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FEDERAL PREEMPTION OF THE STATE REGULATION OF NUCLEAR POWER: STATE LAW STRIKES BACK

Silkwood v. Kerr-McGee Corporation
104 S. Ct. 615 (1984)

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Until its 1981-82 term, the United States Supreme Court had not addressed the issue of the federal preemption of state laws which attempted to regulate the nuclear power industry. The law in this area consisted primarily of the Eighth Circuit Court of Appeals decision in Northern States Power Co. v. Minnesota which the Supreme Court had summarily affirmed without opinion. In Northern States, the Eighth Circuit found a broad preemptive intent in the Atomic Energy Act, as amended, and held that the Atomic Energy Act preempted any state action that directly regulated radiation hazards. As a result of Northern States, the states were left little room to develop and apply their own regulatory schemes.

During its 1983-84 term, however, the Supreme Court decided two cases that focused on the preemptive scope of the Atomic Energy Act. Taken together, these opinions represent a substantial departure from the preemption doctrine set forth in Northern States. Since prior case law in the area had uniformly followed the Eighth Circuit's holding and analysis in Northern States, the Court's decisions in Pacific Gas


2. Id. at 1153-54.

3. See infra notes 87-94 and accompanying text for a discussion of the Northern States holding.


The Northern States holding has not been without its critics. Primarily, the criticism has focused on the broadness of the holding. The following commentaries have found that holding unreconcilable with the Supreme Court's most recent pronouncements governing federal preemption of state laws. Meek, Nuclear Power and State Radiation Protection Measures: The Impotence of Preemption, 10 Envtl. L. 1 (1979); Tribe, California Declines the Nuclear Gamble: Is Such a

In both Pacific Gas and Silkwood, the Court purported to apply the same preemption analysis as did the Northern States court. However, in applying that analysis to the facts before it, the Court significantly broadened the permissible scope of state control over the nuclear industry. In Pacific Gas, for example, the Court upheld a state-imposed moratorium on the certification of new nuclear power plants even though the state’s action effectively regulated in the previously forbidden area of radiation hazards. The Court accepted the state’s contention that the moratorium’s primary purpose was to regulate the economics of nuclear power generation. As a result, the Court held that the Atomic Energy Act did not preempt the moratorium since it was not imposed to regulate the safety of California nuclear power plants.

Likewise, in Silkwood v. Kerr-McGee Corporation, the Court reversed the Tenth Circuit’s holding that the Atomic Energy Act preempted a ten million dollar punitive damage award in favor of the estate of Karen Silkwood. The Court instead found within the federal legislative scheme an implied congressional intent to preserve such awards. Significantly, the Court upheld Silkwood’s punitive damage award even though their imposition will surely increase the standard of care exercised within the nuclear industry when dealing with radiation hazards.

This comment examines the Court’s analysis in Silkwood as well as that decision’s impact on the preemptive scope of the Atomic Energy Act. After examining both the preemption doctrine in general and its application in the nuclear energy field in particular, this comment will analyze the Silkwood opinion on two levels. First, the reasoning and holding of the majority will be criticized on the ground that the Court

7. See infra notes 153-204 and accompanying text.
8. Compare 461 U.S. at 203-04 and 104 S.Ct. at 621-22 with 447 F.2d at 1146-47.
9. 461 U.S. at 216.
11. Id.
12. Id. at 626.
13. See infra notes 165-75 and accompanying text.
misstated the question that it had been called upon to decide.\textsuperscript{14} Second, this comment will examine the new parameters governing preemption in the nuclear field given the \textit{Silkwood} holding and conclude that the Supreme Court has given the states wide latitude to regulate the generation of nuclear power within their borders.\textsuperscript{15}

\textbf{THE HISTORY OF THE PREEMPTION DOCTRINE AND ITS PAST APPLICATION IN THE NUCLEAR FIELD}

The basis upon which the preemption doctrine invalidates contrary state law is the supremacy clause of the United States Constitution.\textsuperscript{16} Balanced against this clause, however, are the express limitations contained within the Constitution on the scope of federal power as well as the tenth amendment's broad reservation of governmental powers to the states.\textsuperscript{17} In essence, preemption decisions are attempts to reconcile these two directives in factual circumstances that often cause the clauses to appear contradictory rather than complementary.

When Congress specifically speaks within a federal law of its intent to preempt state legislation and expressly defines the extent of that preemption, few problems arise.\textsuperscript{18} In such cases, the courts need only look to the explicit statutory command. However, when Congress fails to address expressly either the presence or scope of preemption within the statute, the courts must somehow accommodate the tension between the competing constitutional clauses. They attempt to do so by inquiring into the purposes of the federal statutory scheme and by delving into the congressional intent behind its enactment.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{14} See infra notes 153-83 and accompanying text.
  \item \textsuperscript{15} See infra notes 184-204 and accompanying text.
  \item \textsuperscript{16} U.S. \textsc{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; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
  \item \textsuperscript{17} U.S. \textsc{Const.} amend. X provides:
    The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
  \item \textsuperscript{18} This is generally known as express preemption. An example of express statutory preemption is at 42 U.S.C. § 1973 (1982) (literacy tests to exercise voting rights preempted). Because the doctrine is clear, the Supreme Court has not often ruled on express preemption cases. However, the Court has occasionally addressed the subject. Jones v. Rath Packing Co., 430 U.S. 519, 528-32 (1977) (state labeling regulations held preempted), is one example. In order to find express preemption, the Court has required that the preemptive intent be clearly expressed within the four corners of the statute without recourse to the legislative history. See U.A.W. v. Russell, 356 U.S. 634, 646 (1958).
  \item \textsuperscript{19} This is known as implied preemption.
\end{itemize}
Implied Preemption

In general, the Supreme Court has recognized two grounds upon which preemption of state law will be implied absent an expressed congressional intent to do so. The Court has found preemption where the two bodies of law actually conflict so that compliance with both is impossible. In addition, the Court has implied a preemptive intent when it has found evidence of a congressional design to occupy the entire field of law. Unfortunately, the Court’s preemption decisions have been doctrinally inconsistent in defining the degree and manner in which congressional intent to occupy the field must be expressed to support a finding of implied preemption. Instead, the Court has vacillated over the years, at times liberally implying a preemptive intent while at other times refusing to preempt state enactments that actually conflict with corresponding national laws.

The Court’s earliest treatment of federal preemption recognized a broad preemptive intent in virtually all federal legislation. Up through the 1920s, the Court was predisposed to find that federal regulation in a given area totally preempted concurrent state action in that area. During the 1930s, however, this view radically changed to a more state-oriented view of preemption. The Court expressed this view by requiring that preemptive intent be “clearly indicated” and “definitely expressed” within the statutory language. Absent such a

22. In areas where Congress has occupied the field, a state law is preempted from entering that occupied area. The state law can neither foster actions that interfere with the federal scheme nor impede behavior federal law wishes to encourage. Compare Jones v. Rath Packing Co., 430 U.S. 519 (1977) with Nash v. Florida Industrial Commission, 389 U.S. 235 (1967).
23. See infra notes 26-47 and accompanying text.
26. For a fuller discussion of the historical evolution of the Court’s preemption decisions see Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623 (1975) [hereinafter cited as COLUMBIA NOTE].
28. COLUMBIA NOTE, supra note 26, at 627; NORTHWESTERN NOTE, supra note 4, at 140; Tribe, supra note 4, at 686.
showing, the Court upheld the state law.31

The next shift in the developing preemption doctrine occurred during the 1940s. Within a six year period, the Court decided *Hines v. Davidowitz*32 and *Rice v. Sante Fe Elevator Corp.*33 Although both decisions preserved the congressional intent requirement for a finding of preemption, taken together they greatly expanded the permissible scope of the Court's inquiry into legislative intent.34 *Hines* held that preemption was proper where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."35 *Rice* went still further, holding that preemptive intent could be inferred from such factors as the pervasive nature of the federal scheme or a dominant federal interest in the subject area.36

Thus, *Hines* and *Rice* established a preemption analysis that was much more flexible than that followed during the 1930s.37 The preemption standards articulated by the *Hines* and *Rice* Courts were so broadly phrased and inherently adaptable that congressional intent to preempt could be found in virtually any area of comprehensive federal legislation. Indeed, it is only in the last fifteen years that the Court has begun to narrow the broad tests outlined in those two cases.

