has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor." [12]

Preemption Standards.—Until roughly the New Deal, as recited above, the Supreme Court applied a doctrine of "dual federalism," under which the Federal Government and the states were separate sovereigns, each preeminent in its own fields but lacking authority in the other's. This conception affected preemption cases, with the Court taking the view, largely, that any congressional regulation of a subject effectively preempted the field and ousted the states.[13] Thus, when Congress entered the field of railroad regulation, the result was invalidation of many previously enacted state measures. Even here, however, safety measures tended to survive, and health and safety legislation in other areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards, still recited and relied on, for determining when preemption occurred.[14] All modern cases recite some variation of the basic standards. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute." [15] Congress's intent to supplant state authority in a particular field may be "explicitly stated in the statute's language or implic-

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[12] Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85, 87–88 (1956). "The [Court] appears to use essentially the same reasoning process in a case nominally hinging on preemption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [The] Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed state regulation to stand." Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a "thoughtful student comment" in G. GUNTHER, CONSTITUTIONAL LAW 297 (12th ed. 1991)).

[13] *E.g.*, Charleston & W. Car. Ry. v. Varnville Co., 237 U.S. 597, 604 (1915). *But see* Corn Products Refining Co. v. Eddy, 249 U.S. 427, 438 (1919).

[14] *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); California v. Zook, 336 U.S. 725 (1949).

[15] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (internal quotation marks and case citations omitted). Recourse to legislative history as one means of ascertaining congressional intent, although contested, is permissible. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 606–12 & n.4 (1991). *See also* Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. ___, No. 12–52, slip op. (2013) (provi-