FEDERAL PREEMPTION: GOVERNMENTAL INTERESTS AND THE ROLE OF THE SUPREME COURT

This comment is an analysis of Supreme Court decisions in cases raising a substantial issue of preemption, not including cases involving the National Labor Relations Act and amending legislation. Inquiry is especially directed towards assessing the significance of the relative strengths of the state and federal governmental interests involved in each case.

I

INHERENT in a federal system of government is the inevitability of collision between the policies and acts of the component sovereignties or quasi-sovereignties. Through the supremacy clause,[1] the United States Constitution resorts to a hierarchical system as one method for resolving the problems arising from such collisions.[2] This comment is concerned with collisions of interests occurring as a result of the concurrent exercise of legislative power by the inferior and the superior levels of governmental authority within the hierarchical system.[3] This concurrence poses the issue of preemption,

[1] U.S. CONST. art. VI, § 2.

[2] The hierarchy within the American system consists of only two levels of government, federal and state. Resolution of conflicts between the units which constitute the inferior level of government is the domain of the theory of conflict of laws. The Constitution defines the relationships between these inferior units in terms of equality. Coyle v. Smith, 221 U.S. 559 (1911). As to constitutional limitations on the power of one state to assert its interest to the exclusion of the interest of another see, *e.g.*, Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960); Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Hughes v. Fetter, 341 U.S. 609 (1951); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Pearson v. Northeast Airlines, Inc., 309 F.2d 552 (2d Cir. 1962). See generally CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188-360, 445-525 (1965).

[3] In the interest of limiting the comment to manageable proportions, consideration is limited primarily to cases decided within the past twenty-five years. Labor cases have been deemphasized because the preemption issue as to labor has been exhaustively treated in a number of recent works. *E.g.*, Kovarsky, *Labor Arbitration and Federal Pre-Emption: The Overruling of "Black v. Cutter Laboratories,"* 47 MINN. L. REV. 531 (1963); 31 FORDHAM L. REV. 829 (1963); 60 MICH. L. REV. 1010 (1962); 111 U. PA. L. REV. 380 (1963); 110 U. PA. L. REV. 620 (1962); 48 VA. L. REV. 133 (1962).

Other cases which involve preemption issues but which the Supreme Court has not in terms treated as such are also omitted in the interest of brevity. Two such cases are Sperry v. Florida, 373 U.S. 379 (1963) (one qualified to practice before the United States Patent Office need not achieve admission to state bar as condition to continuance of patent practice), and Arnold v. Panhandle & S.F. Ry., 353 U.S. 360 (1957) (employee suing in state court under the Federal Employers' Liability Act need not comply with state trial procedure rule if enforcement of rule will defeat federal right).

which arises where it is asserted that a state law is void because its operation will frustrate or interfere with the operation of a federal statute or because Congress has required that the operation of the state law be suspended.[4] As employed here, the term "preemption" does not embrace instances of direct conflict with provisions of a federal statute,[5] although it may be difficult in some cases to distinguish between "direct conflict" and "interference with the operation of a federal statute."[6]

The general rules for decision in preemption cases are not of notably recent origin. The Supreme Court said in 1902:

> It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said . . . that "in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.[7]

In more recent cases, the Court has tended to employ language which is not quite so stringent.[8] Even in the heyday of the strictest

[4] The phrase "occupation of the field" may more adequately convey the sense of the preemption concept, but this too seems inappropriate in cases where the state and federal statutes do not appear *clearly* to be directed toward the same field. *E.g.*, Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959).

[5] *E.g.*, Free v. Bland, 369 U.S. 663 (1962). In that case a treasury regulation provided that when a United States savings bond is registered in co-ownership form, upon the death of one co-owner, the survivor will be recognized as the sole and absolute owner. This regulation was held to prevail over the community property law of Texas, which purported to prohibit a married couple from taking advantage of the survivorship provision where the bonds were purchased with community property. See Wissner v. Wissner, 338 U.S. 655 (1950); Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954).

[6] See, *e.g.*, United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963); Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959); text accompanying notes 142-45, *infra*.

Technically, it would seem proper to include instances of direct conflict between state and federal legislation within the term "preemption." It would serve no purpose, however, to discuss such relatively simple cases here.

[7] Reid v. Colorado, 187 U.S. 137, 148 (1902). The principle of the case has been consistently reaffirmed. *E.g.*, Savage v. Jones, 225 U.S. 501 (1912).

[8] Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963): "To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the federal statute would to some extent be frustrated by the state statute." In this case, however, the Court held that a state statute designed to prevent discrimination in hiring on the basis of race was not preempted.

The insistence upon clear manifestation of congressional intent to preempt, apart

statement of the rule, however, the Court in an early decision voided state legislation where the case for preemption appeared weak indeed.[9] That decision may be taken as an indication that the naked rules of decision may not reflect the whole of the process which is involved in the decision of a case involving a substantial issue of preemption.

Where the legislatures of both state and nation have enacted statutes to assert their felt interests concerning public or private activities, and where a party litigant has invoked the aid of the judiciary to determine which statutory mandates are to control his activities, the courts must undertake a difficult and demanding role. The Supreme Court has said that "where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either."[10]

---

from the issue of frustration of congressional purpose, has never wavered. *E.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960); Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[9] In that case, Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926), statutes of two states were in issue. One required an automatic door on the fire box of locomotive boilers; the other required a curtain between the cab and tender to ward off the elements during the cold months of the year. A federal statute, Locomotive Boiler Inspection Act, 36 Stat. 913 (1917), as amended, 45 U.S.C. § 22 (1964), was construed to authorize the Interstate Commerce Commission to specify the kinds of equipment to be used on locomotives. Although conceding that there was "no physical conflict between the devices required by the States and those specifically prescribed by Congress or the Interstate Commerce Commission," Napier v. Atlantic Coast Line R.R., *supra* at 610-11, and while stating that "the intention of Congress to exclude States from exerting their police power must be clearly manifested," *id.* at 611, the Court held in a rather dogmatic pronouncement that Congress intended to occupy the field. It stated without elaboration that there was no legal significance to the fact that the Interstate Commerce Commission had not prescribed *any* regulations respecting automatic fire box doors or cab curtains. *Id.* at 613. And without illuminating discussion, it rejected the argument that since the federal statute was aimed only at accidental injury, while the state legislation was aimed at protection of health from hazards of exposure to heat and cold, there was no reason to void the state acts merely because they operated upon the same physical objects as did the federal act. *Id.* at 612. Nor did the Court cite any legislative history persuasive on the issue of congressional intent.

The result in the *Napier* case might be more readily explicable were the case to be decided today. The decision could probably be reached on commerce clause grounds. See Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945). Or, the Court might use preemption grounds to avoid a decision based on the commerce clause. See Castle v. Hayes Freight Lines, 348 U.S. 61 (1954); Comment, 12 STAN. L. REV. 208, 219-20 (1959). At the time of the *Southern Pac.* case, however, the Court's view of the effect of the commerce clause on state power to regulate was quite different from what it was at the time of the *Napier* decision. See South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). Nor is it easy to reconcile *Napier* with the Court's rejection of preemption grounds in cases prior to *Castle, e.g.*, Buck v. California, 343 U.S. 99 (1952); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, *supra*; Mauer v. Hamilton, 309 U.S. 598 (1940).

[10] Union Brokerage Co. v. Jensen, 322 U.S. 202, 207-08 (1944). The Court held,

But the Court seems not to have found occasion to repeat that statement; rather, formulations of general rules for application to the issue of preemption are cast in terms of the quantum of proof necessary to show a congressional intent to preempt and in terms of the degree of conflicts which must be posited before the Court would be justified in finding state law preempted.[11] Such formulations are not to be condemned; standing alone, however, they may inadequately express the role which the Court has assumed in preemption cases. An inquiry directed to that issue—the role of the Court—may be more profitably pursued by asking what purpose is advanced when the Court follows these verbal formulations or rules of decision.