The most recent Supreme Court decisions on preemption indicate a strong willingness to uphold state legislation in the face of pervasive federal regulation. In *New York State Department of Social Services v. Dublino*,38 the Court backed away from the inference that a comprehensive federal regulatory scheme necessarily implied a congressional intent to preempt could be found in virtually any area of comprehensive federal legislation. Indeed, it is only in the last fifteen years that the Court has begun to narrow the broad tests outlined in those two cases.

Similarly, the Court in *Goldstein v. California*40 narrowed the application of the dominant federal interest factor. In *Goldstein*, the

32. 312 U.S. 52 (1941).
33. 331 U.S. 218 (1947).
34. COLUMBIA NOTE, supra note 26, at 630-32; NORTHWESTERN NOTE, supra note 4, at 141-42.
35. 312 U.S. at 67.
36. 331 U.S. at 230.
37. *See supra* notes 28-30 and accompanying text.
38. 413 U.S. 405 (1973).
Court held that preemption was proper on the ground of a dominant federal interest only in areas "necessarily national in import." Moreover, the Court emphasized that preemption was proper only when state law will "necessarily" conflict with the dominant federal interest and not merely when conflicts "might" possibly arise. In other contexts, the Court has noted that it will not seek out conflicts between state and federal law in any area where none clearly exist.

The Court's decision in *De Canas v. Bica* is an example of the Court applying the more rigid state-oriented preemption standards which it had developed in *Dublino* and *Goldstein*. In *De Canas*, the Court set a very high threshold for proving congressional intent. The Court required that the "clear and manifest purpose of Congress" be present in the language and history of the federal act. Such a purpose is demonstrated only when "the nature of the subject matter permits no other conclusion or the Congress has unmistakably so ordained." The Court's language indicates that a greater showing of preemptive intent is necessary today as compared to *Hines*, where the mere obstruction of the full purposes and objectives of Congress was sufficient.

In the cases discussed above, as in all preemption cases, the Court concentrated its analysis on the congressional intent to preempt as expressed in the statute at issue or its legislative history. A finding of preemption is primarily a matter of statutory construction, since preemption is, above all, essentially a legislative decision. The courts which have confronted the subject have confined themselves to interpreting congressional intent. As a result, while broad trends concerning the Supreme Court's general disposition to preempt or preserve state law are discernable, the dispositive factor in individual cases is the particular statutory scheme at issue.

42. 412 U.S. at 554.
44. 424 U.S. 351 (1976).
47. *See supra* notes 32-37 and accompanying text.
48. *TRIBE, supra* note 4, at 688.
49. *See supra* notes 24-25 and accompanying text.
Federal Nuclear Energy Legislation

In the nuclear energy field, the Atomic Energy Act of 1954 and its amendments are the particular statutory enactments requiring construction. Thus, it is to that legislation that the general preemption rules outlined above apply. As indicated in the previous section, the pivotal concern in the Court's preemption analysis is an examination of congressional intent, either expressed or implied, to preempt concurrent state regulation. This section will briefly discuss the evolution of the Atomic Energy Act, paying particular attention to the expressions of congressional intent that accompanied the passage of the 1959 Cooperation with States Amendment as well as the Price-Anderson Act of 1957.

The Atomic Energy Act of 1954 (hereinafter "the Act") was passed to promote private sector involvement in the nuclear energy production field. Prior to its passage, its predecessor act, the Atomic Energy Act of 1946, governed the nonmilitary application of nuclear fission. Under the earlier legislation, the federal government retained complete control over the production and use of all fissionable materials. The 1954 Act represented a significant departure from the previous law by emphasizing the role of the private sector in the area. However, the Act was silent, containing no language either defining or limiting the extent to which the states could simultaneously regulate the private production of nuclear energy.

1959 Cooperation with States Amendment

In an attempt to clarify the regulatory power of federal and state

52. The scope of this article does not permit an exhaustive examination of what is, by any measure, a complex statutory and regulatory scheme. For fuller discussions of the Atomic Energy Act and its legislative history and reach contrary conclusions regarding its preemptive intent compare Northwestern Note, supra note 4 with Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).
58. Northwestern Note, supra note 4, at 144.
authorities over nuclear energy, Congress added section 274 to the Act in 1959.\textsuperscript{59} This amendment detailed the procedure by which the Atomic Energy Commission\textsuperscript{60} could transfer its regulatory authority over certain types of nuclear material to the states.\textsuperscript{61} The Commission was prohibited, however, from ceding its authority over especially hazardous activities and materials.\textsuperscript{62} In addition, subsection (k) of the 1959 amendment expressly preserved all state or local regulatory activities designed "for purposes other than protection against radiation hazards."\textsuperscript{63}

For purposes of preemption analysis, neither the 1959 amendment taken as a whole, nor subsection (k) in particular, are sufficiently unequivocal to support a finding of express preemption.\textsuperscript{64} Express preemption generally requires an affirmative statement of the nature and scope of the area preempted.\textsuperscript{65} Subsection (k), in contrast, sets forth topics explicitly open to state regulation rather than listing specific forbidden areas. Likewise, the 1959 amendment’s operative sections do not focus on the subjects preempted by federal law. Instead, the amendment details the regulatory duties which the Commission may or may not wholly surrender to the states.\textsuperscript{66} As a result, the preemptive intent of Congress must be implied, if it is to be found at all.

The expressions of congressional intent within the legislative history of the 1959 amendment demonstrate that Congress definitely wished to preempt state law to some degree.\textsuperscript{67} However, the extent of that preemption was left deliberately uncertain, at least in part because


\textsuperscript{61} The amendment specifically allowed the AEC to transfer to the states its regulatory authority over byproduct, source and special nuclear materials in amounts not sufficient to form a critical mass. 42 U.S.C. § 2021(b) (1982). For definitions of these three types of radioactive hazards, see 42 U.S.C. § 2014(e)(2)(aa) (1982).


\textsuperscript{64} Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147 (8th Cir. 1971), aff’d mem., 405 U.S. 1035 (1972). \textit{Contra} Murphy & Lapierre, supra note 53.

