INTRODUCTION

THE Occupational Safety and Health Act[1] (OSH Act) and regulations issued by the Occupational Safety and Health Administration (OSHA) have been the basis of preemption challenges[2] to state environmental statutes that address the dangers of pollution and exposure to toxic substances.[3] The state statutes and regulations are claimed constitutionally defective because, either directly or indirectly, they regulate occupational safety and health in the workplace, a field reserved for exclusive federal regulation by judicial interpretation of the OSH Act.[4]

The challenged state environmental statutes attempt to regulate toxic substances and dangerous practices that expose the citizenry to environmental and health hazards. Because such harmful substances and practices often are created or exist in manufacturing workplaces, the states' efforts frequently intrude into the field already occupied by Congress through the OSH Act[5] and OSHA regulations.[6] The problem states face is compounded by broad judicial interpretation of "occupation of the field" preemption. Based on the concept that the OSH

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1. 29 U.S.C. §§ 651-678 (1988).

2. These challenges have been based on the *Supremacy Clause*. U.S. CONST. art. VI.

3. *See infra* notes 28-43 and accompanying text.

4. *See infra* notes 58-76 and accompanying text.

5. As early as 1974, it was asserted that the "enactment of the federal Occupational Safety and Health Act of 1970 . . . had preempted the field of employee health and safety." Columbus Coated Fabrics v. Industrial Comm'n of Ohio, 498 F.2d 408 (6th Cir. 1974). The states' intrusion may be incidental, as part of a general directive or restriction, or it may be direct, as an attempt to correct a perilous practice or control the handling of a dangerous substance.

6. *See, e.g.*, 29 C.F.R. § 1910.1000 (1993) (listing the substances subject to regulation by OSHA). The content of the list makes obvious why a state regulation attempting to protect its citizens' risk of exposure to toxic chemicals would tend to coincide with OSHA regulations. *See also infra* notes 19-27 and accompanying text.

Act represents a political "compromise" among the legislators to impose the "right" amount of regulation, courts have preempted nonconflicting coincidental state regulations whether or not they actually conflict with the OSH Act.[7]

This Article explores the underpinnings of the judicial conceptualization of preemption from a traditional approach and from a law and economics or public choice point of view. It finds that neither the former's "deliberative" view of the legislative process nor the latter's concept of a "political bargain" among legislators and discrete minorities supports many courts' reasoning.[8] As a result of the current judicial approaches, the OSH Act's preemption has the potential to severely limit the states' ability to exercise police powers in the environmental arena. Recently, the United States Supreme Court afforded states some relief in several cases that appeared to represent a swing toward upholding state regulation unless there exists clear conflict with federal law.[9] Responding to this perceived relaxation of the preemption analysis, federal appellate courts developed several "purpose based tests" and at least one "policy based test" to uphold state environmental statutes regulating some activity already controlled by OSHA under the OSH Act.[10] However, in the most recent United States Supreme Court case construing the OSH Act's preemptive effect, *Gade v. National Solid Wastes Management Ass'n*, the Court rejected the purpose tests and offered a preemption analysis based on the "impact" of a state statute on the federal regulatory scheme.[11]

Gade illustrates the unsettled state of the preemption doctrine. The justices in the plurality were unable to agree as to whether the OSH Act expressly or impliedly preempted the Illinois statutes involved. Indeed, the Court was split 5-to-4 as to whether these statutes were preempted at all. Prior to *Gade*, the preemption doctrine in environmental cases faced criticism. Judges were accused of applying

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7. *See infra* notes 151-179 and accompanying text.

8. It is important to distinguish the legislative bargain predicted by public choice theory from the concept of a political compromise that the courts have applied. The traditional myth of the "political compromise" is based on the existence of a collective intent to enact a particular piece of legislation that represents agreement among legislators as to how the public is best served. Public choice explains legislative results as the bargain that results in the interplay between legislators responding out of their self-interest in getting reelected and discrete minorities exercising their political buying power to obtain beneficial "rentseeking" legislation. *See infra* notes 151-179 and accompanying text.

9. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 220-23 (1983) (noting that courts should not seek out conflict where none existed); Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (requiring "irreconcilable" conflict to preempt); *see also* José L. Fernandez, *The Purpose Test: Shielding State Environmental Statutes from the Sword of Preemption*, 41 SYRACUSE L. REV. 1201, 1203 n.11 (1990).

10. *See* Fernandez, *supra* note 9, at 1203; *see also infra* notes 77-107 and accompanying text.

11. 112 S. Ct. 2374 (1992).

the doctrine to obtain desired results. As one commentator stated, "[a]t times the courts have applied preemption doctrines broadly to invalidate certain state laws, while at other times they dig deeply and search for an avenue by which the state environmental regulation may be saved. . . . [T]raditional tests are 'constantly challenged to meet the changing moral climate of the nation.'"[12]

Recently, Professor William Eskridge offered a "dynamic" statutory interpretation analysis based on applying current societal values to interpret statutes that are textually ambiguous or present a conflict between their legislative history and the results of their text.[13] Where statutory ambiguity exists, Eskridge argues that interpreting the statute in harmony with present-day values would advance the public's interest.[14] This Article recognizes that the OSH Act lacks an express preemption provision and urges the application of a "dynamic purpose" approach as developed herein to interpret the OSH Act's scope of implied preemption. Further, this Article calls for rejection of the "occupation of the field" standard as the basis for preemption analysis. Instead, this Article advances an analysis whereby implied preemption would depend on whether the state regulation presents an obstacle or actual conflict to the "dynamic" statutory purpose of a federal act. The Article notes that some federal statutes, by the plain language of their statements of purpose, indicate the need for a changing or dynamic level of regulation. These "dynamic purpose" statutes are particularly appropriate for rejecting the traditional judicial search for the mindset of the original legislators. Specifically, application of the dynamic purpose method to the OSH Act may be useful to determine the scope of implied preemptive intent that should be imputed to Congress. Finally, the Article demonstrates that limiting the scope of implied preemption will better allow the states to carry out their role as laboratories of legislative experimentation and to safeguard the states' efficient exercise of police power.

II. THE PROBLEM

The OSH Act regulates the occupational safety and health field through regulations or "standards" issued by OSHA, and through the

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12. James E. Preston, *The Environmental Shell Game in the Green Mountains: Is Vermont's CFC Law Hidden Under Federal Preemption, the Commerce Clause or Vermont's Police Powers?*, 41 SYRACUSE L. REV. 1251, 1255 (1990).

13. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (urging that statutes be interpreted "dynamically," that is, "in light of their present societal, political and legal context"); *see also* RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

14. *See* Eskridge, *supra* note 13, at 1481.

OSH Act's "general duty clause."[15] Practices and methods regulated by OSHA include "protective measures" such as warnings, protective equipment and medical examinations.[16] In addition, OSHA may adopt temporary emergency standards.[17] The "general duty" clause imposes an obligation on employers to keep the workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[18]

Even a superficial review of the scope of OSHA regulations promulgated in response to the OSH Act's mandate illustrates the broad scope of possible friction between the federal scheme and state efforts to regulate in the environmental arena.[19] Under section 1900 of the OSHA regulations, conflict may arise from the regulation of air pollutants,[20] noise,[21] exposure to radiation,[22] regulation of hazardous materials in general,[23] handling of hazardous wastes,[24] the adoption of emergency response procedures including fire preplanning,[25] chemical labeling[26] and the regulation of particular toxic chemical substances.[27] Even these broad areas, however, do not detail a comprehensive list of possible friction between states and the federal government. The opportunity for conflict between state laws and OSHA regulations depends on how broadly courts interpret the OSHA provisions and on the many types of regulations a state may enact to protect its citizens from environmental and health hazards.

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15. An OSHA standard "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (1988).

16. *Id.* § 655(b)(7).

17. 29 U.S.C. § 655(c) (1988) (requiring a finding that employees are exposed to grave danger).

18. 29 U.S.C. § 654(a)(1) (1988).

19. This Article treats the terms "environment" and "environmental" to include broad aspects of the natural and human environment. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370, 4331(a) (1969).

20. *See* 29 C.F.R. § 1910.1000 (1993) (exposure to air contaminants); *id.* § 1910.1001 (permissible asbestos exposure limits); *id.* § 1910.94 (ventilation); *id.* § 1915.32-.36 (cleaning solvents, paint removers, painting, and the use of flammable and chemical liquids in surface preparation for painting); *id.* § 1915.51 (ventilation when welding, cutting and heating).

21. *Id.* § 1910.95 (occupational noise exposure).

22. *Id.* § 1910.96(e) (packaging of radioactive materials); *id.* § 1910.96(j) (storage of radioactive materials).

23. *Id.* §§ 1910.101-119 (regulating the use and storage of gases, flammable liquids, explosives, liquified petroleum).

24. 29 C.F.R. § 1910.120(b)(1)(iv) (operations by contractors and subcontractors); *id.* § 1910.120(k) (decontamination procedures); *id.* § 1910.120(j) (hazardous waste containers); *id.* § 1910.120(e) (training of employees exposed to hazardous substances).

25. *See id.* § 1910.155-.165.

26. *See id.* § 1910.1200 (OSHA's hazard communication standard).

27. *See id.* § 1910.1000 subpart Z.

One thing is certain, a significant number of OSH Act preemption challenges to state environmental provisions have already occurred.[28] Cases have included challenges to regulation of hazardous waste sites,[29] tort liability standards,[30] oil refinery pressure vessels,[31] licensing and training of asbestos removal workers,[32] control over chemical container labeling,[33] asbestos removal regulation,[34] chemical labeling,[35] toxic chemical labeling and distribution,[36] toxic hazard disclosure,[37] closing of a dangerous industrial plant,[38] supervision of testing laboratories,[39] right to bring a state damage claim against asbestos manufac-

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28. The conflict between federal regulation and state environmental statutes is not limited to those cases involving the OSH Act. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (interstate movement of waste); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (oil tanker regulation); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (airport noise pollution); Askew v. American Waterways, 411 U.S. 325 (1973) (no-fault liability for clean-up of oil spills); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (transportation of oil resources); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (Or. Ct. App. 1973) (clean-up of highways). *See also* Note, *Emasculating State Environmental Enforcement: The Supreme Court's Selective Adoption of the Preemption Doctrine*, 16 WM. & MARY J. ENVTL. L. 31, 34 (1991) ("Since 1976, the Court has diluted, subverted, and finally reversed the previously prevailing presumption against preemption of state environmental laws.").

29. *See* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992) (holding Illinois law regulating hazardous waste-site operators and workers preempted by the OSH Act).

30. Pedraza v. Shell Oil Co., 942 F.2d 48 (1st Cir. 1991) (holding OSHA provisions did not preempt state tort action for workplace exposure to epichlorohydrin), *cert. denied*, 112 S. Ct. 993 (1992); Schweiss v. Chrysler Motors Corp., 922 F.2d 473 (8th Cir. 1990) (holding that OSHA provisions did not preempt state tort action for wrongful discharge of whistleblowing employee).

31. Sun Ref. & Mktg. Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) (appealing district court's finding that OSHA preempted Ohio's regulation of unfired pressure vessels at petroleum refineries).

32. Associated Indus. of Mass. v. Snow, 898 F.2d 274 (1st Cir. 1990) (holding that OSHA did not preempt state's asbestos abatement statute and regulations).

33. New Jersey Chamber of Commerce v. Hughey, 868 F.2d 621 (3d Cir.) (holding New Jersey Worker and Community Right to Know Act container labeling provisions not preempted by OSHA), *cert. denied*, 492 U.S. 920 (1989).

34. Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48 (2d Cir. 1988) (holding that OSHA regulations on asbestos exposure levels and employee training requirements preempted city's respiratory protection and medical surveillance requirements).

35. Ohio Mfrs. Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986) (holding city's "right to know" ordinance preempted by OSHA hazard communication standard), *cert. denied*, 484 U.S. 801 (1987).

36. Manufactures Ass'n of Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986) (holding that certain schemes of state "right to know" act were preempted as to employees in manufacturing sector), *cert. denied*, 484 U.S. 815 (1987).

37. West Virginia Mfrs. Assoc. v. West Virginia, 714 F.2d 308 (4th Cir. 1983) (holding that Act did not preempt state statute requiring employers to disclose to employees hazards of exposure to toxic chemicals).

38. Columbus Coated Fabrics v. Industrial Comm'n of Ohio, 498 F.2d 408 (6th Cir. 1974) (appeal from district court's finding that OSHA preemption of state law prevented commission from holding hearing to determine whether plant presented danger to employees and frequenters).

39. Dash, Straus & Goodhue, Inc. v. City of Chicago, No. 90-C-2305, 1991 WL 171269

turers for the costs of removal from public schools,[40] employee injury reporting requirements,[41] and criminal prosecution of corporate polluters.[42] As states attempt to remedy perceived inadequacies of federal environmental protection laws, and as more areas of concern particular to a state are discovered, the potential for conflict between the OSH Act and state legislation will increase.[43]

III. PREEMPTION

Judicial tests for preemption accommodate several basic principles of federalism, including the supremacy of the federal Constitution, statutes, and regulations over state laws,[44] and the fact that states reserve the balance of legislative power through the Tenth Amendment.[45] In addition, courts must address the need to preserve a state's role as guardian of the citizenry through the exercise of state police power. By determining the fate of state legislation in preemption cases, courts allocate legislative power between state and federal government in what is primarily a political exercise. In the settlement of the resulting political tussles, the test courts have applied is far from a precise jurisprudential tool. The resulting uncertainty is most severe in instances of implied preemption, where cases demonstrate that courts

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(N.D. Ill. Aug. 27, 1991) (preempting in part the city's code testing laboratories provision imposing requirements for the sale of electrical appliances and electrical equipment in Chicago).

40. Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990) (finding school district's state claim for reimbursement of asbestos removal costs not preempted by OSHA regulations).

41. P & Z Co. v. District of Columbia, 408 A.2d 1249 (D.C. 1979) (holding OSHA regulations did not preempt the Washington, D.C. Industrial Safety Act).

42. People v. Pymm, 563 N.E.2d 1 (N.Y. 1990) (concluding that New York's ability to prosecute corporate actors for mercury contamination of the workplace not preempted), *cert. denied*, 498 U.S. 1085 (1991).

43. As Judge Cudahy stated: "In recent years, popular concern about the environment has spurred legislators at all levels of government to enact laws aimed at abating existing pollution. . . . The resulting patchwork of legislation and regulation . . . has repeatedly generated issues of federal preemption of state and local laws." National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 673 (7th Cir. 1990), *aff'd sub nom.* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 374 (1992).

44.

> 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.

U.S. CONST. art. VI.

45. "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.

may treat the same situation as one of "conflict" or "occupation of the field."[46]

The politically conservative majority of the United States Supreme Court would presumably shield states from too great an intrusion from the federal government in the running of state affairs.[47] However, the cases illustrate that conservatives may support greater federal control if the states are perceived as founts of activist legislation on a particular regulatory subject.[48] Consequently, the Court's preemption decisions may be categorized into two types with different outcomes. First, the federal intrusion may be directed at a state's governmental power, where a high standard of conflict will be required before the Court finds preemption of a state act that directly involves the operation of local government. Second, the federal limit may be applied to curtail a state's regulatory power in a particular area of activity. In these instances, depending on the subject matter, the Court may need to find only a slight conflict before finding preemption. The Court's willingness to restrict states in regulatory areas is evidenced by the fact that Justice O'Connor, "the Court's most assertive advocate of federalism,"[49] is the author of the plurality decision in *Gade*. The fluctuation of the rigidity in applying the preemption test is troublesome because it opens the Court to accusations of legislating from the bench and of "deciding for results."[50]

The remainder of this section will review the traditional preemption tests and the different purpose-based tests that courts have developed. This section also details the problems associated with these tests and

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46. The Court, "in considering the validity of state laws . . . touching the same subject [as the federal law], has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

47. The political nature of the preemption analysis of the current Court members has been noted. *See* Charles Rothfeld, *Federalism in a Conservative Supreme Court*, PUBLIUS, Summer 1992, 21, 30 (1992) ("Any reflection [of the conservative majority's lack of interest in protecting state autonomy] in the Court's decisions likely will occur in preemption cases, which involve assertions of state regulatory authority."). Rothfeld notes that despite the Court's conservative character, under the Court's preemption analysis it is hard to predict a uniform trend of when the Court will either preempt or bow to the states. He states that the current majority displays:

> increased willingness to preclude federal interference with, or direct regulation of, state and local governments. It remains an open question, however, whether the Court will understand federalism principles to protect state regulatory efforts as well as state governments themselves . . . when the beneficiaries of its rulings include those who are turning to state governments as bastions of government activism.

Id. at 21-22.

48. *Id.* at 30.

49. *Id.* at 23; *see* Gregory v. Ashcroft, 501 U.S. 452 (1991) (O'Connor, J., dissenting) (encouraging the use of states as laboratories for experimentation).

50. *See supra* note 47, at 21.

how courts have responded to these difficulties in recent decisions and modes of analysis.

A. *Express Preemption*

It is axiomatic that once Congress has legislated on a subject within its constitutional powers a state may not stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[51] The "purposes and objectives of Congress" may be expressed in the language of the statute, put forth in its subject matter, or implied by the character and language of the act or federal regulation. When Congress' intent to preempt is expressed, determining the fate of a conflicting state act is a relatively simple task involving statutory language interpretation.

B. *Conflict Preemption*

When the intent of Congress is not expressed, however, preemption must then be decided by implication. Because congressional acts must be imbued with the intent to bring to fruition the substance of the act, any state law which conflicts with the achievement of the federal goal must yield. First, such conflict may be direct, as when a state allows what Congress forbids or forbids what Congress allows.[52] Second, the conflict may be indirect, as when a state's attempt to regulate an area not covered by a federal act nevertheless raises obstacles that make the federal goal impossible.[53] Third, a state may not significantly interfere with the operation of a federal regulatory scheme.[54] Such interference occurs when a state, through the effect of its regulations or laws, discourages compliance with a federal act.[55] Fourth, there is jurisprudential-conflict preemption, where Congress expressly, or impliedly through occupying a field of regulation, evinces an intent to reserve a regulatory area for exclusive federal control.[56] Because of the broad scope of federal regulation, jurisprudential-conflict preemption has rapidly become the developing norm.[57]

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51. Hines v. Davidowitz, 312 U.S. 52, 67 (1940); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

52. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

53. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-45 (1963).

54. English v. General Elec. Co., 496 U.S. 72, 79 (1990).

55. *Id.*

56. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

57. Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. REV. 515, 519. Hirsch notes that preemption conflict-based problems are pervasive, having developed over the "entire range of federal regulation." He notes that the fields include labor law, maritime law, agricultural marketing, quarantine, sedition, alien registration, patents, governmental procurement and state taxation and regulation of federal contracts. *Id.* at 516.

C. *Jurisprudential-Conflict Preemption*

The Court has established the principle that "when Congress acts upon [a] . . . subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority."[58] In those instances where Congress expresses its intent to exclude states from an area of regulation, Congress reduces the role of courts to defining the scope of the federal act. However, in cases where congressional intent is not clearly voiced, courts may explore the federal regulatory scheme to detect whether the federal legislation "occupies a field" of regulation.[59] Once a court finds that a field is occupied, it will formalistically infer a congressional intent to preempt all state legislation in that field.[60]

Courts predicate the congressional intent to occupy a field upon a finding that it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated.[61] However, there are no clear or objective standards for the Court to apply when inferring such a "clear and manifest purpose." In *Rice v. Santa Fe Elevator Corp.*,[62] the Court tried to explain the inquiry:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[63]

Supplanting these concerns is the need for national uniformity to avoid unduly burdening interstate commerce.[64] The *Rice* test, how-

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58. New York Cent. R.R. v. Winfield, 244 U.S. 147, 148 (1917).

59. Implied field preemption analysis, however, is indistinguishable from conflict preemption analysis. As Justice Souter stated, "[a]lthough we have chosen to use the term 'conflict' preemption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field' for any nonapproved state law regulating the same safety and health issue." Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2386 n.2 (1992); *see also* English v. General Elec. Co., 496 U.S. 72, 79-80 n.5 (1990).

60. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984).

61. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963).

62. 331 U.S. 218 (1947).

63. *Id.* at 230.

64. *See* New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917). This is a case of occupation of a field because it affects "matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line." *Id.* at 149.

ever, explains little. It fails to provide a list of factors that courts can balance in determining just how pervasive a particular scheme may be, or how dominant the federal interest may be in a particular field.[65] As a result, the courts have exercised great latitude in deciding whether a field of activity is "occupied," and the test can become a subjective inquiry as to whether the state initiative should be preempted.[66]

Field preemption analysis equates congressional regulation in a field with the intent to exclude state laws even if the state legislation seems to advance or complement the congressional purpose. In striking state regulation that supplements a federal statutory goal, the Court has relied on the myth that federal statutes represent an underlying political compromise to legislate "to a point no further."[67] Accordingly, there is no need for evidence of actual conflict. It is enough to demonstrate that the state law has an impact or effect on the federally occupied field.[68]

The development of this formulation can be traced to cases involving the desire to avoid the Balkanization of commercial regulation to safeguard the uninterrupted flow of commerce. In these early cases the Court executed a perceived congressional intent to insure that "the controlling law [regulating commerce] should be uniform and not change at every state line."[69] Consequently, any state laws regulating in the federally occupied field, regardless of whether they conflicted or complemented federal law regulating commerce, were preempted

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65. Indeed, a basis for dissent has been that the Court has failed to show the existence of particular factors required for occupying a field. *See* Pennsylvania v. Nelson, 350 U.S. 497, 515 (1956) (Reed, J., dissenting) (asserting that the majority was incorrect in finding occupation of a field without demonstrating that congressional regulation is pervasive in the field).

66. The United States Supreme Court has been accused of letting its interpretation of a state statute have greater import than the "metaphorical sign-language of 'occupation of the field.'" *See* Roger C. Crampton, *Pennsylvania v. Nelson: A Case Study in Federal Pre-emption*, 26 U. CHI. L. REV. 85, 87 (1958).

There have been periods when the Court appeared to favor state interests and other periods when federal interests have been read expansively to preclude state regulation. *Compare* Charleston & W. Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915) (finding sufficient grounds for preemption where Congress had regulated in the same subject area) *with* Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (requiring that the intent of Congress to occupy the field "definitely and clearly appear") *and* H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939) (requiring that congressional preemptive intent to occupy a field be "definitely expressed").

67. "[T]he legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618 (1842); *see also* Campbell v. Hussey, 368 U.S. 297, 301 (1961) (Congress "preempted the field and left no room for any supplementary state regulation concerning those same types.").

