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Introduction

With growing frequency since 1947, the Supreme Court has been called upon to decide when Congress, by legislating in a field such as labor-management relations, intends to displace state power to act in the same field. The problem grows as the Congress legislates on an increasing number of new matters that were once only of concern to the tsates if they were the concern of any government at all. Congressional vagueness about its intent to preempt adds greatly to the problem that the Court is called upon to handle. In dealing with the preemption question the Court has made three types of decisions: (1) the federal statute may be declared unconstitutional with state power being upheld; (2) both federal and state power may be preserved; or (3) Congress may preempt a field once occupied by the states.

The aim of this paper is to evaluate how effectively the Court resolves the preemption question which makes up a part of the larger problem of state-federal relations. In the evaluation we will consider two questions. *First,* has the Court fashioned a clear and adequate set of guidelines to utilize in deciding preemption cases? *Second,* is the Court consistent, or put another way, are like cases decided in the same way?

The Court has two basic approaches in deciding preemption cases: when the first is used, the burden of proof is on those who aim to maintain state power; when the second is used, it is

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comparatively simple to come up with a decision allowing for the continued exercise of state power. A justice's acceptance of one of the two basic approaches in a given case greatly influences his views on the following questions: is there a preemptable dominant federal interest; is there preemptable conflict or undue burden on interstate commerce; or is there a need for uniformity that would preclude state action?

In the preemption cases that we shall review, the justices frequently disagree about the principles that should apply to a given case or set of cases. Mr. Justice Sutherland speaks of a judge's freedom to apply what he feels is the proper principle to a case when he says in *Puerto Rico v. Shell Company*:[1]

> It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgement in a subsequent suit when the very point is presented on decision.

South Buffalo Ry. v. Ahern[2] represents a particularly good instance in which justices sharply disagreed over what principles should govern a case. Seeing no conflict and no Congressional objection to supplementary state action when authorized by the parties involved, the majority upheld state power to make workmen's compensation awards for injuries covered by federal laws. In so holding, the majority distinguished the case from *New York Cent. R.R. v. Winfield*[3] in which it was held, on grounds of a need for national uniformity, that the Federal Employers Liability Act totally displaced state power to make compensation for the personal injuries of employees received while engaged in interstate commerce. Mr. Justice Douglas, dissenting in *Ahern* applied the *Winfield* uniformity test and precluded state power. At the same time he expressed a willingness to join his colleagues in overruling *Winfield* by applying the principle employed in Mr. Justice Brandeis' *Winfield* dissent—a need for diversity of treatment in railroad liability cases justifies the upholding of supplementary state action.

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1 302 U.S. 253 (1937).
2 344 U.S. 367 (1953).
3 244 U.S. 147 (1917).

CHAPTER ONE

Court Attitudes, Guidelines, and the Preemption Question

I.

First let us examine the attitudes and guidelines used to justify decisions upholding Congressional displacement of state power.

One of the more sweeping guidelines is that once Congress legislates in a field, state power in that field immediately is precluded even though the national act does not go into effect at once. In *Northern Pac. Ry. v. Washington, ex rel. Atkinson,*[4] delay of federal action and and immediate preclusion of state action was justified on the ground that railroad companies should put their full efforts into adjusting to the new federal wage and hour standards for railroad labor which would very shortly replace those of the states.

Preemptionist justices find several signs of Congressional intent to preclude state action in examining the wording and scope of dereal acts. Since the Railway Labor Act dealing with labor-management disputes is spelled out in comprehensive terms, the Court majority held the act applicable even to state-owned railroads over the objection of dissenters who maintained that Congress did not specifically mention such railroads. As a result, the federal law precluded the enforcement of the California Civil Service Act to the extent that it denied collective bargaining rights to state railroad employees.[5] Likewise, the Court sometimes interprets a nelaborate, comprehensive, pervasive federal scheme of regulation as indicative of Congressional intent to preempt a given field. An example is afforded by the case of *Cloverleaf Butter Company v. Patterson.*[6] The majority held that state authority to inspect and seize packing stock butter acquired by a manufacturer to be used in the making of renovated butter for interstate commerce, was precluded by a federal scheme of regulation spelled out in the Internal Revenue Code which prescribed conditions under which the renovated butter was to be made and which made provisions for its inspection and confiscation in the completed stage if necessary. Congress draws

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[4] 222 U.S. 370 (1912).
[5] California v. Taylor, 353 U.S. 553 (1957).
[6] 315 U.S. 148 (1942).

up preemptable pervasive schemes when it provides administrative machinery to afford remedies, to mete out penalties, to initiate and carry out programs, and to decide when federal acts like the National Labor Relations Act apply to a certain set of facts.[7]

Much disagreement exists as to when there is preemptive comprehensive terminology and/or a preemptive comprehensive, elaborate, pervasive federal scheme particularly in the labor-management, alien registration, subversion regulation, and quarantine fields.[8] In *Hines v. Davidowitz*,[9] the majority saw a comprehensive federal scheme involving registration for regulating aliens. The minority did not, partly on the ground that the state scheme requiring aliens to carry a registration card to be shown to the police on demand was more detailed and in fact supplemented the federal scheme.

A guideline that makes preclusion of state action quite simple is found in the case of *Rice v. Santa Fe Elevator Corporation*.[10] Mr. Justice Douglas held that a federal regulatory scheme of warehouses precluded an Illinois scheme regulating the same subject matter even though the latter was older and more comprehensive. In short, even if Congress enters a defined field only partially, it can remove the states from that field totally.

Some justices, at least at present, see Congressional intent to preempt when statutes spell out ways that federal agencies may cede jurisdiction to state agencies should they so choose. Section 10 (a) of the Taft-Hartley Act quoted from *Guss v. Utah Labor Relations Board*[11] reads as follows:

> The [National Labor Relations Board] is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. Provided: That

[7] Plumbers, Steamfitters, R.P.F. and H. v. Door County 359 U.S. 354 (1959); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Labor Union #25 v. N.Y.N.H. and H.Ry., 350 U.S. 155 (1956); Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955).

[8] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941); Oregon-Washington R.R. and Nav. Co. v. Washington, 270 U.S. 87 (1926).

[9] 312 U.S. 52 (1941).

[10] 331 U.S. 218 (1947).

[11] 353 U.S. 1 (1956).

> the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Mr. Justice Burton dissenting in the *Guss* case maintained that the proviso only makes it possible for the states and the federal government to co-operate. Nevertheless, the states continue to exercise their historic power within the field, either with or without Section 10 (a).

On occasion, Congress is deemed to have preempted a field when it makes no express provision for federal-state cooperation. On this ground, the Plant Quarantine Act, aiming to prevent the spread of plant diseases, ruled out the possibility for supplementary state action against interstate transportation of alfalfa hay or meal from regions found to have the alfalfa weevil.[12] The majority concluded that if the Secretary of Agriculture did not act, as in this case, no action was needed.

In *San Diego Building Trades Council v. Garmon*,[13] the Court resorts to another preemption guideline commonly used in labor-management cases. Here, the federal government displaces state power over labor-management activities only arguably subject to Sections 7 and/or 8 of the Taft-Hartley Act. It rests with the National Labor Relations Board and not state boards to determine whether the federal government has jurisdiction over the concerted activities arguably protected by Section 7 and the unfair labor practices arguably prohibited by Section 8.

In order for there to be preemption, federal agencies must sometimes combine jurisdiction over a field with action. However, on other occasions, an agency only needs the jurisdiction to act and inaction serves as no hint that the states may temporarily enter the field. Even with this rather clear cut guideline, justices still differ as to whether or not an agency has acted in

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[12] Oregon-Washington R.R. and Nav. Co. v. Washington, 270 U.S. 87 (1926).
[13] 359 U.S. 236 (1959).

such a way as to actually preempt the states from a field. To a majority in *Pennsylvania Ry. v. Public Service Commission*,[14] Interstate Commerce Commission regulations concerning the equipment for caboose cars without platforms based on the Safety Appliance Act and Post Office requirements concerning equipment of mail cars when they served as end cars, were adequate to bring the whole matter of the requisites of a mail car when used as an end car under federal control. Dissenting Justice Clarke saw no federal administrative action sufficient to displace state power since the federal and the state agencies were not dealing with exactly the same specific matters in the general area.

The case of *Farmers Educational and Co-op Union v. W.D.A.Y. Inc.*,[15] illustrates another way that administrative action can lead to preemption. Here the Court respected an informal administrative preemptionist interpretation of Section 315 (a) of the Federal Communications Act of 1934 even though the majority admitted that an examination of the legislative history dealing with the passage of the act did not show much evidence that Congress wanted to preclude state action. The minority saw no agency "action" of sufficient weight to displace state power. It found preemptive dicta in sundry agency regulations, but no regulation specifically displacing state power. Mr. Justice Frankfurter, speaking for the minority, also questioned the wisdom of the Court in giving such weight to an administrative agency's finding in such a situation.

The principle that federal administrative inaction does not serve as a hint for temporary state entry into a field is applied in *Guss v. Utah Labor Relations Board*[16] (labor-management relations field, federal jurisdiction over activities subject to Sections 7 and 8 of the Taft-Hartley Act), *Oregon-Washington R.R. and Nav. Co. v. Washington*[17] (quarantine), *Chicago v. Atchison, Topeka & Santa Fe R.R.*[18] (issuance by the city of Chicago of a railroad certificate of convenience and necessity), and *La Crosse Telephone Corporation v. Wisconsin Employment Relations*

[14] 250 U.S. 566 (1919).
[15] 360 U.S. 525 (1959).
[16] 353 U.S. 1 (1956).
[17] 270 U.S. 87 (1926).
[18] 357 U.S. 77 (1958).

Board[19] The Court illustrated the use of this guideline particularly well in the last case by holding that the Wisconsin board could not exercise jurisdiction to determine the appropriate collective bargaining representative, even though the National Labor Relations Board hadn't assumed jurisdiction in the particular matter at hand. Here administrative inaction was not enough of an indication to allow state action because the NLRB had not specifically ceded jurisdiction to the state. While recognizing no direct clash between federal and state agencies, in contrast with the *Bethlehem Steel Co. v. N. Y. State Labor Relations Board* case,[20] Mr. Justice Douglas saw possible conflict between state and federal policies concerning labor representation and appropriate bargaining units.

With the eclipse of the doctrine of dual federalism, a federal system of government does not provide serious obstacles for national government entry into and preemption of fields traditionally occupied by the states as long as the central government is exercising a delegated power or is taking necessary and proper means to exercise such powers. In *Northern Pac. Ry. v. N. Dakota, ex rel. Langer*,[21] the war power served as the constitutional basis of comprehensive federal control over intrastate railroad rates resulting in the displacement of traditional state action. Since labor disputes of local scope between a union and a local taxi company which picks up and delivers passengers at railroad terminals, airports, and passenger steamship docks on the one hand and state regulations of intrastate railroad rates and charges on the other affect interstate commerce, Congress may displace state with federal court jurisdiction in the first instance and with federal regulations in the second.[22] Nevertheless, both matters just mentioned would normally be in the traditional state sphere.

