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Mark J. Alonso

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ENVIRONMENTAL LAW: A REEVALUATION OF FEDERAL PRE-EMPTION AND THE COMMERCE CLAUSE

I. Introduction

The legitimate concern of state and local governments to regain control over environmental regulation in recent years has resulted in a marked increase in conflicts with the commerce¹ and supremacy² clauses of the Constitution. Various criteria have been used by the courts to determine violations of these Constitutional provisions where environmental objectives are sought through local laws. In the field of environmental litigation, traditional tests are constantly challenged to meet the changing moral climate of the nation.³

This Comment will weigh the valid desire of local legislatures for more responsive environmental regulation against the federal goal of uniform regulation and unrestrained interstate commerce. Where Congress has enacted an environmental regulation, the supremacy clause bars local entry in the area absent express permission.⁴ The commerce clause forbids the enactment of state and local regulations in certain areas even in the absence of federal law.⁵ When a local law is held to be exempt from federal pre-emption under the supremacy clause, often it is also challenged on the grounds that the local rule unduly restricts interstate commerce in violation of the

1. U.S. CONST. art. I, § 8, cl. 3. "The Congress . . . shall have Power . . . to regulate Commerce . . . among the several States . . ." *Id.*

2. U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." *Id.*

3. The following statements represent interpretations of the maxim "hard cases make bad law:" "Hard cases are the quicksands of the law." *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 F. 705, 710 (C.C. W.D. Mo. 1896).

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

4. See text accompanying note 32 *infra*.

5. See text accompanying note 155 *infra*.

commerce clause.⁶ Thus, these two Constitutional provisions are inextricably intertwined.

II. General Concepts and Overview

A. The Police Power

The power to enact certain legislation is reserved to the states under the tenth amendment of the United States Constitution.⁷ This power may be used to protect a variety of citizens' interests, although it has been most extensively exercised in the area of public health and welfare.⁸ In the presence of federal legislation, local regulation is valid provided it does not contravene the goals of the federal legislation and does not violate the Constitution.⁹

The police power is not limited to the protection of the citizens' rights to immediate health and safety.¹⁰ The state may act to protect the future economic or aesthetic welfare of its citizens.¹¹ The scope of environmental law includes many of these protected rights, for example zoning ordinances, sewage disposal, and a host of other regulations that fall under the larger classification of air, noise, water, and land pollution.

6. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

7. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." *Id.* See note 8 *infra*.

8. *Berman v. Parker*, 348 U.S. 26 (1954). "An attempt to define [the police power's] reach or trace its outer limits is fruitless Public safety, public health, morality, peace and quiet . . . these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Id.* at 32.

9. There must be an "actual conflict." NOWAK, ROTUNDA, and YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 267 (1978) [hereinafter cited as NOWAK]. "The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulations of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of American v. Lockridge*, 403 U.S. 274, 285-86 (1971).

10. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Berman v. Parker*, 348 U.S. 26, 32 (1954).

11. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). "The concept of public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

B. Federal and Local Motives in Enacting Environmental Legislation

State or local legislation directed at environmental concerns is often prompted by (1) absence of federal legislation dealing with the problem,¹² (2) federal legislation not on point with local concerns,¹³ or (3) federal legislation inadequate to eradicate the problem to the extent envisioned by the state.¹⁴

The motivation behind most local environmental legislation may be traced to a desire to preserve a scarce natural resource situated within the locality and to reduce or forestall the added cost of restoring or finding an alternative to the resource.¹⁵ The judicial determination of a motive's validity is in a state of transition. Recently, the United States Supreme Court stated, in dictum, that the motive for the state legislation is irrelevant.¹⁶

A prerequisite for supremacy clause pre-emption as discussed in this Comment is the existence of a federal law.¹⁷ The motivation for Congressional action in the field of environmental law is an integral element of a court's determination of pre-emption. The many facilities and functions exclusively within the control of Congress and the commitment made by it to the goal of a clean and healthy environ-

12. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)(landfill utilization); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911)(protection of oil resources).

13. See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973)(federal imposition of no-fault liability on producers of oil spill covers only cost of federal, not state cleanup).

14. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)(oil spill prevention); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)(airport noise pollution); *British Airways v. Port Authority*, 10 ERC 1216 (2d Cir. 1977)(airport noise pollution); *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973)(federal "Pitch In to Clean Up America" campaign had no appreciable effect on highway litter).

15. Freilich, *1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs*, 10 URB. LAW. 573, 613 (1978).

16. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). "[W]e assume New Jersey has every right to protect its' residents' pocketbooks as well as their environment." *Id.* at 626. The Court's conclusion on this point was not crucial to the decision. The invalidity of the New Jersey statute was assured by its discriminatory nature. *Id.* at 626-27. See note 191 *supra*. Shortly before making this broad statement, the Court stated "[t]his dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case." 437 U.S. at 626.

17. Under the supremacy clause, the Constitution may also pre-empt local regulation without the presence of federal law. Neel, *Ray v. Atlantic Richfield: A Case for Preemption*, 5 HASTINGS CONST. L.Q. 563, 578 (1978). Treaties are also granted supremacy. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

ment arguably make Congress best suited to act in this field.¹⁸ Legitimate interests of local governments may conflict with those of Congress either in purpose or operation.¹⁹ To alleviate this problem, attempts to unite local and federal legislation under the concept of cooperative federalism have been suggested.²⁰ Neither federal nor local governments wish to relinquish their interest or power to act in this area; yet, both recognize the necessity of cooperation and consistent regulation.²¹

C. State Regulation Violative of the Commerce Clause

In the absence of federal legislation, local environmental law may be held invalid if it violates the commerce clause.²² A court will apply three distinct tests to determine whether a state has exceeded judicially imposed boundaries. The hierarchy of these tests is often crucial to the ultimate decision. First, the court will examine the area being regulated and determine if there is a need for uniform federal regulations.²³ Second, the court will search for any sign of discrimination against interstate commerce.²⁴ A corollary of this test

18. "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." National Environmental Policy Act of 1969, § 101(a), 42 U.S.C. § 4331 (1976) (emphasis added).

19. "Conflict in technique can be fully as disruptive to the system Congress has erected as conflict in overt policy." Amalgamated Ass'n of St., Elect. Ry. & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 287 (1971). Legitimate "superior authority" is the *sine qua non* of federal pre-emption. Hines v. Davidowitz, 312 U.S. 52, 66 (1941). A general test would seem to be whether the local "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67.

20. Freilich, *1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs*, 10 URB. LAW. 573, 606 (1978). "Congress has generally given a new twist to the concept of federalism by assigning to the federal government the responsibility for setting substantive environmental quality standards and by assigning to the states the responsibility for implementing and enforcing those standards." Sherrod, *Introductory Survey—1977*, 8 ENVIR. L. REV. ix, xxvii (1977).

21. The concession of this rather obvious point may be crucial to the outcome of the litigation. A state's admission of a federal interest in airspace management was characterized as a "fatal concession" for purposes of a finding of pre-emption. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 627 (1973).

22. U.S. CONST. art. I, § 8, cl. 3. See note 1 *supra*.

23. Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 298, 318-19 (1851); Neel, Ray v. Atlantic Richfield: *A Case for Preemption*, 5 HASTINGS CONST. L.Q. at 569.

24. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. at 626-27.

is that no state may isolate itself from the problems of other states.²⁵ A positive determination under either of the first two criteria will summarily invalidate the offending legislation.²⁶

If the legislation is neither in a uniform area nor discriminatory, a balancing test is applied. Under this test, the benefit to the community is weighed against the burden on interstate commerce.²⁷ In purely commerce-related cases, the weighing test is relatively simple to apply; however, in environmental law, the issue is usually not one of relative cost, but one of contrast between a commercially-recognizable burden and a non-comparable benefit.²⁸ The right of a court to rebalance interests once a local legislature has decided that a certain resource supplies a benefit outweighing any given form of commerce has been questioned.²⁹ Some writers maintain that the balancing test encroaches upon traditional legislative powers and that judicial review of state or local legislation under the commerce clause should be limited to the need for uniformity and discrimination tests.³⁰

In cases where the resource represents a non-comparable benefit, the Supreme Court has concluded that the balancing test is improperly applied when used to invalidate local legislation under the commerce clause.³¹ It may be that no piece of local legislation can fail a balancing test under the commerce clause since by nature, environmental objectives are non-comparable. At the other extreme, there are interpretations of the balancing test that assign to every environmental benefit an economically quantified value.

III. Federal Pre-emption

A. General Construction and Local Motivation

Under the supremacy clause,³² local legislation is pre-empted if it

25. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

26. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

27. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

28. See note 214 *infra*. A non-comparable benefit is a term of art for the psychic benefits prevalent in the field of environmental law.

29. *Firemen v. Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 138-39 (1968). See text accompanying note 210 *infra*.

30. See note 217 *infra*.

31. 393 U.S. at 136. See generally C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 116-92 (1978).

32. U.S. CONST. art. VI, cl.2. See note 2 *supra*.

conflicts with the purpose of a federal act.³³ This may be based upon express language of pre-emption in the federal law.³⁴ Other bases for pre-emption are Congressional intent,³⁵ federal action³⁶ or a federal decision not to act in the field.³⁷ Thus, a major task faced by local legislators is determining whether federal legislation in a given area was intended to exclude all local regulation.³⁸

Conflict exists between local and federal government in the field of environmental law.³⁹ The federal government and the business community validly desire uniformity of regulation.⁴⁰ The states have

33. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

34. *Neel, Ray v. Atlantic Richfield: A Case of Preemption*, 5 HASTINGS CONST. L.Q. at 578 (1978). For example, the Copyright Act of 1976, section 101 states: "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law of statutes of any State." 17 U.S.C. § 301(a) (1976).

35. However, "[t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

36. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

37. "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

38. Decisions by the Supreme Court in this area do not follow a logical or consistent pattern. Prior cases show "an unprincipled quality, seemingly bereft of any consistent doctrinal basis." Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975). General guidelines were set forth in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Chief Justice Warren considered essential to a finding of pre-emption a pervasive federal regulatory scheme, a strong link between the federal law and a dominant federal interest, and a "serious danger of conflict with the administration of the federal program." *Id.* at 502-05.

39. See *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 625-26, 517 P.2d 691, 696 (1973). American Can Co. complained that creation of recycling centers and reorganization of factories precipitated by a ban on "no-deposit bottles and pull-top cans" would drive up costs and result in higher prices. A comparable situation arose in *Procter and Gamble Co. v. City of Chicago*, 7 ERC 1328 (7th Cir. 1975), where the company had only one warehouse for Chicago and its suburbs. Following Chicago's ban on phosphate detergents, the company was forced to choose between creating a separate warehouse and delivery system for its suburban customers (not affected by the Chicago ordinance) or denying them access to phosphate detergents.

40. See *Sherrod, Introductory Survey—1977*, 8 ENVIR. L. REV. at ix-xi. *But see W. ANDREWS, ENVIRONMENTAL POLLUTION* 115 (1972). A test in New York City was reported therein which concluded that air pollution had a decided impact on worker productivity. Workers in offices within 100 feet of heavily trafficked thoroughfares were subject to levels of carbon monoxide three times higher than normal. The implied conclusion is that these workers might have been consistently drowsy or accident-prone. Clearly business interests would benefit from selective environmental regulation abating such emissions of carbon monoxide.

an interest in creating their own environmental legislation since the federal government often moves slowly,⁴¹ and, once it has acted, cannot be expected to tailor legislation to meet the needs of each individual area of the country.⁴²

A primary factor in a court's analysis is the intent of Congress in enacting legislation within a given field.⁴³ Many considerations, including the need for uniform regulation, are involved; however, this "need" is technically insufficient to support a supremacy clause attack. Congressional intent to exclude local legislation must also be apparent. Admittedly, the distinction is blurred, but the need for a uniform rule is more appropriate to support an alleged commerce clause violation.⁴⁴

A determination of pre-emption is facilitated where Congress has addressed the issue of local action. A court will generally accept an express pre-emption clause as adequate evidence of Congressional intent.⁴⁵ If Congress has expressly allowed local legislation to coexist, the issue becomes whether the local regulation has contravened the operation of the federal act⁴⁶ or has exceeded the power dele-

41. See, e.g., Weisman, *U.S. and New York Agree on Disposing of Nuclear Wastes*, N.Y. Times, March 21, 1979, §A, at 1, col. 3. The federal government "agreed to accept responsibility" for disposal of highly radioactive nuclear waste, responding to pleas from New York extending over a year. *Id.* Following a well-publicized nuclear accident in Pennsylvania, the Governor of New York "backed out" of the agreement. N.Y. Times, April 15, 1979, §E, at 3, col. 1.