\textsuperscript{65} \textit{Note, A Framework for Preemption Analysis}, 88 Yale L.J. 363 (1978); Northwestern \textit{Note, supra note 4, at 147.}

\textsuperscript{66} 42 U.S.C. §§ 2021(b) & (c) (1982).

the drafters experienced difficulty in precisely articulating the scope of that preemption. 68 Indeed, Congress apparently believed that the amendment’s preemptive scope was a fluid, rather than a fixed, concept. One portion of the legislative history contains statements that exhorted the states to prepare themselves for even greater regulatory responsibilities as their scientific expertise developed. 69

On the other hand, the Senate report accompanying the amendment clearly states that, with regard to the specific types of nuclear material transferable to state regulatory authority, Congress intended only one regulatory system to prevail. 70 Concurrent regulation by both federal and state authorities was expressly rejected. 71 While this rejection of dual regulation is directly applicable only to the areas and material mentioned in subsections (b) and (c) of the amendment, 72 it does, however, serve to indicate the reservations of the 1959 Congress about the advisability of dual regulation in general. 73

The Price-Anderson Act of 1957

Two years before it passed the cooperation with states legislation, Congress had added the Price-Anderson amendment to the Atomic Energy Act. 74 The congressional purpose behind Price-Anderson was to facilitate private involvement in the nuclear field. It was designed to do so by removing the principal impediment to increased private participation—the specter of tort liability of a virtually unlimited magnitude. 75 Price-Anderson accomplishes this purpose by requiring Commission licensees to carry minimum amounts of liability insurance. 76 The Commission then supplements that minimum coverage by agreeing to indemnify each licensee against damage awards exceeding that minimum level. 77 The statute also sets an aggregate recovery ceil-

68. Id. See also Northwestern Note, supra note 4.
70. Id. at 2879. The amendment insured that the Commission would relinquish its authority only to states with approved programs. The Commission has to determine whether the state program is adequate “to protect the public health and safety” with respect to the materials affected by the regulatory transfer. 42 U.S.C. § 2021(d) (1982).
71. SENATE REPORT, supra note 69.
72. See 42 U.S.C. §§ 2021(b) & (c) (1982).
76. 42 U.S.C. § 2210(b) (1982).
77. 42 U.S.C. §§ 2210(c) & (e) (1982).
ing for each accident. In addition, a 1966 revision of the amendment added a section requiring all licensees to forfeit certain defenses to claims lodged in Price-Anderson litigation, effectively subjecting all licensees to strict liability.

The Price-Anderson compensation scheme is not, however, triggered by every personal injury suit brought against Commission licensees. The accident causing the harm must be sufficiently severe to be classified as an extraordinary nuclear occurrence (ENO). In the *Silkwood* case, the criteria established by the Nuclear Regulatory Commission (NRC) to define an ENO had not been met. Thus, the Price-Anderson issue in *Silkwood* was whether the amendment impliedly preempted punitive damages awarded in a suit not brought pursuant to the NRC's ENO provisions.

Price-Anderson's legislative history does not seem to contain the sort of broadly worded expressions of preemptive intent which would support a finding of preemption under the facts in *Silkwood*. Congress apparently drafted the amendment so as to minimize its interference with state tort law. Its legislative history repeatedly stresses the limited nature of the federal intrusion. The Senate report that accompanied the original bill states that:

> there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the *Federal interference is limited* to the prohibition of making payments through the State courts and to prorating the proceeds available.

Other than such disavowals, the legislative history is of little help. The Senate report, for example, made no specific mention of punitive damage awards.

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78. *Id.*


80. The statutory definition, 42 U.S.C. § 20140 (1982), requires the Commission to declare an ENO when there has been substantial off-site contamination and when there has been, or likely will be, substantial damages to persons or property off-site. The NRC criteria is given at 10 C.F.R. §§ 140.81-85 (1983).


82. See infra notes 135-38 and accompanying text.


84. *Id.*
Nuclear Preemption Cases

Prior to *Silkwood*, the Supreme Court had not analyzed the Atomic Energy Act and its principle amendments for an implied congressional intent to preempt state tort law. The Court did, however, have before it two major decisions on the Act's preemptive scope. Both of the cases—*Northern States Power Co. v. Minnesota* and *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*—concerned state legislative enactments and degree to which those statutory schemes were preempted by the 1959 Cooperation with States amendment.

In *Northern States*, the Eighth Circuit Court of Appeals held that state regulations setting strict limits on the release of radioactive effluents from nuclear power plants were preempted by the Atomic Energy Act. The court implied preemption on the grounds that the federal government had exclusive authority to regulate radiation hazards under the 1959 amendment.

In addition to the language and legislative history of the 1959 amendment, the *Northern States* court cited the pervasive nature of the federal statutory scheme and a dominant federal interest in the subject matter as support for its finding of preemption. The court concluded that the state effluent standards were impliedly preempted and therefore invalid. The Supreme Court subsequently summarily affirmed the court's decision.

As the only authoritative law in the field, *Northern States* became


86. 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).


88. 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). However, the 1977 Clean Air Act amendments, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C. (1982)), have statutorily overruled *Northern States*. These amendments have brought all radioactive effluents within the definition of "air pollutant" under the Clean Air Act. 42 U.S.C. § 7602(g) (1982). Thus, 42 U.S.C. § 7416 (1982) now allows states to regulate such effluent emissions more strictly than does the N.R.C.

89. See supra notes 59-73 and accompanying text.

90. 447 F.2d at 1152-53.

91. Id at 1153-54.

the landmark decision on the scope of the federal preemption of state regulations governing radiation hazards. The decisions which followed uniformly cited the holding and analysis of *Northern States*, using it as the starting point for their analysis of the facts before them. Many commentators, however, questioned the reasoning of the court and the wisdom of the wholesale acceptance of its analysis in the subsequent cases. Still, it was not until the Supreme Court’s decision in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission* that the influence of *Northern States* was significantly curtailed.

In *Pacific Gas and Electric*, several utilities brought a declaratory action seeking to invalidate, *inter alia*, a section of California’s Warren-Alquist Act which imposed a moratorium on the certification of new nuclear power plants in the state. The California law’s moratorium was to last until the Nuclear Regulatory Commission finally approved and adopted a permanent disposal technique for the high level nuclear waste generated by the plants. The statute’s purpose, according to its legislative history, was to regulate the economics of nuclear power, not its safety aspects. Without assurance of technology for disposing of the waste, the state maintained that the plants would have to shut down when their interim on-site storage capacity was filled. As a result, plant construction constituted an economic risk since the cost and timing of the permanent disposal technique could not be reasonably estimated in advance. The utilities brought the challenge on the ground that the Atomic Energy Act preempted the state imposed moratorium, even if the state law was enacted for economic motives.

The Supreme Court, in a unanimous result, held the state law valid. In so doing, the Court purported to explore and define the preemptive scope of the Atomic Energy Act. The Court found that “the federal government maintains complete control of the safety and ‘nuclear’ aspects of energy generation . . .” while the states retained authority in non-nuclear areas. In reaching its decision, the Court concluded that, though a moratorium imposed because of safety concerns would have been struck down, the economic purpose of the Cali-

93. *See supra* note 4 and the cases and materials cited therein.
94. *Id.* *But see* MURPHY & LAPIERRE, *supra* note 53.
95. 461 U.S. at 212 n.24.
96. CAL. PUB. RES. CODE § 25524.2 (West 1977).
97. *Id.*
98. 461 U.S. at 213.
99. *Id.* at 213-14
100. *Id.* at 212.
fornia ban saved it from preemption.101 The Court confined its examination of the statute to whether any non-safety rationale existed for the California law. It expressly refused to search for an underlying safety motive for the moratorium102 citing United States v. O'Brien.103 Finally, the Court emphasized the consistency of its holding with its summary affirmation of Northern States.104 The Court distinguished Northern States by noting that there a state had attempted to directly legislate in the preempted field of nuclear safety. Similar state efforts, according to the Court, would be preempted under its holding in Pacific Gas.