For justices who subscribe to some or all of the guidelines above, it logically follows that once Congress enters a field the states have no authorization to add to or to supplement even the most modest of federal schemes. It makes no difference how many gaps there may be in a given regulatory scheme. Chief

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[19] 336 U.S. 18 (1949).
[20] 330 U.S. 767 (1949).
[21] 250 U.S. 135 (1919).
[22] Superior Court of Washington v. Washington, 361 U.S. 373 (1960); American Express Co. vs. South Dakota, ex rel Caldwell, 244 U.S. 617 (1917).

Justice Warren, speaking for the majority in *Guss v. Utah Labir Relations Board,*[23] held that Congress wanted uniformity in regulation. It was the responsibility of the National Labor Relations Board and not that of the states to fill in regulatory gaps either by taking on a larger work load or by specifically ceding jurisdiction to state agencies by authority of Section 10 (a) of the Taft-Hartley Act. Following the philosophy of the *Guss* case, the Court held in *Amalgamated Meat Cutters and B.W. v. Fairlawn Meats Inc.,*[24] that state courts without specific federal approval could offer no parallel remedies to employers from peaceful picketing even if the NLRB did fail to act. Above and beyond the holdings in the *Guss* and *Fairlawn* cases, the Court went further in *Cloverleaf Butter Co. v. Patterson,*[25] by holding that Congress could preclude supplementary state legislation even if there was no need for a strictly uniform rule.

Even if supplementary legislation is tolerated, state enactments which coincide with or duplicate federal statutes, fall whether there is danger of conflict or not. The Court comments upon this problem in *Charleston and W.C.R. Co. v. Varnville Furniture Co.,*[26] by saying that it considers coincidence as ineffective a justification for the maintenance of state power as opposition (conflict). Mr. Justice Reed, speaking for the majority in *Cloverleaf Butter Co. v. Patterson,* held that those loyal to the idea of co-operative federalism still could not uphold state legislation that coincided with that of the federal government. Instead, he followed the principle just expressed in the *Varnville* case, by saying:

> To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and while federal enforcement (officials) deemed it wholesome, would not only hamper the administration of the federal act, but would be inconsistent with its requirements. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject.

Danger of duplication, particularly in the awarding of damages in the labor-management relations field was adequate ground

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[23] 353 U.S. 1 (1956).
[24] 353 U.S. 20 (1957).
[25] 315 U.S. 148 (1942).
[26] 237 U.S. 597 (1915).

to displace a state scheme at least in the eyes of dissenting Justices Warren and Douglas in *International Union U.A.A. and A.I.W. v. Russell.*[27]

Cases like *Boston & Maine R.R. v. Hooker,*[28] *Marine Engineers Beneficial Association v. Interlake S.S. Co.,*[29] and *Hill v. Florida,*[30] serve as evidence to show that there is a good deal of disagreement among justices as to when the Congress and the states are actually regulating the very same subject matter. Disagreement results in conflicting stands on the preemption question as is well shown in the *Hooker* case. The majority made a preemption ruling on the ground that state regulation of interstate transportation of property was precluded by the federal Carmack amendment to the Hepburn Act. Mr. Justice Pitney, writing the dissent, did not see any evidence that the Carmack amendment applied to the specific matter at hand.

Danger of conflict between federal and state governments is an adequate rationale for preemption especially in current labor-management relations cases pertaining to picketing and certification of collective bargaining units. Danger of conflict is sometimes interpreted to mean possible frustration of federal policy. It can also signify the possible upsetting of a Congressional regulatory scheme that carefully balances the interests of two or more groups such as management and labor. *San Diego Building Trades Council v. Garmon,*[31] illustrates the use of this guideline. Here a California court was precluded by the Taft-Hartley Act from awarding damages to respondents under state law for economic injuries resulting from peaceful picketing of their plant by labor unions which had not been selected by a majority of the respondents employees as their bargaining agent. The Court justified preclusion by explaining that when the NLRB, as in this case, has not clearly determined whether an activity is protected or prohibited by Taft-Hartley, such an activity is withdrawn from state regulation. If the states governed matters potentially subject to federal regulation there would be danger of conflict. At the time the case was decided,

[27] 356 U.S. 634 (1958).
[28] 233 U.S. 97 (1914).
[29] 370 U.S. 173 (1962).
[30] 325 U.S. 538 (1945).
[31] 359 U.S. 236 (1959).

there was no tangible conflict. This type of preemptable potential conflict resembles that in *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board* discussed above.

A claim that a state is exercising traditional bona fide police power does not always outweigh a claim that Congress has entered a field and precluded exercise of traditional police power. While the state police power to enjoin violence or potential violence in picketing is bona fide and will stand against the wishes of some dissenting justices,[32] power to enjoin all picketing when peaceful is precluded by the Wagner and Taft-Hartley Acts which give the NLRB exclusive jurisdiction over such matters.[33] In the *Varnville* case mentioned above, the Court made it clear that a state statute concerned with railroad liability for loss or damage to interstate shipments, would not escape displacement by Congress merely on the claim that the state was exercising historic police power and going beyond the requirements set down by Congress. State police power action over water diversion from Lake Michigan, the regulation of railroad cars and appliances, and the liability for intrastate shipments was displaced in *Sanitary District of Chicago v. United States*,[34] *Napier v. Atlantic and Coast Line R.R.*,[35] and *Adams Express Company v. Croninger*,[36] respectively.

II.

In upholding state power against claims of preemption, during the same time period as covered above, the Court generally held different attitudes and applied different guidelines. A fundamental attitude expressed by justices upholding state power in the face of Congressional action is that the Court should decline to take the lead in declaring preemption, particularly since the Congress has the ability to specifically say if it intends to preempt. This attitude is closely associated with the idea of judicial self-restraint and it is expressed in many of the majority opinions and in some of the lengthier minority opinions in such cases as *Bethlehem Steel Company v. New York State Labor*

[32] United Automobile A. and A.I.W. v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).
[33] Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957).
[34] 266 U.S. 405 (1925).
[35] 272 U.S. 605 (1926).
[36] 226 U.S. 491 (1913).

Relations Board[37] and *Cloverleaf Butter Company v. Patterson.*[38] In short, if Congress says nothing specifically about preemption, don't imply preemption. Had the Court assumed this attitude in deciding *Cloverleaf Butter Company v. Patterson* and *Hill v. Florida,*[39] Alabama would still have the power to inspect and seize packing stock butter and Florida would still be able to set down qualifications for union officials. *Maurer v. Hamilton*[40] represents a case in which the Court expressed the more lenient attitude. It refused to give weight to a statute implying preemption since Congress did not specifically exclude state power to regulate the height and weight of motor vehicles in the Motor Carrier Act. In *Alabama Federation of Labor Local Union v. McAdory,*[41] the Court saw no clear evidence that Congress through the National Labor Relations Act precluded the enforcement of the Alabama Bradford Act which regulated labor unions in great detail. Furthermore, the exact construction to be given to the Alabama act was still unknown and, therefore, the Court was in no position to see any evidence of clear preemptable conflict between the state and the federal acts. Holding to the same attitude as in the *McAdory* case, the Court dissenters in *Chicago v. Atchison, Topeka, and Santa Fe R.R.*[42] held that the federal Interstate Commerce Act did not, at the time the case was being decided, preclude the Chicago Municipal Code provision requiring issuance of a certificate of convenience and necessity to an operator of a transfer service moving interstate passengers and their baggage between different railroad terminals in the city. It was not known how Chicago would interpret and apply the ordinance. The Court was unanimous in its view that an unconstitutional statute of 1906 was of inadequate force to preclude state action by implication.[43]

Closely connected with the view that only Congress should declare preemption, and then in specific terms, is the attitude that Congress in legislating not only spells out specifically what

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[37] 330 U.S. 767 (1947).
[38] 315 U.S. 148 (1942). Also see Cooley v. Board of Wardens, 12 How. 299 (1852).
[39] 325 U.S. 538 (1945).
[40] 309 U.S. 598 (1940).
[41] 325 U.S. 450 (1945).
[42] 357 U.S. 77 (1958).
[43] *Chicago I. and L.Ry. v. Hackett,* 228 U.S. 559 (1913).

it will cover, but at the same time, circumscribes its coverage, even when the coverage is broad. By implication, the Congress leaves room for state action. Thus in *Mitchell v. H. B. Zachry Co.*,[44] the Court majority emphasized the limits to the broadly worded Fair Labor Standards Act by pointing out that it only covers workers engaged in commerce or in the production of goods for commerce or in any closely related process or occupation directly essential to the production thereof. Here, said the majority, Congress had not displaced state jurisdiction over employees engaged in constructing a dam solely to increase the reservoir capacity of the local water system of a city and its vicinity all within a single state. Rather than being impressed with how a Congressionally circumscribed act allowed continued state action, the dissenters took the view that the pervasive federal act had just the opposite effect. The federal act applied here because much of the water supply was to be used by producers of goods for interstate commerce.

One can imply the need for state action from the absence of uniform national rules in a given field. In *Sturges v. Crowninshield*,[45] Chief Justice Marshall declared that absence of uniform rules on bankruptcy left room for the states to pass divergent laws on the subject provided that they did not violate Article I, Section 10 of the Constitution. He concluded that an Act of 1797 and the Collection Law of 1799 did not provide a uniform bankruptcy rule to preclude state action. *Ogden v. Saunders*,[46] added substance to the Marshall claim that there was room for state action by holding that state bankruptcy laws when applied to future debt contracts did not violate Article I, Section 10 of the Constitution.

Defenders of state power find other signs in Congressional enactments that state action is not only tolerated, but greatly needed. In *Seaboard Airline Ry. v. Kenney*,[47] the Court held that the Federal Employers' Liability Act did not completely displace the states in the general field of railroad liability due to negligence for the injury or death of employees. Since the federal act contained no definition of who was to constitute the next

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[44] 362 U.S. 310 (1960).
[45] 4 Wheat. 122 (1819).
[46] 12 Wheat. 213 (1827).
[47] 240 U.S. 489 (1916).

of kin to be granted a right of recovery, the states, said the Court, had the power by statute to do so. Over the vigorous dissent of Justices Douglas and Black that the National Labor Relations Act had displaced state action, the majority held in *United Construction Workers v. Laburnum Construction Corporation*,[48] that a federal act condemning certain union conduct as an unfair labor practice did not prevent a state court from sustaining an employer's common law tort action for damages based upon the same conduct. The majority justices concluded that Congress had provided no procedures for dealing with the consequences of tortious conduct. In short, state action stood because Congress provided inadequate administrative or judicial remedies. Likewise, failure of Congress to make larger appropriations to its agencies regulating warehouses and labor-management relations served as strong evidence to dissenters in *Rice v. Santa Fe Elevator Corporation*[49] and *Guss v. Utah Labor Relations Board*,[50] that Congress had no intention of ousting the states from fields that they had traditionally occupied. The majority in both cases was more concerned with the supposed Congressional intent to construct a uniform set of regulations.

As we shall now see, defenders of state power discard most of the signs used by the preemptionists to show that Congress intended to displace state action.