68. Capital Cities v. Crisp, 467 U.S. 691, 699 (1984).

69. For a list of preemption cases addressing interference with the flow and congressional regulation of interstate commerce, see New York Cent. R.R. v. Winfield, 244 U.S. 147, 148 n.2 (1917).

because they interfered with national uniformity.[70] This principle was mechanically extended to other areas of congressional regulation.[71] In cases involving the OSH Act, traditional preemption doctrine bans any complementary state regulation that increases worker safety and health on grounds that it alters the balance struck by Congress. As the Article will explain later, however, the belief that there exists a collective intent behind the OSH Act which would be offended by increased worker protection is mistaken.[72]

The draconian character of field preemption has not gone unchallenged, especially in light of criticism from members of the Court regarding the increasing tendency to conclude that Congress intended to exclude all state regulation regardless of actual conflict with federal provisions.[73] Justice Brandeis, for example, argued that the mere fact that Congress occupied a limited field of regulation does not lead to the conclusion that Congress intended to exclude all state legislation on the same subject:

> [T]he intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit . . . to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.[74]

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70. As stated in *Winfield*:

> [I]t cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.

Id. at 153 (quoting Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 617 (1842)); *see also* Missouri Pac. R.R. v. Porter, 273 U.S. 341, 346 (1927) (state laws "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.").

71. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941) (concluding that the registration of aliens is a federally occupied field).

72. Even if complementary to the federal law's stated purpose, the state act will not survive under traditional preemption analysis. *See infra* notes 204-205 and accompanying text.

73. New York Cent. R.R. v. Winfield, 244 U.S. 147, 155 (1917) (Brandeis, J., dissenting); *see also* Hines v. Davidowitz, 312 U.S. 52, 78-89 (1941) (Stone, J., dissenting) (arguing that the intent to exclude the state should be expressed by Congress or the Court should find a conflict with the federal law; "Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation.").

74. *See Winfield*, 244 U.S. at 155.

Other justices have voiced similar concerns, arguing that the intent to exclude the states from an entire field should be supported by the congressional language in the act or a finding of actual conflict.[75] Indeed, it was partly in response to this restrictive effect of field preemption that courts developed a new type of preemption test based on comparing the purposes of the federal and state regulation.[76]

D. The Purpose Tests

Cases involving occupation of the field present a special problem to states because of the wide prohibition inherent in closing an entire field of regulation to state initiatives. This problem is compounded in the environmental arena because of the broadness of the issues. Some courts, in trying to accommodate state regulation of environmental or general safety and health issues, have developed implied preemption tests based on comparing the legislative purposes of federal and state acts. Under such tests, upon discerning that the purpose of a state act is not the direct regulation of occupational safety and health, courts have permitted the state regulation to stand if it does not otherwise conflict with the federal scheme of regulation. These purpose-based tests, however, have not been universally well received.[77]

A purpose test for implied preemption has surfaced in at least three variants: the "primary purpose test,"[78] the "substantial purpose test"[79] and the "purpose and effect test."[80]

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75. *See* Pennsylvania v. Nelson, 350 U.S. 497, 514 (1956) (Reed, J., dissenting) ("[T]his Court should not void state legislation without a clear mandate from Congress."); *Hines*, 312 U.S. at 78-79 (Stone, J., dissenting).

With regard to a possible conflict between state and federal regulation, Justice Reed admonishes, "[m]ere fear by courts of possible difficulties does not seem to us in these circumstances a valid reason for ousting a State from exercise of its police power. Those are matters for legislative determination." *Nelson*, 350 U.S. at 519 (Reed, J., dissenting); *see also* Campbell v. Hussey, 368 U.S. 297, 307-08 (1961) (Black, J., dissenting) (evidence of clear and manifest congressional intent is necessary "to justify a finding of a Congressional intent to preempt merely complimentary legislation").

76. As Lawrence Tribe noted, the Court's application of the preemption test appeared to be "softening" in instances where the states were regulating areas of particular state interest. Lawrence H. Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 687 (1979); *see also* Note, *The Preemption Doctrine: Shifting Perceptions on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

77. A principal objection to the purpose tests is that they allow a state to avoid preemption merely by stating a non-conflicting legislative purpose. Critics of the purpose-based tests insist that the courts must look at the effect that the state regulation has on the federal regulatory scheme. *See infra* notes 204-08 and accompanying text.

78. New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985), *cert. denied*, 492 U.S. 920 (1989).

79. Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 57 (2d Cir. 1988).

80. Associated Indus. of Mass. v. Snow, 898 F.2d 274 (1st Cir. 1990).

1. The Primary Purpose Test

The primary purpose test developed in a series of cases within the Third Circuit Court of Appeals' jurisdiction involving New Jersey and Pennsylvania statutes governing the labeling of chemical substances. Since the state acts provided for the labeling of chemicals in the workplace and marketplace, they shared jurisdiction with an OSHA regulation called the hazard communication standard.[81]

In *New Jersey State Chamber of Commerce v. Hughey*,[82] the New Jersey Chemical Right to Know Act was the first to be challenged by the OSHA standard. The district court in *Hughey* held that the state act was expressly preempted. On appeal, however, the circuit court found that some of the labeling provisions and other portions of the statute were not expressly preempted, and remanded for evidentiary findings as to possible implied preemption.[83]

While the district court was conducting these hearings on remand, the United States Court of Appeals for the Third Circuit decided *Manufacturers Ass'n of Tri-County v. Knepper*,[84] which challenged Pennsylvania's chemical labeling statute. In *Knepper*, the district court held that provisions of the state act imposing a labeling obligation on "suppliers" and "employers" were preempted by the OSHA standard to the extent they required either suppliers or manufacturing employers to label containers.[85] On appeal, the court issued a mixed decision. It affirmed the district court's finding of express preemption as to most of the act, including those provisions that attempted to impose labeling obligations on employers.[86] The court also held, however, that the labeling provisions addressed to suppliers were not preempted since the OSH Act's regulation of employers did not occupy the field regulating suppliers.[87] In its analysis, the appellate court relied on its earlier ruling in *Hughey*:

> In *Hughey* . . . [w]e held that because the primary purpose of the workplace hazard surveys [a provision of the New Jersey act] was the promotion of occupational health and safety through hazard communication, . . . [that section of the act] was preempted by OSHA . . . . However, because we found that the environmental

81. 29 C.F.R. § 1910.1200 (1989).
82. 774 F.2d 587 (3d Cir. 1985).
83. *Id.* at 596.
84. 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987).
85. Manufacturers Ass'n of Tri-County v. Knepper, 623 F. Supp. 1066 (M.D. Pa. 1985), *aff'd in part and rev'd in part*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987).
86. *Knepper*, 801 F.2d at 139.
87. *Id.*

> hazard surveys . . . had a different purpose, we held that the environmental hazard . . . provisions of the New Jersey Act were not preempted."[88]

The Third Circuit's message in *Knepper* to the district court considering *Hughey* on remand was that, under a primary purpose test, the issue was whether the purpose of the state act was to inform employees of workplace hazards, which was the OSHA standard's purpose.[89] When *Hughey* returned to the Third Circuit from evidentiary hearings, the court affirmed the district court's holding that the New Jersey statute's provisions considered on remand were not preempted, as they had a primary purpose other than the regulation of workplace hazards for the protection of employees.[90]

2. *The Substantial Purpose Test*

In *Environmental Encapsulating Corp. v. City of New York*,[91] the United States Court of Appeals for the Second Circuit decided an OSHA preemption challenge to New York City's asbestos abatement ordinance providing that workers handling friable asbestos must hold a city issued "asbestos handling certificate."[92] The Second Circuit rejected the Third Circuit's primary purpose test, adopting instead a "substantial purpose" test for preemption. The court noted that "[s]ection 18 [of the OSH Act] and the Revised Construction Standard . . . preclude[s] the City from promulgating an 'occupational safety or health standard' that relates to the issue of abatement workers' exposure to asbestos."[93] The city argued that the purpose of the ordinance was to control air pollution resulting from improperly handled asbestos, and that any effect on the OSHA preempted field of regulation—worker health and safety—was incidental.[94] The court explained that a purpose other than OSHA's may allow the ordinance to avoid preemption by the OSH Act: "[l]ocal legislation enacted for the sole purpose of protecting the public health would not, on its face, be preempted."[95] However, the court found that the city ordinance had a

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88. *Id.* at 137.
89. *See* Fernandez, *supra* note 9, at 1233.
90. New Jersey State Chamber of Commerce v. Hughey, 868 F.2d 621, 626 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989).
91. 855 F.2d 48 (2d Cir. 1988).
92. *Id.*
93. *Id.* at 55.
94. *Id.*
95. *Id.*

dual purpose: to protect public health from air pollution, and to "safeguard employee health and safety."[96] At this point the court refused to engage in exploring the legislative purposes behind the ordinance, as would be required under a "primary purpose" test, because this would lead the court "down an unmarked avenue of inquiry into legislative motive."[97] Instead, the court adopted a preemption test whereby those portions of the city's ordinance that had a substantial legitimate purpose apart from promoting occupational health and safety for employees at the workplace would survive.[98]

3. *A Purpose and Effects Test*

In *Associated Industries of Massachusetts v. Snow*,[99] the United States Court of Appeals for the First Circuit considered a challenge to Massachusetts' regulation of the asbestos removal industry. The court held that the state act regulating asbestos removal procedures was not preempted by the OSHA asbestos standard, noting that with the exception of provisions regarding respirators and employee health monitoring, there was acceptable interplay between the state's exercise of police powers and the federal government's regulation of occupational safety and health.[100] *Snow* acknowledged that a state's written intent alone would be inadequate to protect a state statute that regulated in a field Congress had reserved to itself.[101] The court looked to both the purpose and effect of the state law. If the general effect of the state law fell outside the occupied field and there was no conflict with the federal provision, then the court would hold the state law to be a law of general application with a permissible purpose rather than a conflicting one.[102] If, however, the effect of the state law fell primarily within the field of occupational safety and health, it would be preempted regardless of an alternative state purpose.[103]

Those challenging the state regulation in *Snow* claimed that Massachusetts was altering the balance of workplace concerns struck by the OSH Act.[104] The court rejected the political-balance argument, ruling that the state statute was not preempted merely because it enhanced

96. *Id.* at 56.
97. *Id.* at 57.
98. *Id.*
99. 898 F.2d 274 (1st Cir. 1990).
100. *Id.*
101. *Id.* at 278.
102. *Id.*
103. *Id.* at 279-80.
104. *Id.* at 282.

the protection of the public from exposure to asbestos.[105] In the absence of any conflict between the state and federal purposes, the court found no competing interests to be balanced and no preemption of the state regulation.[106]

In the implied preemption cases discussed above, Congress has been attributed the purpose of occupying a particular field of regulation. Rather than automatically preempting any state law that intrudes into the field, the courts have explored the state's legislative purpose to see if it contradicted an expressed or implied congressional purpose to exclude the state from this area of regulation. Only when the state's purpose was the same as the federal purpose would the court find weakness with the congressional claim of exclusive jurisdiction. The application of these tests effectively opened the doors for the states to oversee activity already regulated by OSHA, but for different reasons.[107] A state's environmental regulation could survive if it did not present an actual obstacle to the operation of the federal regulatory scheme. However, the door opened by the purpose tests did not remain open long.

E. Gade: *Closing The Door On The Purpose Tests*

In *Gade v. National Solid Wastes Management Ass'n*,[108] Illinois argued that two state statutes which licensed laborers and machine operators handling hazardous wastes were not preempted by the OSH Act.[109] The state asserted that preemption was inappropriate because the state laws did not conflict with the federal scheme and did not purport to regulate occupational safety and health in the manufacturing sector as a primary goal. In a 5-to-4 decision, the Court concluded the state regulations were impliedly preempted as conflicting with the full purposes and objectives of the OSH Act.[110] A plurality of the

105. *Id.* at 283.

