# SHEATHING THE SWORD OF FEDERAL PREEMPTION

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It was not too long ago that federal preemption—the doctrine that federal law overrides state laws which "impair federal superintendence of the field" even though Congress has not expressed its intent with any clarity[1]—was a sword which federal courts used with some regularity.[2] In the closing months of his presidency, Ronald Reagan issued an Executive Order intended to sheath this sword. This directive was analogous to the requirement of an environmental impact statement.[3] It required executive departments and agencies to prepare "Preemption Impact Statements." The Order provided, in part, that—

> To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal Statute to preempt State law only when the statute contains an express preemption provision or there is some other *firm and palpable evidence* compelling the conclusion that the Congress intended preemption of state law, or when the exercise of State authority *directly conflicts* with the exercise of Federal authority under the Federal statute . . . .
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> Any regulatory preemption of State law *shall be restricted to the minimum level necessary* to achieve the objectives of the statute pursuant to which the regulations are promulgated.[4]

The actual impact of this Executive Order may be far from earthshaking—not only because it expressly precludes any judicial review of its requirements,[5] but more significantly, because the

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1. 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1, at 624 (1986) [hereinafter ROTUNDA, NOWAK & YOUNG].

2. For citation of cases, see *id.* at 624-29.

3. On environmental impact statements, *see generally* Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), discussing the provisions of the National Environmental Policy Act. *See also* R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 21-54 (1983).

4. Executive Order No. 12,612 (October 26, 1987), §§ 4(a), (c) (emphasis added), *reprinted in* 52 Fed. Reg. 41,685 (1987).

5. *Id.* at § 8.

> *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Supreme Court, in its more recent cases, had already anticipated its strong presumption against preemption. A careful analysis of the current cases offers strong evidence that the trend of the law is increasingly moving away from preemption. In recent years, the Supreme Court has already gone far towards keeping the preemption blade in its sheath. Or, to shift, metaphors, before a plaintiff is able to convince a federal court to rule in favor of preemption, that plaintiff must overcome new, higher barriers, jump over more hurdles.

The mere fact that Congress has the constitutional power to preempt an area does not mean that it has done so. That has long been the law. The leading decision of *Silkwood v. Kerr-McGee Corp.*,[6] neatly summarizes the test for preemption:

> [S]tate law can be pre-empted in either of two general ways. [First,] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Second,] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[7]

A federal administrative regulation may also preempt state law, if the federal agency is "acting within the scope of its congressionally delegated authority . . . ."[8]

This summary of the test is not new. What is new is the vigor with which the Court applies it in specific fact situations. The Court has set up an obstacle course which must be crossed before preemption is reached. Let us now examine some of these obstacles in more detail, in connection first with the "intent to preempt" prong of the preemption test, and then with the "actual conflict" prong.

## I

The first prong requires some showing of an intent to preempt. The mere existence of a federal statute or administrative regulation furnishes, by itself, no evidence that Congress intended to preempt concurrent state regulatory activities in the same area. Under such a system of dual regulation, a person or entity planning to engage in certain regulated activities must pass two hurdles: first, it must secure the federal agency's permission, and second, it must also obtain state regulatory clearance. For example, federally licensed

6. 464 U.S. 238 (1984).
7. *Id.* at 248 (internal citations omitted).
8. Louisiana Public Service Comm. v. FCC, 476 U.S. 355, 369 (1986).

seagoing vessels may still be compelled to meet local pollution standards.[9]

A leading case illustrating the Court's easy acceptance of concurrent regulation is *Florida Lime and Avocado Growers, Inc. v. Paul*.[10] The Court upheld a California standard regarding the maturity of avocados even though the statute was applied to exclude certain Florida avocados from California markets. These Florida avocados had been certified to be mature under federal regulations but did not meet the stricter California requirements regarding maturity. *Florida Lime* explicitly rejected the argument "that a federal license or certificate of compliance with minimum standards immunizes the licensed commerce from inconsistent or more demanding regulations." The Court admitted that this argument draws some support from earlier cases involving interstate carriers, but in modern times, the Justices announced, this "suggestion has been significantly qualified."[11]

The fact that a federal agency issues regulations governing certain activities also does not suggest that state regulations governing that area are preempted. First, the Court has required that the federal agency, like Congress, speak clearly. Indeed, if the federal regulations contemplate concurrent state regulations, then the federal regulations furnish authority *against* the existence of federal preemption.[12] Even if an agency explicitly preempts state regulations, the Court requires clear and specific statutory authority for the agency's action.