The formulations appearing in the more recent preemption cases derive, as indicated above, from statements in earlier cases, notably *Reid v. Colorado*[12] and *Savage v. Jones*.[13] Those decisions pointed out that the preemption formulae are applied "where the state law is but the exercise of a reserved power."[14] The fact that

inter alia, that federal regulation of customhouse brokers did not excuse such an enterprise from complying with a state's laws requiring foreign corporations to qualify to do business in the state.

[11] *E.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963): "[F]ederal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained"; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947): police powers of the states should not be deemed superceded by federal acts "unless that was the clear and manifest purpose of Congress." Occasionally, the terminology is mixed. *E.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945): "Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public . . . unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."

[12] 187 U.S. 137 (1902). Reid was convicted of violation of a state statute which required that livestock being brought into the state be inspected and certified by the State Veterinary Sanitary Board. *Id.* at 138. The cattle had been inspected and certified by a federal inspector in accordance with a federal statute aimed at preventing the exportation of diseased cattle. *Id.* at 140. The court held that the federal regulation did not cover the whole field, but rather left a wide area in which the states were free to exercise their power. Indeed, said the court, legislation should never be construed so as to supersede the state police power unless that purpose is clearly manifested. *Id.* at 148. Since the state statute here was a reasonable exercise of that power, it was allowed to stand.

[13] 225 U.S. 501 (1912). A state statute prohibited the sale within the state of feed for domestic animals without first filing with the state a sworn certificate setting forth, among other things, the ingredients and without making similar disclosure on the label under which the feed was sold. *Id.* at 503 n.1. Quoting from *Reid v. Colorado*, and following the reasoning in that case, the court held that the state regulation was not preempted by federal legislation prohibiting the shipping in interstate commerce of any food, including animal food, which is adulterated or misbranded.

[14] 187 U.S. at 148, quoted in *Savage*, 225 U.S. at 537.

the state laws at issue in those cases were made in the exercise of a reserved power could scarcely have been more obvious; with the limited exception of powers which are redelegated to the states by the national government,[15] *all* state powers are reserved. With rare exception, therefore, every state law is made in the exercise of a reserved power. Thus, what must be implicit from the Court's having purported to give a special significance to the state's exercise of a reserved power is that the Court, for reasons not expressly stated, felt constrained to be especially deferential to the states' interests. Hence, the Court set down the rather stringent requirements as to the showing of congressional intent or of statutory conflict in order to justify a decision on the grounds of federal preemption.

But the Court might well have taken the opposite approach. While the powers of the federal government are merely those which have been delegated by the states, the supremacy clause[16] clearly provides that legislation enacted by Congress, constitutionally authorized, shall be the supreme law of the land, *anything* in the laws of any state to the contrary notwithstanding.[17] Should not this provision be taken as a demand that the Court be most chary of permitting state laws to interefere with the operation of federal statutes? Two arguments might be advanced for rejecting this suggestion. One, rather academic, is that special solicitousness is due state powers simply because the states were originally the exclusive possessors of all governmental powers.[18] A more persuasive reason for only cautiously declaring a state preempted of the exercise of its powers, however, is that such a course permits the maximum assertion of the legitimate interests of both levels of government.[19] It permits the

[15] See, *e.g.*, U.S. CONST. art. I, § 10 (2)-(3); McCarran Act, 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-12 (1964).

[16] U.S. CONST. art. VI, § 2.

[17] "[W]hen Congress has asserted its exclusive jurisdiction, it is for Congress to indicate the extent, if any, to which a state may then share it. To whatever extent that this is not so, federal law will have lost its constitutional supremacy over state law." California v. Zook, 336 U.S. 725, 776 (1949) (Burton, J., dissenting).

[18] See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[19] Where evidence of congressional intent to preempt is equivocal or lacking, but where a close case exists on the issue of frustration of congressional purpose, a decision against preemption may somewhat limit the effectiveness of congressional assertion of the federal interest. Nevertheless, it may be sufficient justification for taking the risk that a contrary decision necessarily will wholly defeat the state's assertion of interest, whereas Congress remains free to specifically provide for preemption should the decision be the other way. See Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

harmonization of state and federal interests without the sacrifice of either.[20]

This discourse has suggested that the interpretation or application of the supremacy clause is to be tempered by regard for assertions of state interests. It does not end the inquiry into the method which the Supreme Court has adopted for the resolution of preemption cases. There are naturally a large number of factors which are of significance. The remainder of this comment will emphasize one factor in particular—the relative weight of the respective state and federal interests—although not to the exclusion of a consideration of other factors. That this factor even exists is often not readily apparent,[21] but that it does exist and that it can be significant becomes clear upon close examination and comparison of the many preemption cases.[22]

II

Subversion and Regulation of Aliens. In a decision much criticized by both commentators and congressmen,[23] the Supreme Court in *Pennsylvania v. Nelson*[24] held that a state statute[25] which proscribed essentially the same conduct as the Smith Act[26] was superseded by the several federal statutes aimed at subversive activities.[27]

[20] The late Professor Currie advocated a roughly similar approach to the solution of problems in the conflict of laws. He demonstrated that if a state, through the instrumentality of its courts, took a restrained and enlightened view of its own self-interest by remaining attentive to the *purposes* of its laws, then many of the so-called conflicts cases are actually false problems. See, *e.g.*, CURRIE, *op. cit. supra* note 2, at 77-127.

[21] In fact, the Court has upon at least one occasion stated that "the relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided [in the supremacy clause] that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962). In that case, however, the state law flatly called for precisely the opposite result expressly provided for by the federal law. See note 5 *supra*. The Court has never made such a statement in the kinds of preemption cases considered herein.

[22] In the discussion immediately to follow, the cases are grouped according to the subject matter of the federal legislation. The several groups can be identified as dealing with subversion and aliens, transportation, agriculture, miscellaneous commerce cases, broadcasting, and federal procurement. In most instances, the subject matter of the state legislation is comparable to that of the federal legislation.

[23] See, *e.g.*, Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287 (1957); 25 FORDHAM L. REV. 522 (1956); 10 VAND. L. REV. 144 (1956). *Contra*, 30 So. CAL. L. REV. 101 (1956).

[24] 350 U.S. 497 (1956).

[25] PA. STAT. ANN. tit. 18, § 4207 (1963).

[26] 18 U.S.C. § 2385 (1964).

[27] Smith Act, 18 U.S.C. § 2385 (1964); Internal Security Act, 64 Stat. 987 (1950), as amended, 50 U.S.C. §§ 781-858 (1964); Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. §§ 841-44 (1964).

The Court briefly examined the pertinent federal legislation and concluded that Congress had intended to occupy the field and that, since the federal interest in sedition was so dominant that it would in no sense be considered a local enforcement problem, no room had been left even for supplementary state legislation.[28] Moreover, enforcement of the state act was said to present a serious danger of conflict with the administration of the federal program in that federal investigators and prosecutors might be hampered by the activities of their counterparts at the state level.[29]

Uphaus v. Wyman,[30] decided three years later, again presented an issue of preemption in the field of subversion. Wyman had refused to comply with a subpoena duces tecum issued by a one-man legislative investigating committee operating under the authority of a New Hampshire subversive activities statute[31] and a legislative resolution.[32] Upon his appeal from a contempt conviction, the court ruled that the state laws were not preempted. *Nelson* was distinguished on the grounds that the holding was only that the Smith Act, prohibiting knowing advocacy of the overthrow of the *federal government* by force and violence, superseded state legislation outlawing the same conduct. All that *Nelson* prohibited

> was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows *a fortiori*.[33]

[28] 350 U.S. at 505. For further discussion of this point, see text accompanying notes 42-56 *infra*.

The United States filed a brief amicus curiae arguing that there was no preemption of the state act. 100 L. Ed. 640, 646-47 (1956).