42. The policy statement of the National Environment Policy Act declares that environmental policy will be created "in cooperation with the State and local governments. . . ." 42 U.S.C. § 4331(a) (1976). See note 18 *supra*. In practice, federal law often runs counter to local environmental policy.

43. An examination of legislative history aimed at ascertaining "the clear and manifest purpose of Congress" was used in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 634-38 (1973) to determine the existence of federal pre-emption. This procedure was criticized. Warren, *Airport Noise Regulation*, 8 *TRANSP. L.J.* 403, 408-09 (1976). See Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

44. "The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives . . . are to be fulfilled." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973).

45. Prior to examining legislative documents, the Court noted the lack of an express pre-emption clause. Although the lack of an express pre-emption clause is "not decisive," the Court implied that its presence might well be. *Id.* at 633. See Murphy & La Pierre, *Nuclear Moratorium Legislation in the States and the Supremacy Clause: A Case for Express Pre-emption*, 8 *ENVIR. L. REV.* 233 (1977).

46. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). The Court quickly concluded that the federal statute permitted state action. *Id.*, at 329, but compared the statutes to positively determine lack of conflict. *Id.* at 330-37. The Court would allow the state law to stand only "in the absence of federal pre-emption and any fatal conflict between the statutory schemes." *Id.* at 337 (emphasis added). Thus neither express tolerance

gated to local government.⁴⁷ Most Congressional action now may be categorized as either express tolerance or express pre-emption. Rarely does Congress now enact a law omitting treatment of local action.

B. Implied Pre-emption

Where Congress has not addressed the issue of pre-emption in the federal law, a court may find implied pre-emption based on Congressional intent, as exhibited in either the legislative history of the act or in the nature of the federal regulation. An exceptionally clear example of implied pre-emption of a local ordinance by comprehensive federal legislation was presented in *City of Burbank v. Lockheed Air Terminal, Inc.*⁴⁸

The city of Burbank was pre-empted from enforcing an ordinance⁴⁹ banning "pure-jet" departures and landings during the night. Although the purpose of this ordinance was to spare Burbank residents the discomfort of jet-aircraft noise during the night, the ban was found not to be the proper remedy given the large amount of federal legislation in this field, some specifically directed at this form of pollution.⁵⁰ The Burbank ordinance was held to directly contravene the intent of Congress as inferred from federal legislation.⁵¹

The local legislation was held to frustrate both the purpose and operation of the Federal Aviation Act.⁵² The most elemental interpretation of the supremacy clause would not permit such an ordinance given the pervasive occupation of the field by the federal

of state or local action nor lack of an express pre-emption provision by Congress is conclusive evidence of pre-emption in and of itself. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

47. See *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246 (1976) discussed at note 90 *infra*.

48. 411 U.S. 624 (1973).

49. Burbank Municipal Code § 20-32.1.

50. 411 U.S. at 629 (1973) See *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956)(altitude regulation); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968)(limiting noise spectra).

51. 411 U.S. at 638. Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1976); Noise Control Act of 1972 (amended 49 U.S.C. § 1431(b)(1) (1970 Supp. II)).

52. 411 U.S. at 639. *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). See note 19 *supra*. See also Note, *Federal Pre-emption and Airport Noise Control*, 8 URB. L. ANN. 229 (1974). The ultimate solution would seem to reside with the Federal Aviation Administration. *Id.* at 239.

government.⁵³ The Supreme Court, examining the legislative history of the Noise Control Act, noted the intent of Congress to act before local legislature enacted noise control statutes.⁵⁴ Burbank conceded that the field of airspace management was already occupied by the federal government in the form of the Federal Aviation Administration. This concession was "fatal."⁵⁵

The practical effect of the supremacy clause is to avoid the friction that might occur between local and federal legislatures if both were permitted to act concurrently in all fields.⁵⁶ The situation in *Lockheed* stands as an example of the potential havoc created when a field demanding a uniform rule is invaded by local legislation. "The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls,"⁵⁷ making any local regulation highly disruptive of the goal of federal legislation and a serious threat to the safety and control necessary for any organized system of airspace management.⁵⁸ However, Congress may pre-empt state regulation without showing an actual need for uniform rule.⁵⁹

Lockheed is illustrative of the varied bases upon which a determination of pre-emption may be upheld. Certain environmental problems of direct concern to local residents must be treated exclusively

53. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956).

54. 411 U.S. at 636-37.

55. *Id.* at 628-29. In *British Airways v. Port Authority*, 10 ERC 1216 (2d Cir. 1977) a holding that the Port Authority was pre-empted from banning the British-French supersonic airplane because the Secretary of Transportation specified regulations on takeoff direction, entries and departures (eight per day) and promulgated a strict nighttime ban, was reversed by the Court of Appeals, based on the Secretary's subsequent statement that the Port Authority had the power to ban the jets.

If, however, local action conflicts with federal legislation in operation not in purpose, and the local law makes compliance with federal regulations impossible then pre-emption occurs. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

56. See W. MILLER, *A NEW HISTORY OF THE UNITED STATES* 118-22 (1968) (discussion of the problems confronted by the Articles of Confederation). "This principle, the supremacy of the Body-politic as constitution-maker and the subordination of the government as the delegated agent of the Body-politic, with no powers but those derived from the Body-politic by virtue of the constitution, is therefore the foundation of American Constitutional Law." 1 J. TUCKER, *THE CONSTITUTION OF THE UNITED STATES* § 54, at 666 (1899).

57. 411 U.S. at 634 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

58. 411 U.S. at 639. The public interest includes "[t]he regulation of air transportation in such a manner as to assure the highest degree of safety 49 U.S.C. § 1302(b) (1976).

59. See text accompanying notes 122-29 *infra*. The intention of Congress to create uniform rules should be distinguished from a situation in which there is an inherent need for uniform regulation. See generally Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Pre-empted?*, 7 *ECOLOGY L.Q.* 679, 690-91 (1979).

by the federal government in spite of the lack of an express statement of pre-emption on the part of Congress.⁶⁰ Thus, the court will look to the nature of the subject being regulated, discussions in Congress prior to enactment of the federal act, and the structure of the act to determine whether pre-emption may be inferred.⁶¹ Though courts habitually engage in such examination, writers often limit the holding of *Lockheed* to the theory that comprehensive federal legislation impliedly pre-empted the local ordinance.⁶²

“What the ultimate remedy may be for aircraft noise which plagues many communities and tens of thousands of people is not know.”⁶³ Pre-emption may exist even where the comprehensive federal legislation is working slowly, and affording little, if any, relief.⁶⁴

C. Express Tolerance of Local Legislation

1. Harsher Penalties on Similar Subjects

Once federal law has recognized local governments' right to act in an area concerning the environment, pre-emption may exist if the local law conflicts with the actual operation of the federal legislation. The local legislature may exceed the limits Congress had anticipated, but not expressly delineated, by enacting an extraordinarily harsh penalty. Pre-emption might also arise if the local penalty is no more severe than Congress had anticipated, but is applied in far broader scope than the the federal government might consider appropriate.

For the protection of its citizens' health, Detroit enacted a Smoke Abatement Code that extended to ships docked in its harbor.⁶⁵ Ships entering the harbor with a tug escort experienced no conflict with the law⁶⁶ but ships running their engines to operate deck machinery while in port emitted smoke in violation of the Smoke Abatement Code.⁶⁷

60. NOWAK, *supra* note 9, at 628.

61. 411 U.S. at 634-37.

62. *Id.* at 633. See *Federal Pre-emption and Noise Control*, 8 URB. L. ANN. 229, 235 (1974) (modern tendency to use narrow grounds for pre-emption); *But see Note, Airport Noise Regulation: Burbank, Aaron and Air Transport*, 8 TRANSP. L.J. 403, 410-11 (1976) for other interpretations of *Lockheed*.

63. 411 U.S. at 638.

64. *Id.* See Note, *Federal Pre-emption and Noise Control*, 8 URB. L. ANN. 229, 239 (1974).

65. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

66. *Id.* at 441.

67. *Id.*

The pre-emption question arose in connection with ship inspection requirements imposed by the federal government.⁶⁸ The same engines in need of extensive structural modification for allegedly polluting Detroit's air were previously approved and licensed by the federal government.⁶⁹ *Huron Portland Cement Co. v. City of Detroit* held the Detroit Smoke Abatement Code not pre-empted despite extensive federal regulation of the subject matter.

Congress had expressly recognized the necessity of having local legislation attack the problem of air pollution.⁷⁰ Additionally, no conflict existed since federal design requirements were enacted to ensure safe passage⁷¹ while the Smoke Abatement Code was enacted to protect the health of Detroit's citizens.⁷² The Court placed no importance upon the similarities of the penalties imposed by each.⁷³ Thus, a local ordinance may penalize and regulate an environmentally offensive agent provided no express limitation appears in the federal act granting power to the localities although the effect of another federal law seems to be impaired.

Lockheed and *Huron* represent opposite extremes in the field of pre-emption. *Lockheed* declared coexistence between federal and local legislation impossible because the federal regulatory scheme was pervasive.⁷⁴ In *Huron*, Congressional intent clearly tolerated local regulation in the field of air pollution reduction. Moreover, the Detroit ordinance did not in fact contravene the goals, of federal ship licensing.⁷⁵ Clearly, forcing a ship to replace its engines may work as great an inconvenience as a total ban on polluting ships. However, the strength of a local ordinance, though significant, is not

68. 46 U.S.C. §§ 391(a),(b) (mandatory hull and equipment standards §§ 392(b),(c),(d) (annual inspection requirements).

69. *Id.* at 447.

70. *Id.* at 445-46, quoting 42 U.S.C. § 1857 (1970) The policy statement of the Air Pollution Prevention and Control Act now states: "The Congress finds— . . . (3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments. . . . 42 U.S.C. § 1857(a)(3) (1976).

71. 362 U.S. at 445. The Coast Guard is required to inspect vessels to determine that they are suitable for navigation with both safe and fit accommodations. 46 U.S.C. § 391(a) (1970). The statute nowhere alludes to the elimination of polluting devices as a goal of the inspection.

72. 362 U.S. at 445.

73. Although Detroit imposed criminal penalties, *id.* at 441, and federal law provides for revocation of inspection certificates, 46 U.S.C. § 391(d) (1970), shipowners must repair or replace the offending engines to avoid conflict with either law.

74. 411 U.S. at 633. See also *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

75. 362 U.S. at 447. See *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

conclusive. Actual conflict must be shown before a local law will be pre-empted on this ground.⁷⁶

2. Penalty Applied in Excessive Scope

A federal law may authorize localities to enact a specific penalty but neglect to describe those to whom the penalty shall apply. A local law may be challenged on federal pre-emption grounds if it manipulates this vagueness to impose broader penalties than anticipated by the federal government.

The issue of authorized penalty applied in excessive breadth under the state act was examined in *Askew v. American Waterways Operators, Inc.*⁷⁷ wherein the Florida Oil Spill Prevention and Pollution Control Act⁷⁸ was found not to be pre-empted by the federal Water Quality Improvement Act of 1970.⁷⁹ Oil spillage is "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent."⁸⁰ Congress intended oil spills to be cleared away by a joint federal-state cleanup force. As in *Huron*, Congress allowed the states to enact legislation to impose additional liability upon the oil companies and to underwrite the cost of their share of the venture.⁸¹ To test the reasonableness of the

76. See note 9 *supra*. But see *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956). The test for pre-emption, using the standard that "enforcement of the state . . . acts presents a serious danger of conflict," has been interpreted as necessitating at least a probable conflict rather than a mere possibility. Since the Court refuses to adjudicate non-controversies, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324 (1936), there is little chance of this point being further refined.

77. 411 U.S. 325 (1978).

78. 1970 Fla. Laws c. 70-244 (establishing no-fault liability against vessels and on-shore facilities to pay for state cleanup costs and damage to property and business caused by oil spills).