In *Louisiana Public Service Commission v. FCC*,[13] for example, the FCC argued that its orders regarding the depreciation of telephone plant and equipment preempted inconsistent state regulation. The Court, however, found that the congressional statutory scheme

9. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). *See also* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) (a state statute which requires employers to provide leave and reinstatement to employees disabled by pregnancy does not conflict with federal law which specifies that illegal sex discrimination includes discrimination on the basis of pregnancy); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (upholding injunction, as violative of state trespass laws, of labor picketing which is arguably but not definitely protected by federal law).

10. 373 U.S. 132 (1963).

11. *Id.* at 141-42 (citing with approval *Huron Portland Cement Co.*, and other cases).

12. *Silkwood*, 464 U.S. at 255 & n.17. *See also* California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1426 (1987) ("If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by any state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations."); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718 (1985) ("because agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.").

13. 476 U.S. 355 (1986).

contemplated "a *dual* regulatory system."[14] Although "the broad language" of one section in the federal statute "no doubt, [makes it] possible to find some support" in favor of preemption, the Court did not find that section sufficiently "unambiguous or straight-forward" in light of the entire federal statutory scheme. "Nor is the word 'pre-emption' used" in the section relied on to support the power of the federal agency to preempt.[15]

In short, if a federal statutory scheme contemplates a dual federal-state regulatory system, if the federal statutes, when read as a whole, do not require preemption and do not even use the word "preemption," and if the agency regulations contemplate concurrent state regulations, then any arguments favoring preemption should fail. In *Louisiana Public Service Comm'n*, for example, the Court refused to find preemption even though those favoring preemption had argued (1) that "the FCC is entitled to preempt inconsistent state regulation which frustrates federal policy,"[16] and (2) that "the refusal of the States to accept the FCC-set depreciation schedules and rules will frustrate the federal policy of increasing competition in the industry, and thus that (3) state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[17]

Even if the federal agency does not issue a preemptive regulation, Congress can always preempt, but the modern trend is to require Congress to speak with absolute clarity.

In *Florida Lime*, for example, the Court said that the "princi-

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14. *Id.* at 370 (emphasis in original).

15. *Id.* at 377.

16. *Id.* at 368.

17. *Id.* at 368-69. Another important recent example is California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987). Federal law allows private citizens to enter federal land in order to explore for mineral deposits. If the private citizen locates such a deposit, he may perfect his claim by complying with various federal requirements. If the claimant so complies, the federal government retains legal title to the land, but the claimant "shall have the *exclusive right* of possession and enjoyment of all the surface included within the lines of their locations . . . ." 30 U.S.C.A. § 26 (1986) (emphasis added). In addition, the claimant may secure a land patent; if he does, he obtains legal title to the land. Thus, although Granite Rock Co. had secured federal approval of its mining plans on federal land, it could not begin mining until it secured a permit from the California Coastal Commission. Granite Rock attacked the state permit requirement on its face.

In *Granite Rock*, the Court held that the claimant who owns an unpatented mining claim must pass another hurdle; he must still comply with California's permit requirement. In so holding, it rejected the Ninth Circuit's conclusion that "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority and thus is preempted." Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077, 1083 (9th Cir. 1985). The Solicitor General supported Granite Rock's arguments for preemption. The Supreme Court majority emphasized that if an administrative regulation declares an intention to preempt, it must do so "with some specificity." *Granite Rock*, 107 S. Ct. at 1426. This regulatory scheme did not.

ple to be derived from our 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."[18] A long line of cases since then has reemphasized that Congress must state its intention clearly. "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."[19]

In determining whether Congress has spoken with sufficient clarity, the Court has given the party claiming preemption the burden of proof. The party seeking preemption must meet this burden by demonstrating, with *specificity*, an intent to preempt. The *Silkwood* decision makes this point quite clearly.

*Silkwood* is a striking illustration of the new reluctance to preempt. Pursuant to state tort law, the estate of Karen Silkwood sued the Kerr-McGee Corporation for damages caused by exposure to plutonium from Kerr-McGee's federally licensed nuclear facility. The only issue before the Court was whether federal nuclear safety regulations preempted a ten million dollar punitive damage award. In the previous Term the Court had held that the states were preempted from regulating the safety aspects of nuclear energy.[20] The Court had broadly concluded that the "Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States."[21]

Based on this recent precedent, Kerr-McGee argued that compliance with federal safety regulations precluded the award of puni-

18. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (emphasis added).