However, the Court's off-handed treatment of Northern States in a footnote masks the extent to which it repudiated the Eighth Circuit's reasoning. The basis of the Northern States holding was that the Atomic Energy Act had two major purposes—one of which was to foster the development of nuclear power.105 Northern States preempted concurrent state regulation on the ground that states might overemphasize safety standards at the expense of promoting the adoption of nuclear power.106 This analysis seemed to suggest that any state legislation which served "to unnecessarily stultify" the development of nuclear energy was preempted regardless of the purpose behind its enactment.

Clearly, the California plant certification moratorium considered in Pacific Gas & Electric stultified the development of nuclear power within the state. Arguably, the degree of burden imposed by the statute is excessive to achieve its avowed economic purpose. The economic impact of the waste disposal problem will be felt, if at all, only when the plant's on-site temporary storage pools are filled.107 Even then, if the technology for the long-term disposal of nuclear waste remained undeveloped, the on-site disposal pools could always be expanded.108

The Pacific Gas decision, however, rejected such an approach.

101. Id. at 213.
102. Id. at 216.
104. 461 U.S. at 212 n.24.
105. 447 F.2d at 1153-54.
106. Id.
107. Interim storage space is exhausted when the sum of the spent fuel in the tank and the active fuel in the core equal the pool's capacity. The plant must maintain sufficient storage space for the active fuel in case fuel rods in the core must be unloaded because of inspections or emergencies. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. at 195.
108. The Pacific Gas & Electric opinion makes no mention of this possible alternative to a state imposed certification moratorium or any other less drastic state response to the waste disposal problem.
While holding that one of the primary purposes of the Atomic Energy Act is, and always has been, to promote the development of nuclear power, the Court concluded that this promotion was not to proceed at all costs.\(^{109}\) Specifically, the Court found that a state could completely halt the development of nuclear power if it did so for economic reasons (or presumably for any non-safety based purpose). Thus, *Pacific Gas* constituted a substantial narrowing of the *Northern States* holding. As such, the preemption precedent in the nuclear field was brought more in line with the Court’s recent reluctance to hold state law preempted in any area.\(^{110}\)

**FACTS AND HISTORY OF THE SILKWOOD CASE**

Less than six months after its decision in *Pacific Gas & Electric*, the Supreme Court heard oral arguments in *Silkwood v. Kerr-McGee Corp.*\(^{111}\) *Silkwood* arose out of the plutonium contamination of Karen Silkwood’s person and property on three separate occasions in November of 1974.\(^{112}\) At that time, Silkwood worked as a laboratory analyst at Kerr-McGee’s fuel rod fabrication plant in Cimarron, Oklahoma.\(^{113}\) Kerr-McGee stipulated at trial that the plutonium which contaminated Silkwood came from its plant.\(^{114}\)

Within eight days of her initial contamination, Karen Silkwood died in an automobile accident unrelated to the subsequent litigation of this case.\(^{115}\) After her death, the administrator of Silkwood’s estate—
her father, Bill Silkwood—filed suit against Kerr-McGee for damages flowing from the contamination incidents. The suit was based on common law tort principles of the State of Oklahoma and brought there in federal district court on diversity of citizenship grounds.  

Following a lengthy trial, the jury found in favor of the plaintiff. It returned a verdict for $505,000 in actual damages—$5,000 for the property in Silkwood’s apartment that had to be destroyed because of plutonium contamination and $500,000 for the personal injury suffered by Silkwood, primarily fear and suffering, as a result of her contamination. In addition, the jury awarded $10,000,000 in punitive damages against Kerr-McGee, presumably on the basis of an instruction that authorized the jury to grant such damages if it found that the defendant had acted in reckless disregard of the plaintiff’s rights. The district court entered judgment on the verdict over defendant’s objections and defendant appealed.  

The Tenth Circuit Court of Appeals affirmed the district court’s judgment for property damages, but reversed the award for personal injuries and punitive damages. The court held that Silkwood’s personal injuries were suffered during the course of her employment and were therefore exclusively compensable under the state’s workman compensation law. In regard to punitive damages, the court concluded that such an award was preempted because it constituted state regulation of radiation hazards. The appeals court adopted the same sort of broad preemption analysis found in Northern States and con-

116. 104 S. Ct. at 618.
117. The evidence presented at trial raised many questions which were never satisfactorily resolved. These questions revolve around the source of Silkwood’s contamination. Kerr-McGee maintained that Silkwood accidently contaminated herself and her apartment while trying to spike her urine samples with plutonium as part of a scheme to embarrass and discredit the company. Plaintiff, on the other hand, advanced evidence suggesting that Kerr-McGee employees might have intentionally contaminated Silkwood in an effort to harass and intimidate her. 677 F.2d at 913-15. Though none of these allegations were ever proven, they fueled media speculation concerning the circumstances of Silkwood’s contamination and death. See, e.g., Kohn, Karen Silkwood’s Dark Victory, ROLLING STONE, July 26, 1979 at 55 (suggesting that the company may have intentionally attempted to poison her); Kohn, Malignant Giant: The Nuclear Industry’s Terrible Power and How It Silenced Karen Silkwood, in THE SILENT BOMB (P. Faulkner ed. 1977) (alleging that Silkwood’s death was not accidental and speculating that she was forced off the road when another vehicle rammed her from behind). The jury resolved only one of these questions directly. It held that Silkwood had not intentionally contaminated herself. 667 F.2d at 915.
118. 104 S. Ct. at 619.
119. Id.
121. 104 S. Ct. at 619.
122. 667 F.2d at 915-23.
123. Id.
124. 104 S. Ct. at 620.
cluded that the Atomic Energy Act preempted any state action that substantially competed with Nuclear Regulatory Commission regulations. The estate subsequently took the case to the Supreme Court on the punitive damage issue alone.

**Reasoning of the Silkwood Court**

**The Majority Opinion**

After initially disposing of a minor jurisdictional issue, the Court turned directly to the question of whether the Atomic Energy Act preempted the punitive damage award won by plaintiff at trial. The Court began by setting forth the two broad preemption tests it had developed in *Rice v. Sante Fe Elevator Corp.* and *Hines v. Davidowitz.* According to these tests, the Court held preemption proper when Congress had either manifested an intent to occupy a particular field or where the state law frustrated the realization of the full purposes and objectives of the federal law. After applying both of these tests to the facts before it, the *Silkwood* Court upheld the $10,000,000 punitive damage award.

**Occupation of the Field**

The Court began its analysis by identifying the scope of the field that Congress had occupied, by implication, through passage of the Atomic Energy Act and its amendments. To do so, the majority cited *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm.* There, the Court held that the federal government had "occupied the entire field of nuclear safety concerns." The

125. *Id.*, citing, 667 F.2d at 923.
126. 104 S. Ct. at 620.
127. The Court had noted probable jurisdiction on Silkwood's appeal from the Tenth Circuit decision and postponed consideration of the jurisdictional issue until the argument on the merits. 104 S. Ct. at 620. In regard to jurisdiction, the Court concluded that the *Silkwood* case did not fall within the scope of its appellate jurisdiction. 28 U.S.C. § 1254(2) (1976). A decision is reviewable by appeal from the federal circuit courts if a state statute is held unconstitutional. *Id.* The Court held that the Tenth Circuit had only invalidated an exercise of authority under the Oklahoma punitive damage statute rather than invalidating the entire statute. 104 S. Ct. at 620-21. As a result, *Silkwood* was outside the jurisdictional grant of 28 U.S.C. § 1254(2) (1976). However, the Court, electing to treat appellant's jurisdictional statement as a writ of certiorari, reached the merits of the case. 104 S. Ct. at 631.
129. 312 U.S. 52 (1941).
130. 104 S.Ct. at 621. For further discussion of the Court's treatment of the preemption doctrine, see *supra* notes 16-50 and accompanying text.
131. 461 U.S. at 190 (1983). The *Pacific Gas & Electric* decision is discussed more fully at, *supra* notes 96-110 and accompanying text.
132. 461 U.S. at 212.
Court then briefly reviewed the legislative history of the 1959 Cooperation with States amendment and concluded that Congress had defined this particular field as it had because it believed that the complexity of the subject matter exceeded the technical sophistication of the states.