106. *Id.*

107. *See* Fernandez, *supra* note 9, at 1201.

108. 112 S. Ct. 2374 (1992).

109. The Solid Wastes Management Association challenged Illinois' Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, ILL. REV. STAT. ch. 111, para. 7701-7717 (1989), and the Hazardous Waste Laborers Licensing Act, ILL. REV. STAT. ch. 111, para. 7801-7815 (1989), claiming that the state acts were preempted by regulations issued by the Occupational Health and Safety Administration pursuant to mandates in the Superfund Amendments and Reauthorization Act of 1986, which were designed "to promulgate standards for the health and safety protection of employees engaged in hazardous waste operations." 29 U.S.C. § 655 (1986).

110. The state acts expressed dual legislative purposes of promoting job safety and protecting "life limb and property." Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992).

Court, led by Justice O'Connor, warned that preemption should not rely solely on comparing legislative purposes because such a decision:

> would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law . . . [A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy clause."[111]

The plurality's test was based on the impact of state legislation on the federally occupied field, a field the Court described as the federal regulation of the workplace "to assure so far as possible every working man and woman in the Nation safe and healthy working conditions."[112] The Court further stated that field preemption exists "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[113]

In its analysis, the plurality repeated the Court's earlier statement that "[t]he purpose of Congress is the ultimate touchstone" in preemption, to be "discern[ed] . . . by examin[ing] the explicit statutory language and the structure and purpose of the statute."[114] However, the lack of an expressed congressional intent to preempt did not deter the ruling of preemption. The Court held that the preemptive effect of the OSH Act extends to coincidental legislation that attempts to advance the same goals as the OSH Act, because "Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counter-productive regulation."[115] The

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111. 112 S. Ct. at 2387 (quoting Perez v. Campbell, 402 U.S. 637, 651-52 (1971)). The Court also described the relationship between the purpose of the state law and the effect of the state law as a way of defining the preempted field: A "part of the preempted field is defined by reference to the purpose of the state law . . . another part of the field is defined by the state law's actual effect." *Id.* at 2386 (quoting English v. General Elec. Co., 496 U.S. 72, 84 (1990)).

A troublesome part of the opinion is a statement which brings a new term to the discussion. After discussing the relationship between purpose and effect, the decision explains that the purpose of the state act and its effect on the federally occupied field define "the *impact* of a state law on a federal scheme." *Id.* at 2387.

112. *Id.* at 2382.

113. *Id.* at 2383 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

114. *Id.* (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

115. *Id.* at 2385. The plurality continued:

> Our review of the Act persuades us that Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counter-productive, regulation. It thus established a system of uniform federal occupational

plurality noted that preemption may also be based on conflict with the method chosen by Congress to achieve its goal in a particular field. In the case of the OSH Act, the method required is the adoption of a state plan by the federal OSHA administrator.[116] This finding of method preemption is best supported by the statutory language. However, the fact that a method is prescribed for the states' "takeover" of the OSHA scheme does not compel the conclusion that the use of any other method was prohibited.[117]

The Court's three opinions led Justice Kennedy to comment that "[t]he Court's previous observation that our pre-emption categories are not 'rigidly distinct,' . . . is proved true by this case,"[118] and demonstrate the unresolved state of the preemption doctrine today. Justice Kennedy, concurring with the decision, disagreed that the OSH Act's preemption needs to be implied. He found that section 18 of the OSH Act, through negative implication, expressly preempts supplementary state legislation.[119] However, Justice Kennedy took issue with the ease

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health and safety standards, but gave States the option of pre-empting federal regulations by developing their own occupational safety and health programs . . . . To allow a State selectively to "supplement" certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.

Id.

116. *Id.* at 2385.

[I]t is not enough to say that the ultimate goal of both federal and state law is the same. A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach th[at] goal. The OSH Act does not foreclose a State from enacting its own laws to advance the goal of worker safety, but it does restrict the ways in which it can do so. If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor, as described in § 18 of the Act.

Id. at 2386 (citations omitted).

117. *Id.* at 2384.

The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.

Id.

118. *Id.* at 2384 (Kennedy, J., concurring).

119. Justice Kennedy, in his concurrence, stated:

Though I concur in the Court's judgment and with the ultimate conclusion that the state law is pre-empted, I would find express pre-emption from the terms of the federal statute. I cannot agree that we should denominate this case as one of implied pre-emption. The contrary view of the plurality is based on an undue expansion of our implied pre-emption jurisprudence which, in my view, is neither wise nor necessary.

Id. at 2388-89.

by which the plurality was willing to strike the state's exercise of police powers.[120]

In *Gade*, the conflict between the justices raises a concern with the approach taken by Justice O'Connor. It entails what Justice Kennedy described as the Court's attempt to guess whether Congress intended to exclude states based on a "free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives [which] would undercut the principle that it is Congress rather than the courts that preempts state law."[121] This Article advances a "dynamic purpose" preemption test that specifically addresses this concern by making the preemption inquiry one of statutory construction that limits the role of courts when construing state legislation under a state's police powers. However, before reaching the discussion on dynamic methods, another approach is worth considering.

F. An Open Policy Approach

Balancing the constitutional principles involved in preemption forces courts to engage in policy considerations to determine whether the importance of state regulation in a particular area outweighs the importance of keeping a federal scheme free of interference by state regulation. If courts were to openly engage in such policy balancing, however, they might be accused of deciding cases based on judges'

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120. *Id.* at 2390. Justice Souter, joined by Justices Blackmun, Stevens and Thomas, concluded that the OSH Act does not preempt non-conflicting state occupational safety and health regulation. *Id.* at 2391-95 (Souter, J., concurring).

This position was raised by Judge Easterbrook in a *dubitante* opinion accompanying the Seventh Circuit's conclusion that the OSH Act preempted the Illinois statutes. National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 685 (7th Cir. 1990), *aff'd sub nom.* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992). *Dubitante* is a "[t]erm affixed to the name of a judge, in the reports, to signify that he doubted the decision rendered." BLACK'S LAW DICTIONARY 499 (6th ed. 1990). Judge Easterbrook took issue with the court of appeals' test because state provisions could have been read as "an option for the states, not like a constraint." *Killian*, 918 F.2d at 685. Furthermore, he disagreed because the coexistence of federal and state schemes is a common occurrence. *Killian*, 918 F.2d at 686.

121. *Gade*, 112 S. Ct. at 2389.

> The plurality would hold today that state occupational safety and health standards regulating an issue on which a federal standard exists conflict with Congress' purpose to "subject employers and employees to only one set of regulations." . . . This is not an application of our pre-emption standards, it is but a conclusory statement of pre-emption, as it assumes that Congress intended exclusive federal jurisdiction. I do not see how such a mode of analysis advances our consideration of the case.
>
> Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute."

Id. (Kennedy, J., concurring).

private views and values. Courts would have to reach an equilibrium that takes into account the fitness of states to respond to particular issues in their jurisdiction through the power reserved under the Tenth Amendment, the congressional mandate to insure the free flow of commerce, and the need for states to fulfill their roles as laboratories while protecting the supreme character of federal laws.[122]

An open policy based preemption analysis would have courts determine the degree and manner in which a state regulation impacts a federal scheme and balance the "harm" suffered by the congressional design against the "harm" suffered by the state if it is unable to achieve its own alternative purpose. Weighing the harm to the state would take into account the ability of the state to achieve the same goal through less intrusive regulation. Under a policy based analysis, conflict preemption would require an exposition of the judges' reasons why in a particular instance the harm suffered by the state in the loss of its regulation is outweighed by the national harm. Harm to the national interest would include interference with interstate commerce, impairment of needed uniformity in an area of national regulation, and interference with a predominantly national interest or an individual constitutional right. Harm to the state would include the erosion of state police power, loss of state sovereignty under the Tenth Amendment, impairment of the state's ability to govern in an area of traditional state interest, and injury to a state's ability to respond to an issue peculiar to that state.

Concerns regarding the need to safeguard the supremacy of federal law could be resolved by making compliance with congressional intent the predominant interest. Accordingly, when Congress expresses its intent to exclude the state from an area of regulation, any interference with carrying out that intent would tilt the scales in favor of preemption. When such concern is not clear, however, the courts would be granted greater flexibility. It would then be up to Congress to correct any "error" by the courts.

Under this approach, state regulation that advances the purpose of a federal statute or does not impede the execution of a federal act might be sustained even if it had some impact on the federally occupied field. A court would no longer strike state regulation merely be-

122. This balance between state and federal powers is not new. Justice Stone openly advocated such a legislative and political role for the Court when deciding whether federal law barred state regulation. He called for the Court to explore the "nature and extent of the burden" which the state regulation imposes on interstate commerce, and whether the "relative weights of the state and national interests involved" are such as to make inapplicable the rule that interstate commerce should flow freely and regulated solely by Congress. *See* Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 551 (1947).

cause it had intruded on an "occupied" field. Courts would no longer base part of their preemption analysis on the myth that it was preventing the altering of a "balance" reached in Congress to "go this far and no further" in executing a federal scheme.

Another advantage to such an approach is that Congress may be prompted to express its preemptive intent by stating it clearly in legislation rather than risking judicial misinterpretation under an implied preemption analysis.[123] Congress could achieve this by two means. First, it could use a savings clause, stating that nothing in a particular act is to be interpreted as prohibiting a state from enacting further regulation within prescribed parameters. Second, and alternatively, Congress could adopt an exclusivity clause declaring a particular area of regulation within the exclusive control of Congress. With these two clauses and implied preemption based on the balancing of policy considerations, it seems possible to address the policy concerns behind the Supremacy Clause without unduly limiting the states in their exercise of police power.

G. Dublino: *A Policy Case?*

An example of the balancing of interests a policy based test would entail is *New York State Department of Social Services v. Dublino*.[124] The case resolved whether the federal Work Incentive Program (WIN) of Aid to Families with Dependent Children (AFDC) preempted New York welfare rules.[125] The New York rules terminated welfare payments for failure to obtain employment at an earlier date than WIN's provisions. As with many cases under the Occupational Safety and Health Act, *Dublino* involved an area traditionally regulated by the states that had been claimed by Congress through federal legislation. To decide preemption, the Court focused on New York's "legitimate interest in ensuring that limited welfare funds be spent on behalf of those genuinely incapacitated and most in need . . . ."[126] Balancing

123. In the case of the OSH Act, if courts err by limiting preemption as to a particular facet of occupational safety and health, Congress can always correct the mistake simply by passing appropriate legislation. It is unlikely that there would be a significant reduction of federal regulatory capacity since such an intrusion into the federally occupied field would not be allowed by the courts to reach the level of conflict. If the current preemptive scope of the OSH Act is not limited, however, it will continue to bar state statutes that address real needs particular to a state. While it is possible for a state to lobby Congress to "correct" instances where the court has gone too far, it is more likely that Congress would respond out of its own national perspective than in response to a particular state.

124. 413 U.S. 405 (1973).

125. *Id.*

126. *Id.* at 413.

the state and federal interests, the Court noted that WIN and AFDC were federal programs meant to cooperate with state action to carry out a common goal.[127] This cooperative federalism is similar to that embodied in the OSH Act, where Congress contemplates state participation in achieving the legislative goal of safe and healthy workplaces for employees.

