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Constitutional Law - Preemption - Upholding California's Nuclear Moratorium - Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission

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CASE NOTES

CONSTITUTIONAL LAW—PREEMPTION. Upholding California's Nuclear Moratorium. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, ___ U.S. ___, 103 S.Ct. 1713 (1983).

California adopted the Warren-Alquist State Energy Resources Conservation and Development Act¹ in 1974. Under this Act, utility companies seeking to construct any electric power generating plant, including nuclear plants, were required to obtain certification by the State Energy Resources Conservation and Development Commission (State Energy Commission). Three amendments to the Act in 1976 added provisions affecting only nuclear power plants.² One of these amendments, section 25524.2, imposed a moratorium on the certification of new nuclear power plants until the State Energy Commission finds that there exists a demonstrated means for the disposal of high-level nuclear waste which has been approved by the authorized federal agency.³

Pacific Gas and Electric Company and Southern California Edison Company, both California public utility companies, were in the business of constructing and operating power generating plants, including nuclear plants. Claiming that California's "nuclear statutes," including section 25524.2, hindered their ability to plan future development of nuclear power plants, Pacific Gas and Electric and Southern California Edison sued the State Energy Commission in federal district court.⁴ The suit sought a declaration that provisions of the Warren-Alquist Act, including section 25524.2, were preempted under the supremacy clause of the United States Constitution⁵ by congressional enactment of the Atomic Energy Act,⁶ which established the Atomic Energy Commission as the exclusive "regulator of all matters nuclear."⁷

The State Energy Commission countered by arguing that section 25524.2 fell outside the field of exclusive federal authority because the purpose of the moratorium was "economic" rather than "protection against radiation hazards."⁸ The federal district courts in both *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development*

1. CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1983).

2. CAL. PUB. RES. CODE §§ 25524.1, 25524.2, 25524.3 (West 1977 & Supp. 1983).

3. CAL. PUB. RES. CODE § 25524.2 (West 1977 & Supp. 1983).

4. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 489 F. Supp. 699, 700-01 (E.D. Cal. 1980), *rev'd sub nom. Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, ___ U.S. ___, 103 S.Ct. 1713 (1983).

5. U.S. CONST. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . . Laws of any State to the Contrary notwithstanding.

6. 42 U.S.C. §§ 2011-2284 (1976 & Supp. V 1981).

7. 103 S.Ct. at 1722; 489 F. Supp. at 702.

8. *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 472 F. Supp. 191, 198 (S.D. Cal. 1979), *rev'd*, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, ___ U.S. ___, 103 S.Ct. 1713 (1983).

Commission and its companion case, *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*,⁹ agreed with the utility companies and held that section 25524.2 was preempted.¹⁰ The cases were consolidated for appeal.¹¹ Reversing the district court decisions, the Ninth Circuit Court of Appeals held that section 25524.2 was not preempted.¹²

The United States Supreme Court granted certiorari limited to determining whether two of the 1976 amendments, sections 25524.1(b)¹³ and 25524.2, were ripe for judicial review, and if so, whether they were preempted.¹⁴ The Supreme Court agreed with the Ninth Circuit Court of Appeals that section 25524.1(b) was not ripe,¹⁵ and focused its attention on the preemption challenge to section 25524.2. Applying "well established" preemption analysis,¹⁶ the Court unanimously held that section 25524.2 was not preempted¹⁷ because the state's moratorium for "economic reasons" fell outside the federally occupied field of "nuclear safety regulation"¹⁸ and did not conflict with federal objectives.¹⁹

BACKGROUND

The supremacy clause grants Congress the power, within constitutional limits, to preempt state legislation. Some state legislation has been challenged under the supremacy clause despite the absence of explicit Congressional preemptive intent. Over the years the Supreme Court has developed a framework for analyzing cases of this type. Even "absent explicit preemptive language," congressional intent to displace state law may be found:²⁰

- a) from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room" for the states to supplement it;²¹ or

9. 472 F. Supp. 191 (S.D. Cal. 1979).

10. *Id.* at 201; 489 F. Supp. at 704.

11. 659 F.2d 903, 906 (9th Cir. 1981), *aff'd sub nom.* *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, ___ U.S. ___, 103 S.Ct. 1713 (1983).

12. *Id.* at 928.

13. CAL. PUB. RES. CODE § 25524.1(b) (West 1977 & Supp. 1983) conditions certification of additional nuclear power plants on a case-by-case finding by the State Energy Commission of adequate capacity for *interim storage* as opposed to permanent disposal of spent fuel rods. 103 S.Ct. at 1719.

14. ___ U.S. ___, 102 S.Ct. 2956 (1982).

15. ___ U.S. ___, 103 S.Ct. 1713, 1720-21 (1983). Section 25524.1(b) was not ripe for review because "we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate." *Id.* at 1721.

16. *Id.* at 1722.

17. *Id.*

18. *Id.* at 1728. The judgment that section 25524.2 was not preempted was unanimous, but in a concurring opinion (joined by Justice Stevens) Justice Blackmun contended that California's moratorium should be valid "even if its authors were motivated by fear of a core meltdown or other nuclear catastrophe." *Id.* at 1735 (Blackmun, J., concurring).

19. *Id.* at 1731-32.

20. *Id.* at 1722.

21. *Id.* Compare Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study*, 13 U.C.D.L.REV. 3, 26, 48 (1979). Professor Wiggins labeled this category "occupation preemption." Occupation preemption may be implied by the language of the federal act alone. In this respect it is similar to express preemption.

- b) because state law actually conflicts with federal law since
 - 1) compliance with both is impossible,²² or
 - 2) state law obstructs the accomplishment of federal objectives.²³

Some earlier preemption cases involved issues sufficiently comparable to those in *Pacific Gas and Electric* that they were discussed by the courts which considered the challenge to section 25524.2. A brief review of these earlier cases helps explain the preemption analysis used in *Pacific Gas and Electric*.