The *Silkwood* majority then, however, observed that the complexity factor, if carried to its logical conclusion, would foreclose all state tort law claims (based, as they necessarily are, on a state-originated standard of care), and not just punitive damage awards. The Court refused to extend the preemptive scope of the Atomic Energy Act so far. Instead, the Court found that the express language and legislative history of the Price-Anderson Act clearly exhibited a congressional intent to preserve in full the great body of state tort law—excepting the specific deviations carefully outlined in Price-Anderson itself. Finding no reference to the preemption of punitive damages in either Price-Anderson or its legislative history, the Court held that Congress's general reservation and use of state tort law under the amendment included the preservation of punitive damage awards. In so doing the Court specifically refused to examine the different purposes served by personal and property damages (compensation for injuries) and punitive damages (regulation and modification of conduct) and to decide the case on the basis of that distinction.

**Frustration of Congressional Purposes**

Having concluded that the punitive damage award was not part of the field occupied by Congress through the Atomic Energy Act, the *Silkwood* Court then proceeded to apply the second preemption test—actual conflict or frustration of the full purposes of Congress. The Court immediately dismissed the notion that the punitive damage award was preemptable as actually conflicting with the federal regulatory system. Nor did the Court find that large punitive damage awards conflicted with the primary purpose of the Atomic Energy

133. See *supra* notes 59-73 and accompanying text.
135. 104 S.Ct. at 622-23.
137. 104 S. Ct. at 626.
138. *Id.*
139. *Id.* The Court observed that paying civil damages in addition to NRC fines was not a physical impossibility and, therefore, not an actual conflict.
Act—the promotion of nuclear energy production. The Court reconciled the apparent inconsistency between the two by observing that Congress, in expressly preserving state tort law actions, had chosen to limit the promotional impact of the Act in order to insure that adequate remedies existed for those injured as a result of the presence of nuclear power. Likewise, the Court concluded that the express reservation of state tort claims by Congress prevented preemption in *Silkwood* even though Congress had expressly rejected dual state and federal regulation in the legislative history of the Act.

*The Blackmun Dissent*

Justice Blackmun, joined by Justice Marshall, argued in dissent that the Court had focused its analysis on the wrong issue, by deciding whether a party injured by a nuclear accident can be compensated under state law for the harm suffered. Blackmun pointed out that the question before the Court concerned only the propriety of punitive damages rather than compensatory awards. In failing to examine the purpose served by punitive damages, the Court lost sight, according to Blackmun, of the teaching of *Pacific Gas and Electric*. *Pacific Gas* held that the purpose and not the effect of the state action was dispositive of the preemption question. *Silkwood*, though, ignored the purpose behind the imposition of punitive damages and instead concentrated on the similar effects of punitive and compensatory awards. In *Silkwood*, the majority’s reasoning seemed to be that since both compensatory and punitive damages can have a regulatory *effect*, the Act could not preempt one without also preempting the other.

The distinction Blackmun recognized is that the purpose of compensatory damages is, as the name implies, to compensate. Punitive damages are imposed, in contrast, to punish egregious conduct and, through punishment, to compel a change in that conduct. Generally, the amount of punitive damages assessed is unrelated to the degree of harm caused by the acts in question. Thus, while both a large compensatory award and a large punitive award may have the same regulatory effect in a given case, the purpose behind their respective imposition is quite different. Given his construction of the *Pacific Gas* holding, this difference was the crucial distinction for Blackmun.

140. 104 S. Ct. at 626.
141. *Id*.
142. *Id* at 631, 634.
144. 104 S. Ct. at 630.
Blackmun’s position was that Pacific Gas’s holding preempted any state action with the purpose of regulating the safety aspects of nuclear power. Under that guideline, punitive damages are preempted since they are imposed only to regulate conduct.\textsuperscript{145} Blackmun concluded by dismissing the primary authority relied upon by the majority in reaching its conclusion, the legislative history of the Price-Anderson Act.\textsuperscript{146} Blackmun read the statements of congressional intent contained therein as referring only to the interaction between the specific compensatory scheme contained in Price-Anderson and state law. He did not read it, as did the majority, as a description of the relationship between all federal nuclear regulation and state law.\textsuperscript{147} Simply put, Blackmun did not interpret the broad language pledging to leave undisturbed all state tort law not expressly altered by the Price-Anderson amendment as immunizing punitive awards from the Pacific Gas preemption analysis and would, therefore, have applied that analysis to preempt the Silkwood award.

\textit{The Powell Dissent}

Justice Blackmun, along the Chief Justice Burger, also joined in a dissent authored by Justice Powell. Powell’s argument began by recognizing the regulatory purpose behind punitive damages in general and the peculiar context in which the majority permitted their imposition in \textit{Silkwood}. In essence, he argued that \textit{Pacific Gas and Electric} had held that the states could impose safety regulations on the nuclear industry only to the extent expressly allowed by Congress.\textsuperscript{148} Powell’s criticism was that the majority had turned that requirement on its head by allowing a state to impose safety standards via punitive damages simply because the Court could find no expressions of congressional intent specifically preempting punitive damage awards.\textsuperscript{149} Thus, Powell contended that the majority had departed from the Pacific Gas precedent.

Powell then argued that the pervasive nature of the federal scheme fundamentally conflicted with state authority to award punitive damages on the facts in \textit{Silkwood}.\textsuperscript{150} Powell claimed that federal nuclear energy regulation was the result of a delicate balance between pervasive safety standards on one hand and a congressional mandate to pro-

\begin{itemize}
\item \textsuperscript{145} \textit{Id}. at 631.
\item \textsuperscript{146} See \textit{supra} notes 74-84 and accompanying text.
\item \textsuperscript{147} 104 S. Ct. at 633.
\item \textsuperscript{148} 461 U.S. at 211-12.
\item \textsuperscript{149} 104 S. Ct. at 637.
\item \textsuperscript{150} See \textit{supra} notes 32-37 and accompanying text.
\end{itemize}
mote nuclear energy on the other. This scheme, according to Powell, afforded no place for the ad hoc regulation offered by juries armed with the authority to impose punitive damages. This is particularly true where, as here, the jury was charged to ignore the federal regulations if it found them inadequate to insure public safety. Powell concluded by observing that the majority's decision left the nuclear industry operating in a standardless environment since the majority's decision allowed a jury wholly lacking the necessary expertise to impose and enforce its own standard of care on the nuclear industry.

**Analysis**

The *Silkwood* case gave the Court an opportunity to consider for the second time in nine months the preemptive scope of the Atomic Energy Act. As such, the case presented the Court with a chance to clarify, expand and reaffirm its reasoning in *Pacific Gas*. Unfortunately, however, the Court did not seize that opportunity. Though *Silkwood* cited *Pacific Gas*, the Supreme Court did not articulate and apply the analytical pattern it had outlined less than a year earlier. Nonetheless, *Silkwood* did reach the same result as did its predecessor case—the state action was allowed to stand. Coupled with *Pacific Gas* then, *Silkwood* sent a clear signal that the Atomic Energy Act's preemptive effect is to be narrowly drawn and rarely applied. As a result, a state can now impose significant restrictions on the nuclear power industry without having its actions preempted.

