State Environmental Protection Versus the Commerce Power

K. Dennis Sisk
STATE ENVIRONMENTAL PROTECTION VERSUS THE COMMERCE POWER¹

K. Dennis Sisk*

As commerce and industry have invaded once virgin lands and waters in an era of heightened environmental consciousness, increasing numbers of state legislatures have responded with strict environmental protection measures.² Environmental protection is unquestionably a legitimate state interest, but such measures often impede the flow of interstate commerce. This article addresses the tension between state environmental protection statutes and the federal constitution’s commerce clause.³ The essential thesis is that traditional commerce clause analysis has not been applied with sufficient sensitivity to adequately reconcile state environmental interests with federal commercial interests.⁴

I. TRADITIONAL COMMERCE CLAUSE ANALYSIS AND ITS APPLICATION TO STATE ENVIRONMENTAL LEGISLATION

Commerce clause analysis of state legislation is generally divided into two areas: (1) preemption by congressional legislation enacted pursuant to the commerce clause, and (2) conflict with the “dormant” commerce clause in the absence of congressional legisla-

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³ U.S. CONST. art. I, § 8, cl. 3.

⁴ At the outset, some disclaimers are necessary. First, this article does not collect or analyze all judicial authority confronting the conflict between state environmental legislation and the commerce clause; only those cases that are noteworthy for illustrative purposes are discussed. Second, in discussing or alluding to the intricate interactions between man’s activities and the environment, this article does not purport to be technically thorough or authoritative; rather, environmental impacts are discussed in generalized terms to illustrate various points under discussion. Finally, this article does not presume to resolve the complex issue of the proper reconciliation of federal commercial interests and local environmental concerns. It merely attempts to take the level of analysis of state environmental interests a step beyond present law.
tion. Both areas ultimately revolve around the supremacy of federal law, constitutional or statutory, over contrary state law. Commerce clause analysis involves the reconciliation of the competing federal and state interests.

A. Preemption

When Congress exercises its authority under the commerce clause by enacting legislation that touches the same subject matter that a state seeks to regulate, the congressional legislation overrides contrary state regulation by virtue of the supremacy clause. A court's central function in this context is to determine if the state legislation conflicts with federal legislation. The conflict with federal legislation may be express or implied.

1. Express Preemption

Express preemption may arise in three ways. First, Congress may incorporate in the federal statute an unambiguous provision which displaces state regulation of the same subject matter. Second, the two regulatory schemes may impose conflicting commands on the regulated activity making it impossible to comply with both. Third, the state legislation may undermine the enforcement or objectives of the federal scheme.


7. In Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), the Court invalidated an Illinois statute requiring grain elevator operators to obtain licenses from the state. The Federal Warehouse Act provided that federal licensing "shall be exclusive." This language unambiguously displaced the state law. Id. at 224, 233, 234, 236.

8. See Campbell v. Hussey, 368 U.S. 297 (1961) (Federal Tobacco Inspection Act required certain type of tobacco to be identified with blue ticket; Georgia Tobacco Identification Act required same tobacco to be identified with white ticket).

9. E.g., Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Emp. Rel. Comm'n, 427 U.S. 132 (1976) (state law may not upset balance between labor and management struck by National Labor Relations Act); Local 20, Teamsters v. Morton, 377 U.S. 252 (1964); Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956). This third form of express preemption is more subtle than the other two forms, and thus may not be identified as "express" preemption by all commentators.
2. Implied Preemption

An implied congressional intent to preempt state legislation may be found on three grounds. First, federal regulation of the subject matter may be so pervasive as to indicate a congressional intent to occupy the field.\(^{10}\) Second, the federal interest in the subject matter may be so dominant that state regulation is preempted.\(^{11}\) Finally, a need for national uniform standards to govern the activity may preclude state regulation.\(^{12}\)

The last two grounds are thinly disguised repetitions of two key considerations applied under the dormant commerce clause.\(^{13}\) In the absence of congressional legislation, a dominant federal interest or a need for national uniform regulation will displace state regulation of the subject matter. Moreover, federal regulation is rarely found to be "pervasive" unless one of these two considerations is also present.\(^{14}\) Pervasiveness thus does not appear to be a truly independent ground for invalidating state legislation; rather, its use is contingent on the presence of one or two considerations that would displace state legislation under the dormant commerce clause.\(^{15}\)

For these reasons, it appears that implied preemption is merely a disguised invalidation of state law by operation of the commerce clause itself.\(^{16}\) This article leaves aside the question of express preemption and addresses the application of pure commerce clause considerations to state environmental legislation. These considerations may arise in either dormant commerce clause or implied preemption contexts.

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13. See text accompanying notes 65-77 infra.

14. Compare, e.g., cases cited note 10 supra with cases cited notes 11 and 12 supra.

15. The Supreme Court has probably preferred the preemption garb in order to give Congress a greater role in defining federal-state relationships under the commerce clause. See, e.g., Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 272 n.6 (1977) (striking down discriminatory state legislation on preemption grounds and noting that decision "is subject to legislative overruling").

