Gade v. National Solid Wastes Management Association: Reality Check on the Preemption Doctrine

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GADE v. NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION:
REALITY CHECK ON THE PREEMPTION DOCTRINE

In the United States, federal and state laws regulate the hazardous waste industry. At the federal level, labor and public health legislation merge in the Occupational Safety and Health Act of 1970 (OSH Act or Act).1 The stated purpose of the Act includes ensuring “so far as possible every working man and woman in the Nation safe and healthful working conditions.”2 Before Congress passed the OSH Act, states had regulated industrial safety for almost a century through their traditional police powers.3 In fact, when Congress enacted federal legislation, most states had in place their own industrial safety programs.4 States often passed such legislation in response to specific industrial accidents and restricted the laws to certain industries or classes of workers.5 As a result, programs varied widely among states and none was as comprehensive, standardized, or contained the range of enforcement procedures as the federal Occupational Safety and Health Act.6 The interference with state authority by new federal guidelines created a conflict between state and federal authority that would ultimately be resolved according to the principles of preemption.7

The OSH Act’s design and method of implementation encourage the federal government to work with the states to regulate employee occupa-

2. Id. at § 651(b).
5. See MINTZ, supra note 3.
7. NOTHSTEIN, supra note 4 at 60-61. Under the doctrine of federal supremacy, the OSH Act temporarily preempted all state occupational health and safety programs, except those covering areas not addressed by federal OSHA standards. Id.
tional health and safety. Section 18 of the Act provides a mechanism for states to gain federal approval to retake jurisdiction of health and safety programs and enforce standards under their own plans. Currently, twenty-three states and territories regulate industrial safety matters under approved plans. Seven states have withdrawn their own federally approved plans and follow the OSH Act.

Section 18(b) of the OSH Act allows a state to assume jurisdiction over occupational state health and safety matters addressed by the Occupational Safety and Health Administration (OSHA) after federal approval of the state's regulatory plan. Although Illinois lacked a federally approved plan, in 1988 the Illinois legislature passed two laws requiring licensing of laborers who work with hazardous wastes. The Illinois laws spoke to several regulatory subjects for which OSHA had developed but

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8. See generally Barbara J. Fick, Symposium Health in the Workplace: Forward, 62 NOTRE DAME L. REV. 807, 807 (1987) (arguing that the OSH Act may have delayed implementation of federal health and safety standards to “prod the states to develop their own standards”).


10. 29 U.S.C. § 667(b) (1988). The Act allows states to decide whether to seek control of occupational safety and health matters, but offers incentives such as federal grants to encourage states to assume jurisdiction through the approval process. The Secretary of Labor, as head of OSHA, approves submitted state programs. Id. § 667(c).


12. WALTER B. CONNOLLY, JR. & DONALD R. CROWELL, II, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT § 1.04[7] n.59 (1991). The seven include Colorado, Connecticut, Illinois, Montana, New York, New Jersey, and Wisconsin. Id. The states’ withdrawal of these plans resulted from either political pressure or failure of the state legislature to enact enabling legislation. Id. § 1.04[7]. Connecticut and New York now have plans that cover only public employees. Id.

13. 29 U.S.C. § 667(b) provides:

Any State which, at any time desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and their enforcement.

14. Shortly after Congress enacted the OSH Act, Illinois submitted a plan that was initially approved, but Illinois withdrew its plan on June 30, 1975 before the Secretary of Labor granted final approval. 40 FED. REG. 24,523 (1975).

not finalized standards. The state laws required certification of at least forty hours of training in an approved program, passage of a written exam, and completion of an annual refresher course to renew the one-year license. The law also mandated hazardous waste crane operators to submit a certified record evidencing their operation for at least 4,000 hours of equipment used to handle toxic waste.

The hazardous waste removal industry would bear the educational and administrative costs of complying with the state regulations. Consequently, the National Solid Wastes Management Association (NSWMA) filed a petition for declaratory judgment against the director of the Illinois Environmental Protection Agency (IEPA), the designated enforcer of the Illinois provisions, seeking to enjoin enforcement of the licensing laws a short time before their effective date.

NSWMA challenged the requirement that training be conducted within the state, which favored Illinois residents over out-of-state workers, as a violation of the Commerce Clause. The district court invalidated the

16. 29 C.F.R. § 1910.120 (1992) (setting forth the federal standards which became effective March 6, 1990). The standards detail requirements for training and certification of workers at hazardous waste sites. Id. § 1910.120(e). The federal guidelines provide for a minimum of 40 hours of instruction and three days of actual field experience. Id. § 1910.120(e)(3)(i). Management or supervisory personnel must log at least eight additional hours of training. Id. § 1910.120(e)(4). Documented work experience may substitute for the 40 hour requirement, but experienced workers must nevertheless receive site-specific training and supervised field experience. Id. § 1910.120(e)(9). The goal of the federal standards is "to provide employees with the knowledge and skills necessary to perform hazardous waste clean-up operations with minimal risk to their safety and health." 54 FED. REG. 9294, 9304 (1989).

The Illinois regulations did not cover all areas reached by federal standards. For example, the Illinois laws provided no special training requirements for emergency cleanup workers. See 29 U.S.C. § 655(d)(4); see also 29 C.F.R. § 1910.120(e)(7) (setting forth training requirements for emergency response personnel).

17. ILL. ANN. STAT., ch. 225, paras. 220(5)(c) and 220(6)(c) and 221(5)(c). As originally enacted, the law mandated that such training occur within Illinois. Id.

18. ILL. ANN. STAT., ch. 225, paras. 220(5)(e), 220(6)(d), and 225(5)(d) (Smith-Hurd 1993) (formerly ch. 111, paras. 7705(e), 7706(d), and 7805(d)).

19. Id. paras. 220(7) and 225(6) (Smith-Hurd 1993) (formerly 7707(b) and 7806(b)).

20. Id. para. 220(5)(d) (Smith-Hurd 1993) (formerly 7705(d)).

21. NSWMA is a trade association with membership consisting of businesses across the United States engaged in removal, transportation, and disposal of waste material, including but not limited to, hazardous waste. See National Solid Wastes Management Ass’n v. Killian, No. 88 C 10732, 1989 WL, at *1 (N.D. Ill. Aug. 17, 1989).

22. When the suit was filed, Bernard Killian was the director of the Illinois Environmental Protection Agency. Mr. Killian was succeeded by Mary Gade and she was substituted for Killian as a party to this action. See Gade v. National Solid Wastes Management Ass’n, 112 S. Ct. 2377, 2380-81 (1992).