Because of the traditional state interest, the fields of regulation covered by AFDC and the OSH Act are specially suited for a test that weighs the policies behind the federal and state acts. As long as the state acts do not present a real obstacle to the operation of the federal scheme, they should not give rise to the concerns that support preemption in situations involving a need for national uniformity or a dominant federal interest such as in the registration of aliens.[128] This approach would have the justices sit openly as a super-legislature, however, thereby increasing the likelihood that the Court would be perceived as deciding cases based on private legislative agendas.[129] To be determining the social "value" of a particular state act and comparing it to the "value" of protecting federal supremacy may be a role too uncomfortable for the Court.[130]

IV. THE STATES AS "LABORATORIES" AND THEIR POLICE POWERS

The limitation of state police power due to the OSH Act's preemption is heightened by occupation of field through OSHA regulations. As Justice Souter noted in *Gade*, the Court is unclear as to the manner and extent to which the OSH Act has occupied the field, sometimes referring to the area occupied as the entire arena of occupational safety and health while other times limiting the field to an area occupied by an OSHA standard.[131] Because the OSH Act has

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127. *Id.* at 411 n.9.

128. *Id.* at 421 ("[W]here coordinate state and federal efforts exist within a complimentary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.").

129. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 652 n.212 (1975).

130. *See* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 381 n.246 (1993) ("The public's periodic re-discovery that at times the courts act according to personal or political biases has long been a source of attacks against the courts. Ever since *Marbury v. Madison* . . . the power of the U.S. Supreme Court . . . has provoked attacks that the Court has appointed itself as a super-legislature.").

131. Still, whether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the federal objective of single regulation, or, as Justice KENNEDY describes it, as express pre-emption, . . . the key is congressional intent, and I find the language of the statute insufficient to demonstrate an intent to preempt state law in this way.

Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2392 (1992).

been found to preempt any field of activity for which OSHA issues a "standard,"[132] there is a need to contrast congressional versus agency occupation of the field. These agency standards are not congressional acts, but instead are a product of legislative delegation. Because field preemption is based on protecting a congressional political balance, when the basis for the challenge is an OSHA standard, the agency is in effect allowed to define the political compromise.[133] Yet when Congress enacted the OSH Act, it could not have forecasted the scope and form of the standards OSHA would adopt.

When an agency standard represents a congressional compromise, judicial treatment of the standard is filtered through the agency's understanding of the balance. Should an agency's interpretation of the political basis for a statute, years after its enactment, be afforded the weight to exclude nonconflicting state regulation from an entire field of activity?[134] It is unlikely that Congress intended to limit the states so much when it came to environmental protection and regulation. In fact, there is evidence to the contrary.[135] Federal environmental statutes often permit and encourage state regulation of the same activity, albeit at a more stringent standard.[136] In addition, it seems improper to assign Congress such a significant erosion of state sovereignty based on an agency's actions. If Congress wants essentially to eliminate the role of the state in environmental regulation it should be required to express so in clear terms.

Requiring an expressed congressional intent to preempt would ensure compliance with the preemption doctrine's axiom that, whenever possible, state exercises of police power should be respected.[137] At is-

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132. *See, e.g.*, 29 C.F.R. § 1910.1200 (1993) (OSHA Hazard Communication Standard).

133. *See* Kelly v. Washington, 302 U.S. 1 (1937) (extending preemption power to regulations promulgated by agencies created by Congress); *see also* Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 713 (1985) (concluding that an agency's power to preempt is limited by congressional preemptive intent behind the enabling federal act).

134. Concern is increased because OSHA may decide the preemptive scope of a standard through informal proceedings. As one commentator explained regarding promulgation of the Hazard Communication Standard, "[t]he OSHA rule indicates, however, that the agency paid little attention to the need for careful substantive evaluation of the need for federal preemption of state regulatory authority over chemical labeling." Richard J. Pierce, *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 666 (1985).

135. *See, e.g.*, 33 U.S.C. § 1370 (1982) (Clean Water Act); 42 U.S.C. § 7416 (1976) (Clean Air Act).

136. 33 U.S.C. § 1370; 42 U.S.C. § 7416.

137. The analysis begins "with the assumption that the historic police powers of the States . . . [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947). This doctrinal axiom has developed to ensure the constitutionally mandated "federal-state balance." United States v. Bass, 404 U.S.

sue is the "traditional . . . power of the states . . . to provide for the public health, safety and morals."[138] This power is not to be frustrated except pursuant to a "clear and manifest purpose of Congress."[139] An express intent requirement would also protect two basic assumptions of federalism: (1) that the states hold a fount of "reserved power" under the Tenth Amendment; and (2) that the states act as "laboratories of experimentation" where, given the political will, a single state could explore what the national consensus was not ready to try.[140]

The concept of a new federalism, coupled with the limitations on federal power imposed by the Constitution and the political structure of the United States, maps a system that guarantees a national floor of shared conditions and allows for the regulatory diversity required to address a particular state's needs.[141] Today, the role of the states as innovators is as important as ever. In part, this is the result of their smaller political entities and more manageable bureaucracies.[142] The smaller state bureaucracy also creates greater accountability, either real or perceived, leading to increased political participation.

The states' legislative experiments also provide solutions that may later be adopted on a national scale.[143] States have taken the lead with "innovations such as zero-based budgeting, equal housing . . . no-fault insurance . . . gun control, pregnancy benefits for working women, limited-access highways, education for handicapped children, auto pollution standards, and energy assistance for the poor."[144] In

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336, 349 (1971). Accordingly, the Court has stated that the striking of state acts that embody the exercise of state police powers should take place only when it is "unmistakably . . . ordained [by Congress]." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

138. Barnes v. Glen Theaters, Inc., 501 U.S. 560 (1991).

139. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 146 (1963); *see also* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (2d ed. 1988); George Henderson, *The Nuclear Choice: Are Health and Safety Issues Preempted?*, 8 B.C. ENVTL. AFF. L. REV. 821, 841-42 (1980).

140. *See* Polybius, *In Support of Strengthening the American Federal System*, 2 PUBLIUS 138 (1972) (The "New Federalism does make immense sense in our geographically vast American Nation with wide diversity of physical, economic and social characteristics.").

141. *Id.*; *see also* Younger v. Harris, 401 U.S. 37, 44 (1971) (noting that federalist concept was one where neither the federal nor state governments would rule alone).

142. Alan Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1041 (1988).

143. "Sometimes, as in health care [regulatory] experiments, what is learned from State efforts may ultimately have a profound influence on national policy. In other cases, the lessons are primarily valuable for possible imitation in other states and localities." OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993 § 20; *see also* Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973).

144. Greenspan, *supra* note 142, at 1043 n.186.

New Jersey,[145] the role of the state as innovator is specially appropriate in environmental regulation, where physical and economic differences make a state by state approach necessary. Congress has a national focus and is not as prepared as states to address the geographical, social, political and economic diversity found throughout the states.[146]

Judge Posner articulates another value to the states' role. He advances the concept that allowing the states to remain somewhat independent and competitive has value beyond allowing them the ability to explore new ideas for regulation.[147] He argues that competition between states results in increased government efficiency. Federalism parcels out power "among competing (not merely independent) institutions."[148] That competition takes the form of trying to make a state the most attractive to citizens and industry by providing better service at a lower tax cost.[149] In addition, despite cries to the contrary, national uniformity need not always be the preferred alternative.[150]

V. PUBLIC CHOICE, LEGISLATIVE HISTORY, AND THE "POLITICAL COMPROMISE"

Ultimately, preemption is an act of statutory interpretation. The courts' traditional approach has been to determine the preemptive

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145. *See* Barry G. Rabe, *Environmental Regulation In New Jersey: Innovations and Limitations*, 21 PUBLIUS 83 (1991) (detailing New Jersey's contributions to novel legislation, including the Environmental Clean-up Responsibility Act and the Toxic Catastrophe Prevention Act).

146. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954). Another commentator has stated:

> Frustrated in their efforts to protect the great laboratories of the nation (the creativity and diversity of local government solutions to national problems which permit experimentation and innovation) through *judicial* interpretation of the tenth amendment, the states are now proceeding to explore new ways of achieving federal diversity through economic, political, and state judicial arenas.

Robert H. Freilich, *Federalism In Transition: The Emergence of New State and Local Strategies in the Face of the Vanishing Tenth Amendment*, 20 URB. LAW. 863, 866-67 (1988).

147. Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987) [hereinafter Posner, *Economic Document*].

148. *Id.* at 14.

149. "If state and local governments merely were administrative conveniences decreed by the central government, they would be no obstacle to centralization, i.e., to monopoly government. To the extent they are independent of the central government they provide real, if today very limited, competitive alternatives for consumers of governmental services." *Id.* A more productive government could produce more unwanted rentseeking legislation, too. *Id.*

150. While it is possible that a state would try to make itself more attractive at the expense of other states, this is unlikely because states may be limited in efforts to externalize the costs of government due to congressional control over commerce and taxation.

scope of an act by first seeking an expression of clear intent in the text and legislative history.[151] If neither the statute's language nor the legislative history provide a clear answer, courts decide whether the intent to preempt should be implied based on the degree of conflict between the state and federal law, or on the extent of occupation of the regulated field. As stated earlier, once field occupation is found, the courts will strike nonconflicting supplemental regulation based on the myth of a political compromise at the time of enactment.[152] The concept of legislative compromise, though, assumes there exists a collective intent that can be ascribed to Congress. It requires the assumption that, as to a specific issue, the legislators engaged in a rational, deliberate attempt to address existing societal needs and reached a compromise as to the substance of a law addressing those needs. Defining such a compromise also requires that the courts accept the existence of a legislative history that they can turn to for exploring the substantive positions of the legislators in order to delineate the parameters of the compromise. These suppositions, however, have been placed in serious doubt by advocates of the law and economics school,[153] public choice theorists,[154] and other scholars and jurists who argue against any reliance on legislative history or who warn against relying solely on the "original" legislative history.[155]

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151. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." Chevron USA, Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

152. *See supra* notes 67-68 and accompanying text.

153. *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774 (1987) [hereinafter Posner, *Decline of Law*]; *see also* ROBERT COOTER & THOMAS ULLEN, LAW AND ECONOMICS 9 (1988); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987).

154. The theory has been described as the "economic study of non-market decision making, or simply the application of economics to political science." DENNIS C. MUELLER, PUBLIC CHOICE 1 (1989). For the origins of public choice theory, see KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); ROBIN FARQUHARSON, THEORY OF VOTING (1967).

155. For example, Justice Scalia rejects the use of legislative history because he doubts the existence of congressional will. *See* Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2488-89 (1991) (Scalia, J., concurring); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (noting that congressional intent is irrelevant, that it is a judge's role to interpret the intent of the statute, and that courts should not to try to determine the intent of legislators when they passed the act); *see also* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (Scalia, J., concurring); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part) (advocating "plain meaning" interpretation of statutes); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

Public choice theory explains legislation as a byproduct of market forces operating in the legislative arena. Legislators are perceived as rational maximizers of their self-interest, selling the ability to produce "rentseeking" legislation[156] to those groups with the greatest impact on each legislator's chances for reelection.[157] The theory holds that a small, discreet group affected either negatively or beneficially is more likely to respond politically to further its interests. Such groups will find it worthwhile to incur the costs of lobbying and organizing votes, and will therefore have an impact on the legislative process disproportionate to their size. Larger, less defined groups do not obtain such a representative voice, in part because of the "free rider" phenomena that acts as a disincentive to political participation,[158] and in part because of the greater transactional costs involved in organizing larger groups of people.[159] Accordingly, groups as large as "the majority of the electorate" or "the poor" are often disadvantaged by legislation on behalf of the smaller groups.[160] If the disadvantage to the majority is large enough, it is justifiable to maintain that "legislative failure" has occurred whereby the legislative result "diminish[es] rather than increase[s the] citizen's average level of well-being."[161]

At least two inferences follow from such a conclusion. First, at some point, there is a need for courts to act on behalf of the majority or public interest to "correct" for "legislative failure"[162] resulting

156. Rentseeking legislation are those enactments that typically help small constituents by imposing a "rent" on larger, less organized groups. *See* Posner, *Economic Document*, *supra* note 147, at 14.

157. Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541 (1993).

158. *See* Marc S. Gerber, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L.J. 2141, 2157 (1993).

159. These transactional costs include "the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached." ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 35 (1990).

160. Not all scholars have reached the same conclusion as to the role of the courts. *See* Grofman, *supra* note 157. Grofman specifically rejects the idea that rentseeking, logrolling or the self-interest of legislators necessarily make a politician's choice one that is properly corrected by some sort of unflawed judicial process. To the contrary, he states "I argue that most of the problems said to plague the legislative process also hold true for the process of judicial interpretation if a majority of judges is required to agree on an interpretation of the text." *Id.* at 1546-47.

Grofman advocates for a civic republican model of legislative thought, described as generally believing that there is a "substantive concept of the public interest that cannot be reduced to an aggregation process based on individual preferences. In short, they believe in some concept of the public good that may be perceived, however dimly, by the citizenry, legislators, and judges." *Id.* at 1549.

161. *Id.*

162. *See* Gerber, *supra* note 158.

from "rentseeking" legislation.[163] Under these circumstances, courts are asked to either amend a statute or interpret it, correcting a legislative failure regardless of the original legislative intent. Second, public choice analysis leads to the conclusion that the legislative process primarily involves the intent of legislators to get reelected. It follows that each legislator had a particular bargain in mind at voting time, showing that there is no collective intent[164] as to the substance of a law that can be imputed to the lawmaking body.[165] The judicial attempts at divining a collective legislative intent behind a political compromise have been misguided. Public choice theory accommodates the interplay between two or more discrete groups, in opposition or otherwise aligned on a particular issue, resulting in a legislative event that balances the different forces at work. However, such a balance or bargain, despite its reflection in a political bargain that is embodied into a statute, is different in quality from the "political compromise" that

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> [U]nder public choice theory, the exclusion of the poor as a class from much of the political process invokes the need for a process to correct the legislative failure that occurs when statutes burden the class. The judiciary's "relative independence, coupled with its power to invalidate statutory bargains by invoking the Constitution, make it the branch of government most capable of guarding against the erosion of constitutional protections under the pressure of special interests groups."

Id. at 2159 (citing A.C. Prichard, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1072 (1991)).

163. Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1789 n.18 (1992).

164. "The existence of agenda control makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

165. *See generally* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (exploring the rejection of legislative intent as a jurisprudential tool in the interpretation of statutes, focusing specifically on the approaches of Justice Scalia and Judge Easterbrook).

Two of the strongest advocates for rejecting legislative histories are Justice Scalia and Judge Easterbrook. Judge Easterbrook limits the issues that can be interpreted under a statute to "cases anticipated by [the statutes'] framers and expressly resolved in the legislative process." Easterbrook, *supra* note 164, at 544.

> The body as a whole, however, has only outcomes. It is not only impossible to reason from one statute to another but also impossible to reason from one or more sections of a statute to a problem not resolved . . . . [J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses.

Id. at 547. Easterbrook also explains that each legislator may have a different design or intent that resulted in a vote, and that in some instances the legislator may not have had any design with regard to that particular piece of legislation. *Id.*; *see also* RONALD DWORKIN, LAW'S EMPIRE 317-27 (1986) (rejecting the possibility of discovering the mental state or intent of a collective body) [hereinafter Dworkin, LAW'S EMPIRE]. *But see* Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 10 (1985) (noting that the political strength and stability of legislatures seems to betray some of the conclusions arrived at under the public choice theory).

the courts impute to the legislatures when rejecting non-conflicting supplemental state legislation. The balance achieved by competing groups in search of rentseeking legislation merely represents what those forces were able to "buy" from legislators at that particular time. Such a compromise does not represent a collective legislative conclusion as to the merits of the substance of a statute in addressing a particular societal need. The intent of the enacting legislation was to obtain the maximum individual political benefit that the "market would bear" for their services. It is dangerous to rely on the result of such bargaining in attempting to divine the legislators' consensus on a particular issue.

Despite increasing rejection of the notion of an original intent or "legislative history" illuminating an original text, there is little consensus as to the extent and manner in which the courts should engage in remedial judicial activism. Among public choice adherents, for example, the conclusion that legislation does not result from a rational search for the public interest does not lead necessarily to advocating for judicial activisim.[166]

Under the guise of interpreting statutes, courts have reconstructed legislative acts based on updated understandings of the original intent.[167] Courts have also devised other judicial strategies to avoid results clearly mandated by Congress.[168] The question remains, however, whether courts should give effect to the legislative act as enacted, use an interpretive tool such as legislative history, or openly amend a statute on behalf of the public interest. A narrow, textualist view holds that original intent as applied in a particular case must be divined only from the text of the statute, rejecting any reliance on legislative history or other sources.[169] Justice Scalia argues that whatever the intent of each member of Congress, the collective result is lawful and effective and therefore the judiciary role should be restricted to "giv[ing] fair and reasonable meaning to the text of the United States Code."[170] Others, such as Judge Posner, urge "reconvening" the original legislature and engaging in "imaginative reconstruction" to resolve an is-

166. Instead, the problem calls for caution in some minds: "[i]f the lawmaking enterprise itself is irrational and incoherent, judicial activism in the name of rationality and coherence becomes increasingly problematic." William N. Eskridge & Phillip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era.* 48 U. PITT. L. REV. 691, 700 (1987).

167. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

168. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

169. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 894-902 (1985).

170. Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

sue.[171] Judge Posner admonishes the judiciary to adopt the frame of mind of the enacting legislators and try to imagine how they would apply the statute to the issue before the court.[172] Posner advocates focusing on the background of statutes, their structure, and the values and attitudes surrounding them when enacted. From there he derives the extent to which judges should modify or apply the statute.[173] Posner, however, would enforce legislative events that do not conform with his view of where the public interest lies, even if the legislation is rentseeking.[174] Judge Posner distinguishes his position from Judge Easterbrook's assertion that the legislatures have no unified purpose by stating that "[i]nstitutions act purposively, therefore they have purposes. A document can manifest a single purpose even though those who drafted and approved it had a variety of private motives and expectations."[175]

Professors Farber and Frickey would go one step further than Posner's communication approach by urging judges to consider the consequences of possible statutory interpretations and subsequent legislative events.[176] In Farber and Frickey's estimation, "to the extent that the effects of various interpretations are relevant, subsequent legislative history can help the judge determine current societal norms,"[177] and therefore avoid a decision based solely on the judge's "own personal preferences."[178] Judge Easterbrook would reject the use of any subsequent statutory history because it "dishonor[s] the procedural aspects of the legislative process."[179]

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171. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) [hereinafter Posner, *Statutory Interpretation*].

172. *Id.* Judge Posner relies on the "communication" theory of legislation, analogizing judges to platoon leaders in the field receiving orders from superiors at headquarters, who do not address all the circumstances before the platoon leader. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1986) [hereinafter Posner, *Legal Formalism*].

173. Posner, *Statutory Interpretation*, *supra* note 171, at 818; *cf.* HENRY M. HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1156 (1958) (taking a position similar to Posner's, but suggesting that judges should ignore interest groups, prejudice, popular ignorance and other things which deflect from the single-minded pursuit of the public interest).

174. For a discussion of rentseeking, see *supra* notes 156-61 and accompanying text. The enforcement of rentseeking legislation, regardless of it consequences, may give rise to high political costs from the legislative bargain. These costs may not readily appear, however, if the statute is neither applied nor interpreted in a politically costly manner before the enacting legislators' terms expire.

175. *See* Posner, *Legal Formalism*, *supra* note 172, at 196.

176. Farber & Frickey, *supra* note 165, at 425.

177. *Id.* at 467.

178. *Id.* at 468 ("The upshot is that even an original intent perspective has room for evolving statutory interpretation.").

179. Easterbrook, *supra* note 164, at 539.

VI. THE DYNAMIC INTERPRETATION METHOD

One of the more interesting responses to the new understanding of the legislative process has been the open judicial "correction" of legislation or a "dynamic" statutory interpretation.[180] Even within this group, however, the degree of judicial activism varies from those who believe courts should overturn and amend statutes regardless of their text,[181] to a more restrained invitation[182] to apply subsequent legislative history and current values when interpreting "ambiguous" statutes.[183]

An advocate of the less radical form of dynamic statutory interpretation is William Eskridge. Professor Eskridge argues that judges should not be restricted from considering "subsequent interpretational history, related constitutional developments, and current societal facts."[184] Eskridge supports this position by reference to the judicial practice of interpreting the Constitution by relying on considerations beyond the text or the historical background.[185] In addition,

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180. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1992); LAW'S EMPIRE, *supra* note 165; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); and William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Interpretation*].

181. Richard Epstein calls for increased judicial intervention to correct the effect of rent-seeking legislation in the area of commercial regulation. Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 711-15 (1984). His work has been described as stating that the "courts should strike down most of the federal legislation of the last 50 years in order to protect free markets and private property." Daniel Farber, *With Liberty for Some*, N.Y. TIMES, Feb. 13, 1994, at A28; *Cf.* CALABRESI, *supra* note 180, which proposes that courts should be able to amend or overrule statutes in order to update them. He asserts that under a dynamic approach courts should:

> treat statutes as if they where no more and no less than part of the common law. At other times it [the dynamic approach] would be used to encourage or even induce legislative reconsideration of the statute. Employing a variety of techniques, the court might begin a 'common law' process of renovation in the absolute law, update the statute directly by replacing it with new rules . . . or do no more than create a situation in which conscious legislative reconsideration of the law was made likely.

CALABRESI, supra note 180, at 98.

182. *See* Dworkin, LAW'S EMPIRE, *supra* note 165 (adopting a "pragmatic" approach to dynamic statutory interpretation). Dworkin views the legislative process as beginning before enactment and continuing up to application of the statute in a case. He argues that statutes should "be read in whatever way follows from the best interpretation of the legislative process as a whole." *Id.* at 337. Ultimately Dworkin calls for judges to make "whatever decision seems to them best for the community's future, not counting on any form of consistency with the past as valuable for its own sake." *Id.* at 95.

183. *See* William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 338 (1988) [hereinafter Eskridge, *Politics Without Romance*] ("A statute must be interpreted with an eye to what it's becoming, not what it was originally.").

184. *See* Eskridge, *Interpretation*, *supra* note 180.