16. In theory at least, Congress is not free to reverse a constitutional holding based on the commerce clause, though it may reverse an implied preemption holding. See note 15 supra. But see Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).
B. The Dormant Commerce Clause

The concern of the judiciary in applying the commerce clause is an allocation of powers between the state and federal governments. The ultimate issue is: which legislature is more appropriate to regulate the subject matter? The commerce clause is a grant of power to Congress. The grant of that power in itself places regulation of some activities beyond the reach of state power;\footnote{17. \textit{E.g.}, Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370 (1976). \textit{But see} Department of Rev. v. Association of Washington Stevedoring Cos., 435 U.S. 734, 749 (1978).} regulation of other activities is beyond the reach of federal power;\footnote{18. This category of activities is small indeed in light of cases such as 
\begin{itemize}
\item See \textit{Cooley v. Board of Wardens}, 53 U.S. (12 How.) 143 (1851).
\item Boston Stock Exchange v. State Tax Comm’n, 429 U.S. 318, 328 (1977); Great Atl & 
\begin{itemize}
\item Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976); \textit{Environmental Legislation, supra} note 5
\item at 1764 n.11. In H. P. Hood & Sons v. Dumond, 336 U.S. 525 (1949), the Court invalidated a state’s denial of a license for a milk shipping plant for an interstate dealer, because the denial was based on the state’s desire to increase the local supply of milk and prevent competition for that supply by interstate concerns.
\item See \textit{Douglas v. Seaconst Prods., Inc.}, 431 U.S. 265, 286 (1977); \textit{American Can Co. v. 
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\item Oregon Liquor Control Comm’n, 517 P.2d 691, 696 (Or. App. 1973).
\item See \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 145 (1970).} at 1764 n.11. In H. P. Hood & Sons v. Dumond, 336 U.S. 525 (1949), the Court invalidated a state’s denial of a license for a milk shipping plant for an interstate dealer, because the denial was based on the state’s desire to increase the local supply of milk and prevent competition for that supply by interstate concerns.} \textit{per se} invalid.\footnote{19. \textit{See} Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851).} The essential rationale is that local political processes can be expected to prevent legislative

1. Discrimination Against Interstate Commerce

A threshold issue is whether the state legislation in question discriminates against interstate commerce. The main purpose of the commerce clause is to equalize the competitive opportunities of the states and to create a zone of free trade by preventing local trade barriers which prefer resident commercial interests over interstate commercial interests.\footnote{20. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440-41 (1978).} The commerce clause is intended to prevent the “economic Balkanization” of the nation to the detriment of all states.\footnote{21. Boston Stock Exchange v. State Tax Comm’n, 429 U.S. 318, 328 (1977); Great Atl & 
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\item Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976); \textit{Environmental Legislation, supra} note 5
\item at 1764 n.11. In H. P. Hood & Sons v. Dumond, 336 U.S. 525 (1949), the Court invalidated a state’s denial of a license for a milk shipping plant for an interstate dealer, because the denial was based on the state’s desire to increase the local supply of milk and prevent competition for that supply by interstate concerns.} If a state statute discriminates against interstate commerce, it is virtually \textit{per se} invalid.\footnote{22. \textit{See} Douglas v. Seaconst Prods., Inc., 431 U.S. 265, 286 (1977); \textit{American Can Co. v. 
\begin{itemize}
\item Oregon Liquor Control Comm’n, 517 P.2d 691, 696 (Or. App. 1973).} \textit{per se} invalid.\footnote{23. \textit{See} Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).} The essential rationale is that local political processes can be expected to prevent legislative
abuses if the statute applies even-handedly to intrastate and inter-
state commercial interests.24 The local interests have input into the
state legislative process, and thus provide an “inner political check”
against excessive burdens on commerce.25 Where such an inner pol-
itical check is lacking, the state legislature presumably will give
undue weight to local concerns and not adequately consider (or
affirmatively desire) heavy burdens on interstate interests. The free
trade value embodied in the commerce clause thus flatly overrides
local economic protectionism.

Though courts unanimously agree that environmental protection
is a legitimate and important state interest,26 regulation purporting
to advance that interest will be struck down if it discriminates
against commerce. In Douglas v. Seacoast Products, Inc.,27 the
Court invalidated a Virginia statute that prohibited non-residents
from catching a certain species of fish in the Chesapeake Bay. More
recently, the Court overturned New Jersey’s ban on the disposal of
out-of-state garbage in New Jersey landfill sites.28 The Court char-
acterized the state’s landfill sites as a “natural resource” and thus
viewed the New Jersey statute as a prohibited protectionist measure
designed to prevent other states from sharing New Jersey’s re-
sources.29 Generally then, a state may not restrict exploitation of, or

24. There are cases in which state legislation that applies evenhandedly on its face in fact
falls almost exclusively on interstate commerce. See Environmental Legislation, supra note
5, at 1774 & n.72. In such cases, a court is more likely to invalidate the state legislation.
Compare Lemke v. Farmer Grain Co., 268 U.S. 50 (1922) (invalidating state regulation of
minimum price of wheat where most wheat was shipped out of state) with Milk Control Bd.
v. Eisenberg Farm Prods., 306 U.S. 346 (1939) (upholding state regulation of minimum price
of milk where most milk was sold inside state). This tendency does not apply in cases
involving taxes on interstate commerce. See note 71 infra and accompanying text.


Air Term. Inc., 411 U.S. 624, 638 (1973); Huron Portland Cement Co. v. City of Detroit, 362
U.S. 440, 445 (1960). Justice Rehnquist’s opinion in Douglas is particularly emphatic in its
recognition of the validity of purpose behind state “regulations designed to conserve and
maintain the collective natural resources of the State.” 431 U.S. at 288 (Rehnquist, J.,
concurring in part and dissenting in part).


E.R.C. 1043 (10th Cir. 1978).