23. Killian, No. 88 C 10732, 1989 WL 96438, at *7; see also U.S. CONST. art. I, § 8, cl. 3
provision for in-state training, finding that exclusive training requirements in no way contributed to the stated purpose of the law, namely to protect the public as well as worker safety and the environment.\textsuperscript{24} The state did not appeal that part of the decision, but the U.S. Court of Appeals for the Seventh Circuit opined:

It seems likely to us, in any event, that the "within Illinois" provision could not have survived NSWMA's commerce clause challenge, since the provision would have imposed a substantial burden on out-of-state workers and companies while making no discernible contribution to public safety.\textsuperscript{25}

Thus, the Commerce Clause challenge dropped out of the case at the district court level and NSWMA's remaining contentions were resolved under preemption analysis.

The United States District Court for the Northern District of Illinois issued its Memorandum Opinion and Order on August 17, 1989.\textsuperscript{26} The court examined the issue as involving the scope of the OSH Act's reach into the areas Illinois sought to regulate.\textsuperscript{27} The court adopted a test used by the Second Circuit to decide another OSH Act preemption case.\textsuperscript{28} Under this "independent basis" test, the OSH Act does not preempt a state law that serves a "legitimate and substantial" purpose other than the one furthered by the federal law.\textsuperscript{29} Applying that standard, the district court first found that the stated purposes of the Illinois laws, promoting public safety and environmental protection, were legitimate goals independent of the federal goal of promoting job safety.\textsuperscript{30} The court, however, invalidated the state law's requirement that training be conducted within Illinois because it found no evidence that the provision promoted the state's goals.\textsuperscript{31} Nonetheless, the district court went on to rule that the offending provisions could be severed from the legitimate portions of the

\textsuperscript{24} Killian, No. 88 C 10732, 1989 WL 96483, at *5.
\textsuperscript{25} National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 676 n.3 (7th Cir. 1990).
\textsuperscript{27} \textit{Id.} at *4.
\textsuperscript{28} The Second Circuit developed this test in Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48 (2d Cir. 1988).
\textsuperscript{29} Killian, No. 88 C 10732, 1989 WL 96438, at *4-5.
\textsuperscript{30} \textit{Id.} at *5.
\textsuperscript{31} \textit{Id.} The court struck the words "within Illinois" from the Illinois laws' training provisions. \textit{Id.} at *8.
laws, allowing portions not preempted by the OSH Act to remain in effect. The court then explicitly found that the OSH Act did not preempt the Illinois statute provisions requiring a certified record of 4,000 hours of equipment operation.

The Court of Appeals for the Seventh Circuit disagreed with the district court and concluded that OSHA’s final rule preempted Illinois’ 4,000-hour experience requirement. Writing for the appellate court, Judge Cudahy stated the standard applied: “[s]ection 18 is clear: where OSHA has properly established a standard, a state may not create a standard of its own on the same topic unless the state acts pursuant to a plan approved by the Secretary of Labor.” However, the Seventh Circuit also refused to invalidate the entire challenged legislation. Instead, the court remanded the case to the district court, reasoning that many of the state law provisions were impossible to evaluate in the absence of final implementing regulations. On remand, the district court presumably would evaluate the final state regulations in light of the standard laid out in the appellate court’s opinion. However, Illinois appealed the decision and the Supreme Court granted certiorari.

The United States Supreme Court heard oral argument on Gade v. Na-

32. Id. at *8.
33. Id.
34. Killian, 918 F.2d at 684.
35. Id. at 684.
36. Id.
37. Id. Judge Cudahy cited the lack of descriptions of the exact content of the training courses and the examinations to be given as examples of missing information. Id. In light of the standard applied to strike down the 4,000-hour requirement, this focus on the content, rather than the mere existence, of state regulation is perplexing. By pausing to consider the content of the Illinois program, Judge Cudahy effectively suggested that a state possibly may act in situations where a federal OSHA standard exists. Such a possibility contradicts his announced test for unapproved state action, given that federal standards exist in the same areas as the Illinois law.
38. Id. The court of appeals confirmed the district court’s dismissal of NSWMA’s Commerce Clause challenge, which NSWMA had not appealed. The court of appeals also expressed some concern about the “potential burden on interstate commerce suggested by the exemption of certain classes of employees” in the Illinois laws. Id. at 684-85. The court noted that “such exemptions may suggest an intent by a state to discriminate against interstate commerce” and encouraged the district court on remand to examine the effects of those exemptions to determine whether they impermissibly favored Illinois residents and companies over those outside the state. Id.

Judge Easterbrook filed a separate opinion expressing some doubt about section 18’s preemption power. Id. at 685. His opinion included a practical approach to this case as well as some criticism of the legal analysis employed by his colleagues. See id. Judge Easterbrook’s analysis serves as part of the foundation of the final section of this Note.
tion Solid Wastes Management Ass'n on March 23, 1992. In a five-to-four decision, the Court found that Illinois' licensing acts governing hazardous waste workers were completely preempted by the federal OSHA standards and therefore invalid. Writing for a plurality, Justice O'Connor relied on the doctrine of implied preemption and constructed congressional intent to strike down the state laws. Concurring in the judgment, Justice Kennedy went a step further and declared that section 18 of the OSH Act expressly preempts all state-imposed standards related to occupational health and safety in any situation in which a federal standard exists. Justice Souter filed a dissenting opinion in which he argued that the existence of federal standards does not necessarily preempt all state regulation in an area.

The Gade decision balanced two legitimate interests: the state's interest in protecting public health and worker safety and the industry's interest in providing cost efficient toxic material operations. Because hazardous waste is a serious present and future health issue, the methods employed to dispose of hazardous materials are critical. Therefore, the balance struck in Gade has significant social implications. The dangers associated with toxic waste most directly impact the workers who handle the material; however, the general public and the environment also bear the risk of exposure to toxic wastes during transportation and disposal procedures. To minimize potential harmful effects of hazardous materials on the planet and on the health of future generations of her inhabitants, the federal government should seek to encourage handling and disposal of dangerous materials in as safe and effective a manner as current technology will permit.

This Note discusses the analysis used in Gade to determine whether a state without an approved plan under section 18 of the OSH Act may selectively supplement federal standards for occupational health and safety to benefit the public and the environment. Part I reviews the pre-emption doctrine and its application in situations similar to that in Gade.

41. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and White, announced the judgment of the Court. Justice Kennedy, joining in all but part II of Justice O'Connor's opinion, wrote a separate concurring opinion. Justice Souter filed a dissenting opinion which Justices Blackmun, Stevens, and Thomas joined.
42. Gade, 112 S. Ct. at 2387-88.
43. Id. at 2390.
44. Id. at 2391-95 (Souter, J., dissenting).
The second and third sections discuss the plurality and dissenting opinions in *Gade*. Finally, Part IV examines the practical effects of the decision and the current state of the law in light of the Supreme Court's decision in *Gade*. Because *Gade* was the Court's first preemption case involving the OSH Act, this Note concludes that the decision marks an important resolution to the questions concerning shared authority between the state and federal governments raised by the passage of the Act. In analyzing *Gade*, this Note looks beyond interpreting the language of the Act and examines the case in the context of similar preemption cases and practical experience to determine the relative wisdom or folly of the decision. As in most areas of law, the conflict between legitimate interests makes accommodation among them necessary; the ultimate question to ask and answer is how the Supreme Court's accommodation in *Gade* will serve society.

I. THE PREEMPTION DOCTRINE AND ITS APPLICATION

A. Preemption Basics and "Dual Impact" Laws

The preemption doctrine is a constitutional principle that says that Congress may regulate an area within its power to the exclusion of state regulation, displacing state involvement without further inquiry. The doctrine is rooted in the Supremacy Clause of Article VI of the United States Constitution. Courts find express preemption when Congress specifically includes in a federal law a provision stating that the federal law is to displace any existing state laws. Under implied preemption analysis, if a court finds that a state law blocks the specific goals of federal legislation, the federal law preempts the state law. That the state traditionally has had authority to regulate the subject matter is irrelevant if the state's law "interferes with or is contrary to" some federal law.

45. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." U.S. CONST. art. VI, cl. 2.


48. *See, e.g.*, Free v. Bland, 369 U.S. 663, 666 (1962) (holding that Treasury Regula-
plied preemption requires a challenged state law to yield to a federal law in two situations. First, a court will find preemption if actual and irreconcilable conflict between federal and state statutes renders compliance with both physically impossible, or if the state standard blocks the federal goals. Second, state law must give way when a federal law serving a dominant federal purpose occupies a particular field with a pervasive scheme of regulation.

Preemption cases often involve a collision between a federal standard and the police power traditionally retained by states, including the state-power to regulate public health and safety. By applying mandatory OSHA health and safety standards to all businesses engaged in interstate commerce, Congress has invaded regulatory areas traditionally managed by individual states.

Moreover, few laws, state or federal, are designed to serve a single purpose. Hence, another common issue in preemption cases is whether state laws which purport to serve multiple purposes (called “dual impact” laws) actually serve those purposes or whether the laws are only phrased in broad terms to evade preemption by federal law. Some of the things a “dual impact” law might seek to protect are the environment, the public at large, and workers. This was the situation in Gade.

B. Preemption Precedent

Courts have applied preemption analysis in many cases before Gade. Indeed, those cases form a backdrop for examination of the legal development taken in Gade. In particular, several other cases have addressed OSHA’s preemptive power. In Associated Industries v. Snow, the U.S. Court of Appeals for the First Circuit held that OSHA standards did not preempt Massachusetts’ asbestos abatement regulations that were more stringent than the federal standards and, as in Gade, not part of an ap-


52. 898 F.2d 274 (1st Cir. 1990).
proved plan. The court in *Snow* specifically held that the state intended the training and licensing regulations to protect the public, at least indirectly, and, because OSHA standards protect only workers, OSHA had no power to preempt laws other than job safety measures. The court did find preemption of two measures related to respirator and medical monitoring requirements, because the regulation served to protect only the health of individual asbestos workers.

In *Environmental Encapsulating Corp. v. City of New York,* which involved the asbestos removal industry, the U.S. Court of Appeals for the Second Circuit invalidated regulations passed by the City of New York mandating training and certification of workers handling asbestos. The court found preempted only those state regulations that purported to protect occupational health and safety. The Second Circuit acknowledged that section 18 of the OSH Act preempted only occupational health and safety standards. Because the local laws had dual purposes of protecting worker and public health, however, the court found that, to avoid invalidation by express preemption, the city would have to be able to demonstrate "a legitimate and substantial" purpose (not effect) for the regulations. Employing implied preemption analysis, the court refused to accept either the notion that Congress intended in the OSH Act to occupy the entire field of asbestos worker training or that the City's program actually conflicted with the goals of the OSH Act. The court concluded that states remained free to regulate in areas where no federal guidelines existed or where the state law served a significant purpose apart from protecting worker health and safety.

Outside the hazardous materials arena, a third case is *California Federal Savings & Loan Ass'n v. Guerra.* In *Guerra,* the Supreme Court ruled that Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Disability Act ("PDA"), did not preempt a state law requiring employers to provide leave and reinstatement to employees with pregnancy-

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53. *Id.* at 283-84.
54. *Id.* at 280.
55. *Id.* at 284.
56. 855 F.2d 48 (2d Cir. 1988).
57. *Id.* at 60.
58. *Id.*
59. *Id.* at 57.
60. *Id.* at 55-57.
61. *Id.* at 59.
62. *Id.* at 60.
related disabilities. The Court reasoned in Guerra that the goals of the state and federal statutes were consistent and that compliance with both was possible. Writing in concurrence, Justice Scalia argued that section 708 of Title VII prohibited preemption except where state law mandated unlawful conduct under the PDA; because California's law did not do so, it was not preempted.

II. THE SUPREME COURT'S DECISION IN GADE

A. Justice O'Connor's Plurality Opinion

The Supreme Court ostensibly granted certiorari in Gade to outline the preemptive effect of OSHA on state "dual impact" statutes. A plurality of the justices construed section 18(b) narrowly and concluded that states may regulate matters for which a federal OSHA standard exists only upon receiving the approval of the Secretary of Labor. Without ruling definitively, Justice O'Connor proclaimed the OSH Act's strong preemptive power over the states and doomed the Illinois laws challenged in Gade.