[29] The Court suggested that state officials might keep information regarding subversive activities to themselves instead of passing it on to federal agents. 350 U.S. at 506-07. The Court was also of the opinion that many state sedition acts did not adequately protect first amendment rights. *Id.* at 508. Moreover, if state acts punishing federal subversion were allowed to stand, the door would be open to multiple prosecutions, a result which the Court was unwilling to ascribe to the intent of Congress. *Id.* at 505-10.

[30] 360 U.S. 72 (1959).

[31] N.H. REV. STAT. ANN. ch. 588 §§ 1-16 (1955).

[32] "*Resolved by the Senate and House of Representatives in General Court convened:*

"That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state . . . ." N.H. Laws, ch. 307 (1953).

[33] 360 U.S. at 76. The Court's distinction of *Nelson* is supportable, but it is far from unassailable. See text accompanying notes 47-51 *infra*.

Hines v. Davidowitz,[34] a case partially relied upon in *Nelson*, held that a state alien registration act[35] was preempted by the Federal Alien Registration Act.[36] The Court first noted that the national power is supreme in the field of foreign affairs and naturalization,[37] and it discussed at length the likelihood of adverse consequences should nationals of other countries be mistreated here.[38] Thus it deemed it imperative to have broad national authority in the field. Additionally, the Court recognized, the area concerns human rights and freedoms, and the case was thus to be distinguished from those dealing with state regulation of commerce.[39] The federal act, said the Court, was intended to steer a middle ground between an onerous system and no registration system at all.[40] The Court therefore concluded that the state act stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[41] and could not be enforced.

That the federal government had an interest in the subject matter of the legislation at issue in the above cases is clear; that interest derives from the Constitution[42] and is expressed in several statutes.[43] The issue is thus the extent to which the federal assertion of its interest modifies the ability of the states to assert and enforce their

---

[34] 312 U.S. 52 (1941).

[35] PA. STAT. ANN. tit. 35, §§ 1801-06 (1940).

[36] 54 Stat. 673 (1940) (codified as amended in scattered sections of 8 U.S.C.).

The provisions of the state and federal acts are compared in 312 U.S. at 59-61. The most significant differences are that the former requires annual registration, the carrying at all times of a registration card which must be shown upon request, and criminal penalties for non-wilful violation, while the latter provides for only a single registration, no requirement as to carrying a registration card, and criminal sanctions only for wilful violation.

[37] *Id.* at 68.

[38] *Id.* at 64-68.

[39] "[T]his legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans." *Id.* at 68.

[40] The federal act sought to assure the availability of information concerning aliens deemed to be necessary, but it sought to gather such information in a manner which would protect personal rights of law-abiding aliens and which would secure them "from the possibility of inquisitorial practices and police surveillance" which in turn might not only adversely affect international relations, but also "generate the very disloyalty which the law has intended gnarding against." *Id.* at 74.

[41] *Id.* at 67.

[42] "The Congress shall have power . . . to establish an uniform rule of naturalization . . . throughout the United States." U.S. CONST. art. I, § 8 (4); "The Congress shall have the Power to . . . provide for the common Defence . . . ." U.S. CONST. art. I, § 8 (1); "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

[43] See notes 27, 36 *supra* and accompanying text.

interest under their reservation of police powers. Putting aside for the moment the question of congressional intent to preempt, the Court's inquiry is directed to whether there is a conflict between the state and federal legislation. In *Hines* the Court strongly suggested that upon enactment of the federal registration act, the states could assert no interest whatever in the registration of aliens.[44] And in *Nelson* the holding was explicit that the evil to which the state statute was applied was in no sense a local enforcement problem in view of the treatment accorded to the same problem by the federal government.[45] Investigation of subversive activities against the state, on the other hand, was held in *Uphaus* to be a legitimate means of enforcing the state's legitimate interest in self-protection.[46]

The manner in which the Court distinguished between the latter two cases suggests that the process of decision in a preemption case consists of more than the bare determination of whether there is a conflict. The proposition asserted by the Court in *Uphaus* to the effect that the *Nelson* decision turned upon the fact that both the Smith Act and the state statute proscribed the same conduct draws support from the statement in *Nelson* that

> all that is before us for review . . . is [the holding of the Supreme Court of Pennsylvania] that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.[47]

[44] While the Court found specific features of the state act to be objectionable (in particular the requirements as to possession and display of identification cards and the liability to criminal punishment even for non-wilful violations) in light of the congressional purpose to tread lightly on personal liberties, 312 U.S. at 60-61, it also implied that the imposition upon aliens of any requirements in addition to those prescribed by Congress might frustrate the federal purpose of preventing the deterioration of international relations and generation of hostility on the part of resident aliens, *id.* at 74. This reasoning can be carried a step further. Any state regulation of aliens over which Congress has no control may adversely affect the relations between the United States and foreigu countries and interfere with congressional and executive control over the conduct of foreign relations. See generally Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248.

[45] 350 U.S. at 499, 509. The Court made clear, however, that the state was far from being wholly deprived of power to assert its interest in self-preservation. *Id.* at 500.

[46] *Ibid.*

[47] *Id.* at 499. The only acts with which the defendant (respondent in the Supreme Court) was charged were directed against the United States, not against Pennsylvania. Commonwealth v. Nelson, 377 Pa. 58, 69, 104 A.2d 133, 139 (1954). The proposition also draws support from the *Uphaus* Court's discussion of the destructive effect of the *Nelson* decision on the laws of forty-four other states and territories. This erosion

Casting doubt on the validity of the Court's distinction, however, is the fact that the Court did not, in deciding the *Nelson* case, remain within the narrow view of the issue as set forth above. Rather, it relied not merely on the Smith Act but also on the aggregate provisions of that act, the Internal Security Act of 1950[48] and the Communist Control Act of 1954[49] in order to show a congressional intent to occupy the field.[50] Moreover, those trepidations of the *Nelson* Court which were based upon a fear of inadequate protections of constitutional rights by state statutes, and, especially, interference with the administration of the federal program,[51] would appear to apply with equal force to the *Uphaus* case.

The infirmities in the Court's distinction invite a search for other factors which may have influenced the *Uphaus* Court. One possibility is that in deciding the earlier case, the Court misread congressional intention. There is much evidence that such a misreading occurred, although no acknowledgment was made in *Uphaus*.[52] A second consideration is the fact that much of the *Nelson* reasoning was technically dictum. It has also been suggested that *Nelson* turned on the presence of constitutional issues other than supremacy.[53] Finally, it is possible that when the Court is required to determine whether a conflict between state and federal statutes is serious enough to warrant voiding the former,[54] one consideration

was illustrated by the lack of a single successful prosecution for sedition against a state government. 350 U.S. at 508.

[48] 64 Stat. 987, as amended, 50 U.S.C. §§ 781-858 (1964).

[49] 68 Stat. 775, 50 U.S.C. §§ 841-44 (1964).

[50] *Pennsylvania v. Nelson*, 350 U.S. at 504.

[51] See note 29 *supra*. Whether, when it was said in *Nelson* that sedition is not a local enforcement problem, the Court was referring only to sedition against the United States or also to sedition against a state is unclear. The Court at one time implied that it was the former, but elsewhere the implication pointed toward the latter. See 350 U.S. at 505. It is, of course, true that if the Court meant the latter, the allusion would have been dictum.

[52] See authorities cited note 23 *supra*. While as a general rule members of the Court may not wish to accuse their colleagues, still sitting, of error, the only evidence of congressional intent not to preempt which was not circumstantial appeared after the *Nelson* decision.