29. 98 S. Ct. at 2537-38. But see Baldwin v. Fish & Game Comm’n, 98 S. Ct. 1852 (1978)
(upholding Montana statute that imposes higher license fee for nonresidents than for resi-
dents to hunt elk under privileges and immunities clause); Hughes v. State, 572 P.2d 573
appealing, the Court’s characterization of New Jersey’s statute is not completely satisfactory.
damage to, local resources by nonresidents when it places no similar restriction on residents.

2. Need for National Uniform Regulation of the Subject Matter

A classic test for determining the constitutionality of state legislation under the commerce clause was posited in Cooley v. Board of Wardens. This test requires a court to determine whether the subject matter that the state seeks to regulate is more appropriate for national uniform regulation or for varying state regulation. If the subject matter requires a single national system of regulation, the state legislation will be overridden by the commerce clause. If varying local conditions suggest that varying local solutions are appropriate, the state legislation will probably be upheld.

A need for national uniform regulation may arise on two grounds: (1) a dominant federal interest in the subject matter, or (2) a

The statute did not discriminate against out-of-state commercial interests because the main economic burden fell on New Jersey landfill operators who were precluded from accepting and charging for the disposal of out-of-state wastes. An "inner political check" was clearly present. Nor did the statute discriminate on environmental grounds. The statute left New Jersey with the environmental degradation resulting from its own wastes while it precluded other states from imposing their wastes on New Jersey. The effect of invalidating the statute is to force New Jersey to bear the environmental degradation resulting from activities inside and outside New Jersey while other states generate garbage but remain clean. The Court intimated that a different New Jersey statute that even-handedly prevented the disposal in New Jersey of all waste, whatever its origin, would be constitutional. The practical effect of such a statute, however, would be to impose New Jersey's garbage on other states while preventing other states from disposing of their garbage in New Jersey. This would result in environmental discrimination of the worst kind.

30. 53 U.S. (12 How.) 143 (1851).
32. The existence of varying local conditions indicates that the state legislature is in a better position than the national legislature to make sound judgments as to how to regulate the subject matter. In Cooley, the Court upheld a requirement that local pilots be hired to guide interstate vessels through local waters, noting that local harbor conditions are highly variable. The Court likewise upheld South Carolina's restriction of the width of trucks traversing state highways. South Carolina State Hwy. Dep't v. Barnwell Bros., 303 U.S. 177 (1938). The Court noted that the local terrain varies substantially and that each state is responsible for the maintenance of its highways. Trucks required to meet South Carolina's width restriction were, of course, forced to either (1) operate with those reduced widths on interstate journeys to or through the state, or (2) transfer loads to and from wider trucks at the state line. Despite this obvious impact on interstate commerce, the statute was sustained. Id. at 187.
33. A dominant federal interest is likely to be found where the state regulation invades the field of foreign affairs. See, e.g., Pennsylvania v. Nelson, 350 U.S. 497 (1956) (state sedition act that punished sedition against the state or the nation); Hines v. Davidowitz, 312 U.S. 52
strong possibility that conflicting local regulations will significantly impede interstate commerce. State regulation of radiological emissions from nuclear power plants was held to be preempted by the Atomic Energy Act in Northern States Power Co. v. Minnesota. While the court concerned itself primarily with express preemption, it also noted the need for national uniform regulation arising from a dominant federal interest in controlling radiological emissions. The Supreme Court upheld a Detroit ordinance limiting smoke emissions from ships, virtually all of which were engaged in interstate commerce, over a strong implied preemption attack in Huron Portland Cement Co. v. City of Detroit. The possibility that various local regulations might subject interstate vessels to conflicting commands was deemed insufficient to invalidate the ordinance. Burbank’s restriction of jet arrival and departure times did not fare so well in Burbank v. Lockheed Air Terminal, Inc. An ordinance placed a curfew on nighttime jet flights in order to reduce noise. The Court readily concluded that noise regulation falls within the traditional local police power, but found that pervasive federal regulation preempted the ordinance. The basis for the finding of pervasiveness was the need for a national uniform system of regulation.


34. 447 F.2d 1143 (8th Cir. 1971), aff’d mem., 405 U.S. 1035 (1972); see Utility Consumers Council v. Public Service Comm’n, 562 S.W.2d 688, 698-99 (Mo. App. 1978); Note, Preemption Under the Atomic Energy Act of 1954, 11 TULSA L.J. 397 (1976). California’s moratorium on new nuclear power plants, pending a permanent solution to the problem of disposing of nuclear wastes, has recently come under similar commerce clause and preemption attacks. See 6 Energy Daily No. 192 at 1 (Oct. 4, 1978).


37. Id. at 448.


39. Id. at 638.

40. Id. at 639. This is a classic example of a purported preemption holding based squarely on a dormant commerce clause rationale. See text accompanying notes 15-21 supra.

41. Id. at 639. A court upheld Chicago’s ban on the sale of phosphate detergents in Proctor & Gamble Co. v. Chicago, 509 F.2d 69 (7th Cir. 1975). Discharge of phosphates into the Illinois River apparently resulted in excessive growth of nuisance algae. The court refused to consider the possibility that conflicting local regulations might unduly burden an interstate commerce.
Perhaps the most significant recent decision in this area is *Ray v. Atlantic Richfield Co.* The Washington tanker law, *inter alia*: (1) required oil tankers of a certain size operating in Puget Sound (a) to possess certain design characteristics, or, alternatively (b) to be escorted by tugs through the Sound, and (2) prohibited tankers exceeding 125,000 dead weight tons from entering the Sound under any circumstances. The Court held that the design requirements and size limitation were preempted by the Federal Ports and Waterways Safety Act, but upheld the alternative tug requirement.