*The Analytical Irreconciliability of Silkwood and Pacific Gas*

Justice White's majority opinion in *Silkwood* cited to the analysis in *Pacific Gas* as support for its conclusion that punitive damages were not preempted by the Atomic Energy Act. However, even though White purported to follow *Pacific Gas*, both of the dissents in *Silkwood* justly criticized the majority for its failure to clearly and logically apply the holding in *Pacific Gas* to the facts in *Silkwood*. Despite the fact that Justice White authored the majority opinion in both cases,

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152. 104 S. Ct. at 639. The jury evidently did ignore NRC standards since the Commission found no significant violations occurred either before or after Silkwood's contamination. The NRC imposed no fines on Kerr-McGee. 104 S. Ct. at 619.
154. *Id.* at 627-32 (Blackmun, J., dissenting); *Id.* at 634-41 (Powell, J., dissenting).
Silkwood ignored the foundation of the Pacific Gas preemption analysis.

Pacific Gas examined the legislative history of the Act as well as its 1959 amendment governing cooperation with the states\textsuperscript{155} and concluded that Congress had distinguished between the spheres of activity open to the states and those exclusively federal. In particular, the Court cited subsection (k) of the 1959 amendment as illustrating that distinction.\textsuperscript{156} Subsection (k) provides that: "[n]othing in this section shall be construed to effect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards."\textsuperscript{157}

Based on such language, the Court ultimately decided that, except where the federal government had expressly ceded certain powers to the states,\textsuperscript{158} the federal government had "occupied the entire field of nuclear safety concerns."\textsuperscript{159} Applying that preemption standard, the Court upheld the California law. The Court did so by accepting without question or analysis California's assertion that the certification moratorium was enacted for a non-safety purpose and, as a result, lay outside the preempted field.

The Court indicated, however, that the state statute's purpose would not be dispositive of the preemption issue in every case. In particular, the Court held that state laws regulating construction and operation standards of a nuclear power plant were preempted, even if enacted for otherwise valid, non-safety purposes.\textsuperscript{160} The Court described that domain as exclusively federal in character and foreclosed any state infringement in the area.\textsuperscript{161} However, on the facts of Pacific Gas, the Court concluded that the California moratorium did not invade that forbidden domain.\textsuperscript{162}

Thus, Pacific Gas provided a rather straight-forward analytical scheme. Initially, the question is whether the state action seeks to regulate in the exclusively federal area of construction or operation standards; if it does, it is preempted. If it does not, the next step is to

\textsuperscript{155} See supra notes 51-84 and accompanying text.
\textsuperscript{156} 461 U.S. at 210.
\textsuperscript{158} See, e.g., 42 U.S.C. § 2021(b) (1982) (authorizing the states to assume regulatory power over limited types of nuclear material pursuant to an agreement with the Commission); 42 U.S.C. §§ 7602(g) & 7416 (1982) (Clean Air Act as amended in 1977 authorizing state regulation of radioactive air pollution from nuclear plants).
\textsuperscript{159} 461 U.S. at 212.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
determine the purpose behind the application of state authority. The state action stands if, as in *Pacific Gas*, there exists any non-safety rationale for its existence.\textsuperscript{163}

The tenor of the *Pacific Gas* opinion suggested, however, that its two-part test was not implicated if the state action was not regulatory by nature or effect. In *Silkwood*, the state action at issue was the imposition of punitive damages pursuant to Oklahoma state law\textsuperscript{164} and not, as in *Pacific Gas*, a legislatively enacted scheme with direct regulatory effects on the nuclear industry. Thus, under a *Pacific Gas* type analysis, the *Silkwood* case presented a preliminary issue of whether the imposition of punitive damages was a form of state regulation at all.

**Punitive Damages as a Form of State Regulation**

Despite the fact that the dispositive element of the preemption issue in *Pacific Gas* was the purpose of the state regulation, logic suggests that the classification of a particular state action as regulatory or not ought to turn on whether its effect is regulatory. In general, the effect of a punitive award is indeed regulatory since it is levied, as the name implies, to punish defendants and to deter others from like conduct.\textsuperscript{165} In fact, courts will disallow punitive damages were the regulatory effect is absent; that is, against defendants who will neither be punished nor deterred by their imposition.\textsuperscript{166} Thus, punitive damages operate in much the same way as do fines or other financial penalties imposed by federal or state regulatory agencies.

In *San Diego Building Trades Council v. Garmon*,\textsuperscript{167} the Supreme Court itself recognized the regulatory effect felt by defendants who are forced to pay large damage awards. The Court stated that “regulation can be as effectively asserted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”\textsuperscript{168} While *Garmon*’s holding dealt with a compensatory award rather than a punitive one, the Court’s language focused on the regulatory effect of the payment itself and not upon

\textsuperscript{163} Id. at 214-16.
\textsuperscript{167} 359 U.S. 236 (1959).
\textsuperscript{168} Id. at 247.
whether the payment was exacted for compensatory or punitive reasons. Indeed, the Court of Appeals for the District of Columbia Circuit, in *Nader v. Allegheny Airlines, Inc.*,169 used the *Garmon* analysis to preempt a punitive damage award imposed against an airline company, holding that such damages were state regulation in the exclusively federal domain of airline regulation.170

As in *Nader*, the punitive damages at issue in *Silkwood* constituted state regulation under the Court's reasoning in *Garmon*. The Oklahoma statute on punitive damages states that such awards are proper where the defendant was "guilty" of actual or presumed oppression, fraud or malice.171 The purpose behind giving punitive damages is, according to the statute, "for sake of example, and by way of punishing the defendant."172 The *Silkwood* jury was, therefore, authorized to award punitive damages only if a regulatory effect attached.

Not only do the punitive damages awarded in *Silkwood* constitute a form of state regulation, they are state regulation that stands in direct competition with the federal regulations promulgated and enforced by the N.R.C. The N.R.C. investigated the Silkwood affair and found that Kerr-McGee had violated no significant federal regulations.173 As a result, the Commission imposed no fine upon the corporation for its part in Silkwood's contamination.174 The *Silkwood* jury nonetheless awarded $10,000,000 in punitive damages. Clearly, the jury award is a potent and competing form of regulation for what, under federal guidelines, were only minor violations. This conclusion is especially apparent given that the N.R.C. has never, under any circumstances, imposed a fine greater than $850,000.175

**Silkwood's Punitive Damages and the Pacific Gas Holding**

As a form of state regulation, the punitive damage award in *Silkwood* fell directly into the preempted field of the Atomic Energy Act under both of the *Pacific Gas* tests. Under the first of these tests, the state action is preempted, regardless of its purpose, if it regulates in the area of construction or operation standards. Since the *Silkwood* award was designed to punish Kerr-McGee for the perceived inade-

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170. *Id.*
172. *Id.*
173. 104 S. Ct. at 619.
174. *Id.*
175. *Id.*
quacy of its operational standards, the Court should have found pre-emption inasmuch as the federal government had not expressly ceded states the authority to regulate the safety aspects of nuclear power generation via punitive damage awards.