185. *Id.*

he further justifies this approach by pointing to conventional judicial practices when interpreting the common law.[186] He criticizes the notion that judges should consider only the text and historical context of statutes when interpreting them.[187] Rejecting the traditional limitations, he argues that judges should interpret statutes "dynamically." That is, statutes should be construed "in light of their present societal, political and legal context."[188]

Eskridge's "dynamic" method is supported by a series of "pluralist" assumptions that are accepted in the dynamic purpose approach advanced by this Article. The primary assumptions are that a functional representative democracy exists in our polity, that the legislatures are the primary lawmaking bodies, and that the language of a statute will often be sufficient to resolve a given case.[189]

Under Eskridge's dynamic approach, there are three considerations for courts to weigh in statutory analysis. First is the interpreter's present day understanding of the text, which is used to determine the limits imposed by the language of the text.[190] Second is "the original legislative expectations surrounding the statute's creation."[191] The third consideration includes the "subsequent evolution of the statute and its present context."[192] Accordingly, if an issue is clearly resolved in the text of the statute, Eskridge advises following the directive of the statute.[193] If, however, the text is "ambiguous" on the relevant point, the language of the act is of limited utility. The text may be shown to be ambiguous when stated purposes are contradicted in the language of the statute.[194] A statute may also be "ambiguous" when the application of its language would lead to results that seem to contradict the historical basis for the statute or lead to a ridiculous result.[195] Thus, when the text of a statute is not clear and when the

186. *Id.*

187. *Id.*

188. *Id.*; *see also* LAW'S EMPIRE, *supra* note 165; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (advocating a "nonoriginalist" interpretation of the statutes and the Constitution). For a perspective rejecting the "dynamic" approach, see Craig W. Dallon, *Interpreting Statutes Faithfully—Not Dynamically*, 1991 B.Y.U. L. REV. 1353 (criticizing the dynamic approach for "not . . . adequately recogniz[ing] the strong historical legitimacy of originalism").

189. *See* Eskridge, *Interpretation*, *supra* note 180.

190. *Id.* at 1483.

191. *Id.*

192. *Id.*

193. Eskridge bases this practice on rule of law principles. *Id.*; *see also* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 313-18 (1985).

194. *See* Eskridge, *Interpretation*, *supra* note 180, at 1483.

195. *Id.*; *see also* United States v. Brown, 333 U.S. 18, 25 (1948) (explaining that criminal statutes should not be interpreted narrowly solely upon their language, when to do so in effect "override[s] common sense and evident statutory purpose").

"original legislative expectations have been overtaken by subsequent changes in society and law,"[196] there would be the type of ambiguity that is best resolved by a dynamic approach.

VII. THE DYNAMIC PURPOSE METHOD

In addition to the "ambiguity" situations Eskridge explains, this Article submits there is another instance when a dynamic interpretational approach is especially suited: when a statute's text manifests a "dynamic" purpose. A statute's purpose may be characterized as dynamic when its text implies a changing degree of regulation as time elapses or conditions evolve. When such a purpose exists, the threshold for the dynamic interpretation of a statute has been crossed. The dynamic purpose method is not offered in substitution of Eskridge's approach, nor as an endorsement of those who would enforce a legislative bargain regardless of the possible harm to the majority. Instead, this Article endeavors to refine one aspect of the "activist" end of the continuum.

Some federal acts express in their text the purpose of imposing a set amount and/or type of regulation. For example, the Federal Tobacco Inspection Act was held to preempt Georgia's tobacco classification law in *Campbell v. Hussey*.[197] This act sets "uniform standards for classification to avoid manipulation and unreasonable fluctuations in prices and quality determinations for the protection of producers and others engaged in commerce and the public interest therein."[198] While the act is aimed at evils presented by the disruption of interstate commerce and price gouging of consumers, the law has as a goal the setting of uniform national tobacco standards.[199] This goal of nationally uniform standards would be thwarted if a state is allowed to modify or supplement the federal regulation. In this Article, laws such as the Federal Tobacco Inspection Act will be designated "static purpose statutes," or simply "static statutes."

Other federal acts have a more fluid character, however, indicating the need to have the type and breadth of regulation effecting them change as economic or technological factors evolve. These acts require change to achieve a stated purpose. These statutes have language indicating that any enacted regulation, be it the protection of a resource or the control of an activity, should be altered as the desired result becomes more feasible. These federal statutes may occupy a field

196. *See* Eskridge, *Interpretation*, *supra* note 180, at 1484.
197. 368 U.S. 297 (1961).
198. *Id.* at 299.
199. *Id.* at 301.

through pervasive regulation yet not embody the intent to exclude nonconflicting supplemental state regulation.

An example is the Federal Water Pollution Control Act.[200] The act's approach to water pollution control includes the concept of increasingly stringent regulations on the discharge of pollutants until all discharges of pollutants into navigable waters ceases.[201] Its language and structure evinces a purpose different in character from that of "static" statutes.[202] The Water Pollution Act mandates movement from an original level of regulation to a more stringent standard as time elapses and new technology is developed. Such a statute has a changing or "dynamic purpose," and for this Article will be labeled a "dynamic statute."

It is sensible to view "field preemption" as merely a form of conflict that may be labelled "jurisdictional conflict." The conflict in such instances results from the state's intrusion into an area reserved solely for federal control. However, such an exclusionary intent by Congress should be expressed in the text of the statute rather than judicially implied in light of the broad preemptive scope that results from the implication of such conflict to most federal legislation. A key premise of the method advocated in this Article is that preemption cases involving dynamic federal statutes do not present jurisdictional conflict with state regulations advancing the same goals as the federal act, unless the congressional prohibition on such state regulation is expressed. This hypothesis rejects the notion of political compromise as the basis from which courts give meaning to statutes.[203] Because there is no intrusion into an implied reserved jurisdiction, there are no "congressional toes to step on" and the supremacy of the federal voice is not diminished.

Based on the static/dynamic differentiation, it is possible to engage in an implied preemption analysis that no longer focuses merely on whether Congress has chosen to regulate in a particular field. The proposed test safeguards any textually expressed limitation on state action by finding conflict with the state legislation even if the state legislation

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200. 33 U.S.C. §§ 1251-1377 (1976).

201. *See id.* § 1371 (stating that the goal of the Clean Water Act is that "the discharge of pollutants into the navigable waters be eliminated by 1985").

202. The Clean Water Act allows a state to adopt water pollution control standards which are more stringent than those promulgated by the Environmental Protection Agency. *Id.* §§ 1251(b), 1370 (1976).

203. The assumption that the concept of the political compromise is bankrupt is supported both by the new understanding of the legislative process resulting from public choice theory and by the realization that the court, even if able to poll the individual enacting legislators, would be unlikely to determine the true intent behind statute. *See supra* note 155 and accompanying text.

purports to advance the same type of regulation as the federal act. The basis for preemption in such an instance would be the conflict with the statute's static purpose. However, in cases involving dynamic statutes, preemption would occur only if the state scheme is in actual conflict with the federal scheme. Accordingly, once a court determines the character, dynamic or static, of a federal statute, it would proceed to determine the degree of conflict presented by the state statute.

VIII. COMPARING THE TESTS

While this Article acknowledges that preemption doctrine terminology is confusing and often interchangeable, for purposes of comparing the proposed dynamic approach with the *Gade* plurality test this Article divides the models of federal and state conflict into three groups: purpose conflict preemption; interference conflict preemption; and method conflict preemption. Purpose conflict occurs in several configurations, all involving conflict with an expressed statutory purpose. Under this type of conflict, the express intent of the federal law excludes state regulation, or a state act contradicts the express purpose or goal of a federal act calling for national uniformity in an area of regulation.[204] Method conflict occurs when the state regulation conflicts with a federal, expressed, statutorily required procedure or method for any state supplemental regulation in a particular area.[205] In these instances, courts would have to conclude that the state is engaging in the *type* of regulation that is only permissible in accordance with the prescribed method. If the state is not following the prescribed method, the state act would be struck.

The state statute may also present a conflict by interfering with the operation of a federal scheme of regulation. Under the proposed approach, interference conflict preemption would depend on the degree and type of impact on the federal scheme and on whether the federal statute was dynamic or static.[206] Interference conflict preemption would include those instances where the state law requires persons to act in violation of federal law, an obvious contradiction of the Supremacy Clause. Also included are those situations where the operation of state law creates a physical obstacle or otherwise significantly

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204. *See* Campbell v. Hussey, 368 U.S. 297 (1961).

205. *See, e.g.*, 29 U.S.C. §§ 651-678 (1988).

206. The relation between the federal law and the state law will fall on a continuum ranging from

> conflicts which are direct and unavoidable in every case through conflicts in which the state law would in some way interfere with or impinge upon the operation of the federal law in every case, to interference in some cases, to the extreme point at which the operation of the state law is recognized as utterly irrelevant to the federal law.

Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. REV. 515, 519.

discourages or blocks the operation of a federal law.[207] Except for the first instance above, in the remaining interference conflict situations, preemption would depend on the degree of interference. It is important to note, however, that a state statute "neutral" on its face may interfere with the federal scheme by increasing the administrative burden of the regulated entity, making noncompliance with the federal act more likely. Similarly, a "neutral" state statute that increases the regulatory load may interfere by creating confusion in the regulated community. Whether a state statute advances, impedes, or is neutral in its operation on a federal scheme remains a factual issue.

In those cases where the scope of intended preemption or method for state regulation is clearly expressed in a federal act, and the statutory purpose or method used in a state act contradicts the federal act's expressed purpose, the issue is one of express preemption and the results should be the same regardless of test applied. Here, the state act must yield to insure the supremacy of the federal voice. Therefore, the discussion here will focus on those instances when the courts must determine preemption based on factors other than a clear statement from Congress.

It is possible, however, to classify four interactions between federal and state laws where implied preemption must be decided based on a comparison of the respective statutory purposes, compliance with federal method, and the effect or impact that the state law has on the federal scheme.

In the first situation, both federal and state laws have similar statutory purposes and the effect of the state law on the federal scheme is not negative.[208] The effect on the operation of the federal scheme may be either neutral or positive. In the second instance, the purpose of the laws again is the same but the effect of the state law on the federal scheme is negative, that is, interfering to a considerable degree with the operation of the federal scheme. In the third instance, the federal and state laws have different statutory purposes and the effect of the state law on the federal scheme is neutral. In the fourth instance, the federal and state laws have different purposes and the effect of the state law on the federal scheme is negative.

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207. Hirsch sees two types of possible "conflict." A narrow reading of conflict is when "the federal and state laws require a defined group of persons to act in contrary ways." *Id.* at 526. A broader reading of conflict is when the federal law licenses certain activity but the state law limits or prohibits a person's use of the federal license. *Id.*

208. "Negative" in this context means to include all the effect and impacts that impede, slow down, discourage, or significantly prevent the federal goal or the operation of the federal regulatory scheme. "Neutral" statutes are those that, regardless of intentions or statutory language, have neither a negative or positive effect.

To proceed in the comparison, it is helpful to review these four interactions using the *Gade* plurality's analysis to compare the effects which would result from a dynamic purpose approach. In the first situation the state act would be preempted if the court finds that Congress has already occupied the field of regulation. The court would imply a congressional intent to exclude the state, thereby creating a purpose conflict situation. That the state law may in fact advance the expressed federal purpose would be irrelevant. In the second instance, the state statute may also be preempted because of purpose conflict in that it also regulates in an occupied field. In addition, the state statute would be preempted because of interference conflict with the operation of the federal scheme. In the third situation, under a *Gade* analysis, a court may or may not find preemption depending on the degree of "impact" that the state law is found to have on the federal scheme. If the state regulation sufficiently invaded the federal arena, the court would find purpose conflict preemption. The court would find conflict with the congressional intent, implied from the occupation of the field, to exclude the state. In addition, if the state regulation was held to be of the type that must be carried out in accordance with an expressed method, the state would face method conflict preemption. In the fourth situation the case would be decided in a manner similar to the third, but the deciding factor would be the degree of "impact" on or conflict with the federal scheme. In these instances, the court would find both purpose conflict and interference conflict preemption.