1. Section 18(b) Interpretation

Justice O'Connor's plurality opinion focused on two issues: (1) section 18(b)'s role within the overall framework of section 18; and (2) the effect of section 18(b) on dual impact state laws not approved as required under the OSH Act. With respect to the first issue, Illinois had argued (along the lines of Judge Easterbrook's opinion in the court of appeals) that the existence of provisions allowing states to retake complete responsibility

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64. Id. at 292.
65. Id. at 288-92. The Court relied on the fact that Congress knew when it enacted the PDA that some state regulations overlapped with the federal scheme "but did not indicate that [the state laws] would be pre-empted by federal law." Id. at 291 n.30.
66. Id. at 295-96.
67. Gade, 112 S. Ct. at 2381.
68. Id. at 2383 ("[T]he only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces federal standards."). The Secretary of Labor is the head of the Occupational Safety and Health Administration. See 29 U.S.C. § 651(c) (1993).
69. Gade, 112 S. Ct. at 2386-88. Section 18(b) of the OSH Act provides:
   Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated ... shall submit a State plan for the development of such standards and their enforcement.
for job health and safety regulation implied that states need only undertake the expensive and time consuming process of gaining federal approval if occupational safety was the state's goal. Instead, IEPA claimed, the OSH Act did not forbid a state's regulating on a piecemeal basis and surpassing federal standards without federal approval.

The plurality soundly rejected IEPA's argument by reading section 18(b) together with other parts of section 18. The Court found that IEPA's theory would render section 18(a) "superfluous" and would "undercut" section 18(c). In addition, the plurality pointed out the inconsistency between IEPA's theory and section 18(f)'s provisions for allocation of jurisdiction between a state and the federal government in the event the Secretary of Labor withdrew approval of the state's program.

Concluding its analysis of the context of section 18(b), the plurality switched from trying to give effect to every word of the statute to placing significant reliance on the legislative history of section 18(h). An early version of section 18(h) would have delayed for up to two years the required coordination with the Department of Labor for a state to retain transitional control even of regulations more stringent than the federal standards. Justice O'Connor noted that the original version of section 18(h), while not adopted, illustrated Congress' intent to preclude "any state regulation of an occupational safety or health issue with respect to which a Federal standard has been established" absent federal

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70. See Killian, 918 F.2d at 685 (Easterbrook, J., dissenting).
71. Gade, 112 S. Ct. at 2381-86.
72. Id. at 2384. Section 18(a) of the OSH Act provides: Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title. 29 U.S.C. § 667(a) (1988 & Supp. 1991).
73. Id. at 2384. Section 18(c) of the Act lists the criteria for a satisfactory state plan. 29 U.S.C. § 667(c) (1988 & Supp. 1991). Generally, the plan must identify an agency to administer the program, provide mechanisms for inspection of workplaces and enforcement of the plan, promise adequate funding for the program, provide assurances that the plan will apply to all covered employees, and require that employers submit regular reports to the Secretary of Labor. Id. In particular, the plan must include standards at least as demanding as the federal standard the state seeks to replace. Id.
74. Gade, 112 S. Ct. at 2384. When the Secretary of Labor withdraws approval, the state plan "cease[s] to be in effect" and the state may retain jurisdiction only over cases that arose before withdrawal of federal approval and do not relate to the reasons for the withdrawal. 29 U.S.C. § 667(f).
approval.\(^77\)

In sum, the plurality concluded that section 18 establishes uniform federal control and simultaneously provides states the option to supplant federal regulations with approved state plans. Justice O'Connor refused to hold that the OSH Act expressly preempted state regulation of occupational safety and health; rather, the plurality merely concluded Congress had erected a pervasive federal scheme.\(^78\) Justice O'Connor refused to label her finding "express preemption" and instead proceeded through the OSH Act section by section to find implied preemption of the challenged Illinois laws.\(^79\)

2. **Implied Preemption Analysis**

Despite concluding that the OSH Act preempts state laws expressly, the plurality addressed the potential conflict between federal standards under the OSH Act and the challenged Illinois law. That analysis amounted to an examination of the OSH Act under implied preemption principles. The plurality noted that goals common to both federal and state laws will not automatically render the state law in conflict with federal law.\(^80\) Rather, the conflict must be threatening to federal policy to justify finding implied preemption. The plurality did not identify a precise conflict that would trigger preemption of the Illinois laws by the OSH Act, but asserted that states must take the approved-plan route because the Act designates that method to further Congress' goal of pro-

\(^77\) Gade, 112 S. Ct. at 2385.

\(^78\) Justice Kennedy concurred in the result in Gade that federal law preempts the Illinois law, but he reached that conclusion using an express preemption rationale. Id. at 2388-89 (Kennedy, J., concurring). Unable to find the conflict suggested by the plurality between the state laws and Congress' intent to have a single set of federal regulations, Justice Kennedy relied on the statutory language of section 18(b) to find express preemption, though he admitted that the text lacked an explicit statement of preemption. Id. at 2390. Instead, Justice Kennedy rationalized that "Congress' intent must be divined from the language, structure, and purposes of the statute as a whole." Id. Adopting the plurality's analysis of section 18, Justice Kennedy concluded that standing alone, section 18 indicated that if a state did not have an approved plan, then it could not enforce job safety and health standards in areas covered by federal standards. Id. at 2390-91. Justice Kennedy further agreed with the plurality on the scope of the OSH Act's preemption power and the irrelevancy of state objectives other than workplace safety as motives for state legislation. Id. at 2391.

\(^79\) Gade, 112 S. Ct. 2385-88.

\(^80\) Gade, 112 S. Ct. at 2386; see also International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (preemption of state laws having same goals as or interfering with federal statutes).
moting worker safety.\textsuperscript{81} The plurality concluded that on its face "the OSH Act pre-empts all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'\textsuperscript{82}

Given that conclusion, the plurality faced the issue of section 18(b)'s effect on "dual impact" laws. Specifically, Justice O'Connor asked whether the challenged Illinois statutes sought to promote exclusively occupational safety and health or whether the statutes legitimately sought to protect public health and the environment, the laws' stated purposes.\textsuperscript{83} In essence, the Court had to decide whether to accept the purposes articulated on the face of the laws. The plurality emphasized the relevance of not only the laws' stated purposes but also the impact on the occupational health and safety field.\textsuperscript{84}