[53] See Comment, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

[54] *Compare* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (the Court will not hold a federal act preemptive unless "the nature of the subject matter permits *no other conclusion* . . . ."), *and* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945) ("unless the state law, in terms or in its practical administration, conflicts with the Act of Congress or *plainly and palpably* infringes its policy"), *with* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963) ("we must be able to conclude that the purpose of the federal

in making that determination is the relative strengths of the respective state and federal interests.[55] Thus, in *Uphaus* the respective state and federal interests in the subject matter which was the common concern of the state and federal legislative acts, protection of the state from subversion, may be said to have been approximately equal. In *Nelson*, the respective interests in the subject matter common to the statutes in issue, protection of the United States from subversion, were unequal; for under the Constitution only the federal government is given responsibility to provide for the defense of the United States.[56]

Transportation. In *Buck v. California*,[57] the Motor Carrier Act of 1935,[58] authorizing the Interstate Commerce Commission to promulgate regulations establishing qualifications for taxi drivers operating in interstate or foreign commerce, was held not to preempt a state or its local subdivisions from providing additional specification not inconsistent with those of the ICC. In this case, the taxis operated between California and Mexico, but not, apparently, between California and another state.[59] The Court made no search for congressional intent, or lack of it, but rather placed emphasis upon its assertion that the taxi business is primarily a local concern even where the taxis cross state or national boundaries.[60] In this regard the Court found significant the fact that the Motor Carrier Act expressly exempted from its coverage all aspects of interstate taxi business except "qualifications and maximum hours of service of employees and safety of operation or standards of equipment."[61]

statute would *to some extent* be frustrated by the state statute.") (Emphasis added.) All of the above cases dealt with federal statutes enacted under the commerce power.

[55] The Court stated in *Nelson* that "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" 350 U.S. at 504, quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), citing *Hines v. Davidowitz*. In *Hines*, the Court phrased the question of interest in alien registration as "a matter of national moment . . . of such a nature that the Constitution permits only of one uniform national system . . . ." 312 U.S. at 73.

[56] U.S. CONST. art. 1, § 8 (1).

[57] 343 U.S. 99 (1952).

[58] 49 Stat. 546, as amended, 49 U.S.C. § 304 (1964).

[59] 343 U.S. at 100. Thus there was no danger that the cab company would be subject to conflicting state regulations. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

[60] 343 U.S. at 102.

[61] *Id.* at 101. See also Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945), which held that merely giving the ICC power to regulate train service in an "emergency" did not preclude state regulation of train lengths designed to protect the

The state statute at issue in *California v. Zook*[62] made unlawful the sale or arrangement of any transportation over the public highways of the state by an interstate carrier lacking an ICC permit.[63] Zook, convicted under the statute, argued that the Federal Motor Carrier Act,[64] which contained essentially the same provision, was preemptive. The Court disagreed, reasoning that an automatic rule that coincidence means invalidity would lead to absurd results, such as prohibiting state prosecutions for robbery from a vehicle in interstate commerce.[65] "[N]ormally," it was held, "congressional purpose to displace local laws must be clearly manifested. . . ."[66] "Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent."[67] The evils Congress intended to regulate (*e.g.*, overloading of cars, irresponsible drivers, mechanical faults) were those traditionally within the police powers of the states. Furthermore, since there was little state regulation in existence when the federal act was passed and the ICC regulations thereunder promulgated, the federal purpose appeared to have been designed more to fill a void than to nationalize a single rule.

In *Buck v. California*, the Court's treatment of the state's interest was confined to merely a definitional statement: "California has a legitimate interest in the kinds and character of persons who engage in the taxicab business in the State."[68] In *California v. Zook*, how-

health and safety of the public. *Id.* at 765. Much of the opinion is dictum, however, for the state regulation was struck down as a burden on interstate commerce.

[62] 336 U.S. 725 (1949).

[63] CAL. PENAL CODE §§ 654.1, .3. These provisions make it unlawful to sell transportation in a carrier which has failed to secure a permit from either the California Public Utilities Commission or the Interstate Commerce Commission.

Respondent's business was the operation of a travel bureau which included among its services the arrangement of share-expense passenger transport in private cars between interstate points. Respondent received a commission for such services. 336 U.S. at 727.

[64] 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301, 302(b), 303(b) (1964).

[65] See also Bartkus v. Illinois, 359 U.S. 121 (1959). *But see Pennsylvania v. Nelson*, where the Court, in holding that a state anti-subversive statute prohibiting substantially the same conduct proscribed by the Smith Act had been preempted, relied in part on the ground that the possibility of multiple prosecutions would raise serious constitutional problems and that in any event, it would not assume that Congress intended to permit the possibility of double punishment. 350 U.S. at 509-10. In *Zook* the Court did not suggest that the possibility of multiple prosecutions would raise constitutional issues. It did suggest, however, that such possibility was a factor tending to imply a congressional intent to reserve exclusive jurisdiction over the offense of operating a carrier without an ICC permit, but held that other factors precluded finding such an intent. 336 U.S. at 737.

[66] *Id.* at 733.

[67] *Id.* at 730.

[68] 343 U.S. at 102.

ever, the Court's treatment of the state's interest was not so limited; it asserted that its decision there was consistent with other cases "giving the state's interest in its own highways more weight than the national interest against 'burdening' commerce . . . ."[69] Such a statement would seem appropriate if there had been conflicting regulation by another state to which the carrier might be subject, or if the case had merely concerned state power to regulate absent congressional action.[70] It is not entirely responsive to the contention that a federal statute enacted as a valid assertion of the commerce power has wholly deprived a state of its power to assert and enforce its interest in the matter covered by the federal statute. What it may fairly imply, however, is that in seeking to determine whether the conflict between a federal and a state statute is serious enough to warrant voiding the latter, the Court may assess the relative strengths of the state and federal interests[70a] as an aid in making that determination.[71] While a similarly conscious weighing of interests does not, as indicated above, expressly appear in the *Buck* case, such a process may be inferable from the great stress laid upon the proposition that the

[69] 336 U.S. at 735.

[70] The statement would now probably be inaccurate, see Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), although it was well supported when made, see Maurer v. Hamilton, 309 U.S. 598 (1940); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[70a] The weighing process which the Court employed in the *Zook* case was apparently this: since the state's interest in its own highways is to be given "more weight than the national interest against burdening commerce," 336 U.S. at 735, then any conflict with federal law presented by the state regulation is less consequential than would be the case if "the national interest burdening commerce" were to be given more weight than "the state's interest in its own highways." It might also be reasoned that if Congress considered the state's interest in a subject upon which the state has legislated to be especially strong or of a "fundamental" character, see text following note 140 *infra*, then this is some evidence of a congressional intent not to preempt the state law.

[71] It is not meant to be implied, in speaking of state and federal interests, that the respective interests are always necessarily different in kind. In the *Buck* case, for example, the essential motive underlying both state and federal enactments was the promotion of safety. Moreover, persons who are citizens of a state are also citizens of the United States. Thus, if it is fair to say that a state's laws are designed primarily to protect its citizens and that federal laws are designed primarily to protect citizens of the United States, there is no difference between the classes of persons (defined by citizenship) for whose benefit state and federal laws are enacted.

It is always possible, however, to distinguish between the state and the federal interest; each has a separate existence. There is no anomaly, for example, in speaking of both a state's interest in highway safety and the United States' interest in highway safety. Further, it is possible to describe a state's or the United States' interest in highway safety as strong or fundamental, although it may be questioned whether the Supreme Court, or any court, is an institution which is well equipped to make such a judgment.

taxicab business is of local concern (that proposition not being cited as evidence of an absence of congressional intent to preempt), although it is equally possible that the Court was attempting to counter the dissenters' argument that the state act constituted an unreasonable burden on foreign commerce.[72]

Later preemption cases involving federal regulation of transportation fail clearly to indicate a disposition to weigh the respective interests of nation and state, although there are grounds for surmising that a balancing of interests occurred in *Huron Portland Cement Co. v. City of Detroit.*[73] The appellant in that case owned and operated several ships in interstate commerce. It was necessary periodically to clean the ships' boilers while they were docked. This process caused the emission of smoke of greater density and duration than permitted by the city code of Detroit.[74] Appellant contended that the code provisions could not be enforced against it because its ships had been inspected and licensed in accordance with a comprehensive federal system of regulation.[75] The Court, however, found no preemption by the federal inspection laws. No overlap was discerned between the city code and federal inspection laws since the purpose of the latter was to ensure seagoing safety while the purpose of the former was to protect the health and safety of the city.[76] As to the federal license laws, the Court granted that they imposed some restrictions upon state police powers.[77] Nevertheless, the possession of a federal license has not in the past immunized a ship from the operation of the normal incidents of local police power such as local pilotage laws,[78] quarantines,[79] and safety inspections.[80] The case, therefore, did not satisfy the articulated rule that congressional intent to preempt state laws made in the exercise of

[72] 343 U.S. at 108-11 (Reed, J., dissenting).