In 1946, the year in which Congress passed the original Atomic Energy Act,²⁴ the Supreme Court decided *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.²⁵ At issue was whether a proposed hydroelectric project involving diversion of water from the navigable Cedar River,²⁶ which otherwise satisfied federal licensing requirements, could be blocked because it failed to comply with requirements for a state permit.²⁷ Congress had passed the Federal Power Act²⁸ to encourage the comprehensive, rather than "piecemeal," development of water power projects on the nation's navigable streams,²⁹ with federal control "over their engineering, economic and financial soundness."³⁰ Although the Act allowed the states to retain their traditional authority over irrigation and municipal uses of water,³¹ authority over the nation's navigable waters was traditionally federal,³² and the Act's detailed scheme of federal regulation of power projects on those navigable waters left "no room or need" for the state to supplement it.³³ State regulation of these projects, such as a restriction on water diversion,³⁴ would have enabled the state to limit feasible project size and thereby undermine comprehensive federal planning and development.³⁵ Consequently, the Court found the Iowa law preempted.³⁶

The relevance of local regulatory purpose to preemption analysis was recognized in *Huron Portland Cement Co. v. City of Detroit*.³⁷ The Court was called upon to decide whether Detroit could prevent the operation of a vessel which, though in compliance with federal licensing standards, was in

22. *Id.* Compare Wiggins, *supra* note 21, at 26. Professor Wiggins included this type of situation in the category he labeled "conflict preemption."

23. *Id.* Compare Wiggins, *supra* note 21, at 26, 48. Professor Wiggins also included cases of this type in the category of conflict preemption. In contrast with cases of occupation preemption, in which the preemptive intent of Congress may be implied solely by the comprehensiveness of the federal legislative scheme, conflict preemption may be inferred only after considering how the federal and state laws will interact.

24. 42 U.S.C. §§ 2011-2284 (1976 & Supp. V 1981).

25. 328 U.S. 152 (1946).

26. *Id.* at 157-58.

27. *Id.* at 161-62.

28. 16 U.S.C. §§ 791a-823a (1982).

29. 328 U.S. at 180.

30. *Id.* at 172.

31. *Id.* at 175-76.

32. *Id.* at 173.

33. *Id.* at 181.

34. *Id.* at 164.

35. *Id.* at 164-67.

36. *Id.* at 182.

37. 362 U.S. 440 (1960).

violation of Detroit's Smoke Abatement Code.³⁸ Both federal and local regulations concerned vessel design, but while the purpose of the federal regulation was limited to promoting seagoing safety, the sole purpose of Detroit's regulation was protecting public health from the hazard of air pollution.³⁹

In *First Iowa*, federal regulation of water power projects on navigable streams precluded separate state permit requirements for the construction of such projects. In *Huron*, the Court determined that the federal vessel design standards did not preclude local regulation of vessel design because the local regulation was undertaken for a different purpose,⁴⁰ was an exercise of the city's traditional police power,⁴¹ and did not seriously disrupt the uniformity of federal regulation that was needed to facilitate interstate commerce.⁴² However, a difference in purpose alone would not have prevented the preemption had Detroit's regulation been found to materially interfere with the federal objective of facilitating interstate commerce.⁴³

The preemption analyses used in *First Iowa* and *Huron* were considered by the Eighth Circuit Court of Appeals in *Northern States Power Co. v. Minnesota*.⁴⁴ Involved was a question of first impression: whether federal regulation of radioactive waste releases from a local power plant precluded more stringent state regulation.⁴⁵ The court conceded that the greater stringency of the state regulation did not make compliance with both state and federal standards physically impossible.⁴⁶ But, the Atomic Energy Commission had exclusive authority to regulate nuclear plant operation,⁴⁷ and the regulation of radioactive discharges was "inextricably intertwined" with regulation of nuclear plant operation.⁴⁸ Therefore, the court reasoned, state regulation of radioactive discharges fell squarely within the federally controlled field.⁴⁹

Minnesota, relying on *Huron*, argued that its regulation of radioactive discharges for the purpose of protecting public health and safety was within the state's traditional police powers,⁵⁰ and thus did not invade a field of exclusive federal authority. The court rejected this argument on the ground that authority to regulate effluent discharge from nuclear plants to protect against radiation hazards was exclusively federal, and not within traditional state police power.⁵¹ In addition, the stricter Minnesota regulation was found to conflict with the uniformity of controls needed to effectuate the congressional objective of encouraging nuclear energy development for electric power production.⁵² The court relied on *First Iowa* for the

38. *Id.* at 441-42.

39. *Id.* at 445.

40. *Id.*

41. *Id.* at 442.

42. *Id.* at 448.

43. *Id.* at 444.

44. 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

45. *Id.* at 1145.

46. *Id.* at 1147.

47. *Id.* at 1152.

48. *Id.* at 1153.

49. *Id.* at 1152.

50. *Id.* at 1153.

51. *Id.* at 1152.

52. *Id.* at 1153-54.

proposition that obstruction of congressional objectives was a basis for inferring preemption, and, accordingly, held that the Minnesota regulation was preempted.⁵³

That same year, in *Perez v. Campbell*,⁵⁴ Justice White, writing for the majority, emphasized that the relevance of state purpose to preemption analysis is limited.⁵⁵ Even in *Huron*, the Court had cautioned that a local regulation which materially affected the accomplishment of federal objectives was precluded regardless of its purpose.⁵⁶ In *Perez*, Justice White stressed that preemption analysis required consideration of the "plain and inevitable effect," not merely the purpose, of the challenged state law.⁵⁷ The Court was concerned with preventing state ability to frustrate the operation of federal law simply by declaring some marginal purpose which would not appear to conflict with federal objectives.⁵⁸

Perez involved a challenge to an Arizona law under which a judgment debtor would not be relieved of his judgment debt by a subsequent discharge in bankruptcy.⁵⁹ At issue was whether this state law was preempted by the Federal Bankruptcy Act,⁶⁰ which provided debtors with a "new opportunity in life . . . unhampered by the pressure . . . of pre-existing debt," including "most kinds of pre-existing tort judgments."⁶¹ The Court held that the Arizona law was preempted because its declared purpose, "to protect judgment creditors 'from financial hardship,'" though different from that of the Federal Bankruptcy Act, clearly indicated that its "plain and inevitable effect" would frustrate the federal objective.⁶²

The relevance of state purpose to preemption analysis was again discussed when Justice White wrote for the majority in *Ray v. Atlantic Richfield Co.*⁶³ Atlantic Richfield sought a declaration that the Ports and Waterways Safety Act of 1972⁶⁴ preempted Washington State's "tanker law,"⁶⁵ including subsection 88.16.190(2), which set safety feature requirements for the design of large oil tankers operating in Puget Sound. Both the federal and state regulations applied to tanker design and both had the same purposes (vessel safety and environmental protection), thus distinguishing the case from *Huron*, in which the federal and local regulations, although both applying to vessel design, had different purposes.⁶⁶ The Court held that subsection 88.16.190(2) was preempted.⁶⁷ Justice White emphasized that both the federal and state regulations had "precisely . . . the same ends,"⁶⁸ but of greater significance was the finding that the

53. *Id.* at 1154.