With respect to the design requirements, the four-justice plurality concluded that Congress intended to establish a uniform national system of regulation of tanker design. This conclusion basically rested on the view that regulation of the structural design of oil tankers operating in interstate and foreign commerce presented "a compelling need for uniformity of decision-making." The plurality producer of detergents. The court relied on *Huron* (and conveniently ignored *Burbank*) for the proposition that actual rather than potential conflict between various local regulations is required to invalidate local environmental legislation. 509 F.2d at 77.


44. The design requirements included a certain weight-to-shaft horsepower ratio, twin screws, double bottoms, and two radars. 435 U.S. at 160. According to the record in the case, no tanker presently afloat meets all these design requirements. Id. at 181 n.1 (Marshall, J., concurring in part and dissenting in part).

45. 435 U.S. at 160.

46. *Id.* at 173.


48. 435 U.S. at 163. The plurality's analysis of the preemption question is particularly illuminating. The Court noted that the smoke abatement ordinance in *Huron*, see text accompanying notes 36 & 37 *supra*, was upheld in part because it was aimed at environmental protection while the federal statute in that case was aimed at ship boiler safety. The Court found that the Washington tanker law and the Ports and Waterways Safety Act were both aimed at environmental protection. The Court thus read the state and federal statutes to represent conflicting legislative judgments about the same substantive object. In this situation, the Court found that the federal judgment overrode the state's judgment under the supremacy clause. *Id.* at 165.

49. *Id.* at 178-79 n.28. Contrast the decision in South Carolina State Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1939), upholding South Carolina's regulation of the design of interstate trucks. *See* note 32 *supra*. Two concurring justices expressly relied on "[t]he federal interest in uniform regulation of commerce on the high seas" as the principal justification for striking down the Washington design requirements. 435 U.S. at 137 (Stevens, J., and Powell, J., concurring in part and dissenting in part). The purported preemption holding of the plurality and concurring Justices was, once again, based on a dormant commerce clause rationale. *See* text accompanying notes 18-21 & note 40 *supra*. Three justices, dissenting on...
likened the tug requirement to the requirement of a local pilot in *Cooley*,\(^\text{50}\) and thus held that requiring a vessel to use a tug escort in a particular body of water does not demand a uniform national rule.\(^\text{51}\) The plurality, with two justices concurring, concluded that the tanker size limitation was preempted by the uniform federal decision-making scheme in essentially the same manner that the design requirements were preempted.\(^\text{52}\) The Court stated that because both the state and federal statutes were aimed at the general goal of environmental protection, the federal judgment not to limit tanker size superseded the state judgment.\(^\text{53}\) Justice Marshall bitingly criticized this position, arguing that the state size limitation was not aimed at "environmental protection *generally*" but was tailored to respond to unique local harbor conditions—"in particular, the unusual susceptibility of Puget Sound to damage from large oil spills and the peculiar navigational problems associated with tanker operations in the Sound."\(^\text{54}\)

The confusion in the cases points up the infirmity of the *Cooley* test, particularly in the environmental context. Most cases do not fit neatly and exclusively into either conceptual category (those demanding national uniform regulation or those peculiarly adapted

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\(^{50}\) 435 U.S. at 179; see text accompanying notes 30-32, *supra*.

\(^{51}\) The plurality also concluded that the tug requirement did not interfere with foreign affairs because the cost of tug escorts was too low to induce tankers to comply with the state's design requirements. 435 U.S. at 180. Three justices concurred with the plurality on the validity of the tug requirement. 435 U.S. at 181 (Marshall, J., Brennan, J., and Rehnquist, J., concurring in part and dissenting in part). Two justices concluded that the design and tug requirements were inseparable and hence that the federal interest in uniformity overrode both provisions. 435 U.S. at 188-90 (Stevens, J., and Powell, J., concurring in part and dissenting in part).

\(^{52}\) 435 U.S. at 173-76 (plurality opinion); *Id.* at 187-88 (Stevens, J., and Powell, J., concurring in part and dissenting in part).


to local regulation); they implicate both state and federal interests in varying degrees. If the state enactment impedes interstate commerce at all, some degree of need for national uniform regulation will arise from the free trade value embodied in the commerce clause. Some need for varying state regulation will almost always be present because of the varying nature of local environments. The Cooley test invites a court to hide behind a verbal incantation without revealing its reasoning. It is altogether too easy for a court to grasp for a talisman like a "need for national uniform regulation" without expressly recognizing and reconciling the competing interests involved. While the Cooley test is useful in resolving some commerce clause challenges to state environmental legislation, in most cases the Cooley test merely poses the problem and does not render the solution. These cases generally require a court to utilize a "balancing" approach.

3. The Balancing Approach

In Southern Pacific Co. v. Arizona, the Court invalidated the state's limit on the length of trains by balancing the need for national uniform regulation against the state's asserted safety interest. The Court noted that the practical effect of Arizona's law was to limit the length of trains for miles outside the state and to substantially interfere with interstate commerce. The Court examined the relevant factual data, determined that the safety value of the length limitation was minimal, and held that the need for uniform regulation outweighed the state's interest.