79. 33 U.S.C. §§ 1151-1175 (1970) as amended by Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1376 (1976). "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . ." 33 U.S.C. § 1251(b) (1976). See 33 U.S.C. § 1321(o)(2) (1976), formerly 33 U.S.C. § 1161(o)(2) (1970): "Nothing in this section shall be construed as pre-empting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State." (wording added since 1973 italicized). The federal act establishes no-fault liability against vessels to recover costs incurred by the federal government in cleaning up oil spills. 33 U.S.C. § 1161 (1970).

80. *Id.* at 328-29.

81. *Id.* at 335-36. The Water Pollution Prevention and Control Act, 33 U.S.C. § 1321 (c)(1,2) (1976) authorized the President to create and publish a National Contingency Plan to deal with oil and hazardous substance removal within sixty days of October 18, 1972. Such

Florida Act, the Court examined the growth in size of modern tankers and the corresponding growth of oil spills in recent years.⁸² The Water Quality Improvement Act never touched on the issue of compensation for damage to waterfront areas.⁸³ The imposition of responsibility for the destruction of Florida's tourist trade, fishing industry and natural wildlife was not unreasonable and remained open to state legislation. The Florida law was allowed to stand not solely because the federal statute expressly provided for tolerance of state regulation,⁸⁴ but because it was crucial to the environment⁸⁵ and did not contravene the purpose or operation of the Federal Act.⁸⁶

For local legislation to avoid pre-emption when a court is basing such a ruling on Congress' express tolerance of local action, the local legislature must not lessen or contravene either the purpose of operation of the federal legislation.⁸⁷ The Florida law merely served to increase the potential liability of the oil companies.⁸⁸ It did not lessen or alter the companies' liability to the federal government.⁸⁹

The supremacy clause notwithstanding, federal and local legislation may coexist within a given field based on a variety of criteria. The express mandate of power in *Huron* was used to direct a strong penalty at a single polluting instrument of commerce already under the aegis of federal control. A similar mandate in *American Waterways Operators* was the basis for the imposition of a penalty no stronger, but of greater scope, than its federal counterpart. Neither

a plan is to include "assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies . . ." 33 U.S.C. § 1321(c)(1)(A) (1976).

82. 411 U.S. at 334-35. See *id.* at 333 n.5.

83. The Water Pollution Prevention and Control Act now extends liability to include, but is not limited to "fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States . . ." 33 U.S.C. § 1321(d) (1976). The Water Quality Improvement Act of 1970 applied in this scope only in cases of "willful negligence or willful misconduct." 33 U.S.C. § 1161(f)-(g) (1970). See 411 U.S. at 336.

84. *Id.* at 328-29.

85. *Id.* at 334-35.

86. *Id.* at 336. The Court postponed the question of whether the liability might result in an excessive financial burden until an actual controversy presented itself. *Id.* The requirement of an actual controversy and reluctance to give advisory opinions might be questioned giving the irreversible nature of the damage and the public interest involved.

87. See note 19 *supra*.

88. *American Ass'n of St., Elect. Ry. & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 287 (1971).

89. 411 U.S. at 336. "Moreover, since Congress dealt only with 'cleanup' costs, it left the States free to impose 'liability' in damages for losses suffered both by the States and by private interests." *Id.*

strength nor scope alone justifies a finding of pre-emption where Congress has expressly indicated its tolerance of local legislation.

3. *Limits on Penalties Implicit in "Minimum Standard" Legislation*

To effect an environmental change, Congress may enact a law specifying a minimum standard to be met by a certain date. A genuine conflict is occasioned when a locality enacts a standard higher than the federally specified minimum. Congress' creation of a timetable of minimum standards of clean air with which states must comply was examined in *Union Electric Co. v. Environment Protection Agency*.⁹⁰ The states possessed the power to enact higher standards of their own, even if attainment of those standards was technologically and financially impossible.⁹¹ The federal Clean Air Act Amendments⁹² were passed to force the states to act more quickly in eradicating air pollution by establishing a minimum health-related standard to be met within three years and a more stringent public welfare-related standard to be met within a reasonable time.⁹³ The Administrator of the Environmental Protection Agency used eight criteria⁹⁴ to initially approve the state legislation.⁹⁵ Neither technological nor financial impossibility was among the criteria.⁹⁶

90. 427 U.S. 246 (1976).

91. *Id.* at 268-69. A potential due process challenge is beyond the scope of this Comment. See *id.* at 269 n.19.

92. Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-5 (1976). See 40 C.F.R. §§ 50.4-50.5 (1975). Due to litigation in this area, "it has taken longer to establish the meaning of its programs than the time allotted for their accomplishment." Kramer, *Economics, Technology, and the Clean Air Amendments of 1970: The First Six Years*, 6 *ECOLOGY L.Q.* 161, 163 (1976).

93. 427 U.S. at 249. "Suffice it to say that the Amendments reflect congressional dissatisfaction with the progress of existing air pollution programs and a determination to 'tak[e] a stick to the States. . . ." *Id.*, citing *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975).

94. Clean Air Act Amendments of 1970, § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1976). The state legislation had to (A) conform to the federal minimum standards, (B) include schedules and timetables, (C) provide data if requested by the Administrator of the EPA and include procedures for compiling and measuring such information, (D) include reviewing procedures concerning new regions to which the minimum standards would apply, (E) insure intergovernmental cooperation, (F) include funding provisions, (G) provide for enforcement of the standards applied to motor vehicles, (H) provide for revision of the entire system if necessary to continue meeting minimum federal standards. *Id.*

95. *Union Electric* never sought review of the state plan in the appropriate time period. 427 U.S. at 252.

96. See note 124 *supra*. See also Kramer, *Economics, Technology, and the Clean Air Act Amendments of 1970: The First Six Years*, 6 *ECOLOGY L.Q.* 161 (1976).

When variances, granted for two years, were not renewed, Union Electric was notified that its emissions were in violation of state law.⁹⁷ Union Electric contended that the local law was invalid because compliance was technologically and financially impossible.⁹⁸ Union Electric also argued that although Congress had intended the creation of technology-forcing legislation⁹⁹ (a purpose peculiar to environmental law¹⁰⁰), the state was pre-empted from adopting the federal purpose. This would not affect the state's right to enforce the minimum federal standards.¹⁰¹ Major conflict arose over the enactment by Missouri of the more stringent public welfare-related emission standard as the three-year goal.¹⁰² Congress had only recommended that this standard be enacted within a reasonable time.¹⁰³ It was alleged that Missouri could not engage in technology-forcing by enacting the higher standard.

At issue was the broader principle of whether a state could, given an express Congressional mandate to act in the field, adopt the spirit of the law. "Minimum standard" does not, by nature, imply an upper limit. The standard, therefore, carries the potential threat of allowing a state to set unrealistic standards to further its own ends.¹⁰⁴ Congress' express mandate necessarily gave the states the

97. 427 U.S. at 252.

98. *Id.* at 253. *But see* *People v. Cunard White Star, Ltd.*, 280 N.Y. 413, 21 N.E.2d 489 (1939). The New York Court of Appeals reversed a conviction of the shipping line for discharging "dense smoke" into the air over New York harbor. One of the grounds upon which the conviction was reversed was the contention that technology at that time could not eliminate the smoke.

"If the prohibition against the discharge of dense smoke is so applied that a steamship company may be found guilty of a violation because, in the operation of great liners with up-to-date equipment, dense smoke is discharged for a few minutes while a vessel is being prepared for departure, though it is shown that, even in the exercise of the greatest care, it would be impossible or impractical to avoid such smoke, then it seems to me clear beyond question that the ordinance is unreasonable"

Id. at 419, 21 N.E.2d at 490.

99. 427 U.S. at 256-57.

100. *See* note 93 *supra*.

101. 427 U.S. at 262.

102. *Id.* at 252 n.2.

103. *Id.* at 250 (citing 42 U.S.C. § 1857c-5(a)(2)(A)).

104. Conceivably, these ends might not always be the elimination of air pollution. A heavily industrialized area might have to enact such stringent measures to reach a minimum standard of air cleanliness that industries might be forced to relocate to less polluted areas where attainment of minimum standards would require less technological investment. The corresponding loss of jobs belonging to state citizens provides an adequate incentive to the state to give industry annual "variances." A state plan might set minimum emission standards so high as to make attainment practically impossible. Because Congress has not recog-

power to deal with the problem to whatever extent they desired.¹⁰⁵ "So long as the national standards were met, the State may choose whatever mix of control devices it desires. . . ." ¹⁰⁶ The Court has interpreted "minimum standard" to create only a bottom line for state action.¹⁰⁷ Such a standard implies no upper limit on compliance and attainment of environmental goals by the state unless expressly set by Congress.

4. *Determining the Upper Limit on Power Given to Local Government by Congress*

Whether or not a local regulation will be upheld is often measured by the difference between the power granted the states and the extent to which states utilize that power. Conflict is not resolved by holding that certain local legislation is not pre-empted. The amount of power delegated and whether the action has exceeded this limit must be determined.

Power to enact airport curfews was impliedly denied local government in *Lockheed*.¹⁰⁸ Thus, the finding of pre-emption obviated the need for the Court to establish the quantity of power given Burbank.¹⁰⁹ Power expressly given to the local government by Congress

nized technological or financial impossibility as a ground for invalidation of the state law, see note 94 *supra*, a court would have to uphold the variances. A state, to circumvent the federal minimum standards, could enact excessively high standards and then issue variances *ad infinitum*. The state, ostensibly acting to eliminate air pollution by enacting higher standards, would, in reality, be acting in collusion with industry.

105. 427 U.S. at 259-60. The Court concluded that Congress desired to remedy "what was perceived as a serious and otherwise uncheckable problem of air pollution," by giving pollution control strategies" to the states.

The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down

Id. at 259, quoting S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2-3 (1970).

106. *Id.* at 266 (citing *Train v. National Resources Defense Council*, 421 U.S. 60, 79 (1975)).

107. The Court recognizes that this path is not without risk. *Id.* at 269. See Sherrod, *Introductory Survey—1973*, 4 ENVIR. L. REV. xi-xii (1973) (discussion of implementation plans).

108. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

109. "A finding of pre-emption tends to be a perfunctory constitutional decision. It is analogous to the Court's practice of deciding a case on other than constitutional grounds if at all possible." Warren, *Airport Noise Regulation*, 8 TRANSP. L.J. 403, 409 (1976) (footnote omitted). The "perfunctory" nature of pre-emption might be more soundly analogized to disposing of a controversy on jurisdictional non-constitutional grounds (i.e. lack of standing)

to deal with the problem of air pollution allowed the Detroit ordinance to escape pre-emption despite its use of criminal sanctions.¹¹⁰ In the future, a general grant of power to achieve a given result will lead the courts to accept whatever penalty the locality has deemed appropriate based on the nature of the pollution.

The Florida law in *American Waterways Operators*, although enacted by express Congressional mandate, exceeded the scope of the federal statute.¹¹¹ Under the express grant of power, the state was not substantially limited in its efforts to impose broader bases of liability. Thus, it is important to note whether, an express upper limit exists on the power exerted by the states.

Union Electric destroyed the concept that a "minimum standard" might be considered an immutable edict to be followed by the states. *Huron*, *American Waterways Operators*, and *Union Electric* illustrate that once Congress has expressly given power to local government, whether or not in the form of minimum standard legislation, a locality may achieve federally imposed goals without fear of pre-emption.

D. Conflict Pre-emption

1. Judicially Imposed Distinctions to Avoid Pre-emption

Once a local law has been held pre-empted, whether courts generally favor voiding the local law in its entirety or severing those portions that might avoid pre-emption is significant. In *Ray v. Atlantic Richfield Co.*,¹¹² a Washington law¹³ prescribing strict design standards and pilotage requirements was partially pre-empted by federal legislation. The general purpose of the Washington law was to minimize the danger of oil spills in Puget Sound. The Court considered each of the three sections of the law separately.¹¹⁴

The first provision involved the application of a judicial distinction to overcome or resolve the pre-emption challenge. This section

were it not for the impact of a finding of pre-emption on the ability of local government to act in a given field. A holding of pre-emption effectively denies local government the power to legislate for the life of the federal law.

110. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). Justice Douglas dissenting, questioned whether the severity of the problem warranted a criminal penalty in light of federal licensing. *Id.* at 449-50 (Douglas, J., dissenting).

111. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 335-36 (1973).

112. 435 U.S. 151 (1978).

113. WASH. REV. CODE §§ 88.16.170-88.16.190 (Supp. 1975).

114. 435 U.S. at 158.

of the Washington law required all tankers to have on board a state-licensed pilot.¹¹⁵ The Court contrasted the purpose of the Washington law with that of the Ports and Waterways Safety Act of 1972 (PWSA).¹¹⁶ Congress intended to pre-empt local legislation only as to enrolled vessels;¹¹⁷ as applied to registered vessels,¹¹⁸ the Washington regulation was permitted to stand.¹¹⁹ Under Title I of the PWSA, the Secretary of Transportation was authorized to regulate enrolled vessel traffic throughout the country.¹²⁰ Congressional silence concerning registered vessels left Washington free to enact legislation in this area.¹²¹

The distinction between registered and enrolled vessels was not contemplated by the Washington legislature. Although the legislature had not expressly made provision for such division, the Court will sever the portions which actually conflict while allowing the remainder to stand.

2. Pre-emption by Similarity of Purpose

Comprehensive federal legislation and the excessive strength of the local penalty are not the sole grounds upon which a finding of pre-emption may be based. Frustration of a federal goal will serve to pre-empt the local ordinance.

A second provision of the Washington law in *Atlantic Richfield* set forth vessel design requirements and demanded such features as twin propellers, double hulls beneath storage tanks, and special collision avoidance radar.¹²² This portion of the law came into direct conflict with Title II of the PWSA,¹²³ which has as its stated purpose "the protection of life, property, and the marine environment from harm."¹²⁴ Pre-emption exists if the purpose of the local statute over-

115. *Id.*, see WASH. REV. CODE § 88.16.180 (Supp. 1975).

116. *Id.* The Washington law specifically conflicted with 46 U.S.C. § 215 (1976), 46 U.S.C. § 364 (1976), and 33 U.S.C. §§ 1221-1227 (Supp. V 1970) (safety program).

117. "Enrolled vessels are those 'engaged in domestic or coastwise trade or used for fishing' whereas registered vessels are those engaged in trade with foreign countries." 435 U.S. 151, 158 n.7 (1978), quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 272-73 (1977).

118. See note 117 *supra*.

119. 435 U.S. at 160.

120. 46 U.S.C. § 2 (1970), 33 U.S.C. § 1221 (1976). See 33 C.F.R. § 164 (1977). See also text accompanying note 130-140 *infra*.

121. 435 U.S. at 159-60.

122. WASH. REV. CODE § 88.16.190(2) (Supp. 1975). See 435 U.S. at 160.

123. *Id.* at 161. See 46 U.S.C. § 391a (1970 ed. Supp. V).

124. 435 U.S. at 161. See 46 U.S.C. § 391a(1) (Supp. V 1970). The policy of Congress is to eliminate the hazards to life, property and the resources within the navigable waters of

laps and conflicts with that of the federal legislation.¹²⁵

Pre-emption was based on "congressional intention to establish a uniform federal regime."¹²⁶ The crucial issue was that "[t]he federal scheme thus aims precisely at the same ends as does § 88.16190(2) of the Washington Law."¹²⁷ The PWSA was enacted with an awareness of the problem of oil spills.¹²⁸ Though not specifically formulated to eliminate the danger of oil spills to the extent desired by Washington, the federal design requirements were clearly enacted with that goal in mind. "Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction requirements would . . . nevertheless be barred from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard."¹²⁹

3. *Pre-emption by Assignment to a Federal Agency*

Three situations may arise once a federal agency has an environmental problem placed in its care.¹³⁰ The agency may postpone decision pending investigation, act, or consider the problem and decide no action is warranted. Failure of a federal agency to consider a problem within its field of responsibility creates an implied grant of power to local government to act which terminates immediately upon the action of the federal agency. Therefore, delegation to a federal agency of a Congressional duty to act represents the final ground for pre-emption.

Atlantic Richfield did not hold that the tanker design requirements discussed above were to be disregarded merely because they were pre-empted as to their original purpose of modifying ship design.¹³¹ Any enrolled or registered vessels failing to meet the design

the United States caused by the carriage of certain cargoes in bulk. *Id.*

125. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

126. 435 U.S. at 165.

127. *Id.*

128. "To implement the twin goals of providing for vessel safety and protecting the marine environment, it is provided that the Secretary of the Department in which the Coast Guard is located 'shall establish' such rules and regulations as may be necessary . . ." *Id.* at 161 (citing 46 U.S.C. § 391a(3) (Supp. V 1970)(footnote omitted).

129. 435 U.S. at 164. To establish pre-emption, no comprehensive scheme of federal legislation was necessary; frustration of a federal goal was sufficient. *Id.* at 158.

130. See text accompanying note 120 *supra*.

131. *Id.* at 173. Although the design standards could not be implemented, they could be utilized as the determinant of whether the vessel would fall under another valid state regulation.

requirements imposed by the Washington law were allowed to enter Puget Sound without structural modification, but would have to utilize a tug escort while entering or leaving the harbor.¹³² Although under Title I of the PWSA, the Secretary of Transportation could enact or forego a tug escort requirement, pre-emption could not be found until such time as he considered the problem.¹³³

The final regulation imposed by the Washington law was a complete ban on all tankers over 125,000 deadweight tons (DWT) from entering Puget Sound under any conditions.¹³⁴ It is peculiarly within the purview of the Secretary of Transportation to act in this field.¹³⁵ This portion of the Washington law could have survived if the Secretary had failed to act within this area.¹³⁶

Once a federal agency has been delegated the responsibility to act in a given area by Congress, intentional failure of the federal agency to act after consideration of the problem constitutes pre-emption of the local regulation. The Secretary's limitation of only one vessel of 70,000 DWT to Rosario Straits in Puget Sound at one time (40,000 DWT in inclement weather) proved that the Secretary had considered the problem and taken action.¹³⁷ The Secretary's decision here does not have the same effect as that of the Administrator of the Environmental Protection Agency regarding Congress' minimum emission standards in *Union Electric*. The *Atlantic Richfield* decision makes clear that a safety regulation is not equivalent to a minimum standard upon which a state may add requirements.¹³⁸

132. *Id.*

133. *Id.* at 172. The mere presence of the topic on the agenda of the Secretary of the applicable federal agency is not sufficient consideration of the problem by the federal agency to constitute pre-emption. There must be a decisive statement by the Secretary. *Id.* at 172 n.23.

134. WASH. REV. CODE § 88.16.190(1) (Supp. 1975).

135. 435 U.S. at 171. See 33 U.S.C. § 1221(e)(iii) (1976).

136. 435 U.S. at 174. The State was allowed to enact safety standards higher than those of the federal government only as applied to "structures." 33 U.S.C. § 1222(b)(1976). Thus the pertinent inquiries were whether a vessel was a structure, and if not, what limit, if any, had the Secretary imposed on tanker size to effectively create the federal standard.

137. *Id.* at 174-75.

138. However, states may so act if that is the intent of Congress, expressed or implied. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). But see *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960). Vessels approved and licensed under federal law were subject to local legislation (under express Congressional mandate) which sought an abatement of air pollution. There was an absolute distinction between the purposes and operation of the local and federal legislation. Despite the express mandate, actual conflict is the final test for federal preemption. 435 U.S. at 158. In *Huron*, the local legislation was aimed at a reduction of air pollution from ships; the federal law

The 125,000 DWT tanker ban was pre-empted by the Secretary's action though insufficient in the view of the Washington legislature.

The Court in *Atlantic Richfield* has recognized this dilemma and displays sensitivity to the environmental desires of local governing bodies and their constituents. Problems that have a bearing on a larger, nationwide activity often pose an immediate threat to the health and well-being of a community. Despite its decision concerning pre-emption, the Court reaffirmed the states' right to expect and demand individual attention from the federal government.¹⁴⁰

Pre-emption of local law does not confer an absolute right upon Congress to enact a single regulation applicable to the entire nation.¹⁴¹ Similar to the problem in *Lockheed* relating to the Burbank airport curfew,¹⁴² *Atlantic Richfield* recognized the need for a single agency to create local regulations favorable to both local and national interests.¹⁴³ Neither Congress nor a federal agency empowered by it may shirk its responsibility to local needs by creating a single rule applicable to the entire country.¹⁴⁴ In most environmental contexts, a need for uniform regulation is more aptly defined as a need for a lone regulator.

issued licenses concerning a ship's suitability based on its safety, not on its emission. Licensing under both the Ports and Waterways Safety Act and under the Washington law in *Atlantic Richfield* was aimed at the protection of the marine environment from harm.

139. *Id.* at 178. Bans based on size are not pre-empted *per se*. The Fire Commissioner of New York City has banned any tank truck carrying over 3000 gallons of gasoline from making a delivery within the city limits. New York City Fire Prevention Directive III, § 4-1 (March 10, 1978). Larger tank trucks en route to outlying areas reachable only through the city (*i.e.*, Nassau and Suffolk Counties) are restricted to certain routes. The ban works a definite hardship on city drivers who must pay increased prices for gasoline. Nevertheless, the potential danger of a larger tank truck accident in a populous area clearly balances out the extra cost to consumers.

The power to enact the directive is located in part III of the Interstate Commerce Act of 1887, 49 U.S.C. §§ 301-327 (1970). The States are expressly allowed to enact regulations provided they comport with various filing requirements of the Interstate Commerce Commission. 49 U.S.C. § 302(b) (1970). Similarly, "[a]ny State or political subdivision may apply to the OHMO (Office of Hazardous Materials Operation) for a determination that a particular existing requirement of that State or political subdivision which is inconsistent with the Act or the regulations issued under the Act is not preempted." 49 C.F.R. § 107.215(a) (1977).

140. 435 U.S. at 177. However, *Lockheed* noted the possibility of preemption despite the lack of a remedy to the environmental problem. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 638.

141. *Id.* The Secretary is to "consider fully the wide variety of interests which may be affected by the exercise of his authority hereunder." 33 U.S.C. § 1222(e)(1976).

142. See text accompanying notes 48-64 *supra*.

143. 435 U.S. at 177.

144. *Id.*

E. Pre-emption: Future Problems

Rapidly changing technology presents courts with an almost impossible task: determining whether a local law is pre-empted under conditions that could not have been foreseen upon passage of federal legislation.¹⁴⁵ This difficulty is alleviated somewhat by regular promulgation of Congressional guidelines.¹⁴⁶

Effective environmental legislation must be achieved through mutual cooperation between federal and local government. On April 13, 1978, the Environment Protection Agency granted to California a waiver of federal pre-emption in order to allow California to enforce its own emission standards.¹⁴⁷ The waiver was conditioned upon California's protection of its citizens' health and welfare¹⁴⁸ and could be revoked if the standards imposed by California were arbi-

145. In *California v. Department of Navy*, 9 ERC 2077 (N. D. Cal. 1977), the District Court held that the federal Clean Air Act did not pre-empt the application of state emission regulations on Navy test cells. Under the Act, the state was allowed to regulate smoke emissions from stationary sources. The federal government was given exclusive power to regulate aircraft emissions. Navy test cells are immense concrete structures in which aircraft engines, separate from their bodies, are tested and repaired. These cells presented a genuine question of interpretation to the court who finally concluded that the test cells were a land structure and not under federal jurisdiction. The most current bulletins are insufficient to advise a court of true Congressional intent as new dangers and substances are discovered. For example, on February 7, 1979 The New York Times reported that residents of the Love Canal area of New York had experienced health improvements after being evacuated from their homes. The residents all lived near the Love Canal in which toxic wastes were dumped. The materials then allegedly filtered through the soil and into the homes of the victims. N.Y. Times, Feb. 7, 1979, §B, at 2, col. 1. As the effects of pollution become more pervasive it is clear that discerning the effects, for example whether Congress intended the power to regulate the newly-discovered form of pollution to be solely theirs, is an almost impossible task.