54. 402 U.S. 637 (1971).

55. *Id.* at 650-52.

56. See *supra* note 43.

57. 402 U.S. at 650-52 (quoting *Kessler v. Dep't. of Public Safety*, 369 U.S. 153, 183 (1962)).

58. *Id.* at 651-52.

59. *Id.* at 643.

60. 11 U.S.C. § 524 (1982).

61. 402 U.S. at 648.

62. *Id.* at 654.

63. 435 U.S. 151 (1978).

64. 33 U.S.C. §§ 1221-1232 (1976 & Supp. V 1981).

65. WASH. REV. CODE §§ 88.16.170-88.16.190 (West Supp. 1983).

66. 435 U.S. at 164-65.

67. *Id.* at 168.

68. *Id.* at 165.

state regulation, regardless of its purpose, would conflict with the congressional objective of establishing uniform national tanker design standards.⁶⁹

THE PACIFIC GAS AND ELECTRIC DECISION

Justice White, who wrote the *Perez* and *Atlantic Richfield* opinions, also wrote the majority opinion in *Pacific Gas and Electric*, which once again discussed the relevance of state legislative purpose to preemption analysis. The Court addressed three arguments challenging section 25524.2:

- 1) section 25524.2 attempted to regulate nuclear power plant construction for the purpose of protection against radiation hazards and thereby invaded a field of exclusive federal authority;⁷⁰
- 2) section 25524.2 was in actual conflict with the federal decision that construction of nuclear plants could safely continue despite uncertainty about permanent nuclear waste disposal;⁷¹ and
- 3) section 25524.2 posed an obstacle to accomplishment of the federal objective of developing nuclear power as a civilian energy source.⁷²

Regulation of Nuclear Plant Construction for the Purpose of Protection Against Radiation Hazards

In order to determine whether section 25524.2 fell within a field of exclusive federal regulatory authority, the Court first had to ascertain the scope of that field.⁷³ The district courts and the Supreme Court agreed that under the original Atomic Energy Act of 1946 the Atomic Energy Commission had a monopoly of ownership and control of nuclear power for "whatever purpose," including civilian use.⁷⁴

The Atomic Energy Act of 1954,⁷⁵ however, opened the field of nuclear power to private construction, operation, and ownership of commercial generating plants subject to federal authority over licensing and regulation.⁷⁶ The district court in *Pacific Gas and Electric* stressed that the 1954 Act did not alter the scheme of exclusive and absolute federal authority to regulate the use of nuclear energy for "whatever purpose."⁷⁷ But the Supreme Court found federal authority under the 1954 Act to be less than absolute because section 2018 of the Act let the states retain their traditional authority over "the economic question whether" a particular com-

69. *Id.* at 165-66, 168.

70. 103 S.Ct. at 1722.

71. *Id.* at 1729.

72. *Id.* at 1730.

73. *Id.* at 1723.

74. *Id.*; 472 F. Supp. at 192-93; 489 F. Supp. at 702.

75. See *supra* note 6.

76. 103 S.Ct. at 1723.

77. 489 F. Supp. at 702.

mercial generating plant should be built.⁷⁸ The Court also relied on its earlier decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁷⁹ for the proposition that "under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power,"⁸⁰ and concluded that this traditional state authority accompanied private enterprise into the field of commercial nuclear power generation.⁸¹

In subsection 2021(b) of the 1959 amendments to the Atomic Energy Act⁸² the district courts did find a relaxation in the exclusivity of federal authority to regulate in the field of nuclear energy.⁸³ Subsection 2021(b) permitted state regulation of certain nuclear materials under limited conditions if covered by contract between the state and the Atomic Energy Commission. But subsection 2021(c) reaffirmed the exclusive federal authority to regulate construction and operation of nuclear plants and disposal of hazardous radioactive materials.

The purpose of section 2021, expressed in subsection 2021(a)(1), was to "clarify the respective responsibilities . . . of the States and the Commission" with respect to regulation of nuclear materials. Subsection 2021(k) provided that "nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards,"⁸⁴ and thereby delegated to the courts the task of identifying state regulatory purpose in order to determine "the precise extent of preemption" under section 2021.⁸⁵

The district courts and the Supreme Court agreed that Congress had intended to monopolize a field of nuclear regulation, but did not agree on the scope of that field.⁸⁶ The district courts, following *Northern States*, reasoned that Congress had intended subsection 2021(k) be construed narrowly,⁸⁷ and not as any "broad renunciation of the exclusivity" of federal control over nuclear power development.⁸⁸ The Supreme Court, on the other hand, in *Vermont Yankee* had already recognized a field of traditional

78. 103 S.Ct. at 1724. 42 U.S.C. § 2018 (amended in 1965) provides:

Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission

The 1965 amendment added the following:

Provided, that this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission. 42 U.S.C. § 2018 (1976 & Supp. V 1981).

The Court determined that this amendment "was not intended to detract from state authority over energy facilities." 103 S.Ct. at 1725.

79. 435 U.S. 519 (1978).

80. 103 S.Ct. at 1723.

81. *Id.* at 1723-24.

82. 42 U.S.C. § 2021 (1976 & Supp. V 1981).

83. 472 F. Supp. at 193; 489 F. Supp. at 703.

84. (Emphasis added).

85. 103 S.Ct. at 1725; 472 F. Supp. at 199; 489 F. Supp. at 703; Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 405 (1976).