[73] 362 U.S. 440 (1960).

[74] *Id.* at 441. It did not appear whether the cleaning process could be performed elsewhere than in Detroit or whether it would have been substantially more burdensome to carry out the process elsewhere.

[75] The federal scheme is set forth at *id.* at 444-45.

[76] *Id.* at 446. *But see* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), wherein it was said that "the test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Id.* at 142.

[77] A state could not, it was suggested, exclude from its waters a ship operating under a federal license. 362 U.S. at 447.

[78] Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

[79] Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886).

[80] Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

the police power by economic regulation " 'is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' "[81] Moreover, a federal statute had declared it to be the policy of Congress to protect the primary responsibilities of state and local governments in controlling air pollution.[82]

The expressed grounds of decision appear sufficient to justify the result, yet it also appears that the Court gave consideration to the relative strengths of the state and federal interests. The Court emphasized the facts that the city code provision was enacted under the police power, that it was, moreover, a health measure, and that the federal act was merely commercial regulation.[83] These factors, coupled with the indulgence in the presumption in order to find intent,[84] all suggest that the Court might have believed that a conflict existed, but felt that the conflict was too slight in relation to the city's interest in the matter to warrant voiding the city code.

In two other transportation cases, state statutes were struck down on the grounds of preemption. In *Castle v. Hayes Freight Lines, Inc.*,[85] the respondent, a motor carrier holding an ICC certificate of convenience and necessity for its interstate operations had brought an action to restrain the state of Illinois from prosecuting it as a repeated violator of highway weight distribution laws. Conviction carried a possible penalty of a temporary suspension of the carrier's right to operate on the state's highways.[86] Congress had given the ICC authority to issue certificates of convenience and necessity which "shall remain in effect until suspended or terminated as provided . . . [in the Motor Carrier Act of 1935]."[87] The Court held that this provision vested the ICC with exclusive authority to suspend

[81] 362 U.S. at 443. The dissent found an "actual conflict" since the type of boiler used by the ships and approved and licensed under federal law could not be used without violation of the ordinance. *Id.* at 451 (Douglas, J., dissenting).

[82] Air Pollution Control Act, 69 Stat. 322 (1955), 42 U.S.C. § 1857 (1964).

[83] 362 U.S. at 441-46.

[84] The often repeated statement that congressional intent to preempt will not be implied "unless the act of Congress, fairly interpreted is in actual conflict with the law of the state," 362 U.S. at 443 (see text accompanying note 81 *supra*), cannot be regarded as a meaningful indication of the actual nature of the decision-making process. If there exists an "actual conflict" between state and federal legislation, the mandate of the supremacy clause is that the state act must fall whether or not there is evidence of a congressional "intent" to preempt. The only relevant evidence of intent would be that which tended to show a congressional intent not to preempt despite the conflict.

[85] 348 U.S. 61 (1954).

[86] ILL. REV. STAT. ch. 95½, §§ 2296.1, 2296.4 (1965).

[87] 49 Stat. 543 (1935), as amended, 49 U.S.C. § 301 (1964).

an interstate carrier's certificate and that the state's penalty would constitute a partial suspension and could therefore not be imposed.[88]

City of Chicago v. Atchison, T. & S.F. Ry.[89] arose as an action for declaratory judgment. Railroad companies operating through Chicago had as a group arranged for transfer of through passengers between the city's terminals. An ordinance provided that no new license for a transfer vehicle would be issued unless a designated city official determined that public convenience and necessity required additional service.[90] The contractor engaged by the railroads to perform transfer service refused to apply for a license and began operations. The city threatened to enforce the ordinance by the arrest and fine of drivers, whereupon the contractor brought this action.[91] The Supreme Court held that the ordinance was invalid insofar as it required the contractor to secure a certificate of convenience and necessity before it could operate. The Interstate Commerce Act made it the duty of common carriers to establish through routes with other carriers and to afford reasonable facilities for the interchange of traffic and passengers between lines.[92] The same act empowered the ICC to establish through routes whenever necessary or desirable in the public interest.[93] The Court held that these several provisions showed a congressional policy to assure the continuous and efficient flow of railroad traffic between states and in the Court's view it would be inconsistent with that policy "if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers."[94]

[88] 348 U.S. at 64.

[89] 357 U.S. 77 (1958).

[90] *Id.* at 80.

[91] *Id.* at 81.

[92] "It shall be the duty of every common carrier subject to this chapter . . . to establish reasonable through routes with other such carriers . . . [and] to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation . . . ." 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 (4) (1964).

"All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines . . . and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines . . . ." 24 Stat. 380 (1887), as amended, 49 U.S.C. § 3 (4) (1964).

[93] "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes . . . ." 24 Stat. 384 (1887), as amended, 49 U.S.C. § 15 (3) (1964).

[94] 357 U.S. at 87. In this regard the Court asserted that the railroads would have much better knowledge of the needs and solutions than would city officials. *Id.* at 88.

Both the *Chicago* and *Castle* cases presented serious conflicts of policy in matters in which both nation and state had strong interests. In each the Court found it necessary to void the acts of a state or local government. Neither opinion resorted to presumptions regarding congressional intent; neither even considered whether Congress gave express consideration to the issue of preemption in fact situations similar to those in the cases;[95] and neither discussed the significance of the police power, as the Court is wont to do where it does not find state acts preempted. There was, in short, no appearance of a weighing of interests. Asserted interests clearly collided, and the federal interest was by necessity upheld.[96]

Agriculture. Two recent cases demonstrate the widely divergent kinds of approaches the Court finds itself constrained to take to resolve a preemption question. The federal statute at issue in *Campbell v. Hussey*[97] required uniform grading of tobacco according to standards which the Secretary of Agriculture was authorized to promulgate. The Secretary's regulations provided that grading should be made solely on characteristics which could be determined by an examination of the tobacco; historical factors and geographical origin were not to be taken into account.[98] One type of tobacco, grown in Georgia and in several other states, was designated as type

[95] With respect to the *Castle* case, it might be said that Congress manifested an intent to preempt any state law declaring, for any reason, an ICC certificate void within the state. However, the Court cited no evidence showing that Congress gave consideration to what else might constitute a suspension of an ICC certificate. It was said in *Castle* that the state might impose conventional forms of punishment, 348 U.S. at 64, but such conventional punishments might also constitute a "partial suspension." If the state cannot deny the right of a carrier to use its highways for a limited period of time, it is questionable whether the state may impose a conventional punishment, such as a fine, which would be equally costly to the carrier.

In Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-42 (1963), the Court said that the implication in *Castle*, that a federal license or certificate immunizes the holder from more demanding state regulation, had been qualified by Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[96] The federal interests in these two cases may have been expressed in part in the commerce clause and the privileges and immunities clause of the fourteenth amendment alone, as well as in the federal statutes. In the *Chicago* case, the Court stated that the city ordinance gave city officials virtually unlimited discretion to determine who could engage in the transfer business. The ordinance might therefore have amounted to an unreasonable burden on commerce. *Cf.* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945). The same might be said of a state law, as in *Castle*, which if enforced might wholly deny a person the right to engage in commerce. *Cf.* Crutcher v. Kentucky, 141 U.S. 47 (1891). See generally Comment, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

[97] 368 U.S. 297 (1961).

[98] 7 C.F.R. § 29.1096 (Supp. 1961).