146. 49 C.F.R. § 172.101 (1977) lists and classifies over a thousand hazardous materials for transportation. With even more specificity, the various radionuclides of 91 elements are listed and classified. 49 C.F.R. § 173.390 (1977). Despite the detail of these regulations, a small change in chemical compound may allow a manufacturer to avoid the strict federal regulations. This has exceptional impact in the practice of dumping wastes, where a harmful effect may not be noticed for years. Following the ban a similar, equally harmful, but legally different material may be used and dumped before federal regulations "catch up" with the new substance.

147. 8 ENVIR. REP. (BNA) 1999 (April 13, 1978). See *Exxon Corp. v. City of New York*, 9 ERC 1670 (2d Cir. 1977), in which a New York City regulation to lower the lead content of gasoline was expressly pre-empted within the language of the Clean Air Act, 42 U.S.C. § 1857f-6c(c)(4)(A) (1976). The court rejected the argument that express pre-emption must be narrowly construed if local regulations seek the same goals as the federal law. It is noteworthy that the court accorded great weight to 42 U.S.C. § 1867d-1 which stated that Congress had no desire to pre-empt any air pollution abatement regulation save those expressly pre-empted.

148. 8 ENVIR. REP. (BNA) at 1999.

trary and capricious or unnecessary.¹⁴⁹ The Environment Protection Agency also demanded that California give consideration to the time and cost of implementation as well as the technological feasibility of compliance.¹⁵⁰

Given intelligible guidelines, local law can coexist harmoniously with Federal legislation. Overly specific language of pre-emption, however, may be interpreted as impliedly permitting local governments to act without restraint in all other areas. Hence, detailed pre-emption clauses are not favored as viable alternatives to present problems of construction. Expansion of this type of federal expression will result in an increase of overreaching and litigation by local government.

Conversely, Congressional language generally pre-empting an entire field may not be the true indicator of Congressional intent. Congress may make subsequent exceptions to the pre-emption clause and specifically sanction appeasement of local interests. Such a trial-and-error approach should not be used in federal legislation. One issue is whether Congress should barter away legitimate local interests in return for simplified statutory construction in cases where there is no pressing need for uniform regulation or potential relaxation of a safety standard. A second pitfall of this approach is the inability of Congress to fulfill the responsibility implicit in such a blanket prohibition. Once the functions of the legislation are delegated to a federal agency, if the agency is unable to consider all the issues, the area might be subject to local regulation until the federal agency makes a decision.¹⁵¹

Another pressing issue concerns the quantity of power given local government. Minimum standards imposed upon the states now carry restrictive language.¹⁵² It is unlikely that the situation in *Union Electric* will ever be repeated. Some local areas, however, still face problems with uniform standards. One region may be forced to expend larger sums of money than another in attempting to comply with the minimum guidelines. Heavily polluted areas will incur the

149. *Id.*

150. *Id.* The practical effect of this waiver may be distinguished from the minimum standard situation in *Union Electric*. See text accompanying notes 90-107 *supra*. This waiver imposes minimum standards, but also provides federal compliance guidelines, making the waiver terminable at will.

151. 435 U.S. at 172 n.23. See note 133 *supra*. See also text accompanying notes 130-140 *supra*.

152. See, e.g., 8 ENVIR. REP. (BNA) 1999 (April 13, 1978).

bulk of initial research and development costs while cleaner areas may benefit from these pre-paid advances in technology as higher minimum standards are enacted. Another drawback of restrictions on minimum standards is that they preclude a state from voluntarily enacting more stringent standards. This is a serious disability in light of the Congressional goal to eliminate pollution and the consideration that many areas, able to meet initial standards with no action at all, should not be foreclosed from contributing to the Federal goal.

Pre-emption ought not to be regarded as a hindrance to environmental reform. Clearly, local governments fear a relinquishment of power over their environmental future. This is predicated on the perceived inability of Congress and its instrumentalities to act quickly and effectively.¹⁵³ Congress shall embrace local needs as enthusiastically as it first attacked the pollution problem.¹⁵⁴ This could transform the negative connotation of pre-emption from an odious abandonment of local control to the gratified bestowal of a sensitive issue upon a responsible and impartial arbiter.

IV. The Commerce Clause

A. General Considerations

Local legislation which avoids federal pre-emption must not exceed other limitations set by the Constitution on state and local power. One obstacle frequently encountered is the commerce clause.¹⁵⁵ Principles applicable to the cases in the field of environmental law originated in controversies over state regulations affecting safety standards,¹⁵⁶ protecting health,¹⁵⁷ or attempting to keep some form of commerce within¹⁵⁸ or without the state.¹⁵⁹ Conflicts between state environmental legislation and the commerce clause

153. See notes 63-64 *supra*.

154. See note 18 *supra*.

155. U.S. CONST., art. I, § 8, cl. 3. See note 1 *supra*. The commerce clause serves a dual function. As a positive grant of power, this constitutional provision allows Congress to "regulate" interstate commerce. The commerce clause also serves as a limit on the states' right to enact legislation affecting interstate commerce. B. SCHWARTZ, CONSTITUTIONAL LAW 126 (1979). This Comment is limited to analysis of environmental law under the latter category.

156. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

157. See, e.g., *Asbell v. Kansas*, 209 U.S. 251 (1908).

158. See, e.g., *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

159. See, e.g., *Duckworth v. Arkansas*, 314 U.S. 390 (1941).

have made it extremely difficult to apply principles and tests formulated in the past.

The divisive and protectionist¹⁶⁰ power over commerce exerted by the individual states prior to the Constitutional Convention prompted the adoption of the commerce clause.¹⁶¹ The original function of the commerce clause was to place interstate commerce under the control of a single, non-biased entity and erase all obstacles that might stand in the way of a flourishing system.¹⁶²

State and local regulations affecting interstate commerce must withstand a number of tests in order to be considered non-violative of the commerce clause. The law must not enter an area demanding a uniform rule, nor may it discriminate against interstate commerce. If both these criteria are met, the benefits afforded local residents are weighed against the burdens imposed on interstate commerce by the regulation.¹⁶³ The following sections will examine each of these tests and alternative interpretations in the context of environmental benefits.

B. The Need for Uniform Regulation

A local regulation affecting a form of interstate commerce which inherently requires a uniform rule will be automatically invalidated. Pre-emption under the commerce clause was first examined in *Cooley v. Board of Port Wardens*.¹⁶⁴ In declaring a Pennsylvania pilotage requirement non-violative of the commerce clause, the Court set the standard that the need for uniform regulation would be sufficient to pre-empt state and local legislation within a given area.¹⁶⁵ The added cost to shipowners was permissible in *Cooley* due to the necessity of the regulation and the superfluousness and impos-

160. THE FEDERALIST No. 7 (A. Hamilton). See E. BURNETT, THE CONTINENTAL CONGRESS 633-34 (1964).

161. "The poor condition of American commerce and the proliferating trade rivalries between the states were the immediate provocations for the calling of the Constitutional Convention." G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 127 (9th ed. 1975). But see M. JENSEN, THE NEW NATION 245-52 (1952) (proposing several alternate theories for the foundation of the Constitution).

162. See THE FEDERALIST No. 23 (A. Hamilton). See also letter of George Washington to John Jay, August 1, 1786, reprinted in XXVIII J. FITZPATRICK, ed., THE WRITINGS OF GEORGE WASHINGTON 216-7 (1938).

163. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

164. *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 298 (1852).

165. *Id.* at 313-14.

sibility of enacting a uniform rule throughout the nation.¹⁶⁶ This test has since remained the prerequisite for all others concerning local and state regulation of interstate commerce.

*Ray v. Atlantic Richfield Co.*¹⁶⁷ held federal law pre-empted state design requirements¹⁶⁸ intended to eliminate the risk of potential oil spills from Puget Sound. Such design requirements, however, could be used to determine tug escort requirements without violation of the commerce clause.¹⁶⁹ "Similar in nature to a pilotage requirement, a requirement that a vessel take on a tug escort when entering a particular body of water is not the type of regulation that demands a uniform rule."¹⁷⁰

A state regulation can coexist with the commerce clause when it does not unreasonably burden interstate commerce.¹⁷¹ To evaluate the validity of a state law, a series of further tests have been formulated by the Supreme Court.

The immense growth of federal legislation dealing with environmental goals has led to a confusion of the commerce clause and the supremacy clause.¹⁷² Where Congress has acted in an area demanding uniform regulation, courts have seen this need for uniform rule as a basis for pre-emption under the supremacy clause.¹⁷³ The need for uniform regulation under the commerce clause does not require federal legislation to be operative, but does require a positive showing of all the definitional components of the commerce clause.¹⁷⁴

166. *Id.* "But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress." *Id.* at 318. There is, in this doctrine, no requirement that Congress be presently fashioning legislation, merely that there be a need for it.

167. 435 U.S. 151 (1978).

168. See text accompanying notes 112-29 *supra*.

169. 435 U.S. at 179-80.

170. *Id.* at 179.

171. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

172. Compare *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) at 318-19 (1852) (need for uniform regulation invalidates state law under the commerce clause) with *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (need for uniform regulation assisted in presumption that Congress intended to pre-empt the field of airspace management under the supremacy clause).

173. *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973). See text accompanying notes 48-64 *supra*.

174. An example of the application of definitional criteria is presented in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The first issue considered by the Court was whether traffic in garbage constituted commerce within the meaning of the commerce clause. The Court examined the state court's interpretation of prior United States Supreme Court deci-

Under the supremacy clause, Congress may remove an area from consideration by state and local legislatures merely through the inclusion of an express pre-emption clause. This generally precludes any discussion of the need for uniform regulation.¹⁷⁵

C. Discrimination Against Interstate Commerce

A state, in protecting an interest of its citizenry under the police power,¹⁷⁶ can affect¹⁷⁷ or regulate¹⁷⁸ interstate commerce, provided it is non-discriminatory. A state cannot, for example, lock within its borders its precious stores of natural gas and oil and deny their availability to other states.¹⁷⁹ In *Oklahoma v. Kansas Natural Gas*,¹⁸⁰ all the natural gas fields beneath the surface were connected and it was admitted that the productivity of one well lessened the future productivity of the gas field as a whole.¹⁸¹ The state regulation prohibited the transportation of natural gas and oil to consumers outside the state while imposing no burden on the in-state consumer.¹⁸² Oklahoma's interest in preserving its oil and natural gas supply was deemed insufficient to overcome the discrimination against Oklahoma's neighboring states.¹⁸³

The statute blatantly violated the non-discriminatory goal of the

sions and concluded that the state court erred in holding that waste products were not a legitimate subject of commerce within the meaning of the commerce clause. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the Court allowed a similar pre-emption of state regulation under the commerce clause. *Neel, Ray v. Atlantic Richfield: A Case for Preemption*, 5 *Hastings L.Q.* at 570. The Court acknowledged both the similarity and the confusion of these tests. 325 U.S. at 768-69.

175. Local regulation in areas demanding uniform regulation is often pre-empted.

"Where the characteristics of a field call for exclusive national jurisdiction, Congress is more likely to be concerned that concurrent state authority would interfere with achievement of federal goals. Moreover, federal preemption of state authority would meet with less opposition if the states' interest in regulating that activity was less substantial. Thus, it is more likely that Congress may have reserved to itself a field the characteristics of which traditionally make it one for exclusive national jurisdiction."

Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *Ecology L.Q.* 679, 690-91 (1979)(footnote omitted).

176. U.S. CONST. amend. X. See notes 7 & 155 *supra*.

177. *Wilson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

178. *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 298 (1852).

179. *West v. Kansas Natural Gas, Co.*, 221 U.S. 229 (1911).

180. *Id.*

181. *Id.* at 245-46.

182. 1907 Okla. Sess. Laws, ch. 67, *quoted in* 221 U.S. at 239 n.1.

183. 221 U.S. at 262.

commerce clause. Oklahoma contended that conservation and not discrimination was the purpose of regulation.¹⁸⁴ The analogy of oil and natural gas to wild animals and natural resources in desperate need of conservation was rejected by the Court.¹⁸⁵ Natural gas and oil are commodities. If the law were allowed to stand, the ramifications might be endless:¹⁸⁶ "Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals."¹⁸⁷ So-called conservation measures might initiate a series of embargoes among states defeating the primary purpose of the commerce clause. The effect of the commerce clause was to place the needs of the country as a whole above those of each state. "[T]he welfare . . . of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it."¹⁸⁸

A New Jersey act¹⁸⁹ prohibiting the importation of most waste material into the state was examined in *City of Philadelphia v. New Jersey*.¹⁹⁰ Because it was discriminatory in nature,¹⁹¹ the act was declared unconstitutional. A certain amount of conflict with interstate commerce is permissible to protect state interests under the police power. The Court in *City of Philadelphia* reiterated its guidelines for invalidating a state law based on discrimination against interstate commerce and stated "incidental burdens on interstate

184. *Id.* at 250-01.