A section of the Civil Aeronautics Act of 1938 reads as follows:

> The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States including the air space above all inland waters and the air space above those portions of the adjocent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

In *Braniff Airways v. Nebraska State Board of Equalization and Assessment*,[51] the Court saw nothing in this sweeping language or in the language of the Air Commerce Act of 1926 to deny states the power to levy an apportioned *ad valorem* tax on the flight equipment of an interstate airline. The Court follows the reason-

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[48] 347 U.S. 656 (1954).
[49] 331 U.S. 218 (1947).
[50] 353 U.S. 1 (1956).
[51] 347 U.S. 590 (1954).

ing of the *Braniff* case in numerous other instances dealing particularly with quarantine systems, non rate and liability regulation of the railroads, grain exchanges, and warehouses.

From the observation of the above attitudes, it is not difficult to understand why justices championing state action decline to accept a modest or pervasive federal scheme as evidence of Congressional intent to preclude state action. In *Kelly v. Washington, ex rel. Foss Co.*,[52] it was held that Washington had the power to inspect the hull and machinery of motor driven tugs which did not carry freight or passengers for hire in order to determine their seaworthiness and safety. The comprehensive federal Motor Boat Act and other acts did not specifically provide for such inspection.

In some cases, it has been held that neither federal administrative action nor inaction in themselves sufficiently imply Congressional intent to preempt. *Eichholz v. Public Service Commission*[53] and *Welch Company v. New Hampshire*,[54] upholding state action when federal agencies with jurisdiction are inactive, contrast sharply with the sister case of *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*.[55] In the *Eichholz* case, the Court held that reasonable state traffic regulations, such as the obtaining of a certificate of public convenience and necessity before carrying on intrastate business in Missouri, applied to an interstate motor carrier trying to obtain a federal operators permit from the Interstate Commerce Commission. The Commission had not yet acted. In *Welch Co. v. New Hampshire*, the Court upheld a New Hampshire safety regulation that applied to carriers covered by the Motor Carrier Act as long as the Interstate Commerce Commission failed to make the same type of regulation.

On some, but not all occasions, the Court respects federal agency decisions to promote or at least acquiesce in state action. This is illustrated in *Parker v. Brown*,[56] where the United States Department of Agriculture, without a program of its own, approved of the California marketing control-price maintenance

[52] 302 U.S. 1 (1937).
[53] 306 U.S. 268 (1939).
[54] 306 U.S. 79 (1939).
[55] 336 U.S. 18 (1949).
[56] 317 U.S. 341 (1943).

program for raisins. In *Mintz v. Baldwin*,[57] the Court in upholding state power, gave weight to the fact that the Department of Agriculture had acquiesced in state measures to suppress cattle diseases even though there were two federal measures on the subject, the Cattle Contagious Diseases Acts of 1903 and 1905. After criticizing the majority decision to displace state legislation, dissenters in *Cloverleaf Butter Company v. Patterson*,[58] asserted that federal and state agencies in this instance had worked together for a long period of time in an atmosphere of sympathetic co-operation. Chief Justice Stone said:

> To find in such circumstances an intent to restrict state power not required by the words of the statute, is to condemn a working harmonious federal-state relationship for the sake of a sterile and harmful insistence on exclusive federal power.

The dissenters in *Schwabacher v. United States*,[59] took the same stand and condemned the majority holding of preemption when the Interstate Commerce Commission had condoned state action.

While some of the following cases represent outdated Court attitudes concerning the power of the states and the national government in the federal system, they do illustrate one of the ways to defend the continued existence of state power. In *Keller v. United States*,[60] the Court saw no preemptive implications in the federal act of 1907 making it a felony to harbor alien prostitutes. Instead, the federal act was held to be an unconstitutional regulation of a matter reserved to the states and subject only to the state police power. In the case of *New York v. Miln*,[61] the Court saw no indication that the federal Revenue Act of 1799 or the Act of 1819 relating to passengers on vessels displaced a New York regulation requiring reports from vessel masters that were to include the name, age, place of birth, and last legal settlement of each passenger. Since federal and state concerns with the passengers in question were put into separate watertight compartments, there was no possibility of a conflict rationale for preemption. Federal laws applied to the passengers until they landed. State power over the passengers became legiti-

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[57] 289 U.S. 346 (1933).
[58] 315 U.S. 148 (1942).
[59] 334 U.S. 182 (1948).
[60] 213 U.S. 138 (1909).
[61] 11 Pet. 102 (1837).

mate thereafter. In this instance, New York was not regulating interstate commerce, it was only exercising its police power over a sphere of activities reserved to the states.

Veazie v. Moore,[62] gives us one other rather interesting but antiquated example of how the principles of federalism as conceived by the justices can prevent a Congressional enactment from precluding state action. In this case, the state of Maine was allowed to prevent federally licensed vessels from navigating the Penobscot River by granting exclusive navigation rights to an improvement company. The Court held that there could be no preemption here because the river was wholly located in Maine and furthermore it was only imperfectly navigable.

After observing the attitudes and guidelines above, it is not surprising that justices find it possible for state legislation to coincide with or supplement federal statutes. One of the leading reasons for Court leniency is the fear of creating twilight zones where neither the states nor the federal government act. In *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission*,[63] the Court precluded the likelihood of a twilight zone by holding that the federal Natural Gas Act, applying to sales of gas in interstate commerce which are for resale, did not displace state regulation of sales in interstate commerce directly to consumers where no resale is involved. Mention of a few cases will show further Court tolerance of supplementary and coinciding state legislation. In *California v. Zook*,[64] the Court held that california could impose penalties beyond those prescribed by the federal Motor Carrier Act for those who sell or arrange any transportation over the public highways of the state if the transporting carrier has no permit from the Interstate Commerce Commission. The majority approved of the diversity of penalties in various states because of the varying acuteness of the problem. The minority felt that the Congress had displaced state initiative because it had not specifically provided for federal-state co-operation. In *South Buffalo Ry. v. Ahern*,[65] it was held over strong dissenting protests that the Federal Employer's Liability Act did not prevent

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[62] 14 How. 568 (1852).
[63] 341 U.S. 329 (1951).
[64] 336 U.S. 725 (1949).
[65] 344 U.S. 367 (1953).

the states from awarding liability compensation to a widow of a railroad employee injured in the course of his employment in interstate commerce when the railroad fully advised of its legal right submitted the controversy to the state Workmen's Compensation Board. *Savage v. Jones*,[66] and *Corn Products v. Eddy*,[67] point out a typical state-federal dual scheme of regulation upheld by the Court. The federal Food and Drug Act of 1906 prohibits advertising and misbranding of foods and drugs in interstate commerce. States like Indiana may place positive commands upon producers by requiring them to disclose the ingredients of concentrated feeding stuffs and other foods.

When the Court upheld the California Act which is very similar to the Federal Motor Carrier Act in *California v. Zook*,[68] it paid service to an attitude directly conflicting with the one expressed in the *Varnville*[69] case mentioned above on page 296. In the *Zook* case, the Court in effect said that coincidence and duplication of state and federal legislation did not in and of itself, displace state legislation.

To justices with an inclination to uphold state action as much as possible, mere showing of a danger of conflict is not enough to serve as a rationale for preemption. To use the terms of the court opinions, there must be clear, actual, present, demonstrable, or irreconcilable conflict. The burden of proof clearly falls on those who are challenging state power. Influenced by such ideas of demonstrated, actual conflict, Mr. Justice Frankfurter, dissenting in *United Mine Workers v. Arkansas Oak Flooring Company*,[70] thought that the Court should have accommodated state and federal interests by allowing the state of Louisiana to enjoin peaceful picketing of an employer by his employees and a union striking to become the employees' bargaining agent, because the union in question had not compiled with the non-Communist and other reporting provisions of Section 9 (f), (g), and (h) of the Taft-Hartley Act. Mr. Justice Frankfurter, in conclusion, felt that the states should be able to supplement the Congressional policy in Section 9 of hampering

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[66] 225 U.S. 501 (1912).
[67] 249 U.S. 427 (1919).
[68] 336 U.S. 725 (1949).
[69] 237 U.S. 597 (1915).
[70] 351 U.S. 62 (1956).

and discriminating against such unions by denying them important trade union rights. The majority relied on other guidelines and attitudes and used conflict as a leading rationale for the displacement of state power. To enjoin such picketing would deprice the union of Taft-Hartley rights under Section 7. In *International Union, U.A.W. v. Wisconsin Employment Relations Board*,[71] the majority was able to uphold state power to enjoin work stoppages that halted production by denying the dissenting contention that the right of work stoppage was a federally protected right. The majority contending that the conduct was neither protected nor prohibited by the federal act was able to see no conflict, hence no rationale for displacement of state power. In *Puerto Rico v. Shell Company*,[72] the court was willing to uphold a territorial act very similar to the Sherman Anti-trust Act on the ground that any conflict between the two would be reconcilable.

Under this narrow interpretation of conflict, the states have continued to act in numerous fields despite Congressional entry. The states may license a federally licensed customs house broker engaged in interstate and foreign commerce,[73] and require that some interstate trains stop at county seats above a stated population.[74] In enforcing a smoke abatement code, a municipality may order a federally licensed ship to undergo some structural alterations before it performs the necessary job of cleaning its fires.[75] Some state regulations designed to deal with local matters are valid even if they indirectly or incidentally touch upon interstate commerce. On numerous occasions the Court has failed to find demonstrable or actual conflict resulting from state regulation of intrastate rairoad rates of interstate carriers.[76] The same also holds for direct and deliberate state regulation of portions of interstate commerce in the motor vehicle, internal labor union affairs, and quarantine fields. From such liberal court attitudes as these, it is not surprising that a state has the power to require vessels engaged in interstate and foreign commerce to pay quarantine fees for examination as to their sanitary con-

[71] 336 U.S. 245 (1949).
[72] 302 U.S. 253 (1937).
[73] Union Brokerage Company v. Jensen, 322 U.S. 202 (1944).
[74] Gulf Colorado & Santa Fe Ry. v. Texas, 246 U.S. 58 (1918).
[75] Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).
[76] Simpson v. Shepard, 230 U.S. 352 (1913).

dition despite Congressional Acts of 1799 and 1878. The fee also stood because it was compensation for service rendered and not a tonnage tax.[77] In *Davis v. Cleveland C. C. and St. L. Ry.*,[78] the Court held that the Interstate Commerce Act did not preclude enforcement of a state law making railroad cars committed to interstate commerce subject to attachment. This type of state action did not result in an actual conflict with federal legislation securing the continuity of interstate transportation.

In concluding this examination of attitudes and guidelines that negate or conflict with those mentioned in the first section, it will come as no surprise that a key motive in upholding state action is deference to the historic exercise of the state police and tax powers. This motive is expressed in cases dealing with virtually all the fields where the question of preemption has arisen—licensing, inspection and seizure, quarantine, protection of animals, and the regulation of picketing, motor vehicles, food sales, railroads, grain exchanges, warehouses, water transportation, liquor and aliens.

III.

The justices use other guidelines in conjunction with those discussed above. However, the general feelings about preemption influencing Court use of guidelines, have already been discussed.

In a few cases, the Court considers the question of dominant federal interest. If one is found, there is preemption. In *Pennsylvania v. Nelson*,[79] the majority held that Congress recognized such an interest and displayed state power to punish sedition against the United States when it passed the Smith, Internal Security, and Communist Control acts. Dissenters said that Congress did not specifically preclude state action. On the question of subversion, the dissent said that in the responsibility of national and local governments to protect themselves against sedition, there was no dominant federal interest.