Under the proposed dynamic purpose analysis for implied preemption, applying the terminology developed above, "occupation of the field" would not result in purpose conflict if the federal act has a dynamic purpose. Such preemptive intent would apply only to express preemption and would require a clear statement of Congress to that effect. In the first situation, the state act would not be preempted unless the court finds that the state act's operation alters the balance of regulation mandated in a static federal act. If the statute is static, there would be purpose conflict with the federal goal. If the court finds that the federal statute is dynamic, there would be no conflict and therefore no preemption. In the second situation, the state statute would be preempted because of conflict interference unless the impact on the federal scheme was insubstantial. In addition, if the federal act is static, the state statute would also fail because under purpose conflict the state is altering the static balance. In the third situation, if the federal act is static, the state statute would be preempted if it attempted to advance the purposes of a static federal statute. However, if the federal statute is found to be dynamic, there would not be a

purpose conflict and therefore no preemption. The fact that the state is regulating in the occupied filed is not the deciding factor, because the effects are not negative in the given example. If the state regulation was of the type that required compliance with a mandated method, however, the state statute might fail due to method conflict preemption. In the fourth situation, the state statute may be preempted because of interference conflict preemption regardless of whether the federal purpose is static or dynamic.

As the comparison of results illustrates, the major differences between the static and dynamic approaches is in the third instance. There, the effect of the dynamic purpose method is to allow nonconflicting state regulation in a federally occupied field if the federal statute has a dynamic purpose, a conclusion that the traditional test bars. It is of note that if the state regulation, although advancing the goal of a dynamic statute, is of the type that the dynamic statute permits only in accordance with a prescribed method, the state must comply with the method or suffer possible conflict preemption. Nevertheless, there is no method conflict preemption when a state act advances the purpose of a dynamic statute through regulation that is not of the type that the federal act allows only pursuant to a specific method.

The distinction is illuminated by a hypothetical. Consider a state statute regulating in a field occupied by a dynamic, federal act mandating a specific method for the issuance of "water color standards." Assume the federal act to have as its statutory purpose "eliminating the hazard posed by paint and ink contamination of our navigable waters." The federal act could require that "water color standards be promulgated only in accordance with a state plan that has been approved by the Federal Water Color Agency." In this hypothetical, the state act's expressed purpose is to "minimize the economic dislocation resulting from the effect of ugly landscape colors on real estate sales." If the state enacts a "water color standard" without complying with the federal act requirement to have the state plan approved, the state could face method conflict preemption. However, if the state adopts a regulation that prohibits the disposal of ink in land or water, the state regulation may survive if the court finds that the state regulation is not a "water color standard," regardless of its effect on water colors. The point is that only the state's promulgation of a "water color standard" must comply with the mandated method or face preemption.

IX. THE OCCUPATIONAL SAFETY AND HEALTH ACT: A "DYNAMIC PURPOSE" STATUTE

The OSH Act is a dynamic purpose statute that does not preempt nonconflicting complementary regulation of occupational health and

safety by state environmental statutes. Both the language and the legislative history of the OSH Act reflect its "dynamic" character. Given its language, history and interpretational ambiguity, the OSH Act should be interpreted in a manner that prevents the interference with states' exercise of police powers to protect their citizens. The OSH Act's language indicates a course of regulatory changes as new technology or economic developments or discovery of harmful effects makes a greater degree of workplace protection "feasible."[209] The concept of a static level of regulation is rejected by the text of the OSH Act, which claims as its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[210] In addition, the OSH Act does not reflect a congressional intent for national uniformity,[211] and, as noted by Justice Souter in the *Gade* dissent, the field of worker protection has traditionally been a state regulated field.[212]

Also, there is no express preemption in the statute. The statute's ambiguity as to the intended scope of implied preemption is illustrated by the Court's difficulties in *Gade*, demonstrating that the text and history of the OSH Act may lead to several understandings of the intended preemptive scope. As Eskridge stated, "neither the majority nor the dissenting opinion [nor the concurring opinion in *Gade*] found decisive support for their views in the generally worded text or in the legislative history of the statute."[213]

Based on the OSH Act's language and legislative history, the OSH Act is not seen as a model of regulation that would restrict the level of workplace protection merely to avoid increased financial burdens on industry.[214] In *American Textile Manufacturer's Institute, Inc. v. Donovan*, the Court held the OSH Act required a feasibility analysis

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209. Linda G. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 807 n.47 (1981).

210. 29 U.S.C. § 651(b) (1988). In addition, the OSH Act's language may be conformed with an acceptance of supplemental state regulation. *See* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992).

211. *See* Amellia Jeauelmen, *Trashing State Criminal Sanctions?: OSHA Preemption Jurisprudence in Light of* Gade v. National Solid Wastes Management Association, 30 AM. CRIM. L. REV. 373 (1993). The author notes that up to *Gade*, many courts found that:

> congressional tolerance of diverse state plans indicated that its main concern was setting a federal floor of standards—if the states sought to build up from that floor with supplemental regulation, they should be free to do so as long as the regulation does not directly conflict with the federal standards.

Id. at 408.

212. *Gade*, 112 U.S. at 2391-92 (Souter, J., dissenting).

213. Eskridge, *Interpretation*, *supra* note 180, at 1484-85.

214. *See* Associated Indus. of Mass. v. Snow, 898 F.2d 274, 283 (1st Cir. 1990).

rather than a cost-benefit analysis.[215] The Court noted that Congress "plac[ed] the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable."[216] In addition, the fact that a state under an approved plan is allowed to enact greater protection than that afforded by the applicable OSHA standard is also evidence that the goal of the OSH Act is directional, not static, heading toward increased workplace protection.

As to the need for national uniformity, such a pattern is simply not supported by the regulatory scheme that Congress mandated. First, the OSH Act, as noted in *Associated Indus. of Mass. v. Snow*, contemplates regulation by other federal agencies and by states that have submitted a plan for approval.[217] In the OSH Act, Congress accepts the states as enforcers of disparate occupational health and safety regulation as long as such regulation is more stringent than that mandated by OSHA.[218] The result of compliance with the OSH Act's state plan requirements would lead to "a literal Balkanization of job safety and health,"[219] a result which is difficult to reconcile with the concept of a legislative "balance" that was not to be disturbed. Thus, the federal act does not evince the concern for national uniformity that is one of the grounds for preemption with static federal statutes such as the Federal Tobacco Inspection Act.[220]

A dynamic purpose interpretation of the OSH Act is especially appropriate because there is no express preemption language in the OSH Act. There is also no credible legislative history or "legislative intent" to support the myth of a political compromise. If the OSH Act embodies a compromise, it is not as to the substance of the OSH Act, but merely the result of the balance of forces of discreet groups in search of rentseeking legislation. In addition, a dynamic purpose analysis allows the courts to safeguard the states' role as laboratories. Such an analysis permits the courts to respond to the states' need to

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215. 452 U.S. 490 (1981).

216. *Id.* at 509.

217. *See Snow*, 898 F.2d at 283. In Lapore v. National Tool & Mfg. Co., 540 A.2d 1296 (1988), the New Jersey court noted that:

> OSHA does not reflect express congressional intent to preempt the field of occupational safety and health. To the contrary, as previously indicated, OSHA specifically permits individual states to adopt a scheme of health and safety regulation along with enforcement procedures so long as the standards are at least as vigorous as those required by OSHA and have been approved by the Secretary of Labor . . . . Beyond that, OSHA gives states express authority to regulate areas of health and safety not governed by an OSHA standard.

Id. at 1306.

218. *See* 29 U.S.C. § 667 (1988).

219. ROBERT D. MORAN, OSHA HANDBOOK, 1-6 (1987).

220. *See supra* notes 197-99 and accompanying text.

exercise their police powers over changing circumstances including the failure of federal environmental statutes to protect the citizenry.[221]

Under a dynamic purpose analysis, preemption under the OSH Act is most convincing when based on conflict with the method by which Congress determined that the field should be regulated. The OSH Act, either expressly, through negative implication, or impliedly,[222] has been found to preempt any state workplace occupational safety and health standard[223] that is not pursuant to a plan approved by the OSHA administrator. However, the dictated method is a requirement only if a state is engaging in the regulation of the occupational health and safety field through state safety and health standards. If a state law does not have as its purpose the regulation of the occupational safety and health field through state standards, the argument for method conflict is deflated unless a court finds that the state regulation is a concealed occupational standard. Therefore, if a state's environmental law, with the purpose of addressing issues other than occupational safety and health, impacts on a field occupied by an

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221. The states are faced with new hazards and limitations on the federal attempts to protect from known hazards. The result is a plethora of state environmental statutes that attempt to fill the need.

222. *See supra* notes 77-107 and accompanying text.

223. The issue of what is a standard and what is a general law comes up with apparently different results in different types of cases. Both tort and criminal laws have been found not to be a "standard." In Pedraza v. Shell Oil Co., 942 F.2d 48 (1st Cir. 1991), a tort action by a worker exposed to epichlorohydrin, the issue was whether the OSH Act preempted the state tort action. The court noted it was "aware of no case which holds that OSHA preempts state tort law." *Id.* at 52 (concluding there was no reason "for an interpretation which would preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application").

The court also noted that a great majority of courts have found that criminal laws which might regulate actions at the workplace are also outside the scope of "occupational and health standards." *Id.* n.5. *See also* National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 680 n.9 (7th. Cir. 1990), *aff'd sub nom.* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992) (noting that state tort laws are not standards within the meaning of 29 U.S.C. § 652(8)).

In People v. Pymm, 563 N.E.2d 1, 5 (N.Y. 1990), *cert. denied*, 111 S. Ct. 958 (1991), the court reasoned that criminal laws of general application are ex post reactive measures, focusing on conduct after an injury has occurred. As a result, they do not fit under the definition of occupational standard; *cf.* California Labor Fed'n v. California Occupational Safety & Health Standards Bd., 221 Cal. App. 3d 1547 (1990), where the court decided that California's Proposition 65 was a labor standard and therefore preempted by OSHA unless it was made part of the state OSHA plan adopted pursuant to section 18 of the OSH Act. Proposition 65 read in part: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . ." *Id.* at 1551. It is possible to take issue with the court's conclusion that proposition 65 is a standard. The law protects "any individual," not just the employees of the "person . . . doing business." In addition, the law on its face would apply beyond the workplace. *Id.* at 1557.

OSHA standard in a way that advances the goals of the OSH Act, the concerns about compliance with the OSH Act's method are simply not applicable.[224] Preemption under the OSH Act is properly limited to those instance where a state attempts to promulgate an "occupational safety and health standard," or when the state's impact on the OSHA scheme is the proper basis for interference conflict preemption.[225]

X. CONCLUSION

A dynamic purpose test provides a more accurate method for ascertaining and carrying out the intent of Congress. It permits the states the flexibility needed to safeguard the exercise of police power in the environmental arena, yet protects the federal interest in cases of conflict with Congress' intent or with the operation or character of a federal law. However, like any test that relies on the application of terms such as "interference," "obstacle" or "conflict," its acceptance must coincide with an understanding that ultimately there is no objective test or judicial standard that would provide certainty in this area other than limiting preemption to those cases where Congress expresses its intent in the legislation.[226]

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224. The purpose of the state law is to be determined by the courts from the legislative language and from the actual impact of the law. Accordingly, a state would not be able to simply list a legislative purpose to avoid preemption. If the courts find that the actual effect of the state law is to regulate worker safety and health, the law would be preempted as in conflict with the method required by the OSH Act.

225. The *Dublino* Court explained:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so . . . federal supremacy is not lightly to be presumed.

New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 417 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).

226. *See* Hirsch, *supra* note 206, at 534.