86. 103 S.Ct. at 1726; 472 F. Supp. at 199-200; 489 F. Supp. at 703.

87. 472 F. Supp. at 198.

88. 489 F. Supp. at 703.

state authority over economic and supply concerns relating to private commercial nuclear power generation. The Court did not read subsection 2021(c) as diminishing this traditional state authority,⁸⁹ and construed subsection 2021(k) to reaffirm it.⁹⁰

However broad the field of exclusive federal authority, there would be no preemption unless the challenged state law was found to fall within that field. Relying on *Perez*, the district court in *Pacific Legal Foundation* concluded that, subsection 2021(k) notwithstanding, the state's declared economic purpose for its moratorium was not conclusive on the preemption issue.⁹¹ Rather than "focusing narrowly on . . . California's legislative purpose," the district court focused on whether the moratorium "impinge[d] upon the sphere of exclusive regulatory jurisdiction reserved to the NRC in section 2021(c)."⁹² The court found that "the question of *whether* nuclear power plants may be constructed" was "exclusively reserved to the NRC by section 2021(c)," thus precluding a state imposed moratorium.⁹³

The Supreme Court agreed that the Nuclear Regulatory Commission, partial successor to the Atomic Energy Commission,⁹⁴ had "exclusive authority over plant construction," but "emphasize[d] that the [California] statute [did] not seek to regulate the construction . . . of a nuclear powerplant."⁹⁵ The Court further conceded that federal authority included the field of nuclear safety regulation, and that any state regulation motivated by "nuclear safety concerns" would fall "squarely within the prohibited field."⁹⁶ However, a similar state regulation might be saved from preemption by a "non-safety rationale."⁹⁷ The Ninth Circuit Court of Appeals had found such a non-safety rationale for section 25524.2,⁹⁸ and the Supreme Court accepted it,⁹⁹ thereby distinguishing *Northern States*,¹⁰⁰ in which Minnesota had sought to regulate radioactive waste discharges for reasons of health and safety. The Court acknowledged that the "specific indicia" of California's legislative purpose for the moratorium were subject to different interpretations, but accepted its "avowed economic purpose" because "inquiry into legislative motive is often an unsatisfactory venture."¹⁰¹ Even without a moratorium, the state's traditional authority to issue or deny certificates of public convenience for economic reasons on a case-by-case basis would be sufficient to accomplish the same result.¹⁰²

89. 103 S.Ct. at 1725.

90. *Id.*

91. 472 F. Supp. at 198-99.

92. *Id.* at 199.

93. *Id.* at 199-200. (Emphasis added).

94. 103 S.Ct. at 1731. Under the Energy Reorganization Act of 1974 (42 U.S.C. §§ 5801-5891 (1976 & Supp. V 1981)) the Atomic Energy Commission was replaced by the Nuclear Regulatory Commission and the Energy Research and Development Administration. The NRC assumed responsibility for nuclear safety, while the ERDA took over responsibility for promotion of nuclear development. *Id.*

95. *Id.* at 1726.

96. *Id.* at 1726-27.

97. *Id.* at 1727.

98. 659 F.2d at 925.

99. 103 S.Ct. at 1727-28.

100. *Id.* at 1726 n.24.

101. *Id.* at 1728.

102. *Id.*

The Nuclear Regulatory Commission Decision that Construction of Nuclear Plants Could Safely Continue

The second argument addressed by the Court was that the moratorium actually conflicted with the Nuclear Regulatory Commission decision that continued licensing and construction of nuclear plants was permissible despite the lack of a method and facility for permanent radioactive waste disposal.¹⁰³ The district courts decided that California's certification scheme, including section 25524.2, required essentially the same determinations as did the federal licensing scheme, and that inconsistency or overlap between state and federal requirements for nuclear plant approval would "conflict with or substantially impede" federal nuclear policy.¹⁰⁴ Specifically, in *Pacific Legal Foundation* the district court found a conflict between California's moratorium and the federal determination that continued nuclear plant licensing and construction was safely permissible even absent existing permanent radioactive waste disposal technology.¹⁰⁵

The Supreme Court responded that the Nuclear Regulatory Commission's "order does not and could not compel a utility to develop a nuclear power plant."¹⁰⁶ For that reason, compliance with both the federal order and California's moratorium was possible.

Subsequent to the circuit court decision in this case, Congress passed the Nuclear Waste Policy Act of 1982,¹⁰⁷ which provided for a "multi-faceted attack on the problem" of nuclear waste disposal.¹⁰⁸ The Supreme Court determined that while the Act was intended to reassure state authorities that nuclear plant certification could safely continue, Congress deliberately refrained from requiring future certifications.¹⁰⁹ In fact preemptive language was deleted from the Senate version so as not to dictate the result in this case.¹¹⁰

The Federal Objective of Promoting Development of Nuclear Energy

The final argument addressed by the Court was that section 25524.2 stood as an "obstacle to the accomplishment of the full purposes and objectives of Congress."¹¹¹ Resolution of this issue involved two steps: 1) defining the congressional objective, and 2) determining whether section 25524.2 obstructed its accomplishment.

The courts generally agreed that the congressional objective through the successive Atomic Energy Acts and amendments remained the promotion of nuclear development.¹¹² The Supreme Court, in *Duke Power Co. v. Carolina Environmental Study Group*,¹¹³ had recently acknowledged this

103. *Id.* at 1729.

104. 489 F. Supp. at 703-04; 472 F. Supp. at 199-200.

105. 472 F. Supp. at 199.

106. 103 S. Ct. at 1729.

107. 42 U.S.C. §§ 10101-10108, 10121, 10131-10145, 10151-10157, 10161, 10171, 10191-10203, 10221-10226 (1982).

108. 103 S.Ct. at 1730.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1731; 472 F. Supp. at 200.