At the risk of making unrealistic distinctions, it appears that the Court often uses the concept of conflict as a guideline rather than the danger of conflict or clear, actual, present, demonstrable,

[77] Morgans S.S. Co. v. Board of Health of Louisiana, 118 U.S. 455 (1886).
[78] 217 U.S. 157 (1910).
[79] 350 U.S. 497 (1956).

irreconciliable conflicts as discussed above. Once again, it should be emphasized that justices often utilize attitudes and guidelines of Part I, in addition to the conflict guideline, and conclude that there is preemptable conflict. The opposite is true for justices utilizing the attitudes and guidelines in Part II. This explains the great lack of agreement as to whether there is conflict in such cases as *Huron Portland Cement Company v. Detroit,*[80] *Bethlemen Steel Company v. New York State Labor Relations Board,*[81] *International Union U.A.A. and A,I,W. v. Russell,*[82] *Hill v. Florida,*[83] and *Pennsylvania v. Nelson.*[84]

The Court, on occasion, has held that federal legislation, to promote interstate commerce like the Interstate Commerce and Motor Carrier acts, does not preclude state measures of a non-penalizing character such as selected local oriented rate regulation of interstate ferries and taxicabs. Concern for possible burdens on interstate commerce enters here.[86]

Justices subscribing to Part I and Part II views differ in their conclusions as to whether Congress wants preemptable uniformity. The clash is well-illustrated in the following two cases. In *International Union U.A.A. and A.I.W. v. Russell,*[86] the preemptionist minority concluded that Congress wanted uniformity in awarding of compensatory and punitive damages against a union for denying a worker access to a plant during a strike. Even if no remedies were available under the federal act, corrective action on the state level would merely upset the delicate balance between labor and business interests provided for in the National Labor Relations Act. The majority, on the other hand, found no evidence that the act specifically gave the National Labor Relations Board exclusive jurisdiction over the subject matter of a common law tort action, and hence, saw no implication that Congress wanted uniform treatment. The majority in *New York Cent. R.R. v. Winfield,*[87] concluded that Congress,

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[80] 362 U.S. 440 (1960).
[81] 330 U.S. 767 (1947).
[82] 356 U.S. 634 (1958).
[83] 325 U.S. 538 (1945).
[84] 350 U.S. 497 (1956).
[85] Buck v. California, 343 U.S. 99 (1952); Port Richmond Ferry Co. v. Board of Chosen Freeholders, 234 U.S. 317 (1914).
[86] 356 U.S. 634 (1958). Also see Cooley v. Board of Wardens 12 How. 299 (1852).
[87] 244 U.S. 147 (1917).

in passing the Federal Employer's Liability Act, wanted a uniform rule on the subject of liabilities and obligations of negligent interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce. After studying the legislative history of the passage of the federal act, Mr. Justice Brandeis dissented and held that Congress made no hint that it wanted a uniform rule. The act did not cover all types of injuries which result from railroad negligence. On the basis of facts showing the innumerable types of injuries that could be incurred, Brandeis concluded that diverse treatment would be needed to adequately cover the subject.

An examination of legislative history concerning the passage of original statutes and amendments and the approval of interstate compacts, fails to bring judicial agreement on the preemption question. The history is recorded in committee hearings and reports and in the *Congressional Record.* The sharpest clashes over the meaning of legislative history have come in *Cloverleaf Butter Company v. Patterson,*[88] *Farmers Educational and Co-op Union v. W.D.A.Y. Inc.,*[89] *New York Cent. R.R. v. Winfield,*[90] *Public Utilities Commission v. United Fuel Gas Co.,*[91] and *Hill v. Florida.*[92]

An examination of the legislative history of the 1931 amendment to the Federal Warehouse Act of 1916, failed to bring total agreement on the preemption question. Instead, the majority in *Rice v. Santa Fe Elevator Corporation,*[93] held that Congress ousted the states from the field of warehouse regulation while the minority, seeing no preemptive implications in a broadly worder amendment, reached the opposite conclusion.

Judicial study of the legislative history behind the Congressional approval of interstate compacts failed to yield unanimous opinions in *Pennsylvania v. Wheeling & Belmont Bridge Company,*[94] or in *De Veau v. Braisted.*[95] The majority in the

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[88] 315 U.S. 148 (1942).
[89] 360 U.S. 525 (1959).
[90] 244 U.S. 147 (1917).
[91] 317 U.S. 456 (1943).
[92] 325 U.S. 538 (1945).
[93] 331 U.S. 218 (1947).
[94] 13 How. 518 (1852).
[95] 363 U.S. 144 (1960).

Wheeling case held that Congressional approval of an interstate compact between Virginia and Kentucky, allowing all U.S. citizens to make use of the navigable Ohio River, precluded the power of Virginia to build a bridge across that River, which would obstruct navigation. Mr. Justice Taney, speaking for the minority, held that vessels enrolled under an act of Congress had the right to navigate waters only when they were navigable. Virginia's right to build a bridge, despite its effect on navigation, should be upheld just as was the right of Delaware to construct a dam across navigable waters in *Willson v. Black Bird Creek Marsh Company*.[96] Congress negated the majority holding and vindicated Taney shortly thereafter by saying that the approved compact could not be interpreted so as to preclude Virginia's right to build the bridge. In *De Veau v. Braisted*, the majority saw Congressional approval of the New Jersey-New York Waterfront Commission Compact as adequate proof that Congress did not intend to preclude the power of New York to pass a statute barring collections of levies from waterfront employees on behalf of unions having convicted felons as officers or agents. The minority saw no such significance in the approval of the compact and exhorted the majority to either follow or specifically overrule *Hill v. Florida*, which held that the Taft-Hartley Act precluded state power to specify the qualifications of a union business agent.[97] So far, Congress has acquiesced in the majority ruling.

One further court practice should not be overlooked before we pass on to the next aspect of the problem at issue. On occasion, the Court avoids the preemption issue *per se*, but nonetheless, makes a decision either upholding or nullifying the exercise of state power. A corporation in interstate commerce sued in a state court to enjoin a labor union from peacefully picketing the corporation place of business.[98] The union sued in a federal district court to enjoin the corporation from further prosecution of its suit in state court. The Supreme Court majority held that Section 2283 of the United States Judicial Code, denied the federal district court power to enjoin the proceedings in the state court, since it was a private litigant, *i.e.* the union,

[96] 2 Pet. 245 (1829).
[97] 325 U.S. 538 (1945).
[98] Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955).

rather than the National Labor Relations Board or its representatives that applied to the District Court for an injunctive ruling. The dissenters found other statutory authority giving the district court jurisdiction to issue the injunction sought by the union. The net result was an upholding, at least temporarily, of state power on technical grounds.

Introduction

The key question before us is whether the Court, with its double set of attitudes and guidelines in turn affecting its views on the equally important questions of dominant federal interest, conflict, burdens on interstate commerce, uniformity, and legislative history, is able to give us consistency and predictability in preemption decisions by at least applying like attitudes and like guidelines to like types of cases.

Recent articles point out the confusion that results from preemption decisions in such fields as labor-management relations because the Court seems to be applying opposing principles to fundamentally similar cases.[99] Despite this charge, an examination of the numerous preemption cases listed in *United States Supreme Court Digest Annotated* and in the *Supreme Court Reporter* shows that even in the field of labor relations the Court has shown fairly strong consistency in deciding cases. Preemption cases fall into three fairly well defined categories which we shall now proceed to examine. There are two categories of cases to which Part I and Part II (preemptionist and non-preemptionist attitudes and guidelines mentioned in Chapter One) standards respectively are consistently applied. The third category of cases is divided into two subsections, the first, in which Part I, and the second, in which Part II principles are generally applied.

CHAPTER TWO

The Extent to Which Like Attitudes and Guidelines Govern Like Cases

I.

The cases in the small category of preempted state action fall into two classifications: first, state interference with the pow-

[99] Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, Chicago Law School Record Supplement, Vol. 8, No. 1 Autumn 1958, p. 96.

ers and duties of federal officials as set down by Congress or federal agencies, and second, actual state nullification of federally granted rights or of a constitutional federal program. The case of *Public Utility Comm'n of California v. United States*,[100] is a good example of the first type of situation. Under a California act the State Public Utilities Commission had the power to decide what constituted just and reasonable railroad rates. In so doing, the commission could prevent common carriers from transporting property at reduced rates for the United States. The Court held that Congress precluded the exercise of such state power when it gave federal procurement officers the authority to determine when existing rates should be accepted or when negotiations for lower rates should be undertaken. There are numerous cases to illustrate point number two. State laws were displaced when they prescribed licensing requirements that would forbid the business operations of telephone and telegraph companies authorized by federal law,[101] when they forbade collective bargaining agreements authorized by federal laws,[102] and when they prevented the enforcement of the Act of 1793 concerning the return of fugitive slaves.[103] In order to make continually effective a federal program of using the property of mentally incompetent servicemen in veterans hospitals dying intestate for the comfort and recreation of others similarly situated, the Court held that a federal statute precluded any further application of state descent laws in such situations.[104] The portions of Part I governing these cases were: broadly worded statutes imply displacement of state power; need for uninformity; presence of conflict; and frustration of federal policy.

Most of the cases in the category to which portions of Part II applied deal either with the power of the states to protect animals and the public health, welfare, and morals of their citizens in the area of food and drug sales, bigamy, and prostitution, or with state power to tax and to determine their own litigation procedures. Four of the cases deal with the protection

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100 355 U.S. 534 (1958).

101 Western Union Telegraph Company v. Boegli, 251 U.S. 315 (1920); Leloup v. Port of Mobile, 127 U.S. 640 (1888).

102 Local 24 of International Brotherhood of Teamsters C.W.H. v. Oliver, 362 U.S. 605 (1960).

103 Prigg v. Pennsylvania, 16 Pet. 539 (1842).

104 United States v. Oregon, 366 U.S. 643 (1961).

of wild ducks, sponges, and fish. The South Dakota act stood alongside the Federal Migratory Bird Act of 1913 and forbade the shipment of common or private carriers, of wild ducks of any variety to any person within or outside of the state.[105] The Florida statute forbade the use of diving equipment for purposes of taking commercial sponges from the Gulf of Mexico or the Straits of Florida or other waters within the territorial limits of the state.[106] The two cases protecting fish in Alaska can be clearly differentiated.[107] In reference to the non-reservation village of Kake, the Court held that Congress had not precluded the enforcement of Alaska's Anti-Fish Trap Conservation Law. However, since the Indian community considered in the second case was a reservation created by Congress, subject to the rules and regulations of the Secretary of Interior, the latter official, in that particular instance, could preclude the enforcement of the Alaska act. The largest group of cases in this category upheld state power to require labeling of goods and to regulate sales of foods and drugs in order to give additional protection to the public from fraud and deception, even in the presence of the Federal Food and Drug, the Harrison Anti-Narcotic Drug, and the Agricultural Adjustment Acts.[108] *Crossman v. Lurman*[109] is of particular interest because the Court upheld the power of New York through its law of 1893 to prohibit the sale of adulterated foods in the state imported from overseas. *McDermott v. Wisconsin*[110] can be fairly distinguished from the other food and drug cases. The Court struck down a Wisconsin statute, not because it directed that corn syrup be labeled as such, but because all non Wisconsin labels, including those of the federal government authorized by the Food and Drug Act of 1906, were to be removed from the containers. This was a case of clear conflict. In *Davis v. Beason*[111] and *Keller v. United States*,[112] the

[105] Carey v. South Dakota, 250 U.S. 118 (1919).
[106] Skiriotes v. Florida, 313 U.S. 69 (1941).
[107] Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Metlakatla Indian Com. Annette Island Res. v. Egan, 369 U.S. 45 (1962).
[108] Florida Lime and Avocado Growers, Inc. v. Paul, 368 U.S. 964 (1962); Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41 (1921); Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919).
[109] 192 U.S. 189 (1904).
[110] 228 U.S. 115 (1913).
[111] 133 U.S. 333 (1890).
[112] 213 U.S. 138 (1909).