185. *Id.* at 258-59. Oklahoma attempted to convince the Court that oil and gas were *ferae naturae*. This defense was applied to game animals in *Geer v. Connecticut*, 161 U.S. 519 (1896). The states' peculiar interest in the preservation of game was traced to classical times by the Court. The Court concluded the State's role was that of protector of the *ferae naturae* for the communal benefit of the state's citizens, rather than that of proprietor. *Id.* at 529. While there was some authority for the extension of this doctrine to water, air and shoreline, *id.* at 525., *Kansas Natural Gas* refused to extend the doctrine to such obviously saleable commodities as oil and natural gas.

186. 221 U.S. at 255.

187. *Id.* The sharing of resources was considered of paramount importance to the general welfare of the nation; however, it is clear the Court did not anticipate a situation in which the resource was incapable of sale outside the state, yet had the characteristics of a commodity. The distinction was branded meaningless in *City of Philadelphia v. New Jersey*, 437 U.S. at 628. Thus, the state is powerless to erect barriers to keep resources within the state, or to keep harmful agents from depleting a state's non-removable resources.

188. 221 U.S. at 255. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (free shipment of uncrated cantaloupes mandated). *But see Sligh v. Kirkwood*, 237 U.S. 52 (1915) (Florida was allowed to prohibit the export of unripe oranges to protect its commercial reputation).

189. N.Y. REV. STAT. § 13:11-10.

190. 437 U.S. 617 (1978).

191. *Id.* at 626-27.

commerce may be unavoidable when a state acts to safeguard the health and safety of its people."¹⁹² However, "where simple economic protectionism is effected by state legislation a virtually *per se* rule of invalidity has been erected."¹⁹³

Discrimination against interstate commerce will be found where a state attempts to protect its economy by burdening the transaction of interstate business based on a fabricated environmental benefit to the community.¹⁹⁴ No health hazards arising out of the actual transportation of the waste products were found to exist in *City of Philadelphia*.¹⁹⁵ All danger to New Jersey citizens occurred once the waste reached the New Jersey landfill sites, and, at that point, the New Jersey waste could not be distinguished from that of Pennsylvania or New York.¹⁹⁶ If there were some inherent hazard in the transportation of garbage, the New Jersey statute would be analogous to a quarantine regulation¹⁹⁷ and might have been regarded more favorably by the Court.¹⁹⁸

A state may not keep scarce natural resources out of interstate commerce solely to satisfy the projected needs of the state's citizens.¹⁹⁹ *City of Philadelphia* expands that rule, holding "a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its bor-

192. *Id.* at 623-24.

193. *Id.* at 624.

194. See *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949). In both cases local and state regulations were invalidated as protective of intrastate at the expense of interstate commerce, although both laws were ostensibly health measures. Although the police power contemplates the protection of economic interests, the commerce clause will not abide a discriminatory burden on interstate commerce on economic interests. To enact a discriminatory regulation, a state must have an immediate and vital health interests as its goal, not mere economic favoritism.

195. 437 U.S. at 629.

196. *Id.*

197. *Id.* at 628-29. See *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902).

198. It is important to bear in mind that the health of the community must be in immediate danger. A potential hazard, or one of low risk but great danger, will not suffice. In *New York v. Nuclear Regulatory Commission*, 9 ERC 1825 (2d Cir. 1977), the court affirmed an order of the District Court denying New York an injunction banning all flights over New York City carrying radioactive materials of a certain concentration. The court examined in detail the probability of a commercial airline crash carrying nuclear materials. The conclusion that commercial air travel is one of the safest modes of travel outweighed the potential death toll and havoc that would be caused by the crash of a single airplane carrying radioactive materials within the city limits.

199. *West v. Kansas Natural Gas*, 221 U.S. 229 (1911).

ders."²⁰⁰ Fossil fuels were both the article of commerce and the state's scarce resource in *Kansas Natural Gas*. The article of commerce in *City of Philadelphia* was garbage while the scarce resource was landfill. New Jersey was given no more right to protect private land located within its borders than was Oklahoma to protect a resource capable of removal for use outside the state.²⁰¹ The crucial similarity was that the respective state governments chose to protect their resources with discriminatory legislation.

The Court placed upon New Jersey the burden of absorbing the waste of sister states.²⁰² Small comfort indeed are the assurances by the Supreme Court that one day the commerce clause will protect New Jersey in its attempts to dump in neighboring states.²⁰³ This holding will inevitably result in additional cost to the citizens of New Jersey by forcing them to seek alternative waste disposal sites sooner than they might otherwise have to develop them.²⁰⁴ The effect of this decision is to merely to forestall the day that alternative waste disposal methods will have to be created.

D. Balancing Test

After application of the tests for discrimination and need for uniform regulation, a balancing test is employed to determine whether the putative benefit to the state outweighs the burden placed on

200. *City of Philadelphia v. New Jersey*, 437 U.S. at 627.

201. *Id.* This statement would seem to contradict the Court's recent holding in *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371 (1978), in which hunting license fees imposed upon non-residents were over seven times those charged residents. The Court failed to find violations of the privileges and immunities clause, or the equal protection clause since the right to hunt Montana elk could not be considered fundamental, nor could this system of protecting a state resource capable of exhaustion be considered irrational. On the contrary, it was a logical and efficacious method of dealing with a pressing problem. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

The difference between the cases above and the principal cases is the regulated resource. In *Baldwin* and *Gibbons*, the land upon which the resource existed was owned by the state, thus owned by every state resident. See note 185 *supra*. In *City of Philadelphia*, the landfill areas existed on land owned by private developers. Thus, despite the fact that the New Jersey landfill areas, although privately owned, are crucial to the well-being of the state, their contents may not be regulated where the statute is discriminatory.

202. 437 U.S. at 629. To date, a state may only exclude quarantined substances, *Mintz v. Baldwin*, 289 U.S. 346 (1933), and items of commerce intrinsically tied to fraud, *Plumley v. Massachusetts*, 155 U.S. 461 (1894). The commerce clause will not protect fraud. This determination is usually effected as a definitional criterion. See note 174 *supra*.

203. 437 U.S. at 629.

204. Freilich, *1977-78 Annual Review of Local Government Law: Judicial and Constitutional Intervention in Municipal Fiscal Affairs*, 10 Urb. Law. 573, 613 (1978).

interstate commerce. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with lesser impact on interstate activities."²⁰⁵

In *Huron Portland Cement Co. v. City of Detroit*,²⁰⁶ a Detroit Smoke Abatement Code was held not to impose an unreasonable burden on interstate commerce, despite its substantial effect of forcing ships engaged in interstate commerce to structurally modify their engines.²⁰⁷ The Court held the lack of either discrimination or need for uniform regulation prerequisites, and the importance of the expected benefit to the community outweighed any possible burden on interstate commerce.

The tug escort in *Atlantic Richfield Co.* did not discriminate, nor did it require uniform regulation by Congress.²⁰⁸ The benefit was then contrasted against the burden on interstate commerce.²⁰⁹ The

205. 437 U.S. at 624 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

206. 362 U.S. 440 (1960). See discussion of preemption in *Huron* at text accompanying notes 65-73 *supra*.

207. 362 U.S. at 448. *But see* *People v. Cunard White Star Ltd.*, 280 N.Y. 413, 21 N.E.2d 489 (1939). The mere imposition of a criminal penalty was deemed to be an unreasonable burden on interstate commerce. There was neither a need for a uniform rule, nor was the ordinance discriminatory. In a balancing test, the benefit of clean air was given far less weight forty years ago than now. In the field of environmental law, the importance of a changing moral climate should not be underestimated. Given this consideration, the concept of forum-shopping ascends to monumental significance as litigants view which courts are most likely to be swayed by the various arguments being urged.

208. See text accompanying notes 112-40 *supra*.

209. 435 U.S. at 179-80. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). While the balancing is certainly influenced by a court's personal bias, the decision need not be made in a total vacuum. There are innumerable exhaustive studies carried out by various agencies, industry, and environmental public interest research groups. For example, in July, 1977, the Office of Minerals Policy and Research Analysis of the Department of the Interior published a final report (prepared by Energy and Environmental Analysis, Inc.) entitled *Benefit/Cost Analysis of Laws and Regulations Affecting Coal*. In its preface the report states:

"Recent years have seen the institution of numerous Federal, State and local laws, regulations and standards designed to affect the supply and consumption of coal

In the fact of these rapid changes, it is becoming increasingly difficult to know whether the numerous new laws and regulations, by themselves or in concert with each other, result in a net social benefit or cost to society."

Id.

The report investigates every possible aspect of coal production, from equipment, reclamation and revegetation to fatal and non-fatal accident benefit valuation. In-depth analyses such as this one, serve to legitimize the science of balancing environmental interests.

Court estimated "the cost of a tug escort for a 120,000 DWT tanker is less than one cent per barrel of oil."²¹⁰ This slight burden was outweighed by the benefits to the environment in the form of oil spill prevention. The legitimate environmental concerns in *Kansas Natural Gas* and *City of Philadelphia* were utterly irrelevant because the presence of discrimination obviated the need for the invocation of the balancing test.²¹¹

E. Non-comparable Benefits in the Balancing Test

The balancing test is subject to numerous interpretations. One path is to accord all environmental objectives the status of non-comparability.²¹² Previously used to protect *ferae naturae*,²¹³ the concept of non-comparability readily lends itself to environmental law. When a benefit to a community is of such value that it cannot be contrasted with the economic indicia of interstate commerce, it may be properly defined a non-comparable objective.²¹⁴

210. 435 U.S. at 180.

211. *City of Philadelphia v. New Jersey*, 437 U.S. at 626. See C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 146 (1978).

212. See text accompanying notes 229-30 *infra*.

213. See *Geer v. Connecticut*, 161 U.S. 519 (1896). See also note 185 *supra*.

214. The following analysis is significant as early evidence of the recognition of the existence of non-comparable benefits in the field of environmental law.

"Our present high level of environmental concern grew from a recognition that pollution was damaging man and nature. The damages occur when a pollutant is not stopped at its source or successfully avoided after it has been released. Damage costs include damage to health, to vegetation, and to materials; the costs of repairing such damages, the destruction of ecosystems; and the loss of aesthetic, recreational, and other environmental amenities.

Many damage costs represent a loss of tangible resources—the medical care required to treat pollution-caused illness, for example, and the cost of cleaning clothes or painting houses more often. These are the costs most often estimated and reported as pollution damage costs, and they are usually measured in terms of the marketplace value of the resources destroyed or consumed.

In addition to these tangible costs, there are various intangible costs—the anxiety created by congestion, risks to health and safety, the aesthetic blight of strip development, the unpleasantness of foul odors and the annoyance of excessive noise. Often called psychic costs, they embrace the range of annoyance and other psychological costs associated with environmental degradation beyond the value of any physical resources damaged. Often they are matters of preference, and their importance is not usually measured accurately by the marketplace. The fact that these psychic costs do not consume tangible resources does not make them less important. A human want that does not directly consume a tangible resource is no less important than one that does.

Many types of environmental damage will create both tangible and intangible costs. By damaging health, air pollution affects tangible resources by causing lost produc-

Determining the intent of the local legislature, whether public health and safety or economic protection, is often an impossible task since almost all environmental legislation has economic repercussions. Although the economic ramifications are not always the primary purpose, there are instances of economic or protectionist regulation cloaked in environmental or public health interests.²¹⁵

The court will determine whether the burden on interstate commerce exceeds the expected benefit of a certain public health measure. This may constitute a usurpation of legislative power.²¹⁶ Presumably, the legislature has already weighed the benefit and burden prior to enacting the legislation.²¹⁷ Neither *Huron* nor *Atlantic Richfield Co.* perceived the danger of applying a balancing of interest test. In both cases, the protected resources (oil-free beaches and smoke-free air) outweighed any burden on interstate commerce.²¹⁸ However, the invocation of the non comparable benefit test would

tion and by consuming equipment, supplies, and the time of highly skilled manpower required to restore good health. The illness, as well as the threatened loss of income security, may also arouse anxiety and fear in the individual and his family and friends. These are some of the psychic costs of air pollution—costs that are rarely included in damage estimates.”

FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 76-77 (1974).

215. See *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

216. The court should balance interests only where legislative judgment is found unreasonable.

“But how are competing interests to be assessed? . . . Full responsibility for the choice cannot be given to the courts. . . . History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”

“Primary responsibility for adjusting the interests which compete in this situation before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.”

Dennis v. United States, 341 U.S. 494, 525 (1951).

217. The balancing of interests test, particularly within the field of environmental law, does not question whether the legislation represents the best possible response, rather, whether it is a reasonable alternative. The court should never examine factors such factors as pressure from constituents, party interests, compromises that may have played a crucial role in the enactment of the alternative in question. C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 133-34 (1978). “The District Court’s responsibility for making findings of fact certainly does not authorize it to resolve conflicts in the evidence against the legislature’s conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was ‘pure speculation.’” *Firemen v. Chicago R.I. & Pac. R.R., Co.*, 393 U.S. at 138-39 (1968).

218. The resources resembled the classical definitions of *ferae naturae*. see note 185 *supra*.

have automatically presumed the environmental legislation to outweigh the burden on interstate commerce.²¹⁹

F. Weight of Burden as a Factor in the Balancing Test

Another consideration in the examination of state and local environmental regulations is whether they serve to prohibit or merely add cost to the transaction of interstate commerce. The effect of the laws in *Kansas Natural Gas* and *City of Philadelphia* was to prohibit interstate shipments.²²⁰ The *Atlantic Richfield Co.* and *Huron* regulations merely resulted in additional cost to the transaction. The disparity between the *Atlantic Richfield Co.* regulation²²¹ and the *Huron* ordinance²²² implies that the substantive weight of added cost as compared to prohibition in the balancing test is negligible.²²³

The nature of the scarce resource is a crucial element of the balancing test. The resources in *Atlantic Richfield Co.* and *Huron* were attributed no possible commercial value.²²⁴ In fact, without government intervention, the resources would probably have remained

219. "The ethos of restraint also follows logically from the precept, mentioned before, that in a democratic society interest-balancing judges should seek to maximize as many claims as possible. Legislative policy, after all, is the product of majority rule. When legislation comes to the Court for review and interpretation, *presumption should be in its favor* because, having been passed by the majority, it is assumed to maximize more claims and satisfy more interests. The only alternative would be to thwart democratic rule and extol minority interests." C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* at 132 (1978) (footnotes omitted) (emphasis added). However, it is essential to recall that the precept upon which this theory is based rests on the dissenting opinion of Justice Brandeis in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924). See C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 130 n.30, (1978).

220. Prohibitory state regulations which are patently discriminatory are permitted if they effect a quarantine or quell fraud. See notes 197 and 202 *supra*.

221. 435 U.S. at 180 (1978). The added cost was approximately one cent per barrel per 120,000 DWT tanker.

222. 362 U.S. at 441 (1960). A criminal penalty was attached to the Detroit Smoke Abatement Code. Therefore, a shipowner was forced to replace or structurally modify his ships' engines.

223. In taxation cases falling under the commerce clause, "it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state." *Northwest Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1958). It seems not too outlandish to suggest that interstate commerce be forced to bear some of the costs of cleaning the state environment it utilizes. Further, interstate commerce should bear a fair share of the burden of protecting the state environment from harm should the state legislature choose to so protect the state.

224. These resources were *ferae naturae* under *Geer v. Connecticut*, 161 U.S. 519 (1896), and were possessed of the right to protection by the state for the benefit of all the state's residents. See note 185 *supra*.

unprotected. *City of Philadelphia* and *Kansas Natural Gas* involved resources environmental in nature, but displaying characteristics similar to valuable commodities. Based on this similarity, the court may infer economic protection and discriminatory intent. This will either preclude the balancing test or obviate the applicability of the non-comparable benefit test. Local legislation dealing with a subject of no inherent commercial value may deserve to be placed within the category of non-comparable benefit. A court failing to expressly apply a non-comparable benefit test may use the traditional balancing test to yield the same result.²²⁵

Local legislatures know that preservation of a valuable commodity is tainted by self-protection and they may attempt to avoid this dilemma by deceptive language.²²⁶ The Supreme Court will not allow protectionist measures on environmental issues to place any burden on interstate commerce regardless of the "currently fashionable garb of environmental legislation" in which the law is wrapped.²²⁷

Where the facts illustrate a purely health or aesthetic purpose behind the legislation, the balancing test should be fairly be applied in favor of the environmental legislation.²²⁸ When there are multiple purposes behind a piece of legislation, courts have a more difficult task deciding whether the legislation exhibits a truly non-comparable benefit.²²⁹ The court is faced with the dilemma of allowing quasi-economic legislation to stand with the strength of purely environmental legislation, or assuming a non-judicial function by assigning certain weights to specific benefits of the statute.²³⁰

225. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

226. *City of Philadelphia v. New Jersey*, 437 U.S. at 625-26.

227. *Id.*

228. The prerequisite is, of course, that the legislation bear a reasonable relation to the problem. See *Firemen v. Chicago R.I. & Pac. R.R.*, 393 U.S. 129, 136 (1968); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 191 (1938). See also C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 132-33 (1978).

229. See C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 133-34. It is argued that these factors should not be a part of a court's determination.

230. Although the court will examine extraneous factors, unless non-environmental (or non-health and safety) objectives so taint the legislation to make it patently unreasonable, the law will be upheld. In practice, far more state legislation fails on the grounds of "need for uniform regulation" or "discrimination" than ever reach an interest balancing test. Exceptions, however, do exist. The Court recognized the relative scarcity of these cases in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). "This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional bur-

G. Alternatives to the Non-comparable Benefit Test

An Oregon court ingeniously created an alternative to the non-comparable benefit test in deciding that an Oregon law banning pull-top cans, non-refundable bottles and cans, and establishing a system of return stations throughout the state did not violate the commerce clause.²³¹ The court in *American Can Co. v. Oregon Liquor Control Commission*²³² examined the need for uniform regulation and possibility of discrimination concluding that the statute could not be held unconstitutional on those grounds. Accordingly, a balancing test was applied.²³³

The environmental and economic objectives of the law were inextricably intertwined. The Liquor Control Commission contended that the only purpose of the legislation was non-comparable, to stop the litter inundating the state.²³⁴ The benefit of litter-free highways was comparable since the task of cleaning up the litter was a measurable expense borne by all Oregon residents.²³⁵ *American Can Co.* contended that the bottle bill was motivated by protectionists interests which discriminated against interstate commerce and resulted in more revenue and jobs for Oregon and its residents.²³⁶ This allegation of self-interest against the state was insufficient to render the law an unreasonable burden of interstate commerce. The minor market fluctuations related to interstate commerce were interpreted by *American Can* as a necessary by-product of constantly evolving community priorities.²³⁷

den on interstate commerce." *Id.* at 529. The paucity of cases in which the Court has applied an interest balancing test has been a relevant factor in the lack of definitive guidelines as to when interests may be weighed without a court's encroaching on a legislative function.

231. *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973). See *Bowie Inn v. City of Bowie*, 7 ERC 2083 (Md. Ct. App. 1975) where a city ordinance requiring a five cent deposit on all soft drink and beer containers was held not to violate the commerce clause.

232. *Id.*, 517 P.2d 691 (1973).

233. 15 Or. App. at 635-36, 517 P.2d at 699-700.

234. *Id.* at 628, 517 P.2d at 696.

235. *Id.* at 641-42, 517, P.2d at 702-03. This logic could easily be applied to all cases that pass the "need for uniform regulation" and "discrimination" tests. In *Atlantic Richfield*, the cost of cleaning the beaches in the event of an oil spill would clearly outweigh the one cent per barrel of oil a 120,000 DWT tanker would be forced to pay for a state-licensed pilot. See note 221 *supra*.

236. 15 Or. App. at 639-42, 517 P.2d at 701-03.

237. *Id.* at 628, 517 P.2d 696. The Court remained unsympathetic to the company's plight, stating, "[j]ust as there were gainers and losers, with plaintiff [*American Can Co.*] among the gainers, when the industry adapted to the development of non-returnable containers,

A balancing test may be applied to economic benefits due to the ease of assigning to them a dollar value.²³⁸ Thus, the purpose of the statute becomes crucial once the court applies a balancing test. The court in *City of Philadelphia* did not discuss the non-comparable benefit rule, but stated that, under the police power, "New Jersey has every right to protect its residents' interests as well as their environment."²³⁹ While this is true, there is a clear tactical disadvantage in conceding the existence of an economic benefit for the purposes of a commerce clause balancing test.²⁴⁰

This purely economic formula would seem to be a solution to the problem of non-comparable benefits by denying their existence. The court in *American Can* recognized the economics on both sides of the situation²⁴¹ and could have concluded at this point that, in precise dollar value, the cost of cleaning highways outweighed the cost of relocating factories. The *American Can* court, however, refused to assume a legislative function, simply allowing the statute to stand absent any discrimination or need for uniform rule. Courts have generally avoided open application of non-comparable benefit criteria to the commerce clause balancing test.

V. Conclusion

The ultimate question is whether environmental law will be directed by federal or local government. The two most recent cases striking down local regulation²⁴² arguably indicia of a trend to re-

there will be new gainers and losers as they adapt to the ban." However, the stereotypic image of business fighting environmental clean-up is rapidly changing. Most obvious among these are tax incentives for environmental programs. See I.R.C. § 169. See also note 40 *supra*. Often environmental regulations yield unexpected financial benefits. In creating the "cleanest and most modern" steel-making facility in the United States, Kaiser Steel Corporation invested \$233 million in its Fontana, California plant. This followed a \$2.1 million fine for non-compliance with pollution violations. Modernization of operations at the new plant precipitated an annual increase of 400,000 tons of steel. N.Y. Times, February 14, 1979. § D, at 1, col. 2.

238. See note 214 *supra*.

239. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). The Court never had to come to any conclusion of relative weight since the New Jersey regulation was invalidated for its discrimination against interstate commerce, thus precluding the application of a balancing test.

240. Public health legislation admitting of desire by the state to gain a distinct competitive advantage over sister states will be held violative of the commerce clause. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

241. See note 235 *supra*.

242. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

move environmental problems from the control of local government. A better interpretation of these supremacy and commerce clause cases would reveal a trend in the diametrically opposite direction: The Supreme Court will invalidate local regulations only where there is a clear violation of Constitutional or federal law.

In cases of federal pre-emption, the local law will stand if (1) it is not expressly pre-empted, (2) it is not impliedly pre-empted and (3) it does not exceed express limits on permissible exercise of local power set in the federal law. Where the commerce clause is allegedly violated, the local law will be held invalid if it discriminates against interstate commerce or enters a field demanding uniform federal regulation. The local law will be upheld in the absence of such blatant violations.

In *Atlantic Richfield*, when one portion of the state law was pre-empted, a distinction was drawn to allow the remainder of that section to stand.²⁴³ Similarly, sections of the Washington law in *Atlantic Richfield* potentially pre-empted by delegation of the problem to a federal agency were only pre-empted when that agency had actually taken action.²⁴⁴ Where the federal agency failed to act, pre-emption did not exist.²⁴⁵ In *City of Philadelphia*, the state law was held to be violative of the commerce clause due to overt discrimination against interstate commerce.²⁴⁶

Recent developments²⁴⁷ have made almost every citizen aware of

243. See text accompanying notes 112-121 *supra*.

244. See text accompanying notes 134-139 *supra*.

245. See text accompanying notes 130-133 *supra*.

246. See text accompanying notes 190-198 *supra*.

247. On March 28, 1979, an accident at the Three Mile Island nuclear power plant near Harrisburg, Pennsylvania imperiled the lives of thousands and caused fear throughout the nation. Schools were closed; pregnant women and pre-school children were ordered out of the danger area. Thousands of others voluntarily evacuated. Plant owners lost approximately \$400,000 every day the plant was closed; moreover, there was no estimate on when the plant would be fit to reopen. The President visited the plant as scientists analyzed a potentially explosive hydrogen bubble at the top of the reactor vessel. Anti-nuclear protest rallies were held throughout the nation. NEWSWEEK, April 19, 1979, at 24-45. Ayers, *Three Mile Island: Notes from a Nightmare*, N.Y. Times, April 16, 1979, § A, at 1, col. 1.

