William & Mary Environmental Law and Policy Review

Volume *16 (1991-1992)*
Issue 1 *William and Mary Journal of Environmental Law*

Article 3

October 1991

Emasculating State Environmental Enforcement: The Supreme Court's Selective Adoption of the Preemption Doctrine

Dion W. Hayes

EMASCULATING STATE ENVIRONMENTAL ENFORCEMENT: THE SUPREME COURT'S SELECTIVE ADOPTION OF THE PREEMPTION DOCTRINE

DION W. HAYES*

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[1]

PREEMPTION GENERALLY

The supremacy of federal law over state law derives directly from the United States Constitution.[2] The United States Supreme Court finds preemption of state law in three circumstances.[3] First, Congress can define explicitly the extent to which its enactments preempt state law.[4] Preemption is a question of congressional intent, and when Congress chooses to express a preemptive intent explicitly, the courts easily can decide that preemption is appropriate. Often, however, Congress does not make its intent readily apparent in its statutory language.[5]

The second area in which the courts usually find preemption is that of "field preemption."[6] In the absence of explicit statutory language, federal law preempts state law that regulates conduct in a field that

---

* Dion Hayes received his B.A. in History from the University of Virginia in 1989, and is currently a third year law student at William and Mary.

1. U.S. CONST., art. VI, cl. 2.

2. *Id.*

3. English v. General Elec. Co., 110 S. Ct. 2270 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

4. *Shaw*, 463 U.S. at 85.

5. 16 U.S.C. § 27 (1988).

6. *English*, 110 S. Ct. at 2275.

Congress intended the federal government to occupy exclusively.[7] The courts will infer such an intent from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject."[8] When the field which Congress allegedly has preempted includes areas that have "been traditionally occupied by the States," however, congressional intent to supersede state laws must be "clear and manifest."[9]

Finally, state law is preempted to the extent that it actually and practically conflicts with federal law.[10] The Court has found preemption where a private party could not possibly comply with both state and federal requirements.[11] State law is also preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

THE MANIPULABLE NATURE OF PREEMPTION STANDARDS

The three categories of preemption outlined above are not rigidly distinct. A federal law may be found to have preemptive effect based on both field preemption and conflict preemption. Nor does the Court apply the three categories uniformly or predictably.

In its preemption decisions the Court must weigh conflicting institutional concerns that extend beyond the particular cases before it.[13]

---

7. *Id.*

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

9. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

10. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

11. *Id.* at 142-43 (finding preemption where compliance with state agricultural regulations would preclude compliance with federal regulations).

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

13. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 268 (1978).

When Congress fails to address explicitly the question of preemption in the statute involved, the Court has wide discretion to find field preemption, conflict preemption, or no preemptive effect.[14] The Court, in finding field or conflict preemption, engages in institutional activism toward the states.[15]

"Tradition," as used in the Court's field preemption analysis, is a very subjective basis on which to hinge the states' only chance to preserve their statutes in areas in which Congress chooses to legislate expansively.[16] Using "pervasiveness" as the only prerequisite for finding a congressional statute to have implicit preemptive effect does not provide any real check on Congress' legislative powers or on Congress' effect on state laws. Even when state laws pursue the same goals as a federal statute, the doctrine of preemption gives Congress vast power over state law.[17]

In no area has the Court employed a more myopic view of "tradition" than in the area of environmental law statutes. Until about 1976, the Court upheld state law supplemental remedies as consistent with a congressional goal of environmental protection.[18] In the last decade, however, this "tradition" of concurrent jurisdiction seemingly evaporated.[19] Congress did not begin suddenly to employ explicit preemptive language in its environmental statutes. Rather, the Court abdicated its previously held presumption against preemption in the absence of an express congressional directive.

In 1947, the Court opined that state law preemption cases "start with the assumption that the historic police powers of the States were not

---

14. *Id.*

15. *Id.*

16. Jones v. Rath Packing Co., 430 U.S. 519 (1977).

17. NOWACK & ROTUNDA, *supra* note 13, at 315.

18. Askew v. Am. Waterways Operators, Inc., 411 U.S. 325 (1973); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).

19. *See infra* note 23 and accompanying text (discussing modification of presumption against preemption).