Court upheld state power to protect the public morals by preventing bigamy and by penalizing those who harbored alien prostitutes.

On the ground that the states should be able to determine their own litigation procedures, the Court held that the Federal Employer's Liability Act did not displace a Minnesota law governing fees to be received by attorneys for actions arising under the federal act.[113] Likewise the Carmack Amendment spelling out the liability of a carrier for the loss or damage to any interstate shipment did not displace state power to pass a law allowing recovery of a reasonable attorney fee as part of costs in suits on contested but proper claims of less than $200,00 for loss on interstate shipments.[114] State tax power is retained in the *Braniff Airways* case (page 301) as are state attachment laws indirectly regulating interstate commerce by virtue of *Davis v. Cleveland C.C. and St. L. Ry.* (page 307)

With the exception of the *McDermott* case, the portions of Part II governing these cases were: implied room for state action even in the face of broadly worded statutes, administrative inaction as a hint that states may enter or stay in the field, the federal system as a barrier to preemption, toleration of supplementary and coinciding legislation by the states, no actual conflict or burdens, deference to the state police power and no dominant federal interest.

III.

Now we reach the largest category of cases, composed of two subsections. Let us first consider the subsection made up of cases in which the Court usually holds that Congress has displaced state action. This set can be distinguished from all other groups of cases by quickly looking at the subject matter. A few cases deal with displacement of state power to deal with bankruptcy and prices. A large number of cases illustrate the Court's

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113 Dickinson v. Stiles, 246 U.S. 631 (1918).

114 Missouri, Kansas & Topeka Ry. Co. v. Harris, 234 U.S. 412 (1914). It should be pointed out however, that the Court has not been unanimous in its decisions upholding state power in the face of the Civil Rights and Federal Communications Acts to permit evidence obtained from an illegal state search or from wiretapping to be used in a state as distinguished from a federal prosecution. See: Pugach v. Dollinger, 365 U.S. 458 (1961); Benanti v. United States, 355 U.S. 96 (1957); Schwartz v. Texas, 344 U.S. 199 (1952); and Steffanelli v. Minard, 342 U.S. 117 (1951).

tendency to uphold exclusive federal control in the area of labor-management relations governed or possibly governed by Sections 7 and/or 8 of the Taft-Hartley Act. National labor relations acts displace state strike regulation statutes and state power to certify collective bargaining units. A final large group of cases shows court's tendency to uphold exclusive federal regulation over interstate and some intrastate railroad and natural gas rates and over railroad liability in interstate commerce.

As early as *Sturges v. Crowninshield*,[115] the Court asserted that Congress could establish uniform rules on bankruptcy and thereby displace the states from the field. After this was done in 1898, the states could neither add to nor supplement the federal law.[116]

State price and rate control statutes as well as state power to establish the price term of transactions fell because they clearly conflicted, at least in the eyes of some of the justices, with Congressional policy except in one distinguishable case—*Parker v. Brown*[117] discussed above on page 302. In that case, the Court satisfied itself that the federal and state schemes blended with one another and that the California attempt to regulate prices of raisins did not conflict with the Sherman Antitrust Act. The California program represented state action; the Sherman Act dealt with private action. However, in *Schwegmann Brothers v. Calvert Distillers Corp.*[118] the Court held that the Sherman Act precluded enforcement of a state fair trade law which enforced an interstate price agreement for the maintenance of minimum resale prices of trademarked commodities against a retailer who was not a party to the agreement. State authorization of private price fixing could not make such price fixing legal.

Case v. Bowles [119] and *Hulbert v. Twin Falls County*[120] illustrate the situations which caused the Court to displace state power on grounds of conflict. State officials were selling timber and tractors respectively, in excess of Office of Price Administration set prices.

Hulbert v. Twin Falls County and *Davies Warehouse Com-*

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115 4 Wheat. 122 (1819).
116 International Shoe Co. v. Pinkus, 278 U.S. 261 (1929).
117 317 U.S. 341 (1943).
118 341 U.S. 384 (1951).
119 327 U.S. 92 (1946).
120 327 U.S. 103 (1946).

pany v. Bowles[121] show the continuing lack of unanimity on the question of federal preemption of state price-rate control powers and of state prerogative to establish price terms of transactions. Even though the Court displaced state power to sell tractors in excess of OPA stated prices in the *Hulbert* case, Justice Douglas dissented on the ground that the state power in question was such an important attribute of sovereignty that it must remain even under wartime conditions until Congress specifically included the states under the coverage of the federal act. In the *Davies Warehouse* case, it was the dissent that urged preemption. The Federal Emergency Price Control Act exempted public utilities from its coverage. The majority saw no Congressional intent to prevent the states from defining what types of businesses constituted a public utility. The dissenters citing the need to effectively combat inflation, in part by having a uniform rule on businesses to be exempted from the act, held that Congress intended to occupy the entire field.

In order to preserve the integrity of federal labor policy and in order to have uniformity, the Court has generally upheld the power of the National Labor Relations Board to initially determine whether or not labor-management conduct usually involving peaceful picketing comes under Sections 7 and/or 8 of the Taft-Hartley Act, and to enforce those provisions by providing relief and/or meting out punishment. *Ex parte George*[122] illustrates the current Court attitude on this point. Here it was held that a state could not enjoin picketing which was arguably subject to NLRB jurisdiction. In addition, the Supreme Court on original habeas corpus set aside the conviction of contempt for violation of such an injunction. The Court had the same attitude in *Local No. 438 Construction and General Laborers Union v. Curry*[123] when it set aside a temporary state injunction against picketing to be in violation of the state right to work law because the conduct enjoined was arguably subject to NLRB jurisdiction.

There is great uncertainty as to what type of activity is subject or arguably subject to Sections 7 and/8 of Taft-Hartley. As a

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[121] 321 U.S. 144 (1944).
[122] 371 U.S. 72 (1962).
[123] Local No. 438, Construction and General Laborer's Union v. Curry, 369 U.S. 883 (1962).

result, there is no clear line between state and federal jurisdiction and the only way to determine the boundary is on a case by case approach by the NLRB or by the federal courts.[124]

There are strong differences of opinion as to whether the states should be able to offer parallel or supplementary remedies in actions dealing with conduct covered by Sections 7 and/or 8. *International Association of Machinists v. Gonzales*,[125] is precedent for upholding state power. In this case, Gonzales sued in a California state court for restoration of his union membership and for damages for illegal expulsion. The California court ordered his re-instatement and awarded damages. The Supreme Court of the United States affirmed the California decision even upon admission that the wrong could have been partially relieved in proceedings before the NLRB. The dissenters protested that the *Garner*[126] and *Weber*[127] precedents, to be mentioned below, were being ignored and that the states had no jurisdiction over activities fully covered under Section 7 and 8 of Taft-Hartley. Later cases such as *Local 100 of United Association of Journeymen and Apprentices v. Borden*,[128] distinguish it and tend to uphold the NLRB's exclusive jurisdiction. Nevertheless, the *Gonzales* precedent still stands.

Finally, there is disagreement as to whether the states should have jurisdiction over activities neither protected nor prohibited by Sections 7 and/or 8 of Taft-Hartley. Cases that reinforce state power here are *International Union U.A.W. v. Wisconsin Employment Relations Board*[129] and *Youngdahl v. Rainfair Inc.*[130] These have not been overruled. Following the *International Union* precedent, the Court in the *Youngdahl* case upheld state power to enjoin picketing accompanied by name calling, threats, and by attempts to intimidate officers, agents and non-striking employees of a manufacturer in interstate commerce. The dissenters maintained that Congress had preempted the field because even if the conduct was not covered by Section 8, it might well have come within the protection of Section 7. The case that

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[124] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
[125] 356 U.S. 617 (1958).
[126] 346 U.S. 485 (1953).
[127] 348 U.S. 468 (1955).
[128] 371 U.S. 939 (1962).
[129] 336 U.S. 245 (1949).
[130] 355 U.S. 131 (1957).

serves as a basis for the displacement of state power over activities neither protected by Section 7 nor prohibited by Section 8 of Taft-Hartley is *Garner v. Teamsters C. & H. Local Union.*[131] *Weber v. Anheuser Busch Inc.*[132] resembles the *Garner* case, but there are hints in *Weber* that the states could have power over conduct which is not clearly protected nor prohibited by Sections 7 and 8. *San Diego Building Trades Council v. Garmon*[133] serving as a strong precedent for recent cases follows in the Garner-Weber tradition.

The Court has been quite preemptive in outlook in displacing three state anti-strike measures. The Michigan Labor Mediation Law covering all industry permitted strikes fell because it allowed strikes at different times than the federal act and required contrary to the federal law a majority vote authorization for any strikes.[134] This case was governed by the doctrine that Congress through the Taft-Hartley Act occupied the field in full and closed it to concurrent state regulation. The Wisconsin Public Utility Anti-Strike Law making it a misdemeanor for any group of public utility employees to engage in a strike which would cause an interruption of an essential public utility service, likewise fell on ground of conflict with the Wagner and Taft-Hartley Acts.[135] The majority held to the doctrine that Congress precluded concurrent state regulation particularly since the national act provided special procedures to deal with strikes that might create antional emergencies. The minority saw no conflict and no reason to forbid concurrent state legislation particularly since Taft-Hartley did not deal in specific terms with the problem of local strikes in public utilities. A Missouri statute authorizing state seizure of a public transit business and injunction against strikes pertaining to the business was held to be in direct conflict with Second 7 of Taft-Hartley and not within the exemption accorded by that act to state owned and operated utilities.[136]

As with state anti-strike laws, the Court takes a preemptive attitude when it comes to state power to certify unions as col-

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[131] 346 U.S. 485 (1953).
[132] 346 U.S. 468 (1955).
[133] 359 U.S. 236 (1959).
[134] International Union of United Automobile, A. and A.I.W. v. O'Brien, 339 U.S. 454 (1950).
[135] Amalgamated Ass'n. S.E.R.M.C.E. v. Wisc. Employment Bd., 340 U.S. 383 (1951).
[136] Amalgamated Ass'n. S.E.R.M.C.E. v. Missouri, 371 U.S. 761 (1963).

lective bargaining representatives. In the parent case of *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*,[137] the Court held that the National Labor Relations Act precluded New York power to certify a foremen's union as a collective bargaining unit following NLRB refusal to do so, particularly since the NLRB had never renounced jurisdiction. Mr. Justice Frankfurter, emphasizing the need for federal-state co-operation in this field, dissented on the ground that the majority opinion made it sound as if the national act superseded altogether state power to enter into cooperation agreements with the NLRB. In *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board*,[138] the majority opinion in *Bethlehem* was reinforced. The Court held that the power of Wisconsin to certify collective bargaining units was precluded even when the NLRB had not attempted to make such a determination. Unimpressed with the idea that NLRB inaction invited state action, the Court emphasized the point that the NLRB failed to exercise its statutory power to cede its jurisdiction to a state agency.