A somewhat different formulation of the balancing test was articulated in Bibb v. Navajo Freight Lines, Inc. There the Court balanced the safety value of Illinois' requirement that trucks use contour mudguards against the "burden" imposed on commerce by the requirement. In Ray v. Atlantic Richfield Co., the Court held that Washington's requirement that oil tankers utilize tug escorts in Puget Sound did not substantially burden commerce; the cost of

55. See analysis of cases in category one; text accompanying notes 91-94, infra.
56. 325 U.S. 761 (1945).
57. Id. at 775.
58. Id. at 779, 783-84.
60. Id. at 530.
61. 435 U.S. 151 (1978); see text accompanying notes 42-54, supra.
compliance per barrel of oil was insignificant. This formulation of
the balancing test—factually demonstrated state interest versus
burden on commerce—was recently restated as a key test for adjust-
ing state and federal interests under the commerce clause.

The key difficulty with the balancing approach is that a court
almost unavoidably makes a legislative judgment. The court hears
facts that support the state's judgment that the activity in question
threatens the local environment and that the statute will help alle-
viate the threat. The court hears the facts that demonstrate a bur-
den on commerce. The court then decides what the facts warrant.

4. The Less Restrictive Alternative

An adjunct to the balancing test is the "less restrictive alterna-
tive" approach. This test was definitively articulated in Dean Milk
Co. v. Madison. The Court invalidated the city's requirement that
all milk sold in the city be pasteurized at an approved plant within
five miles of the city. The Court noted that city officials could
inspect plants outside the five-mile radius and thus achieve the
city's health interest with substantially less restriction of interstate
milk shipments. The less restrictive alternative approach is seldom
used as an exclusive basis for a commerce clause decision. It is
usually tacked on as an additional consideration in a case involving
either discrimination or an undue burden on commerce.

The less restrictive alternative approach will prove fruitless in
most environmental cases. In the typical case, a state makes a judg-
ment that a given level of environmental harm or risk is acceptable
and defines the level in terms of detailed regulations. A court's
pronouncement that a less restrictive alternative exists usually has
the effect of substituting the court's judgment that a potentially
greater level of harm or risk is acceptable. This effectively means

63. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978); see also California v.
64. See Brotherhood of Locomotive Firemen v. Chicago, Rock Island, & Pac. R.R., 393
U.S. 129, 136 (1968); Proctor & Gamble Co. v. Chicago, 509 F.2d 69, 75-76 (7th Cir. 1975);
Environmental Legislation, supra note 5 at 1778 & n.90.
67. In environmental cases, a court can rarely be confident that its "less restrictive" regula-
that the court finds the state's desired level of protection less important than some national interest. A disguised balancing of state and federal interests is thus executed under the table. The less restrictive alternative approach is, therefore, analytically dishonest unless the court devises an alternative that results in the same level of harm or risk as the challenged enactment. This may explain why this approach is rarely used in the environmental context.

5. The Tax Case Analogy: Making Commerce "Pay Its Way"

The Supreme Court has upheld local taxes on interstate commercial activities in a number of cases.

The basic theory is that interstate commerce may be forced to compensate a state for the costs which that commerce imposes on the state. Of course, a tax that on its face applies exclusively to interstate transactions may be invalidated on the ground that it discriminates against interstate commerce. On the other hand, a tax that on its face applies evenly-handedly to intrastate and interstate interests is likely to be upheld, even if the incidence of the tax falls almost exclusively on interstate commerce, provided that the tax is fair and reasonably approximates the cost imposed on the state by that commerce. In this way, commerce can be forced to "pay its way" through a state.

At least two cases and two commentators have suggested that
the effect of some state environmental legislation is merely to force interstate commerce to "internalize" what would otherwise be an external cost imposed by such commerce on the state. In Portland Pipe Line Corp. v. Environmental Improvement Commission,75 Maine required a ½ cent per barrel license fee for transferring oil over water and imposed strict vicarious liability on oil terminal operators for oil spills.76 The fund from the license fees was to be held and applied solely for the purpose of spill prevention and clean-up. The court likened the license fee to a non-discriminatory tax on commerce designed to make commerce pay its just share of state tax burdens.77 The court held that part of that "just share" was the cost of preventing and remedying a harm caused by a danger inherent in the commerce being taxed. In effect, the interstate oil interests were merely being forced to pay the cost of a regulatory scheme designed to reduce the effects of a peril created by those interstate interests.78 The court thus upheld the state statute.79

This analysis can be applied to virtually all non-discriminatory state environmental legislation. The cost imposed on the local environment by interstate commerce is economically equivalent to the cost of preventing irreversible environmental damage.80 State legislation designed to prevent environmental harm merely imposes the economic cost of prevention on the interstate commerce that creates the hazard. Thus, there is no "burden" on commerce at all: it is merely forced to "pay its way."

There are two flaws in this approach. First, interstate commerce must pay the cost based on a local judgment as to the value of the local environment and the risk of environmental harm that is ac-

75. See note 73 supra.
77. 307 A.2d at 37.
78. 307 A.2d at 37, 38.
80. This may not always work out with clean symmetry. The cost of efficient clean-up may be less than the cost of prevention in some instances. In these circumstances, the state may arguably impose the cost of clean-up on the commerce that causes the damage. See Portland Pipe Line Corp. v. Environmental Improv. Comm'n, 307 A.2d at 37; cf. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (upholding state's imposition of strict liability for oil spills on oil transfer facilities and ships).
ceptable. The cost of compliance with the state’s regulatory scheme is not in proportion to a uniform “national mean pollution acceptability factor.” Thus, interstate commerce is forced to pay an additional premium to keep the local environment particularly clean for the local residents based on a local value judgment that those engaged in interstate commerce had comparatively little voice in making. The tax analogy thus does not represent a “no cost” option to interstate commercial concerns: it does not escape the necessity of balancing the state interest in exacting the premium for a uniquely clean environment against the burden that premium places on interstate commerce. Second, it is impossible to confine the tax analogy to environmental cases. It can plausibly be argued that the state in Southern Pacific merely sought to force the railroads to internalize the cost of preventing a safety hazard resulting from long trains that the railroads used within the state. The extension of the tax analogy thus results in the conclusion that no legitimate exercise of state police power really burdens commerce at all. The absurdity of the conclusion suggested by this second point reinforces the validity of the first point: a state enactment that seeks to keep the state cleaner than the nation as a whole does impose a cost on commerce.