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[20] This doctrine put the burden of proving the "clear and manifest purpose of Congress" squarely on the shoulders of the party seeking a ruling of preemption.[21]

PREEMPTION OF STATE ENVIRONMENTAL STATUTES

Since 1976, the Court has diluted, subverted, and finally reversed the previously prevailing presumption against preemption of state environmental laws.[22] The abandonment of this principle threatens states' attempts to improve the environment and jeopardizes the principles of federalism.

In *Ray v. Atlantic Richfield Co.*,[23] the Court reviewed the constitutionality of the Washington Tanker Law,[24] which regulated the design, size, and movement of oil tankers in the Puget Sound. Examining the federal Ports and Waterways Safety Act of 1972,[25] the Court concluded that this federal law preempted the state statute.[26] The Court in *Ray* recited its traditional presumption against the preemption of state laws enacted under the states' police power, but the Court's holding ran contrary to this presumption.[27] The presumption as applied in *Ray* is nothing but a toothless rule of law easily overcome by the flimsiest evidence of preemptive intent on the part of Congress.

The Court in *Ray* found that the imposition by the state of Washington of "standard safety features" on oil tankers using the Puget

---

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

21. *Id.*

22. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); Exxon Corp. v. Hunt, 475 U.S. 355 (1986); Ray v. Atl. Richfield Co., 435 U.S. 151 (1978).

23. 435 U.S. 151 (1978).

24. WASH. REV. CODE § 88.16.170 (Supp. 1975).

25. 33 U.S.C. §§ 1221-1227, 46 U.S.C. § 391a (1970 ed., Supp. V).

26. *Ray*, 435 U.S. at 168.

27. *Id.* at 157, 174-75.

Sound frustrated Congress' attempt to promulgate uniform national standards for the design and construction of tankers.[28] The Washington statute had imposed higher standards on oil tanker design than had the federal statute.[29] *Ray* did not involve a private litigant's inability to comply with both state and federal law simultaneously. Washington State simply desired more safety precautions on tankers in Puget Sound than Congress had imposed nationally.[30]

It is difficult to imagine how the state law at issue in *Ray* could possibly thwart the goals and objectives of the federal law. The Court conceded in its opinion that both pieces of legislation were aimed "precisely at the same ends."[31] The Court's assumption that when a federal law and a state law pursue the same end, the state law somehow automatically prevents attainment of that objective belies the existence of multi-purpose legislation. The assumption also prevents states from requiring higher standards than those which Congress mandated, to the detriment of environmental protection.

In the Ports and Waterways Act, Congress used the word "minimum" to describe the Act's standards.[32] The Court did not construe this usage to mean that Congress intended to allow states to impose higher standards than those in the Act. Rather, the Court strained to find an intent on the part of Congress to promulgate uniform standards nationally.[33] This intent is absent from the language of the statute and from the legislative history. Indeed, the varied natures and capacities of our nation's ports require otherwise.[34] The Court inferred this intent from both the "statutory pattern" and the application of the Act to foreign vessels, an area that the Court believed required uniform national

---

28. *Id.* at 160-63.

29. *Id.* at 165.

30. *Id.*

31. *Id.*

32. *Id.* at 161 (quoting 46 U.S.C. § 391a(1) (1970 ed., Supp. V)).

33. *Id.* at 163.

34. *Id.* at 186 (Marshall, J., concurring and dissenting).

standards.[35]

Although field preemption and conflict preemption may overlap, insufficient evidence of both does not coalesce into sufficient evidence for preemption generally, contrary to the Court's convolutions in *Ray*. Field and conflict preemption are alternative bases for a holding of preemption, not complementary bases.[36]

After *Ray*, the Court displayed similar enthusiasm for the preemption of state environmental law.[37] In 1985, the Court held that state law obligations to clean up toxic waste sites were claims dischargeable in bankruptcy.[38] The Court claimed that this case concerned the proper construction of the Bankruptcy Reform Act, and the Court conspicuously neglected to mention the presumption against preemption of state law.[39]

In *Exxon Corp. v. Hunt*,[40] the Court found that New Jersey's attempt to create a cleanup fund for leaking toxic waste disposal sites violated the supremacy clause.[41] The Court held that section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[42] preempted a state statute that taxed major petroleum and chemical facilities in the state to create such a fund.[43] The Court initially stated that the case was simply one of "express preemption" in which the Court "need go no further than the statutory language to determine whether the state statute [was] preempted."[44] The Court did find, however, that the applicable provisions of CERCLA were unartfully

---

35. *Id.* at 163, 166-68.