14 and was to be identified by a blue tag. A Georgia statute,[99] however, required type 14 tobacco grown and sold in Georgia to be identified by a white tag. In the Supreme Court, Georgia argued that prospective buyers who saw a white tag would recognize the tobacco as that type designated according to federal standards as type 14. They would in addition know that the tobacco was grown in Georgia, but, it was argued, this additional knowledge could in no way disrupt the federal scheme.[100] The Court agreed that the Georgia act did not conflict with the substantive terms of the federal act but, rather, supplemented it. Nevertheless, relying on statutory language stating an imperative need for uniform standards of classification,[101] the Court held that Congress had completely preempted the field.[102]

In *Florida Lime & Avocado Growers, Inc. v. Paul*,[103] a California statute prohibited the transport or sale in California of avocados of less than eight per cent oil in weight. Appellants sued to enjoin enforcement of the statute against interstate transportation of avocados grown in Florida and certified mature under federal regulations which gave no siguificance to oil content. The Supreme Court held for the state, rejecting the claim that the California statute had been preempted. It stated that there is no unqualified rule that a federal license or certificate of compliance with federal regulation immunizes a product from more demanding state statutes.[104] The readying of foodstuffs for market, the Court emphasized, has always been a matter of peculiarly local concern. In the Court's

[99] Ga. Laws No. 557, at 214 (1960).

[100] 368 U.S. at 300.

[101] "[T]he classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; . . . without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control . . . ." Tobacco Inspection Act § 2, 49 Stat. 731 (1935), 7 U.S.C. § 511a (1964).

[102] 297 U.S. at 301. The Court also noted that white tag tobacco drew much higher prices than blue tag. *Id.* at 300-01 n.3. The dissent asserted that the lower prices actually were made on tobacco designated as type 13. *Id.* at 305, & n.10 (Black, J., dissenting). The dissent also took a different view of Congress' interest, arguing that nothing in history, langnage, or comprehensiveness of the federal act required a finding of preemption. *Id.* at 311-17.

[103] 373 U.S. 132 (1963).

[104] *Id.* at 141-42; *cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), discussed in text accompanying notes 73-84 *supra*.

In the *Avocado Growers* case the Court stated that "whether a state may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 373 U.S. at 141. It

view the federal regulation was aimed at the supervision of picking, processing and transportation of the fruit, whereas the state regulations were directed to the distribution and retail sale of the fruit in the interests of consumers.[105] Thus the Court could not say that the state requirements interfered with the administration of the federal scheme.[106] Treating the issue of congressional intent apart from the issue of frustration of purpose, the Court found it to be the settled mandate that "in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' "[107] a congressional purpose to preempt must be clear and manifest. The Court not only failed to find such a clear and manifest purpose, but argued that contrary implications could be drawn from the facts that the federal orders were designed only to deal with emergency situations and applied only to regional growing areas, and even then only upon approval of the growers who would be affected.[108]

In *Campbell v. Hussey*,[109] the critical decisional factor is easily identified: the Court believed that there was a clear declaration from Congress that its regulatory scheme should be exclusive.[110] The case must be accepted on those grounds, and to assert that other considerations influenced the decision would be rank

said also that the principle to be derived from earlier decisions is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id.* at 142.

[105] *Id.* at 144-46.

[106] The Court noted that there was evidence that Florida avocados do attain or exceed eight per cent oil content while in prime market condition. *Id.* at 143. The dissent emphasized that, nevertheless, some Florida avocados had been rejected by California officials applying California staudards. *Id.* at 166 (White, J., dissenting).

[107] *Id.* at 146. Although the California statute was passed pursuant to state police power, the purpose of the provision was merely to assure orderly marketing and satisfactory palatability of the fruit; the regulations imposed by the statute were not related to health or safety. *Ibid.*

[108] *Id.* at 138-39, 148-49. There were no federal maturity orders in effect for California avocados.

[109] 368 U.S. 297 (1961).

[110] *Id.* at 300-02. *Cf.* Parker v. Brown, 317 U.S. 341 (1943), which involved a state regulating marketing, restraining competition and maintaining prices in order to conserve the wealth of the state and prevent economic waste. These provisions were held not to conflict with federal legislation authorizing the Secretary of Agriculture to issue orders limiting the quantity of certain crops, including raisins, since the Secretary had issued no orders and provisions had been made for cooperation between federal and state authorities. The Court adopted the position that the existence of a comprehensive state program might be sufficient reason to preclude the Secretary from issuing such orders. *Id.* at 354.

speculation.[111] In sharp contrast, it cannot be said with certainty which, if any, factor was of crucial significance in the *Avocado Growers* case. The Court first emphasized the strength of the state's interest[112] in supervising the preparation of food for market, implying, although not expressly utilizing, a weighing process. Second, the Court defined the respective interests in such a way as to be able to find that they did not collide. The federal interest was asserted in the production and transportation of the produce; the state interest was asserted in the marketing thereof.[113] Third, it was acknowledged that deference was due the exercise of police powers by the state.[114] Finally, the Court found what it considered to be affirmative evidence that Congress intended not to make its scheme exclusive.[115]

Miscellaneous Commerce Cases. Of the cases grouped under this heading all but one may be discussed in fairly summary fashion since they employ straightforward applications of elementary principles. *Rice v. Santa Fe Elevator Corp.*[116] held that state laws regu-

[111] Cases in which it is clear that Congress actually gave consideration to the problem of preemption are the exception rather than the rule. A recent case, Brotherhood of Locomotive Eng'rs v. Chicago, R.I. & Pac. R.R., 382 U.S. 423 (1966), in which it was held that neither a federal statute providing for compulsory arbitration of disputes concerning the use of firemen and the size of train crews nor awards thereunder preempted state statutes establishing minimum crew sizes, constitutes such an exception. Although the federal statute itself did not speak to the preemption issue, its legislative history indicates that the question had been discussed in Congress. The decision in the case (insofar as the preemption issue was concerned) rested entirely upon the majority's belief that the legislative history clearly demonstrated a congressional intent not to preempt. *Id.* at 435. Mr. Justice Douglas, dissenting, took the opposite view of the history. *Id.* at 444-47.

[112] 373 U.S. at 144-45.

[113] *Id.* at 145. The Court distinguished Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942), a case in which federal regulation of the manufacture of a product for human consumption was held to preempt state regulation of the same subject. The *Cloverleaf* case arose when state officials, acting under statutory authority, seized some of petitioner's packing stock butter, a substance from which the final product, processed butter, was manufactured. The federal regulation held by the Court to be preemptive comprehensively affected the entire process of manufacture. The Court declared that "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture." *Id.* at 169. In the *Avocado Growers* case, on the other hand, the state regulation did not commence until after the federal regulations had been applied and, in the Court's view, their purpose fulfilled. 373 U.S. at 145.

[114] 373 U.S. at 146. The only reason which was suggested to justify such deference was that state police powers are "historic." See text accompanying note 84 *supra*. Compare text accompanying notes 17-19 *supra*.

[115] 373 U.S. at 146-52. See text accompanying notes 107-08 *supra*.

[116] 331 U.S. 218 (1947).

lating warehouses and warehouse receipts could not be enforced as to matters in any way regulated by a federal statute clearly purporting, in the Court's view, to be the exclusive authority with respect to any matter which it treated.[117] State regulation of the wholesale marketing of natural gas was held preempted in *Northern Natural Gas Co. v. State Corp. Comm'n.*[118] The Court found not only that Congress had "plainly occupied the regulatory field,"[119] but also that the state regulation made it impossible for the Federal Power Commission effectively to discharge its regulatory functions.[120]

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.,[121] arose when a state commission found that a Negro's employment application was rejected solely on the grounds of race, in violation of a state statute.[122] The defendant, an airline, urged that the field had been preempted by the Federal Aviation Act.[123] Upon the assumption that the federal and state acts were identical in purpose, the Court held that, in order to find that the latter had been preempted, it must nevertheless be shown that the federal act would to some extent be frustrated. In a brief discussion the Court held that no such showing had been made.[124]

Union Brokerage Co. v. Jensen[125] is no more controversial than the three cases immediately above, but it is instructive in its thoughtful conception of the judicial function and in its careful delineation of the competing governmental interests. In that case Union, a

[117] *Id.* at 234-36; *cf.* Campbell v. Hussey, 368 U.S. 297 (1961).