However, even advancing to the second part of the Pacific Gas pre-emption test does not salvage the Silkwood award. There is no “non-safety rationale” for the imposition of punitive damages in the instant case. The purpose of the Silkwood punitive damage award was to regulate and deter egregious conduct. As such, its imposition in this case was clearly for a safety purpose. Thus, under the Pacific Gas analysis, the Silkwood damage award should have been preempted.

The Silkwood majority, however, did not apply either of the Pacific Gas tests on its way to upholding the punitive damage award. Instead, the Court sidetracked itself onto a question it had not been called upon to decide. At the outset, the Silkwood Court acknowledged the precedential force of Pacific Gas and then, inexplicably, looked to the Atomic Energy Act itself to determine if Congress had expressed or implied an intent to preempt punitive damage awards. Finding no mention of punitive damage awards in particular, the Court relied on Price-Anderson’s general reservation of state tort law as encompassing a reservation of punitive damages.

In effect, the majority’s reasoning ignored Pacific Gas and its holding entirely. As Justice Blackmun observed in his dissent, the numerous remarks in Price-Anderson’s legislative history on the role of state tort law refer only to the limited effect of Price-Anderson itself. The relationship between the Atomic Energy Act and state tort law (including punitive damages) should have been governed by the Pacific Gas decision.

Of course, the Court has overruled precedent sub silentio in the past and may have intended to do so in Silkwood. However, Pacific Gas was only nine months old when the Court released the Silkwood decision. It is doubtful that the Court would have changed directions

176. Id. at 625-26.
177. See supra notes 96-104 and accompanying text.
178. See supra notes 165-75 and accompanying text.
179. In contrast, compensatory awards survive the “purpose” test since they are levied to compensate plaintiffs for injuries actually suffered. Like the California statute in Pacific Gas, the regulatory effects of compensatory damages are incidental since their purpose is non-safety based.
180. Thus, the majority opinion, focusing as it does on the wrong question, proves only that Price-Anderson does not preempt the Silkwood award. The majority does not explore the preemptive effect of the Atomic Energy Act as a whole.
181. 104 S. Ct. at 627-32.
so quickly and dramatically without acknowledging its course. This is not to say that the *Pacific Gas* analysis is beyond criticism. Before the decision was issued, at least one commentator had argued that the Congressional expressions on the preemptive scope of the Atomic Energy Act were so vague that the Supreme Court, when finally faced with the issue, should have recognized no preemption whatsoever.\(^{182}\)

The Court, however, has never shown any disposition toward this point of view.\(^{183}\) Moreover, implicit in the *Pacific Gas* opinions and the *Silkwood* opinions is the understanding that the Atomic Energy Act does preempt state law to some degree. The writers disagreed only in regard to the proper scope of the preemption.

Simply put, the *Silkwood* Court did not analyze the punitive damage award at issue as though it was a form of state regulation. As a result, the Court did not apply the preemption tests presented in *Pacific Gas* to the facts in *Silkwood*. Had it done so, the Court would have held the punitive damages preempted. Because the majority ignored the reasoning of its decision in *Pacific Gas*, the *Silkwood* opinion analytically contradicts the clear legacy of the earlier case and demonstrates that the Supreme Court will go to great lengths to uphold state activities in the nuclear field.

*Nuclear Preemption after Silkwood and Pacific Gas*

Even though *Silkwood* did not follow the letter of the *Pacific Gas* holding, the two cases are consistent with one another in that they reached the same result. Both decisions found that federal preemption did not invalidate the particular state action at issue. In that sense, these decisions are in line with the Court’s recent trend in favor of preserving state law in the face of preemption challenges.\(^{184}\)

In order to fully reconcile *Pacific Gas* with *Silkwood*, a distinction must be drawn between *Pacific Gas*’s description of the preemptive scope of the Atomic Energy Act and the Court’s treatment of the facts and issues raised in the two cases. In *Pacific Gas*, the Court declined to take a “hard look” at California’s professed economic purpose in imposing the certification moratorium. As a result, the Court upheld the state action at issue as falling outside of the preempted field. Likewise, in *Silkwood*, the Court never examined the punitive damage award as

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184. *See supra* notes 38-47 and accompanying text.
possibly invading the exclusively federal domain of construction and operation standards as defined in the first part of the *Pacific Gas* test.\textsuperscript{185} In each case, the Court approached the preemption issue in a manner that virtually assured that the state action would survive the preemption challenge.

At its core, the *Pacific Gas* decision recognized a broad preemptive intent in the Atomic Energy Act to occupy the entire field of nuclear safety concerns.\textsuperscript{186} However, a close examination of the Court's reasoning demonstrates that *Pacific Gas* went on to define the field of nuclear safety concerns very narrowly indeed. As a result, a state can now impose substantial regulations on the nuclear industry if \textit{any} non-safety purpose will justify its action.\textsuperscript{187}

The California moratorium in *Pacific Gas* survived preemption on the basis of the state's contention that it was, in substance, an economic regulation. The state argued that nuclear plants might incur unpredictably high costs or perhaps even shut down as their on-site interim storage capacity dwindled and finally disappeared.\textsuperscript{188} The Court accepted the state's avowed purpose for its action and notably failed to consider if the state's reasoning actually justified a complete moratorium on the certification of new nuclear power plants.

In fact, had the Court examined the state's claim more closely, it would have seen that the fear of a plant closure for lack of a permanent repository for its spent fuel rods was entirely hypothetical. After approximately a quarter of a century, no plant has yet been forced to close because of the waste disposal problem. The *Pacific Gas* Court admitted as much in a footnote.\textsuperscript{189} Indeed, the federal government has, for years, warned that some plant closures were "imminent". But, during that time, utilities have simply expanded their interim on-site storage capacity to accommodate their increased needs.\textsuperscript{190}

The Court never questioned the supposed economic justification offered for the moratorium in light of an obvious alternative course of action open to the state. The state could have required utilities, as a condition for certification, to increase on-site storage capacity or, alternatively, to prepare contingency plans for increasing that capacity should the need arise. The availability of these less drastic means to

\textsuperscript{185} See supra notes 176-81 and accompanying text.

\textsuperscript{186} 461 U.S. at 212.

\textsuperscript{187} This is particularly true when *Pacific Gas* is coupled with the impact of the 1977 Clean Air Act amendments. See discussion of that issue infra at note 204.

\textsuperscript{188} 461 U.S. at 213-14.

\textsuperscript{189} Id. at 195-96 n.2.

\textsuperscript{190} Id.
the same economic benefit raises the possibility that the state's true purpose in imposing the moratorium may have differed from its avowed justification. The Court, however, refused to seriously consider that possibility.\(^{191}\)

Thus, the Court held California's non-safety rationale sufficient to save the statute even though the Court concluded that the same law would have been preempted had its purpose been to regulate safety.\(^{192}\)

This purpose-oriented approach to preemption in the nuclear field is superficially very attractive. But, in its application, it is somewhat artificial, particularly since the outcome of \emph{Pacific Gas} demonstrated that the Court would not delve very deeply into the seriousness of the avowed purpose of the state action at issue. Thus, while claiming to recognize a limited state right "to regulate activities for purposes other than protection against radiation hazards,"\(^{193}\) the Court effectively, but tacitly, has given states the right to regulate radiation hazards if \emph{any} non-safety justification can be found for their actions.