36. LAWRENCE TRIBE, CONSTITUTIONAL LAW 384 (1978).

37. Ohio v. Kovacs, 469 U.S. 274 (1985).

38. *Id.*

39. *Id.* at 284.

40. 475 U.S. 355 (1986).

41. *Id.*

42. 42 U.S.C. § 9614(c) (1988).

43. *Kovacs*, 475 U.S. at 355.

44. *Id.* at 362.

drafted and unclear, and therefore turned to legislative history to determine congressional intent regarding preemption.[45] Although the Court agreed with the State of New Jersey that the state statute furthered the congressional intent to eliminate threats to public health and safety generated by improperly managed hazardous waste disposal facilities, the Court inexplicably went on to infer an additional congressional intent: the intent to avoid damaging the American chemical industry through excessive taxation.[46] This intent manifests itself nowhere in the statutory language or legislative history of CERCLA.

The Court's holding in *Hunt* constituted an ironic footnote to the history of legislative efforts to deal with the clean-up of hazardous waste disposal sites. New Jersey's Spill Compensation and Control Act of 1976[47] constituted the model for CERCLA.[48] The Court's anti-environmental application of the preemption doctrine in the face of congressional silence on the issue indicates why many commentators feel that the federalization of environmental law has occurred at the expense of our natural resources.[49]

In the afore-mentioned cases, the Court failed to apply the presumption against preemption in the absence of express congressional direction. The Court claims that evidence of field or conflict preemption may be sufficient to override the presumption. At the same time, the Court's failure in many recent environmental cases to mention the previously prevailing presumption represents an evolving favoritism towards regulatory preemption. The Court continued its emasculation of the presumption against preemption in two more cases involving environmental statutes, in 1987 and 1990.

In *International Paper Company v. Ouellette*,[50] the Court

---

45. *Id.* at 363-65.

46. *Id.* at 371-72.

47. N.J.S.A. 58:10-23.11b (1982).

48. John Pendergrass, *Where the Action Is*, 8:1 THE ENVTL. F. 7 (Jan./Feb. 1991).

49. *Id.*

50. 479 U.S. 481 (1987).

discarded an apparent congressional intent not to preempt state law, and reversed the traditional presumption against such preemption.[51] The Court held that in interstate water disputes the Clean Water Act preempts common law actions under the law of the affected state.[52] Reversing the presumption, the Court asserted that preemption may be presumed when federal legislation is sufficiently comprehensive to indicate Congress' desire to preclude supplementary state legislation.[53]

The presumption which the majority (joined by Justice Rehnquist) applied in *Ouellette* contradicts Justice Rehnquist's opinion in *City of Milwaukee v. Illinois (Milwaukee II).*[54] In *Milwaukee II* Justice Rehnquist wrote that the Court starts with the assumption that state police powers are not preempted "unless [preemption] was the clear and manifest purpose of Congress."[55] In the same case Justice Rehnquist wrote that "the comprehensive character of a federal statute" would not be relevant to a state preemption issue.[56] In both *Milwaukee II* and *Ouellette* the Court struck down state efforts to foster accountability among polluters;[57] therein lies their doctrinal reconciliation.

The Court in *Ouellette* further held that in light of the Clean Water Act's pervasive regulation of water pollution, "it is clear that the only state [common law] suits that remain available are those specifically preserved by the Act."[58] The legislative history of the Clean Water Act, however, reveals that Congress never considered the issue raised in *Ouellette.*[59] The Senate report of the bill suggests that compliance with the Clean

---

51. *Id.*

52. *Id.* at 494.

53. *Id.* at 491.

54. 451 U.S. 304 (1981).

55. *Id.* at 316 (citation omitted).

56. *Id.* at 319 n.14.

57. *Ouellette*, 479 U.S. at 493.

58. *Id.* at 492.