113. 438 U.S. 59 (1978).

objective when it upheld a limitation on private liability stemming from a nuclear accident.¹¹⁴

There was less agreement between the courts about the effect of section 25524.2 on the accomplishment of this federal objective. The district court in *Pacific Legal Foundation* recognized limited state authority "to regulate on the subject of nuclear energy within the confines of section 2021(k) and 2021(b)" without frustrating the federal policy of promoting nuclear development, but determined that a moratorium fell outside those confines and would frustrate the federal policy.¹¹⁵ The district court relied on *First Iowa*, which held that a comprehensive federal plan to promote hydro-electric power development embodied an important federal objective which the state was not permitted to frustrate by imposing its own stricter licensing requirements.¹¹⁶

The Supreme Court distinguished *Pacific Gas and Electric* from *First Iowa*, however, because "the Atomic Energy Act [did] not give the NRC comprehensive planning responsibility."¹¹⁷ Moreover, the Court reasoned that the promotion of nuclear development "is not to be accomplished 'at all costs,' " because, under section 2018, Congress "has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons."¹¹⁸ Based on its findings that California's moratorium was an exercise of this retained state authority and that there was no "comprehensive" federal plan for nuclear development, the Court concluded that the moratorium did not clearly frustrate the accomplishment of federal objectives and thus was not preempted.¹¹⁹

ANALYSIS

When a state law is challenged under the supremacy clause, the court will first consider whether there is an express or clearly implied preemption.¹²⁰ If the challenged statute survives this threshold test, preemption may still be found if the challenged statute obstructs the accomplishment of a federal objective.¹²¹

Express Preemption of Authority to Regulate Nuclear Plant Construction

The Court recognized that states have "traditional" authority to make decisions about the need for construction of additional power generating plants.¹²² Congress, in 42 U.S.C. section 2021(c), expressly preserved

114. *Id.* at 93; 103 S.Ct. at 1731.

115. 472 F. Supp. at 200.

116. *Id.* at 200-01.

117. 103 S.Ct. at 1732 n.34.

118. *Id.* at 1731-32. The Court determined that the Atomic Energy Act of 1954 (*see supra* note 6) did not give the Atomic Energy Commission "authority over . . . the economic question whether a particular plant should be built. . . . the only reasonable inference is that Congress intended the states to continue to make these judgments. Any doubt that . . . plant-need questions were to remain in state hands was removed by . . . 42 U.S.C. § 2018." *Id.* at 1724. *See also supra* note 78.

119. *Id.* at 1731-32.

120. *Id.* at 1722.

121. *Id.*

122. *Id.* at 1723.

exclusive federal authority to regulate construction of nuclear power plants,¹²³ but did not clearly manifest the intent that "regulation of construction" include the threshold decision whether or not to build a particular plant.¹²⁴ The Court was not inclined to find a preemption of this "traditional" state authority absent a clearer expression of congressional intent.¹²⁵ This "state supportive presumption"¹²⁶ fairly balances state and federal interests because a Court finding of preemption would deprive the state of the authority in question, but a Court finding against preemption would preserve the state authority without preventing Congress from thereafter acting to expressly abolish it.¹²⁷

*Express or Clearly Implied Preemption of Authority to Regulate for the Purpose of Protection Against Radiation Hazards*¹²⁸

The Court specifically considered the relevance of statutory purpose to preemption in *Huron*, *Perez*, and *Atlantic Richfield*. *Huron* stands for the proposition that preemption of local vessel design standards should not be found from less rigorous federal vessel design standards¹²⁹ when the purpose of the local regulation:

- a) is within "traditional" local authority,¹³⁰ and
- b) differs from the purpose of the federal regulation,¹³¹
- c) unless, regardless of its purpose, the local regulation would materially obstruct the accomplishment of federal objectives.¹³²

Atlantic Richfield, expanding upon *Huron*, stands for the proposition that preemption of state tanker design standards could be found from less rigorous federal tanker design standards¹³³ when the purposes of the state regulation:

- a) are "precisely . . . the same" as the purposes of the federal regulation,¹³⁴ and
- b) the state regulation would materially obstruct the accomplishment of federal objectives.¹³⁵

123. *Id.* at 1725-26.

124. *Id.* at 1723-24.

125. *Id.* at 1723, 1732.

126. *Id.* at 1723; Wiggins, *supra* note 21, at 26-27. Where Congress has legislated . . . in a field which the States have traditionally occupied," the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). (Emphasis added).

127. 103 S.Ct. at 1732; Wiggins, *supra* note 21, at 27-28.

128. Murphy & La Pierre, *supra* note 85, at 445-46. The authors noted that the district court in *Northern States* found in 42 U.S.C. § 2021 (*see supra* note 82) an express preemption of nuclear power plant regulation for the purpose of protection against radiation hazards, but the Eighth Circuit Court of Appeals, in affirming the district court's judgment, found only an implied preemption. The authors agreed with the district court.

129. 362 U.S. at 447.

130. *Id.* at 442.

131. *Id.* at 445.

132. *Id.* at 444.

133. 435 U.S. at 163-64.

134. *Id.* at 165.

135. *Id.* at 168.

Huron and *Atlantic Richfield* suggest that, absent an express preemption, state statutory purpose is a factor to consider in gauging the likelihood that concurrent federal and state regulations will conflict. That is, the more similar the purposes, the more likely the conflict.¹³⁶ But ultimately, it is the effect, not the purpose, of the state regulation that is dispositive of the preemption issue.¹³⁷

136. Wiggins, *supra* note 21, at 50.

137. *Id.* at 48-56. Professor Wiggins contends that a "finding of difference in purpose" between federal and local regulations "appears now to be an important ingredient in conflict preemption doctrine." *Id.* at 50. In support of this position he relies upon *Huron*, *Atlantic Richfield*, and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973). Reference to these cases by the Court in *Pacific Gas and Electric* was notably absent.

Professor Wiggins claims that the "difference in purpose prevented preemption" in *Huron*. Wiggins, *supra* note 21, at 49. This analysis becomes more accurate when combined with his observation that "different purposes are less likely to conflict with one another." *Id.* at 50. While the *Huron* Court did mention the difference in purpose between the federal and local vessel design regulations (362 U.S. at 445), it placed greater emphasis upon the traditional character of the police power exercised by Detroit (*Id.* at 442), and the determination that Detroit's regulation would not seriously conflict with federal objectives. *Id.* at 448.