II. TIPPING THE BALANCE: A CLOSER LOOK AT STATE ENVIRONMENTAL INTERESTS

A. Nature of the Problem: A Conflict of Interests

The core problem confronting a court when state environmental legislation is challenged under the commerce clause is a conflict of value judgments between two levels of government, each of which seeks to promote legitimate interests. The commerce clause embodies a national value judgment designed to protect the national interest in free trade. The national values that may be impaired by state environmental legislation are primarily commercial or economic.

81. One commentator notes that it is possible to argue that interstate business “should pay for that portion of their pollution sufficient to reach a cleanliness level equal to the average of the nation” and that local residents “should pay for the additional cost of reaching a higher living standard” or keeping a “uniquely clean environment.” Environmental Legislation, supra note 5, at 1784.


83. Some state environmental legislation, such as oil tanker regulation, may raise the spectre of interference with foreign affairs. See note 51 supra. State legislation deserves less
The nature of this national commercial interest is essentially the same in virtually all commerce clause cases, though the degree that it is impeded varies substantially from case to case. State legislative judgments embodied in state environmental protection statutes are generally designed to promote local health and welfare.

When these state and federal interests collide, the natural tendency is to hold that the federal interest overrides the state interest by virtue of the supremacy clause. Two factors, however, suggest that this may not be an appropriate result. First, local environments differ markedly from state to state. Geographical and meteorological conditions, as well as the degree of man's despoilation of the environment, vary so widely that the appropriateness of local regulation is strongly suggested. Second, the people who live in a given area are more directly interested in their surroundings than the national body politic. Thus, the nation can too easily disregard the interests of the local body politic because (1) the same increment of pollution may have a drastically more deleterious effect on the local environment than it has on the national environment, and (2)

deferecence when such an overriding national interest is involved. See note 33 supra.

84. This statement appears on its face to be too simplistic. It can be argued that the statement obfuscates the complexity and diversity of national concerns. Federal legislation enacted under the commerce power serves a wide variety of substantive purposes—protection of competitive markets, consumer protection, social welfare, harmonious race relations, and enhancement of the environment, to name a few. Thus, the substantive purpose of the federal statute and the statute's means for effecting that purpose, coupled with the federal interest in free trade among the states, are the real federal interests that should be balanced against state interests.

The difficulty with this argument is that it confuses express preemption issues with dormant commerce clause issues. Any conflict between federal and state statutory purposes or provisions should be resolved under the rubric of express preemption. When state legislation is "impliedly" preempted because of a "need for national uniformity" or a "dominant federal interest" apart from a statute's substantive purpose, the federal interest usually implicated is the commercial interest in free trade. See Philadelphia v. New Jersey, 98 S. Ct. 2531, 2535 (1978); California v. Zook, 336 U.S. 725, 728 (1940). But see note 83 supra. The weight to be attributed to this federal interest depends on the degree that it is impaired in a particular case.


86. The New York resident may be willing to accept a little more industrial waste in the Hudson because the incremental damage would be slight, while the Washington resident would shudder at the thought of ruined fishing and recreation if the same amount of industrial waste were dumped in the Columbia River.

87. If a tanker runs aground in Puget Sound, the Washington resident must live with oily shores and dead fish and birds, while the Floridian comfortably reads about the event in his newspaper.

88. A given increment of pollution may pose a much greater threat to a pristine local
local environmental harm does not directly affect people nationally as it does local residents.

The typical commerce clause challenge to state environmental legislation thus involves a direct clash of two substantial values. A state will make a value judgment that a given environmental risk is unacceptable. This judgment will collide with the free trade value embodied in the commerce clause. Casting a court in the role of a super-legislature is probably unavoidable in this context; the court must arbitrate the competing interests by a weighing process.\(^{89}\)

B. State Environmental Interests and the Balancing Approach\(^{90}\)

In the absence of discrimination against commerce, there are at least three categories of environmental cases to which different considerations apply in determining the appropriate weight of state interests in the balancing process. The three categories described below are not offered as creating simple and automatic solutions to concrete cases by a process of facile classification; few cases will fall exclusively into any single category. Rather, these categories are urged as aids to the identification of appropriate factors in determining the weight to be ascribed to a given state enactment in the balancing process in a given case. The courts have seldom recognized these factors and thus have often gravely underestimated the weight of state environmental interests in the face of commerce clause attacks.

In the first category of cases, a given commercial activity causes the same type and degree of harm or risk in any state because the pertinent conditions are essentially the same nationwide. The state legislature merely makes a different value judgment about the ac-environment than to the national environment. See discussion of Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), text accompanying notes 99 and 101-02, infra. See also note 86 supra. On the other hand, an increment of another pollutant may dissipate and become unnoticeable in a pristine environment, though it would cause a threshold of harm to be passed in a dirtier local environment. See discussion of Proctor & Gamble Co. v. Chicago, 509 F.2d 69 (7th Cir. 1975), text accompanying notes 100 and 103 infra. This highlights the need to evaluate the facts of particular cases. The important point is that local judgments about peculiar local facts deserve judicial deference. See note 32 supra.