19. New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)). *See also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978) ("This Court is generally reluctant to infer preemption . . . ."). In Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987), the Court held that a Maine statute requiring employers to provide a one-time severance payment to employees if there is a plant closing was not preempted by either ERISA or the NLRA. ERISA explicitly provided that it preempts: "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C.A. § 1144(a) (1984). Nonetheless, the majority refused to find preemption because they read "plan" to refer to an administrative scheme rather than to a one-time lump-sum payment. The majority also ruled that there was no preemption under the NLRA. Justice White joined by Rehnquist, O'Connor, and Scalia, dissented: "The Court's 'administrative-scheme' rationale provides states with a means of circumventing congressional intent, clearly expressed in § 1144, to pre-empt all state laws that relate to employee benefit plans." 107 S. Ct. at 2225.

20. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

21. *Id.* at 212.

tive damages to Silkwood's estate. The Tenth Circuit agreed. Its reasoning was straightforward. If the states are preempted from regulating nuclear safety directly, they cannot regulate it indirectly via punitive damage awards, because the purpose of punitive damages is to punish bad practices and to deter future similar practices.[22] The primary purpose of punitive damages (like the purpose of regulation) is not to compensate the victim but to change the behavior of the defendant.

Nonetheless, the Supreme Court refused to find preemption: "Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. . . . [I]t is Kerr-McGee's burden to show that Congress intended to preclude such awards."[23]

There was no dispute that Kerr-McGee was "subject to exclusive NRC safety regulation . . . .",[24] and that Congress "prohibit[ed] the States from regulating the safety aspects of nuclear development . . . ."[25] The Court noted that the states were not competent to deal with technical safety considerations. Still, the Supreme Court refused to find preemption because it said that there was "ample evidence that Congress had no intention of forbidding the States to provide [punitive damage] remedies."[26] What was this ample evidence?

First there was congressional "silence."[27] Second, the Court found it significant that Congress did not provide "any federal remedy for persons injured by such conduct."[28] To which "conduct" was the Court referring? The evidence showed that Kerr-McGee's only violations of any regulations during the relevant time "was its failure to maintain a record of the dates of two urine samples submitted by Silkwood."[29] Thus when *Silkwood* states that Congress provided no federal remedies from "such conduct," it appears to suggest that Congress provided for no remedies from radiation injuries which were not causally related to violation of any federal statute or rules; no one, after all, claimed that Karen Silkwood was injured because Kerr-McGee did not record the dates of two urine

22. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 246 (1984).
23. *Id.* at 255.
24. *Id.* at 250 n.11.
25. *Id.* at 250.
26. *Id.* at 251.
27. *Id.*
28. *Id.* In contrast, not only did Oklahoma provide for punitive damages as well as for actual damages; it also provided for strict liability. *Id.* at 245.
29. *Id.* at 244; *see id.* at 262 & n.4 (Blackmun, J., dissenting).

samples. Third, the *Silkwood* majority, in finding no preemption, also relied on the Price-Anderson Act (which set a limit on state law suits arising out of a nuclear accident), even though the Court cheerfully conceded that the Act "does not apply to the present situation . . . ."[30]

The Court also rejected the position advocated by the United States—that state punitive damage claims are preempted because the NRC is authorized to impose civil penalties if federal standards have been violated:

> [T]he award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.[31]

We thus end up with an ironic result. Because the Court had found that the states lack the technological expertise to impose modest civil fines on a nuclear facility, it ruled that state regulation of nuclear safety is preempted. Yet a randomly selected jury may impose a ten million dollar punitive damage award if the nuclear facility does not measure up to a jury's *ex post facto* decision as to what constitutes adequate safety procedures.[32]

*Silkwood*, in short, highlights the extreme reluctance of the modern Court to find preemption. Preemption exists if Congress clearly and explicitly provides for it by statute. Otherwise, if it is possible for the party to comply both with the federal law and the state regulation—if such dual compliance is not "physically impossible"—then the Court is unlikely to find preemption.[33]

## II

Apart from passing the "intent to preempt" hurdle, a state law must also avoid "actual conflict" with federal law. There are two ways to determine whether a state law is preempted because "it actually conflicts with federal law." First, there is preemption (and state law "actually conflicts" with federal law) if it is impossible to comply with both state and federal law. If dual compliance is not "physically impossible," as in *Silkwood*, there is no "actual conflict." Second, state law "actually conflicts" with federal law "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[34]

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30. *Id.* at 251.
31. *Id.* at 257.
32. *See id.* at 260 (Blackmun, J., dissenting).
33. Note also that the Solicitor General argued in favor of preemption. *Id.* at 257.
34. *Id.* at 248.