The Supreme Court disregarded the purposes of the Illinois laws apart from job safety. The legislative history of the Illinois licensing statutes is, not surprisingly, mixed. Although none of the three Supreme Court opinions examined the legislative history of the state measures, some of that history accords with the Court's conclusion that the Illinois laws intended to target solely job safety. Concededly, one of the stated purposes, to "promote job safety,"\textsuperscript{85} duplicates the OSH Act's purpose.\textsuperscript{86} However, the long titles of both of the licensing statutes proclaim them to be laws "in relation to environmental protection."\textsuperscript{87} In fact, the Illinois laws are narrower in scope than the OSH Act in that they do not apply to two significant hazardous waste situations: voluntary clean-up sites and

\begin{footnotes}
\item[81] Gade, 112 S. Ct. at 2386; see also Ouellette, 479 U.S. at 494.
\item[83] Id. at 2386-88.
\item[84] Id. at 2387. Thus, one may phrase the inquiry as whether the state law acts more as a job safety measure or as a public safety or environmental measure. Cf. English v. General Elec. Co., 496 U.S. 72, 84 (1990) (California nuclear safety law's "actual effect" examined in preemption analysis); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (purposes of state laws are not revealed in the legislature's description and the practical impact is what the court determines).
\item[85] ILL. ANN. STAT., ch. 225, paras. 220(2) & 221(2) (Smith-Hurd 1993). Both statutes seek to "promote job safety and protect life, limb and property." Id.
\item[86] See supra note 2 and accompanying text. Congressional debate concerning OSHA acknowledged that federal legislation normally does not supersede state law when the state law is superior to the federal provisions. 116 CONG. REC. 38, 385 (November 23, 1970) (statement of Rep. Dent). Furthermore, the Senate Committee Report indicated that the OSH Act's requirements were intended to be minimum requirements. S. REP. No. 1282, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 5177, 5182.
\item[87] ILL. ANN. STAT., ch. 225, paras. 220(1) & 221(1) (Smith-Hurd 1993).
\end{footnotes}
emergency response sites. Additionally, Illinois did not intend the laws to regulate all of the same classes of workers that the OSH Act does. Also, the statutes do not extend coverage to any sites or workers not already covered by the OSH Act.

Illinois tailored the laws narrowly, presumably to address specific problems within the state that were not addressed adequately under existing federal standards. Had the legislature attempted to augment all of the federal standards for workers in the hazardous materials industry, the result would have appeared more as legislation driven by special interests, rather than a measure addressing a state problem. On the other hand, the licensing provisions were enacted on the heels of another bill designed to raise revenue for state and local hazardous waste disposal funds. Political reality being what it is, it would be facile to impute a single motive to the Illinois legislature in enacting the licensing provisions.

One sponsor of the Illinois laws identified “one of the major reasons for [the bill was] that we have now several sites being cleaned up in the state where out-of-state personnel are coming in” with unknown qualifications. But those concerns do not support the state’s argument for concurrent state and federal standards because the federal standard for licensing toxic waste workers directly addresses that issue. Federal standards qualifying workers who handle hazardous materials dispense completely with any need for state action. Given the apparent lack of need for state-specific regulations, the Supreme Court reasonably looked beyond the stated purposes of the challenged laws toward the measures’ actual impact.

After analyzing the Illinois statutes’ stated purposes, Justice O’Connor considered the second prong of the implied preemption analysis, the actual impact of the licensing provisions. As Justice O’Connor noted, this prong was less susceptible to clear resolution because the Illinois laws had

88. Id. paras. 220(3)(f) & 221(3)(e) (Smith-Hurd 1993).
89. Id. paras. 220(4)(c)-(f) and 221(4)(b)-(e) (Smith-Hurd 1993).
90. STATE OF ILLINOIS 85TH GENERAL ASSEMBLY HOUSE OF REPRESENTATIVES TRANSCRIPTION OF DEBATE 127th Legislative Day 55 (July 1, 1988). Illinois Representative Breslin noted in debate on the bill that the legislature had passed a measure the year before which allowed municipalities to create their own programs for collection of hazardous wastes from households. Id. at 57. He identified the concern generated by having untrained people handle toxic waste and the need for state action. Id.
91. Id.
92. STATE OF ILLINOIS 85TH GENERAL ASSEMBLY SENATE TRANSCRIPTION OF DEBATE 127th Legislative Day 62 (July 1, 1988) (remarks of Senator Welch).
not gone into effect when NSWMA sued to enjoin their enforcement.\textsuperscript{93} The plurality opinion pointed out that under the Superfund Amendments and Reauthorization Act of 1986 (SARA),\textsuperscript{94} certification requirements for workers who seek to engage in hazardous material operations constitute occupational health and safety standards.\textsuperscript{95} Concluding "[t]hat such a [state] law may also have a nonoccupational impact does not render it any less an occupational standard for purposes of preemption analysis," the plurality doomed Illinois' entire licensing scheme to death by federal preemption, although a majority of the Supreme Court was unwilling to do so outright.\textsuperscript{96}

\textbf{B. The Plurality's Exception to Its Own Rule is Likely Unworkable.}

Though the plurality dismissed Illinois' argument that the state laws constituted "dual impact" measures not subject to preemption, Justice O'Connor's opinion did not claim to require federal approval of all state action regulating areas covered by federal standards. Rather, the plurality's opinion indicated that states may still have some room to act. Only laws not part of a federally approved plan that "directly, substantially, and specifically" regulate worker health and safety must fail.\textsuperscript{97} The Court distinguished such laws from those of "general applicability" that the OSH Act would not preempt, even if the state measures had a direct, clear, and substantial connection to occupational health and safety.\textsuperscript{98} The Court described generally applicable laws as those which apply to workers "simply as members of the general public."\textsuperscript{99}

The plurality's "generally applicable" standard is deficient in two respects, both largely ignored in the Court's legal analysis. First, the standard is difficult to apply because all workers are members of the general public. Illinois certainly intended to protect hazardous waste workers

\textsuperscript{93} Gade, 112 S. Ct. at 2386-88.
\textsuperscript{95} Gade, 112 S. Ct. at 2388.
\textsuperscript{96} Id. A majority of the justices affirmed the decision of the Court of Appeals for the Seventh Circuit which effectively remanded the case for findings of fact on the impact of the laws: "Like the Court of Appeals, we do not specifically consider which of the licensing acts' provisions will stand or fall under the preemption analysis set forth above." Id. Some speculation on the possible impact of the Illinois statutes is contained in part V of this Note.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Justice O'Connor pointed to traffic and fire safety laws as examples of generally applicable laws. Id. at 2387.
while on the job.\textsuperscript{100} However, the long-term implications of toxic waste improperly disposed also affect the workers, their families, and their neighbors as members of the public. Addressing a public health threat as serious as hazardous materials, the state law targets every state citizen. One could argue that regulations like those challenged in \textit{Gade} regulate workers merely because they are the first line of society's defense.\textsuperscript{101} The Illinois laws in question set high standards for worker training to protect the public and the environment as much as the workers. All of the opinions in \textit{Gade} ignore the specific factual circumstances of the case — the local exigencies involved in disposing of toxic wastes. The result is a rule that irresponsibly fails to allow a state to require stringent training for hazardous material handlers absent federal approval.