In most cases the Court held that Congress, in passing the Interstate Commerce, Hepburn, Transportation and other Acts, precluded state power to regulate interstate and some intrastate rates of railroads, on the ground that the federal acts covered the same subject matter and that Congress could regulate and exclude state power to set intrastate rates that adversely affected interstate commerce. Two cases will illustrate the general Court opinion: In *Southern Ry. v. Reid*,[139] a North Carolina statute penalizing a carrier for refusing to receive freight for transportation whenever tendered at a regular railroad station was precluded because it conflicted with provisions of the federal Hepburn Act that no carrier "shall engage or participate in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with this Act." In *Pennsylvania Ry. v. Illinois Brick Co.*[140] the Court held that a railroad following an Interstate Commerce Commission order putting into effect an increase on intrastate rates to bring them

[137] 330 U.S. 767 (1947).
[138] 336 U.S. 18 (1949).
[139] 222 U.S. 424 (1912).
[140] 297 U.S. 447 (1936).

up to previously approved interstate rates, could ignore a state order requiring railroads to pay shippers reparation due to the increased intrastate rates. In a few cases, however, the Court has upheld state power to regulate intrastate rates when the ICC had not yet acted or when such regulations have not worked any undue or unreasonable discrimination against interstate commerce.[141]

The Federal Natural Gas Act precludes state regulation of interstate, but not intrastate natural gas sales. In holding that Congress had not occupied the whole field, the Court found that a state may continue to regulate the rates for natural gas transported interstate and sold directly to consumers within the state.[142] Likewise, the Michigan Public Service Commission continued to have the power to require a natural gas company engaged in interstate commerce to obtain a certificate of public convenience and necessity before selling gas directly to local consumers.[143] The Court held in this case that since the Natural Gas Act applied only to sales of gas in interstate commerce which are for resale, it did not preclude state regulation of sales made directly to consumers. Justices Douglas and Frankfurter, in dissent, saw preemption because the Federal Power Commission had exercised authority many times over transportation of natural gas for direct sales to consumers.

The rationale for federal supersedure of most state statutes concerning the liability of railroads consists of the following: need for uniformity in regulating the same subject matter, avoidance of conflict, and Congressional intent to occupy the whole field as based on an examination of legislative history. Hence the Carmack Amendment to the Hepburn Act which put the responsibility for loss of or injury to cargo upon the initial carrier superseded all state statutes limiting recovery for loss or injury to goods in transportation to an agreed or declared value.[144] The Federal Employer's Liability Act of 1908 as amended in 1910, displaced all state legislation concerning railroad lia-

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141 Simpson v. Shepard, 230 U.S. 352 (1913).

142 Panhandle Eastern Pipeline Co. v. Pub. Serv. Comm'n, 332 U.S. 507 (1947).

143 Panhandle Eastern Pipeline Co. v. Mich. Pub. Serv. Comm'n, 341 U.S. 329 (1951).

144 Edward S. Corwin Ed., *The Constitution of the United States of America, Analysis and Interpretation* (Washington: Government Printing Office, 1953) p. 247.

bility due to negligence for injuries to or death of railroad employees engaged in interstate commerce.[145] The exclusiveness of the federal liability act is shown in *New York Cent. R.R. v. Winfield.*[146] The Court held that since Congress fully covered the subject no room existed for state regulation even of injuries occurring without fault of the carriers to which the federal act provided no remedy. Thus, New York was precluded from making an award under its Workmen's Compensation Act for injuries not attributable to the negligence of the carrier which were obtained by an employee of an interstate railroad while both were engaged in interstate commerce. Mr. Justice Douglas, dissenting in *South Buffalo Ry. v. Ahern,*[147] declared when the Court upheld a New York statute permitting a state board, with employer and claimant approval, to make workmen's compensation awards in respect to injuries subject to the Federal Employer's Liability Act. On numerous occasions, however, the Court has shown consistency by upholding state power to award damages for the injury or death of railroad employees injured in intrastate commerce.[148]

The application of both Part I and II attitudes and guidelines is particularly apparent in this set of cases. The preemptionist saw the following signs as heralding the preclusion of state action: modest and pervasive federal schemes not to be supplemented or bolstered; matters arguably subject to exclusive federal jurisdiction; absence of specific federal authorization for state action; danger of conflict; and coincidence of state and federal legislation. To the preemptionist, federal administrative inaction was not the signal for the states to enter a given field. State police power could not act as a barrier to the exercise of constitutional federal power. The non-preemptionist held to the view that it is up to Congress and not the Court to make specific preemption declarations. Likewise, this group assumed the following: Congress limits itself automatically when it spells out what it intends to do; the states may supplement and bolster federal schemes; federal administrative inaction implies room for state action; and broadly worded federal statutes and provi-

145 *Id.* at 247.
146 244 U.S. 147 (1917).
147 344 U.S. 367 (1953).
148 Tipton v. Atchison Topeka & Santa Fe R.R., 298 U.S. 141 (1936); Boston & Maine R.R. v. Armburg, 285 234 (1932).

sions for federal agencies to cede jurisdiction to the states do not imply preemption. The danger of conflict guideline was replaced with that of demonstrated, actual, irreconciliable conflict. The two groups of justices disagreed on the question of conflict and of Congressional intent that there be uniformity.

We now reach the second subsection of the third category of cases where the Court condones joint federal-state action. In general, the Court upholds state power to regulate general business practices and internal union affairs. States have jurisdiction over actions arising under Section 301 of the Taft-Hartley Act. Likewise they may regulate picketing where violence is involved, motor vehicle and water transportation, and the railroads in areas not directly connected with liability and interstate rates. Generally, state quarantine and inspection systems stand. Finally, state power to aid the federal government in realizing its aims has been upheld on a few occasions.

The Court has been generous in upholding state regulations of general business practices that promote safety and public convenience, that protect the public from fraud and deception, and from common abuses such as high rates, and that prohibit or seek to prohibit business practices or conditions deemed undesirarble such as gambling, and the use of trading stamps. Likewise, state measures to combat monopoly, and to prevent restraints of trade and racial discrimination in employment have been upheld. In only six of the general business practice cases were the defenders of state power in the minority. In four of these the minority wrote strong dissents. In one instance, Congress vindicated the minority as we shall see shortly. A brief description of the cases will give a clearer idea of the types of state power upheld.

In exercising the general power to regulate business, the professions, and the trades, the states may order telegraph companies operating in interstate commerce to use certain depreciation rates in accounting and reporting of local and interstate business.[149] The Interstate Commerce Commission had not yet acted on this matter. States may: (1) require produce company merchants governed by a federal act to execute a bond against fraudulent

[149] Northwestern Bell Tel. Co. v. Neb. State Ry., 297 U.S. 471 (1936); Smith v. Ill. Bell. Tel. Co., 282 U.S. 133 (1930).

conduct and for the protection of consignors conditional on honest accounting and handling of produce received;[150] (2) require the use of containers of a certain type, form, and dimension in the marketing of strawberries, raspberries, etc. even with the presence of the Federal Standard Baskets and Containers Act;[151] (3) require weighing of grain received from or shipped to points outside the state in the face of the United States Grain Standards Act of 1916;[152] (4) regulate grain exchanges governed by the Federal Commodity Exchange Act of 1936;[153] (5) regulate charges of warehousemen for the handling and selling of leaf tobacco in spite of the Federal Tobacco Inspection Act;[154] (6) make illegal gambling in grain futures in the presence of the Federal Grain Futures Act;[155] (7) prohibit retail sales of lard otherwise than in bulk unless put in 1, 3, or 5 pound packages or some multiple of those numbers in the face of the Pure Food and Drug Act of 1906;[156] (8) have power to adjudicate claims of fraud under state law in the transfer of a radio station regulated by the Federal Communications Commission,[157] and (9) require out of state corporations, including a federally licensed customs house broker, to obtain a license for a small fee by furnishing the names of officers and directors, and by reporting authorized capitalization.[158] (Without this license the corporation could not maintain an action in the Minnesota Courts.)

In still other cases, the Court has given Puerto Rico the power to have an anti-trust act very similar to the Sherman Anti-trust Act;[159] Colorado the ability to prohibit discrimination in the hiring of pilots for interstate air carriers;[160] and New York the right to have safety regulations of its state labor law apply to construction work on post office sites.[161]

A majority making rulings in favor of preemption in six cases

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150 Hartford Acc. and Indem. Co. v. Illinois, 298 U.S. 155 (1936).
151 Pacific States Box and Basket Co. v. White, 296 U.S. 176 (1935).
152 Merchants Exchange v. Missouri, ex rel. Barker, 248 U.S. 365 (1919).
153 Rice v. Board of Trade of City of Chicago, 331 U.S. 247 (1947).
154 Townsend v. Yeomans, 301 U.S. 441 (1937).
155 Dickson v. Uhlmann Grain Co., 288 U.S. 188 (1933).
156 Armour & Co. v. N. Dakota, 240 U.S. 510 (1916).
157 Radio Station W.O.W. Inc. v. Johnson, 326 U.S. 120 (1945).
158 Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).
159 Puerto Rico v. Shell Co., 302 U.S. 253 (1937).
160 Colorado Anti-Discrimination Comm'n v. Continental Airlines, 371 U.S. 809 (1962).
161 Stewart and Company v. Sadrakula, 309 U.S. 94 (1940).

prevailed over a generally vocal minority. The preemption cases have many of the common characteristics of those just discussed; they incidentally regulate interstate and/or foreign commerce, but aim primarily at governing local matters and problems. Dissenters were silent in only two cases. Both of them concerned state interference with uniform federal regulation of the interstate business transactions of telephone and telegraph companies.[162] In the third case, the majority held that the amended Warehouse Act of 1916 (1931) precluded state power to regulate warehouses. The dissent as already noted on page 301 saw no preemption because Congress failed to substantially increase appropriations to provide for comprehensive federal administration of the amended act.[163]

In *Farmers Educational and Co-op Union v. W.D.A.Y.*, mentioned briefly on page 294, the majority held on the basis of inconclusive legislative history and administrative practice, that the Federal Communications Act of 1934 precluded the application of a state libel law to a radio broadcasting license for the defamatory statements made in a speech broadcast on his station by a candidate for public office.[164] the Federal Communications Act provides that if anyone licensed to operate a radio broadcasting station shall permit any person who is a legally qualified candidate for public office to broadcast over such a station, he should afford equal opportunities to all other such candidates for that office. The act further provides that the operator of the station shall have no power of censorship over the material broadcast. The dissenters saw no preemption in this situation because Section 315 of the federal act did not specifically displace the states. Attempts to specifically provide for immunity from state statutes had failed.