[118] 372 U.S. 84 (1963).

[119] *Id.* at 93.

[120] *Id.* at 91-93. The effect of the state regulation was to balance the output of all the natural gas wells within the state. *Id.* at 92. The Court felt that the federal scheme was so comprehensive it left no room for direct or indirect regulation. *Id.* at 91.

[121] 372 U.S. 714 (1963).

[122] COLO. REV. STAT. ANN. § 80-21-6 (1963).

[123] 72 Stat. 731 (1958), 49 U.S.C. 1301-1542 (1964). The Court held that the Railway Labor Act, 44 Stat. 577 (1926), *as amended*, 45 U.S.C. §§ 151-88 (1964), was inapplicable since no provision even mentions discrimination by common carriers and the act has never been used to prevent it. 372 U.S. at 724.

[124] *Id.* at 722-25. The Court apparently did not consider whether a federal investigation into discriminatory hiring might be hampered by a concurrent state investigation. Compare Pennsylvania v. Nelson, 350 U.S. 497 (1956). The Court may have believed it unlikely that a discriminatee would file complaints with both state and federal agencies, or it may have been influenced in that the United States as amicus curiae argued against preemption.

[125] 322 U.S. 202 (1944).

North Dakota customhouse brokerage corporation[126] with its principal place of business in Minnesota, sued certain of its officers for breach of fiduciary duties in a Minnesota state court. Among the defenses asserted was that the plaintiff had failed to comply with Minnesota laws for qualification as a foreign corporation[127] and hence was ineligible to sue.[128] To counter this defense, it was urged[129] that the qualification statute, insofar as it affected the plaintiff, was preempted by a federal statute regulating customhouse brokers.[130] Under the authority of this statute, the Secretary of the Treasury had promulgated elaborate regulations dealing with an applicant's character and experience, the kinds of persons with whom he could not do business, ethical standards, indebtedness, and other matters.[131] The Court held that there was no preemption, stating that "in a situation like the present, where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either."[132] Union's business was localized in Minnesota, the Court reasoned, and in that state it enters into dealings with Minnesota residents wholly apart from the arrangement it makes with importers and exporters. Minnesota, therefore, has a legitimate interest in safeguarding its own people, and that is the purpose of the qualification statute.[133] The federal regulations, however, are concerned only with the relations of customhouse brokers to the

[126] The customhouse brokerage business arises because of the necessity of collecting a duty on goods shipped to this country from Canada. The consignee of imported merchandise must declare the contents and value of the shipment and pay the estimated tariff before the goods can be further shipped. The customhouse broker advances the duty in order that the goods may be cleared. See *id.* at 203-04.

[127] MINN. STAT. § 303.20 (1947), provides that no foreign corporation transacting business in the state without a certificate of authority may maintain an action in the state until it has obtained such certificate.

[128] 322 U.S. at 202, 206-07.

[129] *Id.* at 203.

[130] 46 Stat. 759 (1930), 19 U.S.C. 1641 (a) (1964).

[131] Under 19 C.F.R. § 31.15 (1965), a person applying for a license is subject to a thorough investigation concerning his character, experience and fitness. If not satisfied, the Commissioner may have the applicant appear in person. 19 C.F.R. § 31.4 (f) (1965). The broker is subject to certain duties and obligations, 19 C.F.R. § 31.10 (1965), and is subject to revocation or suspension if he fails to comply with them, 19 C.F.R. § 21.11 (1965).

[132] 322 U.S. at 207-08. *Cf.* CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 93-94, 186 (1963), where the author argnes that courts having jurisdiction of conflict of laws cases should undertake a restrained and enlightened assessment of their state's own self-interest.

[133] 322 U.S. at 208-09.

United States and to importers and exporters and do not preempt appropriate means devised by the state for the protection of its own interests.[134]

Broadcasting. In *Head v. New Mexico Bd. of Examiners,*[135] a radio station and a newspaper, both of which operated primarily in New Mexico but served parts of Texas as well, had been enjoined by a New Mexico court from publishing advertisements from a Texas optometrist relating to optomological services in violation of a New Mexico statute.[136] The statute was attacked on the grounds that regulation of radio advertising had been preempted by the Federal Communications Act of 1934.[137] The Court acknowledged that federal regulation of the radio broadcasting industry was comprehensive, but held that this fact did not end the inquiry; there must be either an " 'actual conflict,' " or " 'evidence of a congressional design to preempt the field.' "[138] Apparently finding no "actual conflict," the Court declared that it was not persuaded that by granting the FCC authority to consider advertising content in licensing proceedings Congress intended to supplant all detailed state regulation of professional practices, "an area of such fundamentally local concern."[139] Particularly was this so where the grant of power to the FCC was accomplished by no substantive standard other than the "public interest, convenience, and necessity."[140]

One aspect of the *Head* case which merits particular attention is the Court's assertion that the state's concern was of a fundamental character. The Court's purpose in making a qualitative assessment of the state's interest, rather than simply defining that interest, was apparently designed not merely to enable it to determine whether the state's interest outweighed the national interest, but also to gain insight into probable congressional intent. Thus, if it could be said that Congress considered the state's interest to be greater than that of the federal government, it could also be inferred that Congress did not intend to preempt the state legislation.[141]

In *Farmers Union v. WDAY, Inc.,*[142] the Court held that section

[134] *Id.* at 209.
[135] 374 U.S. 424 (1963).
[136] *Id.* at 425-27.
[137] 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609 (1964).
[138] 374 U.S. at 430, quoting *Florida Lime & Avocado Growers, Inc. v. Paul.*
[139] *Id.* at 432.
[140] *Id.* at 431.
[141] See also Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959); note 149 *infra.*
[142] 360 U.S. 525 (1959).

315 of the Federal Communications Act of 1934,[143] which requires broadcasting licensees to grant equal time to candidates for public office and specifically prohibits the licensee from censoring a candidate's speech, precluded a state from enforcing its civil libel law against the licensee where a candidate who had been granted equal time following his opponent's speech allegedly libeled the opponent. The Court searched for congressional intent and found contradictory indications.[144] It concluded, however, that at least it could not presume that Congress affirmatively intended to authorize civil or criminal actions for libel where a broadcaster, having been *required* by the federal statute to grant equal time to the opponent of a political candidate who had previously been allowed the use of the broadcaster's facilities, was prohibited by the same statute from censoring such opponent's speech. Such a result seemed to the Court to be too much in conflict with traditional concepts of fairness.[145] To counter the assertion that a licensee could protect itself by denying access to its facilities to all political candidates, the Court relied upon the purpose of Congress to promote full political discussion on the air in enacting the equal time-no censorship provision.[146]

The result in the *WDAY* case seems clearly consistent with often repeated formulae regarding conflict or frustration.[147] Four members of the Court dissented, however, articulating a restrictive view of the Court's function:

> [D]ue regard for the principle of separation of powers limiting this Court's functions and respect for the binding principle of federalism, leaving to the States authority not withdrawn by the Consti-

[143] 48 Stat. 1088, as amended, 47 U.S.C. § 315 (1964).

[144] 360 U.S. at 531-33.

[145] *Id.* at 533-35. The Court did not intimate that it would constitute a denial of due process to subject a broadcaster who had relied on § 315 to a suit for slander. A more serious constitutional problem, however, would arise under the first amendment had the Court not placed its decision on the preemption ground. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[146] 360 U.S. at 529-30.

[147] "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. at 142. "Congress . . . will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public . . . unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy." Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. at 766.