90. This article leaves aside the question of the appropriate weight of federal interests in the balancing process, see notes 33 & 84 supra, and concentrates on developing an analytical structure for determining the weight of state interests.
ceptability of that harm or risk to the local body politic. Traditional commerce clause cases falling within this category are *Southern Pacific* and *Bibb*. A long train presents essentially the same dangers in New Mexico as it does in Arizona. Contour mudguards are just as necessary (or unnecessary) in Arkansas as they are in Illinois. *Northern States Power Co. v. Minnesota*, an environmental case, probably also falls in this category. Radiological emissions are basically no more or less dangerous in Minnesota than they are in Tennessee.

In cases falling within the first category, a court will defer to the local legislative judgment unless there is a substantial interference with commerce. If there is such an interference, the state judgment must give way. Implicit in this result is the conclusion that the same environmental harm or risk is acceptable for all states in light of the national interest in free trade.

In the second category of cases, a given commercial activity causes the same type but different degrees of harm or risk in various states because of varying local conditions. In a state where the degree of harm or risk is greater, the state may make a value judgment that that degree of harm or risk is unacceptable. This involves more than the sheer value judgment of a given risk applicable throughout the nation is unacceptable. In *South Carolina Highway Department v. Barnwell Brothers*, the essence of the state’s position was that wide trucks posed a peculiar risk on narrow South Carolina highways. Though the nature of the risk of collision was the same in all states, the magnitude of risk was greater on narrow roads. Arguably, the *Huron* and *Burbank* cases fall within this category. Detroit

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93. 447 F.2d 1143 (8th Cir. 1971), *aff’d mem.*, 405 U.S. 1035 (1972).
95. 303 U.S. 177 (1938); *see note 32 supra.*
96. Being hit by a truck in South Carolina is no different from being hit by a truck in Oregon.
97. South Carolina could eliminate this peculiar risk by widening its highways. Ultimately, the Court was unwilling to force the state to either (1) submit to the peculiar local risk, or (2) undertake the substantial expenditures that would be required to widen roads across South Carolina terrain.
98. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *see text accompanying
harbor is a congested and smoky area. A given amount of pollution that would dissipate on an open lake would add to the concentration of pollution in Detroit. Once a given threshold of pollution is passed, incremental additions to that level may cause more harm than would be caused in cleaner areas. Similarly, the proximity of high-density residential neighborhoods to the Burbank airport suggests a higher degree of disturbance from airport noise than at Washington, D.C.'s Dulles Airport, which is conveniently located in the middle of nowhere.

In cases falling within the second category, the state interest is stronger and more deserving of deference by a court. The state is subjected to a greater harm or risk from the same activity than the nation as a whole. If the state's legislation were overridden, it would be forced to pay a higher cost than its sister states to advance the federal interest in free trade.

In the third category of cases, a given commercial activity causes different types and degrees of harm or risk in various states because of varying local conditions. Many environmental harms are not simple cause-effect harms like the threatened train accidents and ensuing damage in *Southern Pacific* or the threatened truck accidents and ensuing damage in *Barnwell*. Environmental pollutants often interact with peculiar local ecosystems to produce different kinds of harm in different localities. Many environmental cases may be sui generis in this respect. When a state acts to prevent such a harm, much more is involved than a simple legislative judgment that a given harm or risk applicable throughout the nation is unacceptable.

Cases falling within this category include *Ray v. Atlantic Richfield Co.* and *Proctor & Gamble Co. v. Chicago.* In *Ray*, the Washington legislature was concerned that oil spills in the confined and relatively unsullied salt water environment of Puget Sound would create a great danger of long-term damage that would not be present in the case of a coastal spill where oil would soon break up. Though the plurality in *Ray* indicated that both the state and

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99. 435 U.S. 151 (1978); *see text accompanying notes 42-54 supra.*
100. 509 F.2d 69 (7th Cir. 1975); *see note 41 supra.*
101. *See note 54 supra.*
federal statutes were aimed at environmental protection, it is not at all clear that the two statutes "therefore" had the same purpose nor that the federal judgment should automatically override the state's judgment. Justice Marshall correctly noted that the Washington statute was designed to reduce the threat of a particular type of environmental harm resulting from peculiar local conditions. In Proctor & Gamble, phosphate discharges would not produce nuisance algae in rivers until the ambient level of phosphates reached a certain threshold. No environmental harm would result at all unless peculiar local conditions were ripe for interaction with the environmental pollution.

In cases falling within the third category, the state interest is often extremely strong and deserving of judicial deference. The state is subjected to a harm or risk from a given activity that may not be tangibly felt by the nation. If the state's legislation were overridden, the state would be forced to pay a cost to advance the federal interest in free trade that other states would not pay. It is not at all

102. See note 54 and accompanying text supra.
103. 509 F.2d at 73-74.
104. It can be argued that the same is often true with respect to local economic interests. For example, when federal air quality legislation discourages the use of high-sulfur coal, some eastern coal-producing regions suffer greater economic sacrifice than the rest of the nation in the name of protecting the national environment. Thus, it is argued, either the author's rationale supports greater deference to local interests generally or the author is guilty of making the assumption that environmental interests generally are more important than economic interests.