While the majority held that the Federal Reserve Act displaced a New York statute forbidding national banks to use the word "saving" or "savings" in their business advertising on the ground of conflict with federally granted rights, the dissent saw no preemption because the federal act did not specifically grant the right to national banks to use these two words in advertis-

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[162] Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920); Postal Telegraph Cable Co. v. Warren Goodwin Lumber Co., 251 U.S. 27 (1919).
[163] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).
[164] 360 U.S. 525 (1959).

ing.[165] The dissent concluded that New York was justified in following previous practice in reserving the words "saving" and "savings" to identify mutual banks that had an excellent record in the state and were held in high public esteem.

Mr. Justice Harlan, dissenting in *Bowman v. Chicago & N.W.Ry.*[166] was later vindicated by Congress which upheld state power. The majority held that Congressional silence on the specific matter plus Federal Revenue Statute Section 5258 displaced the power of Iowa to forbid common carriers to bring intoxicating liquor into the state from any other state or territory without first meeting some Iowa requirements. The Federal Revenue Statute freed railroad transportation of commodities between the states from restrictions except when imposed by Congress or by the states with Congressional approval. To Mr. Justice Harlan, the statute still did not go far enough to show clear Congressional intent to displace state power to protect the health, welfare, and morals of its citizens. The Webb-Kenyon Act which placed intoxicants entering a state from another state under the control of the former for all purposes was passed by Congress in 1913.

In a number of cases, the Court has preserved some of the historic state power in the labor field by allowing the states to regulate many internal union affairs. Nevertheless, some justices dissent on the ground that states incidentally regulate subject matter covered by the preemptive Section 7 and 8 of the Taft-Hartley Act.[167] *Alabama Federation of Labor Local Union v. McAdory*[168] gives states the power to regulate the internal affairs of labor unions in detail in the absence of a demonstrated conflict. Later cases give states the authority to either allow or forbid agency shops,[169] to prohibit exclusion of any person from membership in a labor organization on account of race, color, or creed,[170] and to require a ⅔ vote for a maintenance of membership clause in a collective bargaining agreement.[171] In the last instance the minority objected that this put a new interpretation

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165 Franklin National Bank v. New York, 347 U.S. 373 (1954).
166 125 U.S. 465 (1888).
167 Algoma Plywood and Veneer Co. v. Wisc. Employment Relations Bd., 336 U.S. 301 (1949).
168 325 U.S. 450 (1945).
169 NLRB v. Gen. Motors Corp., 371 U.S. 908 (1962).
170 Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945).
171 Algoma Plywood and Veneer Co. v. Wisc. Employment Relations Bd., 336 U.S. 301 (1949).

on Section 8 (3) of the Taft-Hartley Act formerly interpreted to preclude state action. *De Veau v. Braisted*[172] which upheld a New York law barring collections from waterfront employees under certain circumstances was discussed above on pages 309 and 310. Recently the Court held that state criminal laws apply to a union official who took for his own use employees' contributions to the union welfare fund. Dissenters felt that only Taft-Hartley criminal sanctions could and should have been applied.[173]

The Supreme Court has held that federal courts as well as the NLRB have jurisdiction to enforce collective bargaining agreements with provisions calling for arbitration of grievance disputes.[174] Shortly thereafter, and partly in deference to traditional state power over labor relations, the Court held that state courts also had jurisdiction to enforce such agreements as long as they applied uniform federal law fashioned by the federal courts.[175] The collective bargaining agreements under discussion are authorized by Section 301 of the Taft-Hartley Act. Continuing to uphold state power over actions coming under Section 301, the Court majority in *Smith v. Evening News Association*[176] upheld Michigan circuit court jurisdiction of a suit brought for an alleged violation of a collective bargaining agreement even though the allegation if proven would constitute an unfair labor practice under National Labor Relations Board jurisdiction. The majority held that the preemptive doctrine of the *Garmon* case mentioned on pages 293 and 297, did not apply to actions also coming under Section 301. Mr. Justice Black dissented, on the ground that the NLRB jurisdiction should be exclusive. If Black prevailed, some of the cases footnoted here would have to be included with cases under subsection one of this category.

In a particularly controversial group of cases the court majority has upheld state power to enjoin picketing connected with violence or possible violence and to award damages for tortious conduct connected with picketing and violence even though some of the activities were closely governed by Sections 7 and 8

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[172] 363 U.S. 144 (1960).
[173] Arroyo v. United States, 359 U.S. 419 (1959).
[174] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
[175] Teamsters, Chauffers, Warehousemen and Helpers v. Lucas Flour Co., 369 U.S. 95 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
[176] 371 U.S. 195 (1962).

of the Taft-Hartley Act.[177] Preemptionists argue that the federal regulation is comprehensive enough to handle such problems and that state action merely frustrates the implementation of federal policy. Preemptionists are particularly concerned with the possibility that defenders of state action will broadly define the concepts of violence and possible violence and give states greater power to regulate activities governed by Sections 7 and 8 of the Taft-Hartley Act.[178]

The Court allows state safety regulation of the motor vehicle branch of interstate commerce as long as federal rights are not taken away. Therefore, a state has power to require a permit to drive a taxicab across unincorporated areas and from Mexico to the United States;[179] to require carriers without ICC permits to obtain a state certificate of public convenience and necessity before operating in intrastate business;[180] to restrict the number of continuous hours an operator of a motor vehicle subject to the Federal Motor Carrier Act may drive;[181] and to prohibit on its highways motor vehicles subject to the Motor Carrier Act that carry other vehicles above their cabs.[182] On the other hand, the Court without dissent has held that it is up to the ICC, and not a state agency, to interpret a carrier's right under its ICC certificate to transport commodities.[183] In the same vein, the Court held that Illinois could not determine which carriers certified under the Motor Carrier Act could operate in interstate commerce even in punishing one of them for violation of the state road regulations.[184] Such state power would deprive the carrier of federally granted license rights without federal sanction.

The Court has been generous in upholding state health, safety, and general welfare measures to protect the public from abuses when they have applied to water transportation. While the Inter-

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[177] International Union U.A.A. and A.I.W. v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957); United Automobile A. and A.I.W. v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[178] Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957).

[179] Buck v. California, 343 U.S. 99 (1952).

[180] Eichholz v. Pub. Serv. Comm'n, 306 U.S. 268 (1939).

[181] Welch Co. v. New Hampshire, 306 U.S. 79 (1939).

[182] Maurer v. Hamilton, 309 U.S. 598 (1940).

[183] Jones Motor Co. v. Pa. Pub. Util. Comm., 361 U.S. 11 (1959); Service Storage and Transfer Co. v. Virginia, 359 U.S. 171 (1959).

[184] Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954).

state Commerce Act of 1887 precluded the power of the states to regulate the rates of a ferry which was part of an interstate railroad,[185] the states could still regulate the round trip rates of an interstate ferry not operated in connection with a railroad.[186] The power of the state of Washington to inspect and regulate every vessel operated by machinery which was not subject to inspection under the Federal Motor Boat Act and other federal laws has already been discussed above on page 302. State power, through a municipal smoke abatement code, to require federally licensed vessels to undergo structural alterations thereby reducing their tendency to produce smoke has already been discussed on page 306. It was not mentioned, however, that the dissenters in this case objected strongly, on ground of preemptable conflict, to state prosecution against the shipowner and officers for using federally authorized rather than municipally required equipment.[187]

While state power to impose a license fee upon federally regulated ferry keepers with boats, having situs in the state, engaged in interstate commerce has been upheld,[188] attempts to make the exercise of rights granted by Congress contingent upon the meeting of additional state requirements, the payment of state fees, or the issuance of state licenses has been precluded.[189] Therefore, the Court voided an Alabama act of 1854 requiring a federally enrolled and licensed ship before it could leave Mobile, to register the names of the steamboat owners, their places of business, their interest in the vessel, and the name of the vessel.[190] *Veazie v. Moore,* discussed on page 304, offers an exception to the rule.

The Court has been of little help in showing precisely where Congress intended, by enacting the Merchant Marine Act of 1920 and the Longshoremens' and Harbor Workers Act, to super-

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[185] New York Cent. & Hudson River R.R. v. Hudson County, 227 U.S. 248 (1913).

[186] Port Richmond Ferry Co. v. Board of Chosen Freeholders, 234 U.S. 317 (1914).

[187] Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

[188] Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1883).

[189] Sault Ste. Marie v. Int'l. Transit Co., 234 U.S. 333 (1914); Harman v. Chicago, 147 U.S. 396 (1893); Foster v. Davenport, 22 How. 244 (1859); Contrast Cooley v. Board of Wardens, 12 How. 299 (1852); Gibbons v. Ogden, 9 Wheat. 1 (1924).

[190] Sinnot v. Davenport, 22 How. 227 (1859).

sede state power to award damages for the injury or death of employees doing maritime work or work on navigable waters.[191] Rather than trying to draw a line with any preciseness at all, the Court has merely referred to a large shaded area or twilight zone where either state or federal compensation laws could apply depending upon which government acted first.

As in the motor vehicle and water transportation fields state health and safety regulations applying to the railroads usually stand despite claims of federal preemption. In the face of the Federal Railway Labor, Interstate Commerce, and other acts, the states have power to license locomotive engineers on interstate trains,[192] to require a railroad engaged in interstate commerce to promote the health and safety of its employees by providing cabooses[193] to regulate the size of freight trains and of switching crews,[194] to forbid heating of passenger cars by stoves on interstate trains,[195] and to require installation of additional safety equipment unless that matter has been generally provided for by federal legislation such as the Safety Appliance Act.[196] As mentioned above, there is not always unanimous agreement on this last point. Since, however, the Hours of Service Act of 1907 dealt with the hours of service of railroad and telegraph operators engaged in interstate commerce, New York was precluded from enforcing an act providing for a shorter work day than was authorized under the federal act.[197]

While more preemptive than in the cases discussed immediately above, the Court has in the case of the Interstate Commerce, Transportation, Natural Gas, and other acts upheld state power to require more railroad service to promote public convenience. Thus a state can with Interstate Commerce Commission approval require that a railroad build a new union station.[198]

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[191] Calbeck v. Traveler's Ins. Co., 370 U.S. 114 (1962); Hahn v. Ross Island Sand and Gravel Co., 358 U.S. 272 (1959); Davis v. Department of Labor, 317 U.S. (1942); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[192] Smith v. Alabama, 124 U.S. 465 (1888).

[193] Terminal R.R. Ass'n. v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943).

[194] Missouri Pac. R.R. v. Norwood, 283 U.S. 249 (1931).

[195] New York, New Haven & Hartford R.R. v. New York, 165 U.S. 628 (1897).

[196] Atlantic Coast Line R.R. v. Ga., 234 U.S. 280 (1914).

[197] Erie Ry. v. New York, 233 U.S. 671 (1914).

[198] Atchison, Topeka & Santa Fe R.R. v. Ry. Commission, 283 U.S. 380 (1931).

However, the Court has held that the Interstate Commerce and the Natural Gas acts respectively, give to the federal government and take from the states first, the power to channel expenditures for construction or operation to lines reasonably necessary for the service of the public[199] and second, the power to pass on the question as to whether a local natural gas pipeline may extend its facilities.[200] While the states may require a railroad to make physical connection with an interurban railway for interchange of intrastate traffic[201] and to make specified stops along its routes, e.g. at county seats,[202] the ICC has control over the furnishing of cars to shippers.[203] Congress precluded state power to require a local certificate of convenience and necessity for an operator of a transfer service moving interstate passengers and their baggage between different Chicago railroad terminals.[204] The majority saw the transfer service as an integral part of interstate commerce subject to exclusive federal control while the minority, as stated above, felt that the Court made a premature ruling on preemption.