The second problem with the \textit{Gade} plurality's "generally applicable" standard is that the statutes challenged in \textit{Gade} appear to satisfy the standard, yet the Court declined, without explanation, to apply the standard to the facts of the case. Illinois' laws applied to hazardous waste workers, at least in part, as members of the general public. Only by ignoring the Illinois laws' stated goals of protecting "life, limb, and property" did the Court reject the Illinois laws.\textsuperscript{102} In doing so, the Court sends mixed signals about the proper application of the standard. On one hand, the Court finds that the OSH Act preempts state law only if the state measures relate exclusively to job safety. But on the other hand, the Court's example in \textit{Gade} indicates that courts should carefully scrutinize state laws but may freely disregard the laws' stated purposes. Thus, \textit{Gade} raises doubts as to whether any state law can meet the standard of the Court's "generally applicable" exception.

III. \textbf{Justice Souter's Dissenting Opinion: Parallel Analysis of Section 18 Leads to Opposite Conclusion}

The dissent\textsuperscript{103} argued simply that the text of the OSH Act failed to support the plurality's conclusion that Congress intended section 18 to preempt "state regulation of any occupational safety or health issue as to which there is a federal standard, whether or not the state regulation con-

\textsuperscript{100} \textit{Ill. Ann. Stat.,} ch. 225, paras. 220(2) and 221(2) (Smith-Hurd 1993).

\textsuperscript{101} States could possibly draft laws to circumvent preemption as follows: "no one shall handle toxic wastes without becoming licensed . . . ." Drafted this way, the law arguably applies to all people equally.

\textsuperscript{102} \textit{Gade,} 112 S. Ct. at 2386-87.

\textsuperscript{103} \textit{Id.} at 2391-95 (Souter, J., dissenting). Justice Souter, joined by Justices Blackmun, Stevens, and Thomas, dissented.
flicts with the federal standard." The plurality analyzed the *Gade* facts under principles of preemption where state law impedes the accomplishment of the "full purposes and objectives of Congress." By examining exactly the same subsections of the OSH Act's section 18 as did the plurality, Justice Souter thoughtfully demonstrated an alternative interpretation of section 18 which led him to conclude that all state law is not necessarily preempted in areas where federal standards exist. The dissent argued that since preemption principles did not apply to cases such as *Gade*, courts should analyze similar section 18(b) cases according to principles of the dormant Commerce Clause doctrine.

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104. *Id.* at 2391-92.
105. *Id.* at 2392 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
106. *Id.* at 2395 ("A purely permissive provision for enforcement of state regulations does not imply that all state regulations are otherwise unenforceable.").
107. *Id.* at 2394. Dormant Commerce Clause analysis is based on the idea that states may not unduly burden interstate commerce even in the absence of federal action because Congress has explicit power over interstate commerce. *e.g.*, Gibbons v. Ogden, 22 U.S. 1 (1824); see *U.S. Const.* art. I, § 8, cl. 3. The commerce power of Congress is plenary and covers anything affecting commercial intercourse. *Gibbons*, 22 U.S. at 211. Generally, courts invalidate state statutes that either burden or discriminate against interstate commerce. A balancing test is applied to potentially burdensome statutes; the law will be allowed to stand if its burden on interstate commerce is not clearly excessive relative to putative local benefits. *See, e.g.*, Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974) (holding unconstitutional a Mississippi law which barred an out-of-state cotton buyer from enforcing its purchase contracts with Mississippi cotton growers in the state's courts); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (holding that Arizona could not require in-state packing of fruit grown in Arizona that was to be shipped out of the state). Significantly, the balancing test allows some flexibility if the state law implicates safety interests and the total effect of the law as a safety measure is not slight. *Cf.* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (holding unconstitutional an Iowa statute limiting trucks to 55 feet in length in the state for lack of evidence of promoting safety and refusing to engage in balancing of safety interests).

To determine whether a state impermissibly discriminates against interstate commerce, courts simply find that laws treating in-state interests differently from out-of-state interests are per se invalid. City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (forbidding New Jersey to ban importation of waste into its landfills). Laws which are not protectionist may also be held invalid if they discriminate either on their face or in their practical effect. To survive the Court's "strictest scrutiny," the state must structure its laws to serve legitimate local purposes only and the court must find that no less discriminatory alternatives exist. *See* Maine v. Taylor, 477 U.S. 131, 150 (1986) (upholding state law prohibiting importation of baitfish); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 354 (1977) (acknowledging that the state law articulated a legitimate local purpose, but striking down the law because a reasonable, nondiscriminatory alternative method of reaching the state's goals existed); Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (because inspection was a nondiscriminatory method of assuring milk quality, the city could not require all milk sold in the area to be packaged in cardboard containers). The burden rests on the state to justify its need for the discriminatory law. *Hunt*, 432 U.S. at 353.
Countering the majority's conclusion that Section 18 preempted the Illinois licensing acts, the dissent duplicated the plurality's inspection of sections 18(a), (b), (f), and (h) and reached the opposite conclusion. The dissent argued that the plurality opinion and Justice Kennedy's concurrence included the preconceived notion that the state laws were preempted and drew conclusions about the statutory language which were not necessarily the only possible conclusions. By raising a specter of doubt about the analysis employed by Justices O'Connor and Kennedy, the dissent effectively undermined the certainty of the rule expressed by a majority of Justices.

First Justice Souter dealt with the express preemption argument. The dissent relied on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* for the proposition that express preemption requires an explicit provision of preemption. Noting the absence of "explicit pre-emptive language" in OSHA, Justice Souter discarded Justice Kennedy's finding of express preemption.

The dissent's approach differs from those of Justices O'Connor and Kennedy in that it seems to begin with the presumption that "Congress did not intend to displace state law." The dissent argued that the Court should find preemption of state law only where congressional intent to preempt is unmistakable. Applying that stricter standard, the dissent looked to section 18 of the OSH Act for a rational interpretation that did not necessitate preemption of state law.

A. Sections 18(a) and 18(b) Analysis

The plurality drew on section 18(a) of the OSH Act to support its conclusion that the Act preempts state law because, it claimed, that without prescribing preemption, section 18(a)'s permissive language allowing

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The basic difference between preemption and dormant Commerce Clause analysis is that preemption looks to what Congress has already enacted for guidance, while dormant Commerce Clause analysis examines what state law has done and, as long as the state has not violated the Commerce Clause, leaves the matter to Congress to address by enacting a specific federal law.