Professor Wiggins also claims that "analysis of purpose was dispositive in *Ware*." Wiggins, *supra* note 21, at 52. In his estimation, "an actual conflict between a state statute and a New York Stock Exchange Rule" was not ground for preemption in *Ware* "because of the different purpose of the two enactments." *Id.* at 51. *Ware* posed the question "whether certain rules of the New York Stock Exchange, promulgated as self-regulation measures pursuant to § 6 of the Securities Exchange Act of 1934 . . . preempt avenues of wage relief otherwise available to the employee under state law." 414 U.S. at 119. No preemption was found. Justice Blackmun, who wrote the *Ware* opinion, stressed that:

- [1] Rule 347(b) [of the New York Stock Exchange, requiring arbitration of wage disputes] cannot be categorized . . . and as part of a need for uniform national regulation . . . Merrill Lynch has not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy. Convenience in exchange management . . . does not support a plea for uniform application when the rule to be applied is *not necessary for the achievement of the national policy objectives reflected in the Act.* *Id.* at 136-37. (Emphasis added).
- [2] Section 6(c) [of the Securities Exchange Act of 1934, concerning the application of state law to exchange procedures] has no independent existence creating some sort of spurious uniformity of application for all States. It has meaning only in the context of the assertion of a federal interest, and it *hinges on our determination that the particular rule be integrally related to or substantially effect the aims and purposes of the Act.* *Id.* at 137-38. (Emphasis added).
- [3] In other contexts, pre-emption has been measured by whether the state statute frustrates any part of the purpose of the federal legislation. . . . it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the federal statutory purpose. . . . [California's] policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference. . . . *Id.* at 139-40.

Clearly the Court seemed more concerned with the absence of conflict than with difference in purpose.

In *Atlantic Richfield*, the only reference to *Ware* was made by Justice Marshall in his opinion, concurring in part and dissenting in part, and then for the proposition that "[u]nder well-established principles . . . state law should be displaced 'only to the extent necessary to protect the achievement of the aims of' federal law." 435 U.S. at 182-83 (Marshall, J., concurring in part, dissenting in part).

Justice Blackmun, author of the *Ware* opinion, also wrote the concurring opinion in *Pacific Gas and Electric*, in which he agreed with Professor Wiggins that states should not be "forced to ignore" safety considerations when making their traditional energy policy decisions (103 S.Ct. at 1733 (Blackmun, J., concurring)), but argued against basing preemption "on the elusive test of legislative motive." *Id.* at 1735.

In *Perez*, the purpose of the challenged state statute (protecting automobile accident victims from financial hardship) differed from the purpose of the Federal Bankruptcy Act (giving tort judgment debtors a fresh start). However, the dissimilarity of purpose did not save the state law from preemption because its "plain and inevitable effect" clearly obstructed the accomplishment of a federal objective.¹³⁸ In the opinion, Justice White stressed that the effect of the state statute, not its declared purpose, should be dispositive of the preemption issue.¹³⁹ Thus *Perez* minimized the significance of state statutory purpose as a basis for inferring preemption.

In *Huron*, *Perez*, and *Atlantic Richfield*, local regulatory purpose was merely a gauge of potential conflict between state law and federal objectives, and thus of only indirect significance in the preemption analysis. *Pacific Gas and Electric* differed in that the contested state law was challenged under the Atomic Energy Act, which, in subsection 2021(k), expressly¹⁴⁰ prohibited state regulation imposed for the particular purpose of "protection against radiation hazards."¹⁴¹ Consequently, the Court had to identify the purpose of the challenged statute. Failure to find a "non-safety" purpose¹⁴² for the moratorium would by itself result in preemption,¹⁴³ and the issue of the moratorium's effect upon federal objectives would never be reached. On the other hand, even the finding of a non-safety rationale would not save the statute from preemption if the effect of the statute would conflict with federal objectives. In other words, failure to find a non-safety (non-prohibited) purpose for the moratorium would by itself be outcome determinative, but a cursory acceptance of California's "avowed" non-safety purpose would not.

The Court apparently wanted to avoid, if possible, basing its decision solely on California's motive for imposing the moratorium. By accepting the state's "avowed" economic purpose, the Court was able to move beyond the "purpose" issue and consider the statute's effect upon federal objectives.¹⁴⁴

There are good reasons for the Court's reluctance to base preemption on the state's statutory purpose. First, as recognized in *Perez*,¹⁴⁵ too much reliance upon statutory purpose "would enable state legislatures to nullify nearly all unwanted federal legislation by simply . . . articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." Second, as recognized in *Pacific Gas and Electric*,¹⁴⁶ what motivates one legislator to vote for a statute is not necessarily what motivates others.

138. 402 U.S. at 648, 650.

139. *Id.* at 650-54.

140. *See supra* note 128.

141. *See supra* text accompanying note 84.

142. 103 S.Ct. at 1732 (Blackmun, J., concurring). Justice Blackmun observed that the majority opinion broadly characterized the preempted purpose as "nuclear safety concerns" rather than the narrower concern for "protection against radiation hazards" connected with nuclear plant construction and operation. *Id.*

143. *Id.* at 1726-27.

144. *Id.* at 1728 n.28.

145. 402 U.S. at 651-52.

146. 103 S.Ct. at 1728.

And finally, as recognized in *Atlantic Richfield*,¹⁴⁷ a single statute may have multiple objectives.