This argument is unconvincing for two reasons. First, the example involves an express preemption issue rather than a commerce clause issue. If federal legislation conflicts with local legislation, the supremacy clause dictates that the federal scheme prevail regardless of the substantive purposes of the respective statutes and despite disparate burdens imposed on the states. Congress will presumably have confronted the issue of disparate state burdens and will have concluded that the federal goal is worth the cost. This is not the case when the commerce clause's concern for free trade and national economic welfare forces a court to balance state interests against national commercial interests. Second, and more importantly, local economic interests bear a different relationship to national free trade concerns than do local environmental interests. Legislation which is designed to effectively protect a local economy but which burdens interstate commerce appropriates X-dollars to the state at a cost of Y-dollars to the nation. The theory underlying the commerce clause, growing out of concrete historical fact, is that if local interests can freely utilize local governmental force to keep money in the pockets of the "local boys," other states will retaliate and all states will suffer. For this reason, local economic protection is highly suspect. See Philadelphia v. New Jersey, 98 S. Ct. 2531, 2535 (1978). The nation as a whole will prosper, in the long run, by preventing local economic preferences; what the state gives up today will rebound to its and other states' economic benefit over the course of many tomorrows. Environmental protection bears a different relation to national commercial interests. Local environmental legislation is often
clear that the commerce clause was intended to produce such a result.\(^{105}\)

III. CONCLUSION

Mere resort to the supremacy clause in the event of a clash between a state's judgment, embodied in environmental protection legislation, and commerce clause values will not result in a satisfactory solution to many environmental cases. The commerce clause was designed to prevent "economic Balkanization" that was perceived as inimical to the best interests of all the states. Some degree of "ecological Balkanization" is probably necessary to ensure an appropriate adjustment of state and federal interests.

To gain insight into this suggestion, it is necessary to reconsider the theory behind the discrimination test in commerce clause analysis. The basis of this test is the perception that state legislatures are relatively insensitive to unrepresented non-resident commercial interests because any harm to the economic interests of the nation will not be directly felt by the local body politic. This principle applies inversely in the environmental cases described in categories two and three above. In such cases, people in the locality are more directly designed to protect unique local health, aesthetic, and other values that characterize the surroundings in which local people must live every day. Allowing commerce to run freely over the local environment does not promise long-term local or national environmental benefits: in fact, it portends the opposite. This does not mean that local environmental statutes should always be preferred to national commercial values. It does mean that a court should be more sensitive to local environmental protection than to local economic protection when either must be balanced against the commerce clause. \textit{But see} Philadelphia v. New Jersey, 98 S. Ct. at 2537.

Suppose, however, that the argument above is shifted to focus on a comparison between local environmental interests and, for example, local safety interests. Is there any difference between these local concerns that suggests a need for greater deference to one or the other under the commerce clause? In many cases, there will be no broad analytical difference: several safety and environmental cases will be most appropriately characterized under category two above. More environmental cases, however, are likely to fall in category three, where particular deference to state legislation is generally warranted.

\(^{105}\) The three categories described above are not clearly distinct. Most cases will not fall neatly and exclusively into any one category. The real world presents a complex continuum of factual patterns that often defy precise classification. Nor will a case falling in the third category always call for greater deference to the state than a case falling in the second category. A state that suffers a substantially greater degree of a harm shared by other states may deserve more deference than a state that suffers an isolated but insignificant harm. The analysis underlying the categories nonetheless identifies important considerations that bear on the degree of deference due to state environmental statutes under commerce clause attack.
interested in the local environment. An activity that is not particularly harmful to most of the nation's environment presents a peculiar local environmental hazard. The national body politic does not directly feel the effect of the hazard. National policies, in the form of the commerce clause or "pervasive" federal legislation, are unlikely to take sufficient account of localized environmental impacts. The commerce clause is designed to equalize the competitive positions of the states by preventing unwarranted barriers to free trade, not to require one state to bear a peculiar environmental hazard not shared by sister states. The national free trade value embodied in the commerce clause thus should not automatically overcome state environmental legislation falling in categories two and three above.

The Supreme Court presently uses a verbal formulation of the balancing test that indicates that state regulation will be upheld unless the burden imposed on commerce is "clearly excessive in relation to the putative local benefits." This verbal formulation sometimes has little content. There is a continuing danger that the balancing test will be applied without due reflection in environmental cases described in categories two and three above. The balancing test must be infused with content that adequately reflects the nature and weight of state interests in each environmental case if courts are to attain a workable and meaningful allocation of powers between state and federal governments in the field of environmental regulation.


107. See text accompanying notes 21-23 supra. This conclusion is strongly reinforced by Department of Rev. of Washington v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734 (1978). In upholding a state tax on stevedoring activities, the Court stated that "[r]equiring coastal states to subsidize the commerce of inland consumers [by preventing reasonable taxation of commerce as it moves through these states] may well exacerbate, rather than diminish, rivalries and hostilities." 435 U.S. at 760.

108. This does not mean that all local environmental regulation is per se constitutional in the same sense that discriminatory local regulation is per se unconstitutional. See notes 23 and 24, supra, and accompanying text. Such state regulation may seek marginal environmental goals at a tremendous cost to interstate and foreign commerce. However, the presumption of constitutionality of state legislation should be exceptionally strong in the latter two categories of environmental cases.


110. This formulation is sometimes little more than a tip of the hat to state interests followed by a talismanic incantation of "need for national uniform regulation" and the invalidation of the state statute. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. at 157, 165; see text accompanying notes 44-54 supra.