No clear line separates preemptionist from non-preemptionist cases in this last group. In both instances there is some indirect state regulation of interstate commerce.

Even though Congress has passed the Immigration, Animal Industry, Cattle Contageous Diseases, and Plant Quarantine acts, state quarantine measures to prevent the spread of diseases among people, animals, and plants have been upheld with one exception. In the one preemption case of *Oregon-Washington R.R. and Nav. Co. v. Washington,*[205] the majority held that Congress had occupied the field and left no room for supplementary state action, a view held by dissenters in other quarantine cases. Congress nullified the Oregon-Washington decision by returning

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199 Transit Commission v. United States, 289 U.S. 121 (1933); Railroad Commission v. Southern Pac. Co., 264 U.S. 331 (1924).

200 Ill. National Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498 (1942).

201 Michigan Cent. R.R. v. Mich. R.R. Commission, 236 U.S. 615 (1915).

202 Gulf, Colorado & Santa Fe Fy. v. Texas, 246 U.S. 58 (1918); Lake Shore & Mich. So. Ry. v. Ohio ex rel. Lawrence, 173 U.S. 285 (1899).

203 Missouri Pac. Ry. v. Stroud, 267 U.S. 404 (1925); Ill. Cent. R.R. v. Fuentes, 236 U.S. 157 (1915).

204 Chicago v. Atchison, Topeka & Santa Fe R.R., 357 U.S. 77 (1958).

205 270 U.S. 87 (1926). Cases upholding state power: Mintz v. Baldwin, 289 U.S. 346 (1933); Reid v. Colorado, 187 U.S. 137 (1902); Compagnie Francaise de Navigation a Vapeur v. State Board of Health, 186 U.S. 380 (1902); Missouri, Kansas & Texas Ry. v. Harber 169 U.S. (1898).

to the states the power to prevent, in case of federal inaction, interstate transportation of alfalfa hay and alfala meal from regions found to have the alfalfa weevil. Nevertheless, the Court held that the 1886 Act of Congress recognizing oleomargerine as an article of food and commerce precluded Pennsylvania from enforcing its statute against the manufacture and sale of oleomargarine.[206] Justices Harlan and Gray dissented on the ground that Congress had not specifically precluded state power. States have the authority to finance their quarantine systems by inspection and examination fees on vessels, but not by tonnage taxes.[207]

In two of the three inspection and seizure cases the Court upheld state laws to protect the public from fraud and from the spread of diseases.[208] Supersedure of state power in *Cloverleaf Butter Company v. Patterson*[209] has already been noted on page 291. A pervasive federal scheme of regulation meant preemption to the majority but not to the minority especially since state power to take adequate health measures was involved.

One interesting category of four cases in which Court preemptionists and non-preemptionists clashed involves instances in which the states passed statutes designed to help the federal government realize its objectives. There were sharp clashes in all four cases. Upholders of state power predominated in *Houston v. Moore*[210] which authorized the states as well as the federal government to prescribe penalties for failure to obey a Presidential call of the militia in pursuance of the Federal Act of 1795. Mr. Justice Story did not take a preemptionist stand, but he did argue that state courts should not be used to administer federal laws. Likewise, in *Gilbert v. Minnesota*[211] the Court upheld a Minnesota law making it a misdemeanor for any person to teach or advocate by any written or printed matter or by oral speech that citizens of the state should refuse to aid or assist the United States in carrying on the First World War. The majority simply held that the states, in exercising their police power,

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206 Schollenberger v. Pennsylvania, 171 U.S. 1 (1898).
207 Morgans S.S. Co. v. Bd. of Health of Louisiana, 118 U.S. 455 (1886).
208 Turner v. Md., 107 U.S. 38 (1883); Asbell v. Kansas, 209 U.S. 251 (1908).
209 315 U.S. 148 (1942).
210 5 Wheat. 1 (1820).
211 254 U.S. 325 (1920).

could make the national purpose their own purpose. The dissenters saw conflict with the newly passed federal Espionage Act of 1917, hence a rationale for preemption. Preemptionists prevailed in *Hines v. Davidowitz*,[212] holding that the Federal Alien Registration Act of 1940 precluded the enforcement of the relatively, but not totally similar Pennsylvania Alien Registration Act of 1939, and in *Pennsylvania v. Nelson*[213]—siding with the highest state court—holding that the Smith, Internal Security, and Communist Control Acts of 1940, 1950, and 1954 respectively, precluded the enforcement of a Pennsylvania law prescribing penalties for subversive conduct against the United States. The states may still, however, punish subversive activities against themselves.[214] The minority upholders of state power saw no justification for preemption, i.e. on specific Congressional preemption statement; no pervasive federal scheme; no dominant federal interest; and no actual conflict.

There are not enough cases in this last set to determine more clearly when the states may assist the federal government, but the two recent cases seem to suggest that the presence of extensive federal regulation in a given circumstance makes preemption a growing possibility.

From the discussion of the cases in the second subsection of the third category, it becomes evident that justices have used the attitudes and guidelines of both Parts I and II of Chapter One. The non-preemptionists deplored what they called a premature decision on the preemption question and they found that Congress in spelling out what it intended to do in a given field also set limits as to how much of the field it would occupy. Congressional failure to appropriate and administrative inactivity were signs of federal unwillingness to preempt. State freedom to supplement and bolster federal schemes and to eliminate twilight zones was accepted. Pervasive federal schemes and state-federal legislative coincidence did not in themselves imply preemption. The non-preemptionists still maintained that conflict could only be preemptable if it was actual, demonstrable, and unresolvable. Indirect regulation of interstate commerce, even temporary interference with interstate commerce, did not

[212] 312 U.S. 52 (1941).
[213] 350 U.S. 497 (1956).
[214] Uphaus v. Wyman, 360 U.S. 72 (1959).

represent conflict. Great deference was given to the exercise of the state police power. The preemptionists continued to imply preemption rather than the opposite. Preemptive signs included modest and pervasive federal schemes that could not be supplemented or bolstered, coincidence of state and federal legislation, failure of Congress to specifically authorize the states to act, and the presence of a federal administrative agency with jurisdiction over a field whether it acted or not in a given situation. To the preemptionists, a general claim of conflict rather than a showing of actual or demonstrated conflict was satisfactory. Indirect state regulation of interstate commerce added up to conflict. Preemptionists and non-preemptionists disagreed as to when there was conflict, a burden on interstate commerce, a pervasive scheme, a need for uniformity, federal agency action, and dominant federal interest. It is not surprising that the justices in these two camps also disagreed over the meaning of legislative history or in some cases over the preemptive implications of interstate compacts and amendments.

CHAPTER THREE

Conclusions

One must sympathize with the Court as it tries to resolve preemption questions. It is hard to find legislative intent because Congress is very vague and sometimes it fails to really consider the preemption question or the impact of its legislation upon federal-state relations. Thus it remains to the Court in effect to speak for the Congress.

An examination of the cases above shows at least four reasons why it is difficult, if not impossible, to expect all members of the Court as a unit to unanimously follow a like principle governing a like case approach in disposing of individual or a group of preemption cases. First, the real difficulty arises because justices fail in some, but not all instances, to agree on the merits of maintaining state power once Congress enters a field. Some justices like Douglas, dissenting in *Hulbert v. Twin Falls County,* are willing to pay a relatively larger price than their brothers to maintain that power. It will be recalled that Douglas, championing state sovereignty over federal inflation controls, would have maintained state power to sell tractors above OPA stated

prices until Congress specifically prohibited such a practice. Unlike Douglas Mr. Justice Frankfurter, dissenting in *California v. Zook*, would not risk possible conflict between state and federal power by upholding a California statute penalizing those who sold or arranged any transportation over the state highways if the transporting carrier had no Interstate Commerce Commission permit. The differences in fundamental viewpoint are reflected in the ways that the Court uses guidelines in deciding preemption cases. First, some justices apply Part I (Chapter One) while others apply Part II (Chapter One) approaches to decide a case. The first approach makes it difficult to uphold state power. The second yields the opposite result. Second, justices disagree on what specifically constitutes a preemptive worded federal statute, pervasive or modest scheme, arrangement for federal agencies to cede jurisdiction to state agencies should they so desire, and agency action or inaction. Third, justices can't agree on what specifically constitutes preemptive dominant federal interest, burden on interstate commerce, uniformity, or implications in legislative history.

While there is disagreement on the proper principle to govern a case, the Court still cannot be charged with caprice. Almost all decisions are made in reference to one or a combination of the attitudes and guidelines discussed in this paper.

The uniqueness of preemption cases makes it impossible to decide all of them on a strict precedent basis. A case may have many of the characteristics of a group of other cases, but it can so differ in one major respect that it may be justifiably governed by a different principle. The instance in which the Court upheld state power to regulate the local rates of interstate ferries not connected with railroads while it displaced state power to regulate rates of such ferries connected with railroads comes in mind. The *McDermott* (food licensing), *Metlakatla* and *Kake* (animal protection) cases, mentioned in Chapter Two, also illustrate this problem. The distinction between approval state price administering, and displaceable state power to enforce private price fixing due to the Sherman Anti-trust Act, is brought out in *Parker v. Brown* and *Schwegmann Brothers v. Calvert Distillers Corp.*

On many occasions, cases have characteristics that make it

possible to place them simultaneously in categories governed by Part I (Chapter One) and by Part II (Chapter One) principles. Justices particularly impressed with the merits of maintaining state power, even at a large price, make the choice by incorporating the case in the category governed by Part II principles, while those of the opposite persuasion choose to incorporate such cases in categories governed by Part I principles. As a result, it becomes more difficult to distinguish between the categories to the satisfaction of all the justices. There is no unanimous agreement on where to draw the boundary lines between categories of cases. This is particularly true in the labor field in respect to the following: preemptionist category of cases in which the subject matter is governed exclusively by Taft-Hartley Sections 7 and 8 versus the non-preemptionist categories of cases where the facts are governed by Section 301 of Taft-Hartley (and on occasion by Taft-Hartley Sections 7 and 8), and where there is violence in addition to picketing (governed by Sections 7 and 8 of Taft-Hartley). In short, justices do not unanimously agree as to what constitutes a like case to be governed by a like principle. This problem is particularly acute in the water transportation liability field.

Finally, the Court may decide questions of state versus federal power by invoking other guidelines. *Sturges v. Crowninshield* and *Southern Pacific Co. v. Arizona* were semi-preemption cases, but state action was precluded in both instances because it conflicted with provision in the United States Constitution. State power in the *Richman* case was upheld on a technicality involving the jurisdiction of a Federal District Court.

In conclusion, lack of unanimity and of total consistency in preemption cases is due to: (1) the different opinions of the justices about the merits of maintaining state power after Congress enters a field; (2) uniqueness of cases; (3) cases with characteristics that make it possible for them to be simultaneously placed in more than one Court-constructed category of cases governed by opposing principles; and (4) decision of the issue of state power on other grounds than brought out in Chapter One of this paper.