Although the Warren-Alquist Act manifests a variety of concerns, the *Pacific Gas and Electric* opinion did not clearly address the possibility that the moratorium on certification of "nuclear fission thermal powerplant[s]" imposed by section 25524.2 might have *both* safety and non-safety purposes. The Warren-Alquist Act requires that environmental, economic, and public health and safety considerations be balanced in "planning and certification of facilities proposed by electric utilities," and reflects concern about "potential adverse social, economic, or environmental impacts" from increased energy production, including "increases in air, water, and other forms of pollution."¹⁴⁸

Certainly radioactive waste material from nuclear power plants is a potential form of pollution, especially if adequate means for its disposal are not available. Justice White, in *Pacific Gas and Electric*, recognized that "if not properly stored, nuclear wastes might leak" into the environment, adversely affecting *both* "human health" and the "economic attractiveness of the nuclear option."¹⁴⁹

Grounds for both safety and economic concerns about the nuclear waste disposal problems were apparent to Justice White, but his opinion did not state whether recognition of *both* these concerns by California's legislature would have been fatal to the moratorium. The Court was not disposed to "become embroiled in attempting to ascertain California's true motive,"¹⁵⁰ so not surprisingly it declined the opportunity to complicate the matter by considering possible multiple purposes. The contention that a "state prohibition on nuclear construction for safety reasons . . . would be preempted," but the finding of "a non-safety rationale" would save it¹⁵¹ could arguably be interpreted as requiring only a non-safety rationale *in addition* to safety reasons. But this interpretation is not supported by the general "either-or" tone of the Court's discussion. However, even if the Court had found both a safety and a non-safety purpose for the moratorium, the thrust of *Huron*, *Perez*, *Atlantic Richfield*, and *Pacific Gas and Electric* suggests that the ultimate basis for decision on the preemption issue would still have been the moratorium's effect on federal objectives.

Preemption Inferred from the Effect of State Regulation upon Accomplishment of Federal Objectives

The Court's acceptance of California's "avowed" non-safety purpose for enacting section 25524.2 left the moratorium's effect upon federal

147. 435 U.S. at 165.

148. CAL. PUB. RES. CODE §§ 25309, 25500.5, 25523, 25524, 25524.2 (West 1977 & Supp. 1983).

149. 103 S.Ct. at 1718, 1718 n.6. Justice White observed that "the lack of a long-term disposal option increases the risk that the insufficiency of interim storage space for spent fuel will lead to reactor-shutdowns, rendering nuclear energy an unpredictable and uneconomical adventure." *Id.* at 1718. Furthermore, until a means of permanent disposal is developed and authorized, the ultimate expense of nuclear waste disposal remains uncertain, adding to the economic unpredictability of the nuclear option. *Id.* at 1718 n.6.

150. *Id.* at 1728.

151. *Id.* at 1727. (Emphasis added).

policy objectives as the issue dispositive of the preemption challenge.¹⁵² The Court's conclusion that California's moratorium did not conflict with federal policy objectives was well founded.

1. Federal Policy of Promoting Development of Nuclear Power for Civilian Use

The degree of protection appropriate during the infancy of an industry should no longer be necessary at a more advanced stage of development. Congressional interest in protecting an infant nuclear power industry should not require a disregard of other interests unexpectedly affected by the subsequent course of nuclear development. Early in the *Pacific Gas and Electric* opinion Justice White described the unanticipated "urgency" of the spent nuclear fuel problem.¹⁵³ In addition, other occurrences, such as a disruption of fuel importation or a growth in public concern about the environment, may alter federal priorities.

By 1974, the commercial nuclear power industry had outgrown its infancy. The nation had experienced a "shortage of environmentally acceptable forms of energy."¹⁵⁴ Although Congress may not have "retreated from its oft-expressed commitment to further development of nuclear power," it was clearly seeking "simultaneously to promote the development of alternative energy sources."¹⁵⁵ The Energy Reorganization Act of 1974¹⁵⁶ and the Federal Nonnuclear Energy Research and Development Act of 1974¹⁵⁷ indicated that development of nuclear power was no longer an end in itself, but rather one facet of a broader federal policy "to develop . . . all energy sources" while "enhancing environmental quality, and . . . assur[ing] public health and safety."¹⁵⁸ Priority among sources of energy to be developed "should be based on such considerations as . . . reduction of pollutants."¹⁵⁹ "The urgency of the Nation's energy challenge will require . . . development . . . in *nonnuclear* energy technologies,"¹⁶⁰ while according "the proper priority to . . . protect[ing] the environment."¹⁶¹ In short, the Court had ample support for its conclusion that "the promotion of nuclear power is not to be accomplished 'at all costs,' "¹⁶² and thus California's moratorium, which would incidentally facilitate the development of "nonnuclear energy technologies," did not impermissibly conflict with federal policy objectives.

2. Uniformity of Regulation as a Federal Objective

Huron,¹⁶³ and *Atlantic Richfield*¹⁶⁴ recognized uniformity of regulation to be of potential importance in expediting interstate or international

152. *Id.* at 1730.

153. *Id.* at 1717-18.

154. 42 U.S.C. § 5901(a) (1976 & Supp. V 1981).

155. 103 S.Ct. at 1731.

156. 42 U.S.C. §§ 5801-5891 (1976 & Supp. V 1981).

157. 42 U.S.C. §§ 5901-5920 (1976 & Supp. V 1981).

158. 42 U.S.C. § 5801(a) (1976 & Supp. V 1981).

159. 42 U.S.C. § 5801(e) (1976 & Supp. V 1981).

160. 42 U.S.C. § 5901(c) (1976 & Supp. V 1981).

161. 42 U.S.C. § 5901(e) (1976 & Supp. V 1981).

162. 103 S.Ct. at 1731.

163. 362 U.S. at 444.

164. 435 U.S. at 168.

commerce. *Perez*¹⁶⁵ observed that without uniform application "in the States, Territories, and the District of Columbia," a discharge in bankruptcy under the Federal Bankruptcy Act would not accomplish its intended objective. Although uniformity of regulation was not given the same attention in *Pacific Gas and Electric*, the Court did notice that the challenged statute refrained from imposing "its own standards on nuclear waste disposal," but rather accepted federal authority to set such standards.¹⁶⁶ Furthermore, as the moratorium did not regulate existing nuclear plants, uniformity of regulation according to federal standards was not disturbed.

CONCLUSION

The *Pacific Gas and Electric* decision shows the Supreme Court's willingness to uphold a state-imposed moratorium on the construction of additional nuclear power plants. However, this willingness was tempered by the majority's insistence that a moratorium "grounded in safety concerns" would not be sustained.¹⁶⁷ The Court also stressed that the moratorium was an exercise of traditional state authority to make the threshold decision whether or not to approve construction of a new power plant of any kind.¹⁶⁸

Pacific Gas and Electric, *Atlantic Richfield*, *Perez*, and *Huron* together provide guidance in a broader sense. Local regulatory purpose, though generally not directly dispositive of the preemption issue, may nevertheless be considered indicative of a challenged statute's potential for conflict with federal objectives. If a particular regulatory purpose is itself the target of an express preemption, the Court will have to identify the purpose of a challenged statute, but may not be inclined to delve too deeply. In either case, the Court's primary concern is to allow the state to retain its traditional authority so long as the likelihood of a material conflict with federal objectives is minimal.¹⁶⁹

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165. 402 U.S. at 656.