59. S. REP. NO. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47.

Water Act would not be a defense in a private damage action.[60]

In fact, the Clean Water Act expressly reserved to the states the right to impose more stringent controls than those contained in the Act.[61] The Court ignored this express direction of Congress and turned to the goals and policies of the Act to determine whether Congress intended to preempt state common law remedies in interstate pollution disputes.[62] As it did in *Exxon Corp.*, the Court rejected the argument that ambiguities should be resolved in the manner most consistent with the statute's ultimate goal of eliminating water pollution.[63] Without supporting references, the Court concluded that Congress intended considerations such as economic and technological feasibility to temper the statute's ultimate goals.[64]

The Court's finding of preemption in *Ouellette* contradicts the express language in the citizen suit provisions of the Clean Water Act preserving state law remedies.[65] Legislative history indicating that compliance with minimum federal standards would not be a defense to actions based on more stringent state standards illustrated Congress' intent not to preempt state law.[66] The Court claimed that allowing affected states to impose more stringent standards would upset the balance between pollution control and economic efficiency established by the agencies to whom Congress had delegated the task.[67] The Court's concern was not shared by Congress.

---

60. *Id.*

61. *See, e.g.*, 33 U.S.C. §§ 1311(b)(1)(c), 1370(1) (1982). *See also* S. REP. NO. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3751 (stating that "[t]his section of the Act retains the right of any State or locality to adopt or enforce . . . any . . . requirement . . . more stringent than those required or established under this Act.").

62. *Ouellette*, 479 U.S. at 493.

63. Exxon Corp. v. Hunt, 475 U.S. 355 (1986).

64. *Ouellette*, 479 U.S. at 494-95.

65. 33 U.S.C. § 1365(e) (1988).

66. *See Ouellette*, 479 U.S. at 493 n.13 (quoting S. REP. NO. 92-414, 2 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT at 1499 (1971)).

67. *Id.* at 494-95.

The Court further obscured the muddled area of preemption in a 1990 hydroelectric case when it failed to articulate clearly whether it was basing its finding of preemption on a field theory or a conflict theory.[68] In *California v. FERC*,[69] the Court held that the Federal Power Act ("FPA") preempted California's requirements for minimum stream flow for a river on which a federally licensed hydroelectric project was located.[70] Initially, the Court seemed to adopt a conflict analysis in its preemption decision.[71] The Court announced that state law is preempted to the extent that it "actually conflicts with federal law," that California's flow requirements would "disturb and conflict with the balance embodied in" the decisions of the Federal Energy Regulatory Commission ("FERC"), and that the California requirements could result in a "veto" of the project.[72] This wording suggests that state law is preempted only to the extent that it actually conflicts with FERC regulation.

Other language in the opinion, however, suggests that Congress has "occupied the field" of hydropower regulation.[73] The Court concluded that section 27 of the FPA[74] provides for "exclusive federal regulation of hydropower projects", implying that state regulation in that area is impermissible regardless of whether it conflicts with federal regulation.[75]

---

68. California v. FERC, 110 S. Ct. 2024 (1990).

69. *Id.*

70. *Id.* at 2028.

71. *Id.* at 2033-34.

72. *Id.*

73. *Id.* at 2029.

74. Section 27 of the FPA reads as follows:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821 (1988).

75. California v. FERC, 110 S. Ct. at 2029.

The Court also stated that section 27 is limited to "proprietary rights,"[76] implying that all forms of state regulation of hydropower uses are impermissible.

Whether the Court in *California v. FERC* based its preemption holding on field or conflict theory significantly affects state water rights regulation. If Congress occupies the field exclusively, then nearly five hundred licenses issued to or applied for by hydropower projects in the state of California alone would be void *ab initio*.[77] Under a conflict theory, all such permits would be valid to the extent that the conditions contained therein do not actually conflict with FERC requirements. Through its unartfully crafted opinion in *California v. FERC*, the Court has left unanswered the question of whether the states have any meaningful role to play in hydropower development.

Private parties also have used congressional ambiguity on the issue of preemption for financial gain.[78] The Supreme Court in 1990 refused to hear the case of *Onan Corp. v. Industrial Steel Container Co.*,[79] which involved the extent to which state corporation law precluded suits against a dissolved company under CERCLA. Onan had contributed to cleanup costs for a site in Andover, Minnesota and later sued Industrial Steel to recover part of those costs.[80] In October 1983, Industrial Steel filed for dissolution.[81] Industrial Steel claimed in 1988 that it was immune from suits under state corporation law because it had dissolved more than three years earlier.[82] The U.S. District Court for the District of Minnesota and

---

76. *Id.* at 2029, 2031.

77. Brief for Petitioner at 8 n.2, California v. FERC, 110 S. Ct. 2024 (1990) (No. 89-333).

78. Onan Corp. v. Indus. Steel Container Co., 909 F.2d 511 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 431 (1990).