109. *Id.* at 2393-95.
111. *Gade*, 112 S. Ct. at 2392.
112. *Pacific Gas*, 461 U.S. at 203; see *Gade*, 112 S. Ct. at 2391-92 (Souter, J., dissenting); *cf.* *Gade*, 112 S. Ct. at 2390 (Kennedy, J., concurring) (finding the language of the OSH Act sufficient to expressly preempt state laws).
states to enforce standards in the absence of federal standards would be meaningless. In contrast, Justice Souter argued that section 18(a) implied only that some federal regulations might preempt some state laws. The dissent found that the text of section 18(a) would permit federal and state standards to coexist if "compliance with both . . . is not physically impossible." Furthermore, Justice Souter interpreted section 18(a) to allow Congress discretion to enact field preemption. Thus, according to the dissent's reading, section 18(a) declares that the OSH Act should preempt state law only if federal and state laws conflict in practice.

The dissent pointed out that section 18(b) on its face does not provide for automatic preemption of unapproved state programs by federal standards. Rather, the dissent found that section 18(b), like section 18(a), lacks any language that expressly prohibits concurrent state and federal jurisdiction. The dissent reasoned that because the OSH Act does not require states to assume responsibility for hazardous waste regulation, Congress provided the mechanism for state plan approval in section 18(b) only for use by states choosing to accept the federal enforcement role, which entails a complete transfer of jurisdiction over occupational health and safety from the state to the federal level.

Justice Souter pointed out that the Secretary of Labor's authority to approve state plans is limited by the Secretary's judgment that a plan does not unduly burden interstate commerce. The plurality concluded that preemption would prevent states from enforcing standards which did violate that standard. However, the dissent suggested that dormant Commerce Clause analysis rather than preemption analysis is available for those situations, should they ever arise.

115. See Gade, 112 S. Ct. at 2384 ("[I]f a state were free to enact conflicting safety and health regulations then § 18(a) would be superfluous.").
116. Id. at 2393 (Souter, J., dissenting).
117. Id.
118. Id. Field preemption describes those situations in which Congress' laws "occupy the field" to such an extent as to permit the inference that Congress intended to rule out any state regulation in the same areas.
119. Gade, 112 S. Ct. at 2394. Section 18(b) is set forth supra note 13.
120. Gade, 112 S. Ct. 2393-94 (Souter, J., dissenting).
121. Id. at 2394 ("[I]n actually providing a mechanism for a State to 'assume responsibility' for an issue with respect to which a federal standard has been promulgated . . . § 18(b) is far from preemptive of anything adopted by the States.").
123. See supra note 106 for a discussion of dormant Commerce Clause analysis.
B. Sections 18(f) and 18(h) Analysis

The dissent attacked the plurality's assertion that section 18(f)'s reference to withdrawal of approval for a state plan amounted to a complete reversion to federal guidelines. According to the dissent, section 18(f) provides only for the loss of state enforcement authority with respect to a plan for which federal approval has been withdrawn. The dissent concluded that the OSH Act's section 18(f) does not address how a state with an approved plan should treat enforcement of state measures not included in that plan. In essence, the Gade issues boil down to whether a state law not under the aegis of a federally approved plan can coexist with federal OSHA standards. If the dissent's interpretation of section 18 is correct, then section 18(f) would have the limited effect of invalidating an unapproved state plan; it would not affect any state law beyond the scope of the plan from which federal approval was withdrawn. As the dissent points out, such a result is consistent with the statutory language.

Justice Souter completed his attack on the plurality's statutory construction of section 18 by noting that section 18(h) supports more than one implication of congressional intent. The dissent faulted the plurality for claiming that its interpretation was the only appropriate one. Section 18(h) allowed for continued enforcement of state regulations for up to two years after federal standards had been promulgated. Although section 18(h)'s effective period has expired, the provision does indicate something about Congress' scheme. The plurality had contended that allowing for continued state jurisdiction during the transition from state to federal regulation implied that states would be prohibited from enforcing any regulation of their own in areas where federal standards had been passed. Emphasizing the temporary and transitional nature of section 18(h), the dissent argued that for a limited time, states could

124. Section 18(h) provides:
The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.


125. Gade, 112 S. Ct. at 2395 n.1 (Souter, J., dissenting).
126. Id.
127. Id. at 2395.
128. Id. at 2394-95.
129. Id. at 2395.
have continued enforcing their own regulations (unless they conflicted with federal standards), while awaiting federal approval of their plans.\(^1\) In short, the dissent interpreted the statute as providing for a single transition from state law in existence at the time of the OSH Act's passage to state law embodied in a federally sanctioned plan.\(^2\) Such a construction of section 18(f) is persuasive in its inherent logic and practicality. If Congress intended to apply only one set of standards to areas of job health and safety, as the plurality contended,\(^3\) Justice Souter's interpretation of section 18(f) provides the more efficient means to that end.

Unwilling to find in section 18 of the OSH Act a congressional intent to preempt all state law in areas where federal standards exist, the dissent would have considered further the Illinois laws to determine if compliance with both federal and state standards was possible. If coexistence was possible, the dissent would uphold the Illinois licensing statutes.\(^4\) The dissent did not approve of courts resolving situations like _Gade_ by applying the harsh preemption analysis advocated by the majority. As long as the state enacted regulations consistent with federal enforcement efforts, Justice Souter would leave opponents of the state laws to resort to trying to change the law through the legislative process.\(^5\)

### IV. _Gade_ in Legal and Practical Focus

In the analysis of any Supreme Court decision, the importance of public policy issues generally equals, if not outweighs, the significance of the legal analysis employed by the Court. When reviewing _Gade_ one must remember that the Court invalidated the Illinois hazardous waste licensing regulations on the ground that the laws constituted exclusively job safety measures. The Court effectively disregarded the fact that such laws might have measurably improved the safety of disposal of toxic wastes to the benefit of the public and the environment.\(^6\)

The result in _Gade_ is that the federal OSHA standards preempted the licensing regulations Illinois enacted in 1988. Thus, the Illinois hazardous waste licensing regulations are no longer applicable. This decision has significant implications for states and federal agencies in the context of hazardous waste management, as well as for the ongoing debate over preemption and the balance of state and federal regulatory authority.\(^7\)

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1. Id.
2. Id.
3. Id. at 2383.
4. Id. at 2395.
5. Such a result would be judiciously economical because the courts would have to determine only whether an actual conflict existed between federal and state standards or whether the state regulation unduly burdened interstate commerce.
6. The Court has allowed states to impose other laws on employers that cost more money than the federal standard would, for example, in the context of minimum wages paid to employees.
waste operators will not be required to finance additional training and certification of its workers. Because the Illinois laws did not actually go into effect, the cost of hazardous waste operations should not change as significantly as they might have if employers had been forced to take their increased costs of training and documentation into setting prices for their services. While the availability of toxic waste services at reasonable costs is important to society, the Gade outcome raises the question: at what other expense do we make that choice?