*CTS Corp. v. Dynamics Corp.*,[35] is a striking example of the Court's reluctance to find that state law interferes with the "full purposes and objectives of Congress." Any obstacles that the state sets up must be fairly high before the Court will infer preemption. In *CTS* the Court upheld an Indiana law which in effect severely limited hostile corporate takeovers. The practical effect of the law as applied to corporations incorporated in Indiana was that a takeover required prior approval of a majority of the preexisting disinterested shareholders. The district court and the court of appeals each held that the Williams Act, a federal law regulating takeovers, preempted the state law. As the Seventh Circuit noted: "Very few tender offers could run the gauntlet that Indiana has set up."[36] Nonetheless, the Supreme Court found no preemption.

The Court first quickly dismissed, in one sentence, the contention that it was impossible to comply with both the state and federal law: "Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be preempted only if it frustrates the purpose of the federal law."[37] Then the Court turned to the question whether the Indiana law was an obstacle to the full purposes and objectives of Congress.

The Court assumed that the purpose of the Williams Act was to strike "a careful balance between the interests of offerors and target companies, and that any state statute that upset this balance

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35. 107 S. Ct. 1637 (1987).

36. Dynamics Corp. v. CTS Corp., 749 F.2d 250, 263 (7th Cir. 1986). It is difficult to overemphasize the significance of *CTS*. Takeovers were one of the major forces behind the 1987 bull market in stocks. The *CTS* decision and other restrictions on takeovers were widely viewed as one of the causes leading to the stock market crash of October 19, 1987. As a Wall Street Journal analysis noted:

> No one [at first] had paid much attention, but the underpinnings of the takeover boom had undergone even more severe erosion. In April, the U.S. Supreme Court, in a surprising decision [the *CTS* case], upheld an Indiana statute plainly designed to curb hostile takeovers of Indiana corporations. The ruling seemed to sanctify other anti-takeover statutes and led to the passage of similar laws in other states.
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> Congress, meanwhile, was considering its own package of legislation to curb takeovers. The proposed tax bill would repeal many tax breaks related to takeovers and could halt highly leveraged deals.
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> Even without legislative curbs, there was growing uneasiness that the takeover boom was nearing an end. As the prices of such deals and the corresponding debt loads grew ever higher, even a whiff of recession—triggered by higher interest rates, inflation or a weaker dollar—raised the specter of widespread defaults by debt-ridden companies. Heading into October, the pace of takeovers had turned down from the year before.

Stewart & Hertzberg, *The Crash of '87: Before the Fall, (Part I)*, Wall St. J., Dec. 11, 1987, at 14, col. 1. *See also* Smith, Swartz, & Anders, *The Crash of '87: Black Monday, (Part II)*, Wall St. J., Dec. 16, 1987, at 1, col. 6.

37. 107 S. Ct. at 1644.

was preempted."[38] Nonetheless the Court ruled that the Williams Act did not preempt the Indiana law. The purpose of the state law, said the Court, was not to favor management against offerors, to the detriment of shareholders; such a purpose would upset the balance struck by the Williams Act. Instead, the Indiana law "protects the independent shareholder against both of the contending parties."[39] Thus, the purpose of the Indiana law did not frustrate federal law, even though—in the words of the Seventh Circuit quoted above—"Very few tender offers could run the gauntlet that Indiana has set up."[40]

In *CTS* the state law limited the competition in takeovers. Yet even before *CTS* it was clear that federal law does not preempt state law simply because the federal law provides for more competition than the state law would accept. In *Exxon Corp. v. Governor of Maryland*,[41] for example, the Court upheld a Maryland statute prohibiting oil producers or refiners from operating retail gas service stations within the state and requiring them to extend all temporary price reductions uniformly to all stations that they supply. The Court held that the congressional expression in favor of vigorous competition found in the Clayton Act and the Robinson-Patman Act did not directly or indirectly preempt the Maryland law. The Court said that the existence of hypothetical conflicts was too

38. *Id.* at 1645.

39. *Id.*

40. DeCanas v. Bica, 424 U.S. 351 (1976), follows a similar methodology and analysis. It held that federal law did not preempt a California law which provided criminal penalties if an employer knowingly employed an illegal alien if such employment would adversely affect lawful resident workers. The unanimous Court conceded that the power to regulate immigration is an exclusive federal power, but argued that not all state regulation of aliens is a regulation of immigration. Nor does the "comprehensiveness of the INA scheme for regulation" demand preemption. Congress, it was true, had failed (as of that time) to enact any general laws criminalizing knowing employment of illegal aliens. Still, the *DeCanas* Court refused to find preemption. It found no evidence that Congress " 'unmistakably . . . ordained' exclusivity of federal regulation in this field." 424 U.S. at 361. The Court also found persuasive a reference in the Federal Labor Contractor Registration Act that referred to "appropriate State law and regulation," although, the Court admitted, this Act was "concerned only with agricultural employment." *Id.* at 362. In *DeCanas*, as in *Silkwood*, the Solicitor General also argued that this state law was not appropriate because it conflicted with federal regulation. *Id.* at 362 n.11.