Considering the current poor economic condition of the nuclear industry, a state can use this newly given right to impose substantial restrictions on the development of nuclear power within its boundaries. These restrictions can be justified as valid economic regulations permissible under \emph{Pacific Gas} and, as a result, escape preemption. In \emph{Pacific Gas}, California justified its moratorium on the specific ground that the absence of a permanent waste disposal system made nuclear power economically unviable. The \emph{Pacific Gas} holding is, however, much broader. A state can probably enforce a total restriction on nuclear plant construction on the more general ground that such construction is inherently economically unviable. By tying its restrictions to the recent economic track record of the industry, a state which imposed such a moratorium could bar nuclear plant construction indefinitely if it so desired.

Any state which elected to justify a moratorium on such a basis would have little difficulty making its case. Within the last year alone, the Washington Public Power Supply System defaulted on $2.25 billion worth of bonds (the largest municipal bond default in history) after cancelling or postponing construction on four of its five proposed nuclear power plants; the Nuclear Regulatory Commission denied Com-

\(^{191}\) \emph{Id.} at 214-16. This is not to say that the waste disposal issue spotlighted by the California law is not a problem. This article does argue, however, that it represents a safety problem rather than an economic one.

\(^{192}\) \emph{Id.} at 212-13.

\(^{193}\) \emph{Id.} at 210, quoting, 42 U.S.C. § 2021(k) (1982).
monwealth Edison of Illinois an operating license on its $3.7 billion Byron nuclear power plant; and Public Service Company of Indiana shelved plans to complete its half-finished Marble Hill nuclear power plant and wrote off the $2.5 billion it had already invested.¹⁹⁴ These debacles have left the sponsoring utilities in precarious economic circumstances that must ultimately be borne by their customers and stockholders.

Beyond these dramatic setbacks are the frighteningly regular cost overruns and construction delays. Some of the more egregious examples include the Public Service Company of New Hampshire’s Seabrook nuclear power plant (nearly $5 billion over-budget); the Long Island Lighting Company’s Shoreham nuclear power plant (approximately $4 billion over-budget and nine years behind schedule); and the Michigan Consumers Power Company’s Midland nuclear power plant (over $4 billion over-budget and nine years behind schedule).¹⁹⁵ Industry-wide, the Federal Energy Information Administration¹⁹⁶ has determined that 36 of the 47 nuclear plants it surveyed cost at least double their original projections.¹⁹⁷ Of that number, 13 were four times as costly as initially estimated.¹⁹⁸ Clearly, the Court, in sanctioning economically motivated legislation as a basis for state regulation of nuclear power, has given the states great latitude to control nuclear power production within their boundaries.

Having put its predecessor case in the proper perspective, the Silkwood Court’s refusal to find preemption is more understandable. While Pacific Gas showed that a state’s avowed purpose for enacting state regulatory legislation would not be closely scrutinized,¹⁹⁹ Silkwood demonstrated that state regulation of nuclear safety concerns was permissible, at least if indirectly asserted via punitive damages. Thus, even though the Silkwood award regulated in what the Pacific Gas Court described as the exclusive federal domain of plant operating procedure, the Court refused to hold it preempted.

These two cases illustrate that, despite having articulated the two-part preemption test in Pacific Gas, the Court has declined to rigorously

¹⁹⁵ TIME, supra note 194, at 39.
¹⁹⁶ This agency is a division of the United States Department of Energy.
¹⁹⁷ TIME, supra note 194, at 39.
¹⁹⁸ Id. The Shoreham plant discussed above at supra note 185 and accompanying text is now over 15 times as costly as originally planned with no guarantee that the price will not go even higher. Id.
¹⁹⁹ See supra notes 179-83 and accompanying text.
apply it in either instance. In Pacific Gas, the Court opened a door that could conceivably allow any state to ban or significantly curtail the adoption of nuclear power within its borders. Economically motivated regulation of what is, by any definition, an economically sick industry ought to survive the Court's application of the Pacific Gas preemption test. Similarly, the Court in Silkwood effectively looked the other way in allowing Oklahoma state tort law to impose a $10,000,000 "fine" on a nuclear facility for its failure to adhere to a state created standard of care. After Silkwood then, Pacific Gas's definition of the preempted field as "all nuclear safety concerns" appears to be all form and little substance.

The State of the Law after Silkwood

As the outcome of Silkwood and Pacific Gas suggests, the analytical framework offered by the Court is less important to the preemption question than the Court's general disposition to uphold state actions facing preemption challenges. Thus far, the preemption law of the 1970s and 1980s has been characterized by a strong trend in favor of upholding state law. Though very descriptive of the path apparently adopted by the Court in these two cases, the weakness of such an outcome-oriented approach is that its predictive capability is limited by the duration of the trend. This shortcoming is particularly significant given the fact that the Court's analytical treatment of the subject matter would support a much broader application of preemption than that found in either Pacific Gas or Silkwood.

With this weakness in mind, the Court's treatment of Silkwood and Pacific Gas suggests that the Court will go to great lengths to place any disputed state action outside the preempted area. In fact, the only instance where the Court has thus far allowed preemption in the nuclear field is instructive of the Court's current view of the preemptive scope of the Act. That case dealt with a legislative enactment passed with an avowed purpose to regulate the safety aspects of a nuclear plant's operation standards. The result in that case, Northern States Power Company v. Minnesota, was reaffirmed by the Pacific Gas

200. In addition to the analysis of the Silkwood and Pacific Gas cases, see supra notes 38-47 and accompanying text for the Court's recent treatment of preemption cases in other fields of law.

201. See supra notes 16-50 and accompanying text for an explanation of the various approaches adopted by the Supreme Court in preemption cases during this century.

202. See supra notes 184-99 and accompanying text.

203. 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). For further discussion of this case and its holding, see supra notes 88-95 and accompanying text.
Thus, *Silkwood* and *Pacific Gas* indicate that the preemptive scope of the Atomic Energy Act is apparently limited to those facts. The lengths to which the Court went to uphold the state action in *Silkwood* and *Pacific Gas* suggest that such a law would survive preemption. The Court would probably decide that, while regulation for safety reasons alone is preempted by *Northern States*, the mere presence of an avowed safety-related purpose does not require preemption if other valid, non-safety justifications will support the same assertion of regulatory power. The Court could then resurrect the *Pacific Gas* purpose-oriented analysis to uphold all elements of the regulatory scheme for which there were non-safety justifications.

**CONCLUSION**

The Supreme Court's analysis of the preemption question in *Silkwood* demonstrates a decided willingness to allow greater state regulation of the nuclear power industry than that which had previously been permissible under the *Northern States* decision. This result is in line with the Court's general trend toward upholding, rather than preempting, state law. However, in achieving this degree of outcome continuity, the Court sacrificed a sound intellectual treatment of the subject matter in light of its recent prior decision in *Pacific Gas & Electric*. As a result, *Silkwood* serves to obscure both the basis for its own particular outcome, as well as the factors weighed by the Court in deciding preemption cases in the nuclear field in general.

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204. 103 S. Ct. at 212, n.24.

However, the specific result in *Northern States* has been overruled by the enactment of the Clean Air Act amendments of 1977. In *Northern States*, Minnesota attempted to set stricter effluent standards for radioactive pollutants than did the N.R.C. The 1977 amendments modified the definition of "air pollutant" to include "any radioactive ... substance or matter" emitted into the ambient air. 42 U.S.C. § 7602(g) (1982). Thus, under 42 U.S.C. § 7416 (1982), states may now set their own effluent standards for radioactive pollutants provided that the state standard can never be less stringent than the federal rules. Even if the state effluent standards are created for an avowed safety purpose, they should survive a preemption challenge since Congress authorized the states to assert such regulatory authority by passing the 1977 amendments.