The majority and dissent in Gade present two different paths for future resolution of federal preemption of state law under OSHA: one administrative and one litigious. A majority of the Court chose to require states to pursue administrative approval of desired regulation. But securing federal approval of state hazardous waste plans requires a significant amount of time. Therefore, if states cannot act in any area in which a federal standard exists until such action becomes part of an approved plan, a lag time between the development of better methods of dealing with toxic materials and the implementation of those methods will always exist. In effect, the Court, subject to a very limited “generally applicable” exception, has designated the Secretary of Labor as the gatekeeper for technological advancements in the field of toxic waste disposal. Delay might not be terribly harmful in some industries; however, hazardous waste materials pose such serious public health risks that the majority’s resolution of Gade is not entirely satisfactory from a public health perspective.

The result of the case under the dissent’s analysis is not vastly superior in a public health context because it only substitutes the lengthy process of litigation for administrative approval. Legislation of the type passed by Illinois will usually be challenged by those most likely to incur the costs of its implementation. The dissent in Gade would leave factual determinations (such as whether actual conflict exists between federal and state regulation or whether state law imposes an unjustified burden on interstate commerce) to the courts. The financial costs and delay associated with litigation may in many cases even exceed the burden of waiting for the federal administrative approval imposed by the majority.

Justice O’Connor’s opinion in Gade also confuses traditional preemption analysis. Although she found that the text of the OSH Act sup-

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138. As the dissent read § 18(f) of the OSH Act, which was passed in 1970, that time was thought to be up to two years. See Notthstein, supra note 4, at 68-69 (describing final stages of approval process and associated time intervals).
ported express preemption of state regulation, she did not label her conclusion clearly and proceeded to analyze the facts under an implied preemption theory. Implied preemption analysis is not necessary to reach the holding in the case but its presence in the opinion calls into question precedents on preemption.

For example, in Associated Industries v. Snow, the court of appeals validated state regulations on the grounds that they were intended to protect asbestos workers.\(^{139}\) Were it to follow Gade, a majority of the Supreme Court might reject the stated purpose of the state laws and decide that all of the challenged Massachusetts regulations were preempted by the OSH Act.\(^{140}\) However, since the Court in Gade failed to articulate how proffered justifications for state laws were to be distinguished, state lawmakers are left wondering whether the purposes they write into the laws will be respected by the courts.

In another case, a different court of appeals upheld regulations that it found did not conflict with OSHA standards because they served a purpose other than protecting workers. Here again, Gade reflects a more skeptical perspective on conflict and suggests that failure to find preemption of the city's laws puts the Second Circuit in error.\(^{141}\)

Finally, the Supreme Court's own decision in Guerra\(^{142}\) found that the Pregnancy Disability Act did not preempt a California law because the Court believed that preemption was only appropriate where the state law required unlawful conduct under the federal statute. Such logic would suggest that the Illinois statutes challenged in Gade could stand, since they were consistent with the OSH Act's goal of protecting worker safety and did not call for any illegal acts. The fact that the Court decided Gade differently indicates that the current Court more readily will favor preemption of state laws by federal statutes than the Court did in Guerra. In this way, Gade represents a significant increase in the Court's willingness to preempt state law in the absence of clear statutory language indicating Congress' intent to displace state law. That approach directly contradicts the Court's presumption in Guerra that "pre-emption is not to be lightly presumed."\(^{143}\)

Under the Gade approach, Guerra might well turn out

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139. See supra notes 51-54 and accompanying text.
140. The Court disapproved of Associated Industries in Gade. Gade, 112 S. Ct. at 2382 n.1.
142. See supra notes 62-65 and accompanying text.
differently. The problem is that *Gade* disrupts preemption analysis and does not offer certainty under its "generally applicable" standard.

V. Conclusion

If permitted to coexist with the OSH Act, Illinois' licensing laws would clearly have resulted in increased costs to employers engaged in hazardous waste operations. More speculatively, employers might have tried to reduce the costs imposed by the laws by training fewer employees, which in turn would have produced fewer licensed workers to cope with the serious public health risk of hazardous waste disposal. The almost certain result would have been a more highly skilled group of workers handling toxic waste and improvements in waste management due to annual updating of state training programs. Therefore, the Supreme Court's invalidating of the Illinois laws may negatively impact implementation of emerging technology in the toxic waste industry because any new standard must gain federal approval before being used.

In conclusion, *Gade v. National Solid Wastes Management Ass'n* represents a difficult resolution of legal principles and public health concerns. It would be costly to society to allow a state like Illinois to require extraordinary training and testing of its employees because few employers could stay in business under such circumstances. Logically, fewer qualified employees would be able to clean up proportionally less waste than a greater number of less-qualified workers. Thus, hazardous waste operations might be disposed of more effectively, but more toxic materials might never be handled at all.

On the other side, why should a state not be allowed to supplement federal guidelines without assuming total responsibility for worker health and safety? Laws not beneficial to society could simply be repealed

Justice Souter's dissent in *Gade*, 112 S. Ct. at 2392 (noting that when Congress explicitly states its laws "alone are to regulate a part of commerce," no analysis is necessary because "state laws regulating that aspect of commerce must fall.").


146. The district court accepted the proposition that the state law would improve the industry. *National Solid Wastes Management Ass'n v. Killian*, No. 88 C 10732, 1989 WL 96438 at *6 (N.D. Ill. Aug. 17, 1989) ("It is a truism that expertise follows experience. And 4,000 hours of experience represents a sizable step on the road to expertise.").
through the same legislative process that brought the laws into being. Then states could more quickly implement changes in response to developed technology or react to specific problems within the state.

The fact remains that *Gade*’s rule is that states may under practically no circumstances implement regulations that supplement the federal standards under the OSH Act. If a state were to do so, the rule in *Gade* requires preemption of state standards under the authority of section 18(b) of the OSH Act. Only time will tell exactly how narrowly the “generally applicable” standard will be interpreted by lower courts and whether the Supreme Court will continue to use the doctrine of preemption to trample states’ attempts to regulate job safety and health.

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