248. "It [Three Mile Island] was an accident destined to threaten not only the lives of thousands, born and unborn, but also the future of nuclear power itself—an accident that would generate a week of doomsday fear, panicky flight, conflicting statements, noisy demonstrations and intense confusion." *Id.*, April 16, 1979, § A, at 1, col. 2. "The size of the anti-nuclear reaction is already creating a new and unexpected pressure on politicians. In California, . . . Governor Jerry Brown has called for the shutting down of the Rancho Seco plant in the Sacramento Valley until it can be proven safe. . . . We look forward to joining dozens of anti-nuclear organizations in an effort to tie together a powerful citizen's movement that can

the impact of environmental legislation upon his life. The public's fears may be the basis for a grass-roots movement to shift control from the federal to local government control on the assumption that local legislators will better protect the citizens' interests.²⁴⁸ A battle for local control will be fought for control of nuclear power plants.²⁴⁹ Contrary to the perceived Supreme Court trend are decisions of federal courts holding local nuclear regulation invalid.²⁵⁰

A recent decision in the area is *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*²⁵¹ where a state regulation was pre-empted despite the existence of a clause in the federal act expressly tolerating local action in a limited area.²⁵² The local law was interpreted as contravening Congressional goals and operation in other sections of the federal act.²⁵³ The Atomic Energy Act²⁵⁴ created guidelines for federal control of nuclear power. Later amendments delegated to the states control over "activities for purposes other than protection against radiation hazards."²⁵⁵ The federal government retained control over operation and construction of nuclear installations and disposal of nuclear waste.²⁵⁶ The state enacted a *de facto* ban on nuclear power plants lacking state-approved waste storage and disposal facilities.²⁵⁷ The regulation was ostensibly based on fiscal motives, with no more than a tangential concern for "radiation hazard."²⁵⁸

The court was unimpressed with the state's ability to fabricate purposes separate from those of Congress in order to avoid pre-

break the back of the utility-government nuclear lobby" Fonda, Hayden, *Mobilizing Against the Nukes*, New York, April 16, 1979, at 43.

249. There are already several cases on the issue of local control over nuclear power. See *Nothern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *United States v. City of New York*, No. 77-3485 (S.D.N.Y. December 26, 1978); *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n*, No. 78-711-E (S.D.Cal. March 6, 1979).

250. See note 249 *supra*.

251. No. 78-711-E (S.D. Cal. March 6, 1979).

252. 42 U.S.C. § 2021(k) (1976).

253. *Pacific Legal Foundation v. State Energy Resources Conservation Dev. Comm'n*, No. 78-711-E, slip op. at 19-20 (S.D. Cal. March 6, 1979).

254. 42 U.S.C. §§ 2011-2281 (1976).

255. 42 U.S.C. § 2021(k) (1976).

256. 42 U.S.C. § 2021(c) (1976).

257. *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n*, No. 78-711-E, slip op. at 9 (S.D. Cal. March 6, 1979). See Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *Ecology L.Q.* 679, 683 (1979).

258. *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n*, No. 78-711-E, slip op. at 13 (S.D. Cal. March 6, 1979).

emption.²⁵⁹ At a superficial level, the court's analysis is sound, but an in depth examination reveals flaws in the court's finding of pre-emption. Express pre-emption was not found by the court.²⁶⁰ Congress made no statement of express pre-emption in the Atomic Energy Act, placing the court on solid ground when it observed that the state regulation could still be pre-empted "by implication."²⁶¹ The court also noted that actual conflict with a federal law will pre-empt state regulation.²⁶² Based on these definition of pre-emption by implication²⁶³ and by conflict,²⁶⁴ the court held the state law pre-empted on both grounds.²⁶⁵

Proponents of the state regulation sought to distinguish the purpose of the federal law from that of the state regulation; however, the argument was rejected.²⁶⁶ The danger of conceding the validity of this purpose was clear to the court.²⁶⁷ The court's finding that

259. *Id.* "The underlying premise seems to be that any sort of regulation at all is permissible as long as a state is willing and ingenious enough to conjure up a legislative purpose other than radiation control." *Id.*, slip op. at 13. Questions of fiscal soundness should not be dismissed lightly. During the Three Mile Island accident, *see* note 247 *supra*, "the utility was losing perhaps \$400,000 every day the plant was down. 'And it will be a long time [before] it ever runs again,' predicted NRC official G.N. Lauben." *NEWSWEEK*, April 9, 1979, at 30. A nuclear power plant near New York City "has been shut down since 1974, when Con Edison declined to develop a costly new emergency core-cooling system now demanded by the federal Nuclear Regulatory Commission . . ." *NEW YORK*, April 16, 1979, at 39. "While agreeing that agriculture products—particularly milk—would have to be monitored for a radius of 50 miles from a nuclear accident . . . , nuclear officials are not entirely in sympathy with those who claim long-range bad effects from low-level radiation. *Id.*, April 16, 1979, at 40.

260. *Id.*, slip op. at 10.

261. *Id.*, slip op. at 10-11 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

262. *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n*, No. 78-711-E, slip op. at 11 (S.D. Cal. March 6, 1979) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)). The court noted two separate tests for conflict pre-emption, *id.*, slip op. at 11, (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The tests seem indistinguishable. Also, in *Atlantic Richfield*, the state law was enacted in the absence of any Congressional tolerance of state regulation. Regulations on oil tankers were pre-empted only where they conflicted with the actual exercise of federal power. In the instant case, pre-emption is based on prospective exercise of federal power where Congress under the Atomic Energy Act has expressly addressed the issue of pre-emption.

263. Examined in this Comment at text accompanying notes 48-64 *supra*.

264. Examined in this Comment at text accompanying notes 65-131 *supra*.

265. *Pacific Legal Foundation v. State Energy Conservation & Dev. Comm'n*, No. 78-711-E, slip op. at 10-20. (S.D. Cal. March 6, 1979).

266. *Id.*, slip op. at 13.

267. "If section 2021(k) is broadly interpreted to validate any state statute or regulation as long as there appears a stated purpose other than protection against radiation hazard, then

Congress did not intend for a state to inhibit any federal action effectively nullified state power under the Atomic Energy Act.²⁶⁸

The court's application of the principles of implied pre-emption is unsound. When implied pre-emption is alleged, the court must discern the intent of Congress to pre-empt local regulation based on a total absence of guidelines within the federal law.²⁶⁹ The clearest example of implied pre-emption occurred in *City of Burbank v. Lockheed Air Terminal, Inc.*,²⁷⁰ wherein the total absence of a statement on pre-emption in the federal act precipitated an examination of legislative intent. Congressional intent has since been examined to support allegations of conflict pre-emption,²⁷² not to substantiate implied pre-emption. Where Congress has expressly granted local government power to act in an area, it is impossible to infer implied pre-emption from the nature of the statute.²⁷³ Implied pre-emption must be denied because Congress has addressed the issue of local action.

The most persuasive argument for pre-emption is made in the conflict of operation category. The *Pacific Legal Foundation* interpretation of this issue, however, evidences a major oversight. Assuming, as the court does,²⁷⁴ the state regulation is valid, conflict of actual operation must be found.²⁷⁵ The argument for conflict of operation is clearly set forth in the opinion.²⁷⁶ Congress has made a decision to encourage development of nuclear energy which may be frustrated by state regulation.²⁷⁷

The argument against pre-emption may be based on *Huron Portland Cement Co. v. City of Detroit*.²⁷⁸ Detroit was allowed by federal

the States would effectively be permitted to intrude into the preempted sphere and regulate radiation hazard under the guise of a permitted legislative purpose." *Id.*, slip op. at 14.

268. *Id.*, slip op. at 14.

269. See text accompanying notes 48-64 *supra*.

270. 411 U.S. 624 (1973). *Lockheed* was not discussed in *Pacific Legal Foundation*.

271. *Id.* at 633.

272. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). *Askew* and *Huron* were not discussed in *Pacific Legal Foundation*.

273. See text accompanying notes 65-89 *supra*.

274. *Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n*, No. 78-711-E, slip op. at 17 (S.D. Cal. March 6, 1979).

275. This was the same procedure used to seek pre-emption in *Askew* and in *Huron*, although neither case is cited or distinguished in *Pacific Legal Foundation*.

276. *Id.*, slip op. at 14-20.

277. *Id.*, slip op. at 18. See 42 U.S.C. 2022-2012 (1976).

278. 362 U.S. 440 (1960). *Huron* was not discussed or distinguished in *Pacific Legal Foundation*.

law to enact stringent air pollution regulations which directly superseded, federal ship licensing legislation. The conflict of operation was permitted based on "recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution" ²⁷⁹ Similarly, no conflict should be found between subsections of the Atomic Energy Act. *Huron* allows a local regulation expressly permitted by the federal government to defeat a coexisting federal regulation without fear of pre-emption. ²⁸⁰

Local regulation of nuclear power which does avoid pre-emption, may not be valid on other grounds. If a sufficiently strong argument may be made for uniform federal regulation ²⁸¹ or discrimination against interstate commerce, ²⁸² the local law would be held violative of the commerce clause.

City of Philadelphia v. New Jersey held that no state may discriminate against interstate transportation of waste. ²⁸³ Given that Congress intends to encourage development of nuclear energy and dangerous waste is a necessary by-product of such power, no one state should be allowed to set higher standards for its safe disposal. Refusal by a state to approve nuclear waste disposal procedures will inevitably result in disposal of waste in neighboring states. *City of Philadelphia* denied states the right to lock out waste, therefore, the commerce clause should prohibit states from forcing waste on sister states.

A totally different issue is raised, however, where the actual trans-

279. *Id.* at 445 (quoting 42 U.S.C. 1857 (1960)).

280. "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." *Id.* at 447. The offending ships in *Huron* were granted a license to operate, as are nuclear power plants under 42 U.S.C. § 2021(c), yet, the federal license did not constitute an immunity to police power regulation permitted by Congress.

281. While the merits of local and federal legislation in this area have yet to be litigated, it is recognized that the national security and uniform standards present compelling arguments for federal control. However, the right of area residents to have a voice in nuclear power plant siting and operation should not be discounted. Furthermore, in the Three Mile Island mishap, see note 247 *supra.*, the Nuclear Regulatory Commission failed to prove its superior ability to handle the emergency. On March 30, 1979, the Commission chairman stated that he and the Governor of Pennsylvania lacked crucial information and were "like a couple of blind men staggering around." On April 1, 1979, the President visited the nuclear plant while it was in a potentially explosive condition. N.Y. Times, April 15, 1979, § E, at 3, col. 1.

282. See text accompanying notes 176-204 *supra.*

283. 437 U.S. 617, 627 (1978).

portation of the matter is dangerous. If this can be proven,²⁸⁴ even overt discrimination under the commerce clause is permissible.²⁸⁵

No simple solution exists for a conciliation of competing interests seeking control over environmental regulation. In the end, either the Supreme Court or Congress will balance the merits of both sides and determine whether federal or local control will best suit the environmental needs of the nation in the future.

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284. *Id.* at 628-29. See *Asbell v. Kansas*, 209 U.S. 251 (1908); *Reid v. Colorado*, 187 U.S. 137 (1902).

285. "Nuclear fuel is manufactured at sites that may be far from the nuclear plants that use it, and it must be carried to its destination by truck or train. Similarly, the spent fuel removed from the reactor core is still highly radioactive, and in many cases must be carried, along with contaminated clothing and equipment, to distant sites for disposal. *NEWSWEEK*, April 9, 1979, at 39.

In March, 1979, a truck carrying radioactive nuclear fuel "overturned in Washington releasing some radiation." *Id.*, April 9, 1979, at 39. On January 28, 1979, a truck carrying 40,000 pounds of cobalt 60 and cesium 137 overturned spilling and breaking open forty-six drums of the nuclear waste. *N.Y. Times*, § A, at 12, col. 6.