166. 103 S.Ct. at 1730.

167. *Id.* at 1726-27. *But see supra* note 18.

168. *Id.* at 1723, 1726, 1731.

169. About nine months after its decision in *Pacific Gas and Electric*, the Court decided *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043 (1984). *Silkwood* posed the question "whether a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility is preempted either because it falls within th[e] forbidden field [of nuclear safety regulation] or because it conflicts with some other aspect of the Atomic Energy Act." *Id.* at 4044. The Court conceded that the punitive damage award might in effect regulate nuclear plant operation (*id.* at 4048), but a five-to-four majority found no preemption. *Id.* at 4049. Justice White, again writing for the majority, reasoned that:

- a) Congress has not "so completely occupied the field of safety that state remedies are foreclosed" (*id.* at 4048) because
 - 1) although Congress expressly reserved for the federal government "exclusive regulatory authority over the safety aspects of nuclear power" (*id.* at 4046),
 - 2) the state has "traditional authority to provide tort remedies to its citizens," (*id.* at 4046), including punitive damages (*id.* at 4048), and
 - 3) "the only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available" (*id.* at 4047), and

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- b) the award of punitive damages does not "frustrate the objectives of the federal law" (*id.* at 4048) because
 - 1) although "a primary purpose of the Atomic Energy Act . . . continues to be . . . the promotion of nuclear power" (*id.*) (emphasis added).
 - 2) nuclear development is "not to be accomplished 'at all costs,' " but rather "only to the extent it is consistent 'with the health and safety of the public' " (*id.*), and
 - 3) an award of punitive damages "for those who are injured by exposure to hazardous nuclear materials" would not discourage the type of activity that Congress is interested in promoting. *Id.*

In keeping with the analysis used in *Pacific Gas and Electric*, the majority opinion in *Silkwood* emphasized that:

- a) providing tort remedies, including punitive damages, is an exercise of traditional state authority (*id.* at 4046, 4048),
- b) this traditional state authority is preserved "unless . . . expressly supplanted" by Congress (*id.* at 4048), and
- c) the award of punitive damages does not "frustrate the objective of the federal law." *Id.*

Justice Blackmun, who had concurred in the *Pacific Gas and Electric* decision, dissented from the decision in *Silkwood*. In *Pacific Gas and Electric*, Justice Blackmun contended that:

- a) "Congress has occupied not the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards" (103 S.Ct. at 1732 (Blackmun, J., concurring)),
- b) "legislative motive" should be discounted in the Court's preemption analysis (*id.* at 1735), and
- c) California's moratorium should be valid even if "motivated by concerns about the safety of such [nuclear] plants." *Id.* at 1732.

Then in *Silkwood*, he:

- a) made repeated reference to the complete "pre-emption of nuclear safety concerns" (52 U.S.L.W. at 4049-50, 4052-53 (Blackmun, J., dissenting)),
- b) claimed that "the purpose of a statute is critical in a pre-emption analysis under the Atomic Energy Act" (*id.* at 4051), and
- c) concluded that as "the purpose of punitive damages is to regulate safety," the punitive damage award should not be permitted. *Id.* at 4050.

The Court in *Pacific Gas and Electric* recognized exclusive federal authority to regulate nuclear plant construction and operation. 103 S.Ct. at 1726. Even though California's moratorium did not regulate nuclear plant construction or operation (*id.*), the Court warned that the moratorium would still be set aside if "grounded in safety concerns" (*id.* at 1726-27) because "the federal government has occupied the entire field of nuclear safety concerns." *Id.* at 1726. Justice Blackmun disagreed, insisting instead that "Congress has occupied not the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards." *Id.* at 1732 (Blackmun, J., concurring). He contended that if the moratorium did not regulate nuclear plant construction or operation, then California's legislative motive should not be critical in the Court's preemption analysis. *Id.* at 1735.

In his *Silkwood* dissent, Justice Blackmun perceived the state-authorized award of punitive damages to be a regulation of nuclear plant operation. 52 U.S.L.W. at 4049 (Blackmun, J., dissenting). As such, the punitive damage award would fall squarely within the federally occupied field of authority to regulate nuclear plant construction and operation. This alone would distinguish *Silkwood* from *Pacific Gas and Electric*.

But Justice Blackmun's dissent goes on to scold the majority for straying from positions they had taken in *Pacific Gas and Electric*. *Id.* at 4049, 4053. At first glance, it appears to be Justice Blackmun who has reversed himself. In *Pacific Gas and Electric* Justice Blackmun had objected to the Court's broad description of the federally occupied field as "nuclear safety concerns" (103 S.Ct. at 1732 n.1 (Blackmun, J., concurring)), but in his *Silkwood* dissent he repeatedly used that very language. 52 U.S.L.W. at 4049-50, 4052-53 (Blackmun, J., dissenting). And although he had argued that the "elusive test of legislative motive" was inappropriate for the preemption analysis in *Pacific Gas and Electric* (103 S.Ct. at 1735 (Blackmun, J., concurring)), in *Silkwood* Justice Blackmun insisted that "*Pacific Gas and Electric* made clear that the purpose of a statute is critical in a pre-emption analysis under the Atomic Energy Act." 52 U.S.L.W. at 4051 (Blackmun, J., dissenting).

The positions asserted by Justice Blackmun in his *Silkwood* dissent are positions that in *Pacific Gas and Electric* were asserted by the Court but rejected by Justice Blackmun

in his concurring opinion. In his *Silkwood* dissent, Justice Blackmun emphasized the inconsistency between these positions and the majority decision in *Silkwood*. *Id.* at 4049, 4053. In so doing, his criticism seems directed as much at the "Court's dict[a]" in *Pacific Gas and Electric* (103 S.Ct. at 1732 (Blackmun, J., concurring)) as at the majority's opinion in *Silkwood*.