79. 111 S. Ct. 431 (1990).

80. *Id.*

81. *Id.*

82. *Id.*

the Court of Appeals for the Eighth Circuit agreed.[83]

Federal courts disagree on this issue, but the Supreme Court failed to grant certiorari to clear up the discrepancy.[84] Congress' ambiguity and the Court's failure to develop a meaningful test for preemption in the environmental area have hampered efforts to hold polluters accountable. The effect of the muddled area of preemption thus extends from the federal government's enforcement actions to private litigants' use of preemption for financial gain.

POSSIBLE JUSTIFICATIONS FOR THE SUPREME COURT'S POSTURE

The federalization of environmental regulation has not furthered environmentalism. Although the federal government may be better able to regulate such areas as air or transboundary water pollution, the states have initiated most innovations in environmental policy.[85] Pennsylvania's Surface Mining Conservation and Reclamation Act of 1963 provided the model for the federal Surface Mining Control and Reclamation Act of 1977.[86] More than one year before Congress amended the Clean Air Act, Louisiana passed a law to reduce toxic air emissions by fifty percent within five years.[87] Also, in 1989, Massachusetts and Oregon each enacted statutes designed to reduce toxic pollution across all media.[88] States have surpassed the federal government in promulgating new and more stringent regulatory standards as well. California has taken the lead in the area of air pollution, and the federal government looks to that state for guidance as to what standards to promulgate nationally.[89]

---

83. *See* Onan Corp. v. Indus. Steel Corp., 909 F.2d 511 (8th Cir. 1990) (Table, No. 89-5387); Onan Corp. v. Indus. Steel Corp., 770 F. Supp 490 (D. Minn. 1989).

84. *Onan Corp.*, 111 S. Ct. at 431.

85. Pendergrass, *supra* note 48, at 7.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

One of the motivations for the Supreme Court's willingness to find preemption of state anti-pollution statutes even where Congress has expressed a contrary intent may be a perception that the federal government is better equipped to clean up and prevent damage to the environment. This theory seems doubtful, however, when the court admits that efficiency is not one of the values it seeks to protect in its preemption decisions.[90]

Regardless of whether such a perception motivates the Court, the perception is not well-founded. For example, state hazardous substance cleanup programs have been eminently more successful than the federal Superfund program.[91] The federal Superfund program was authorized to receive $8.5 billion for the five-year period 1986-91, or about $1.7 billion per year (though the Environmental Protection Agency never actually received this much).[92] As of August, 1990, the hazardous substance cleanup programs in forty-nine states (only Nebraska does not have one) had available approximately $2.43 billion for cleanups in 1990 alone.[93]

CONCLUSION

While the Constitution does not enumerate the power to regulate business to protect the natural environment as a power of the federal government, one cannot responsibly advocate the federal government's abdication of the responsibility it has assumed in that arena. The environment would benefit from the resurrection of the tradition of concurrent jurisdiction that prevailed in the environmental area prior to 1976.

The Supreme Court acts with institutional restraint when it interprets an explicit directive regarding preemption from Congress as

---

90. "[I]t is more important that the applicable rule of law be settled than that it be settled right . . . ." Square D Co. v. Niagara Frontier Tariff Bur., Inc., 476 U.S. 409, 424 (1986).

91. Pendergrass, *supra* note 48 at 7.

92. *Id.*

93. *Id.*

Congress intended the law to take effect. The Court correctly states that Congress is the governmental body best equipped to assess whether federal and state regulation can coexist successfully.[94] When the Court reaches beyond any directive from Congress and finds in legislative history or another source a presumed intent of Congress as to preemption and so invalidates a state anti-pollution law, the Court enlarges its role and engages in unwarranted judicial activism toward the states.

If, as many Court observers suggest, the justices are acutely aware of the political implications of their decisions, then the justices must also be aware of the grassroots support in this country for the preservation of the natural environment. The Court's decisions in the environmental area almost uniformly have hindered the states' efforts to clean up the environment. Concurrent jurisdiction is the best approach to take in the area of environmental regulation. The sooner the Court realizes this and resurrects the presumption against preemption, the more effective anti-pollution efforts at both the state and federal levels will become.

94. City of Milwaukee v. Illinois (Milwaukee II), 451 U.S. 304, 313 (1981).