> tution or absorbed by the Congress, are more compelling considerations than avoidance of a hardship legally imposed.[148]

The extent to which the majority rejected the principles thus expressed by the dissent is a somewhat conjectural point,[149] but it is an important one. Implicit in the dissent's view of "the binding principle of federalism" appears to be a command that the Court exercise a special deference to state interests and powers for the reasons that the states were the original possessors of all powers. The position of the majority may be that the force of the supremacy clause is an equally significant part of the binding principle of federalism.

Federal Procurement. A case decided in 1943, *Penn Dairies, Inc. v. Milk Control Comm'n*,[150] held that state milk price-fixing laws were not preempted with respect to sales to the United States Army[151] where federal statutes required the Army to make purchases by competitive bidding except in emergencies or where it was impracticable to secure competition.[152] It appeared to the Court that the exception for situations in which it was impracticable to secure competition covered the case.[153] In any event, congressional intent to preempt state regnlation of this kind,[154] the Court held,

[148] 360 U.S. at 536 (dissenting opinion). The dissenters adopted the view of Alexander Hamilton, whom they quoted, saying that, "'it is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of sovereignty.'" *Id.* at 546, quoting from THE FEDERALIST No. 32, at 203 (Van Doren ed. 1945) (Hamilton). This they felt, was such an "inconvenience" which would not warrant striking down state powers.

[149] The dissent's use of the term "hardship" makes it appear at first glance that the statement was in response to the Court's reference to "traditional concepts of fairness." It appears, however, that the Court's decision was not based on the notion that a contrary result would be unfair. Rather, its reliance upon concepts of fairness was to show that evidence of congressional intent was inconclusive, see note 145 *supra* and accompanying text, and hence it was free to find preemption upon the grounds of frustration of congressional purpose.

[150] 318 U.S. 261 (1943).

[151] The particular sales involved were made at a military encampment established under permit from the state. It was not contended, however, that the permit involved any surrender of state jurisdiction or authority over the area occupied by the camp. *Id.* at 267.

[152] The case arose when the state milk control commission issued to a dealer who had sold milk to the Army pursuant to a bid setting a price lower than the minimum as fixed by the Commission an order to show cause why its application for renewal of its license should not be denied. *Ibid.*

[153] *Id.* at 272-73. The Court's reasoning appears to be that where there exist state laws fixing prices, then ipso facto it is impracticable, within the meaning of the statutes, to secure competition.

[154] Mr. Justice Murphy, concurring, placed particular emphasis on the fact that the state law dealt with the field of health. 318 U.S. at 279 (concurring opinion).

was not lightly to be inferred. It found no such express intent[155] and in particular no indication that low cost was such a controlling consideration as to call for a holding of preemption.[156] The opinion also pointed out that states are themselves powerless to resolve the effect of a decision of preemption, whereas Congress may undo the decision if it so desires.[157] The Court therefore advised caution in the use of the preemption rationale.

In two more recent but rather similar cases, *Public Util. Comm'n v. United States*[158] and *United States v. Georgia Pub. Serv. Comm'n*, [159] a different result was reached. In the former case, an action for declaratory judgment, the United States attacked a California statute providing that common carriers subject to the regulatory jurisdiction of the state could negotiate rates, lower than those ordinarily prescribed, for the transportation of property belonging to the United States only upon approval of the state commission and subject to such conditions as the commission might consider just and reasonable.[160] Citing evidence of the probability of increases in costs and delays if the Government, especially the military, were restricted by the act, the Court held that it clearly conflicted with the federal policy of negotiated rates and was invalid as applied to the United States.[161] In the *Georgia* case the Court held that the statute vesting in the General Services Administration authority to represent federal agencies "in negotiations with carriers and other public utilities"[162] empowered the Admin-

[155] The Court had questionable success in meeting an argument to the contrary based upon an Army Regulation which provided that "appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with state price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State." Army Reg. 5-100, ¶ 11-d, rescinded, 7 Fed. Reg. 8083 (1942). The Court disposed of this regulation by asserting that statutes giving the Secretary of War authority to make regulations "give no hint of any delegation . . . to do what Congress has failed to do . . . ." 318 U.S. at 276. Further, the Court noted that the regulation was at most a direction not to assume responsibility for carrying out state price-fixing laws. *Id.* at 276-77.

[156] *Id.* at 272-74.

[157] *Id.* at 275.

[158] 355 U.S. 534 (1958).

[159] 371 U.S. 285 (1963).

[160] CAL. PUB. UTIL. CODE § 530.

[161] 355 U.S. at 544-46.

[162] Federal Property & Administrative Services Act of 1949, 63 Stat. 383, as amended, 40 U.S.C. § 481 (a) (1964).

istration to bypass state regulation of intrastate carrier rates and secure competitive bidding for the transportation of the possessions of government employees.[163]

Neither of the later cases purported to overrule *Penn Dairies*, although both reflect a change in the Court's attitude. The *California* case was brought as a declaratory judgment action, for the California statute had never been applied to the federal government. Thus, had the Court desired to be as obliging to the state's interests as it had been in *Penn Dairies*, it could have required abstention. The manifestation of congressional intent upon which the Court relied in the *Georgia* case appeared considerably less than compelling and was clearly no response to the assertion in *Penn Dairies* that Congress could by an express provision assure the overturning of a case which refused to find preemption.[164]

III

The cases examined herein imply that the rules of decision in preemption cases do not always reveal the entire process of decision employed by the Court. It is clear, for example, that the Court has found it proper to determine whether Congress has intended to preempt state law. That inquiry has been criticized as irrelevant,[165] and experience has demonstrated that the inquiry is a risky one.[166] Nevertheless, so long as the Court continues to speak in terms of congressional intent, the advocate must remain astute to its significance. Several cases suggest that the inquiry into intent gives the Court the opportunity to weigh the relative strengths of the state and federal interests.[167] In other cases, the Court appears to have used presumptions regarding congressional intent to avoid the necessity of deciding other constitutional questions in addition to supremacy.[168]

The search for conflict between state and federal laws likewise may involve processes which are not immediately apparent. Whether or not a conflict is found depends upon the way in which the state

[163] 371 U.S. at 292.

[164] See note 157 *supra* and accompanying text.

[165] Comment, 12 STAN. L. REV. 208, 224-25 (1959).

[166] See authorities cited note 23 *supra*.

[167] *E.g.*, Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959); California v. Zook, 336 U.S. 725 (1949). See note 149 and text accompanying notes 68-71, 139-41 *supra*.

[168] *E.g.*, Farmers Union v. WDAY, Inc., *supra* note 167; Pennsylvania v. Nelson, 350 U.S. 497 (1956).

and national interests are defined,[169] so that a careful definition of such interests is the lawyer's first task. The Court has frequently stated that state law will not be invalidated on grounds of preemption unless a certain *degree* of conflict appears.[170] The advocate must therefore attempt to show, according to his client's interest, the seriousness of the conflict. Furthermore, if conflict is a relative term, one must determine the standard according to which it is to be ascertained. Several cases imply that the comparative strengths of the governmental interests may constitute a part of such a standard.[171]

The Supreme Court is bound to uphold the Constitution. Since the Constitution recognizes both state and national powers, the Court must assume, in a preemption case, the role of the protector of both the state and the national interests. This fact implies that its first task in such cases is to avoid the sacrifices of either interest wherever possible. The propriety of its decisional processes should be judged in light of that duty, and the argument of the advocate should be couched in terms of that duty.

e.d.g., jr.
t.n.w.

[169] See, *e.g.*, Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); City of Chicago v. Atkinson T. & S.F. Ry., 357 U.S. 77 (1958).

[170] *E.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-42 (1963); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 446 (1960); California v. Zook, 336 U.S. 725, 729 (1949).

[171] See Huron Portland Cement Co. v. City of Detroit, *supra* note 170; Uphaus v. Wyman, 360 U.S. 72 (1959); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Buck v. California, 343 U.S. 99 (1952); cases cited note 167 *supra*.