*DeCanas* conceded that the federal statute making it a felony to harbor illegal entrants also provided that employment of such illegal entrants does *not* constitute harboring. The Court did not even consider the argument that Congress may have refused to define employment as harboring because of a careful balance of competing interests: the national interest in protecting local employment versus the foreign affairs interest in not antagonizing a petroleum rich neighbor whose citizens constitute a large part of this country's illegal immigrants. In such circumstances, it would appear that the Court's approval of the California law undermines the federal purpose.

41. 437 U.S. 117 (1978).

speculative to warrant preemption.[42]

The Court in *Exxon v. Governor* also reasoned that, in interpreting the Clayton Act, it "is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption."[43] The appellants argued that the Maryland statute " 'undermin[es]' the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts."[44] The Court did not so much dispute this argument as find it irrelevant:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.[45]

The Court then found that the Maryland statute, even though it had an anticompetitive effect, did not stand as an obstacle to the accomplishment of congressional objectives.

## III

In general, the party claiming preemption has the burden of proof. As we have seen, this burden is now quite heavy. In meeting this burden, the party must persuade the Court that preemption is proper in one of two general ways.

First, Congress (or a federal agency, if authorized by Congress to do so), may expressly preempt an area of concern, thereby precluding any state regulation. Because the Court "is generally reluctant to infer preemption,"[46] Congress must speak clearly and make its intention to preempt unmistakable. If a federal agency claims preemption, it must also speak clearly in its regulations. If the federal scheme contemplates a dual regulatory system and the federal statutes do not explicitly provide for preemption, the federal courts will likely find that the federal agency has no authority to preempt even if its regulations so provide.

Alternatively, the party must demonstrate that federal law

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42. *Id.* at 130-31.
43. *Id.* at 132.
44. *Id.* at 133.
45. *Id.* at 133 (internal citation omitted).
46. *E.g., id.* at 132, and cases cited therein.

preempts state law to the extent that the state law "actually conflicts with federal law." If it is possible to comply with both state and federal law, there is no "actual conflict." Similarly, there is no "actual conflict" unless the state law frustrates the purposes of the federal law. This standard is not easy to meet. For example, as the cases discussed above show, a state law does not frustrate federal purposes merely because it provides for less competition, or requires that federally licensed vessels in interstate commerce also meet local pollution standards, or prohibits items transported in interstate commerce that do not meet state maturity standards which are set higher than federal maturity standards. In all these cases, the state requirements place hurdles in the way of federal regulation, but these hurdles are not treated as improper when the Court finds that Congress did not intend to preclude concurrent state and federal regulations.

The Court's recent reluctance to infer preemption may be part of a broader tendency to shift primary responsibility to Congress in deciding when states should be powerless to act in a given area. If Congress wishes to preempt, it may certainly do so, merely by expressing its intentions clearly. The Court's recent preemption cases may be signalling that, out of respect for federalism, the more democratic branches of the central government should be preferred to make the primary decisions limiting the power of the states to regulate concurrently with the federal government.[47] Power and responsibility should go together like pepper and salt. Because Congress has the ultimate power to decide preemption cases—Congress after all can always overrule the Court on this question—Congress ought to exercise this power unambiguously and shoulder the ultimate responsibility as well.[48]

47. ROTUNDA, NOWAK & YOUNG *supra* note 1, at § 12.1 *See also id.* at § 11.1.

48. *Cf.* Michigan v. Long, 463 U.S. 1032 (1983), holding that a state court must make clear that it is deciding a case only on state grounds in order to persuade a federal court that no federal questions need to be decided because the state grounds are adequate and independent. Justice O'Connor's opinion for the Court in *Long* established an important principle of federalism: states should not be bound by phantom federal restrictions. If a state court wishes to impose constitutional restrictions on the state, it may certainly do so, and if those restrictions are based on the state constitution, the federal courts will not interfere simply because the state court has gone further in creating constitutional rights (based on the *state* constitution) than a federal court would have gone (based on the U.S. Constitution). But if state courts are going to create rights, they must take the responsibility for doing so and unambiguously decide the case on state law grounds. Otherwise, state courts could, in effect, blame the federal Constitution for imposing what are really phantom constitutional restrictions on state government. In order to unleash the states from these phantom federal restrictions, the Supreme Court reviews such cases only where state courts have created constitutional rights purportedly (and ambiguously) relying on the federal Constitution.