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Pacific Gas & Electric: Opening the Door To State Regulation in the Nuclear Field

I. Introduction

The Supreme Court, in upholding a California statute imposing a moratorium on the construction and licensing of nuclear power plants pending federal government approval of a permanent disposal program for high level nuclear wastes, finally opened the door to state-initiated participation in nuclear regulatory matters.

Unlike more recent federal regulatory schemes affecting the environment, the Atomic Energy Act of 1946¹ made no provision for state involvement.² To the contrary, it was meant to create a federal government monopoly in nuclear matters.³ Amendments in 1954⁴ and 1959⁵ permitted but did not define state involvement.⁶ This left much in question.

1. Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (codified as amended at 42 U.S.C. §§ 2011-2282 (1976 & Supp. V 1981)).

2. Under the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (current version at 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981), commonly referred to as the Clean Water Act, *see* 33 U.S.C. § 1251 (Supp. V 1981)), the states have an essential role in constructing sewage treatment plants, 33 U.S.C. §§ 1281-1293 (1976 & Supp. V 1981), and the maintenance of the permit program for pollution discharges, 33 U.S.C. §§ 1342-1345 (1976 & Supp. V 1981). The Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1981) also gives states the primary responsibility for the permit program established under the Act. Under the scheme of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981), the states have a primary and essential role in the regulation and management of hazardous waste.

3. S. Rep. No. 1211, 79th Cong., 2d Sess. 14-15, *reprinted in*, 1946 U.S. Code Cong. Serv. 1327, 1330. *See* *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

4. Atomic Energy Act of 1954, ch. 1073, § 271, 68 Stat. 919, 960 (codified as amended at 42 U.S.C. § 2018 (1976 & Supp. V 1981)).

5. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274, 73 Stat. 688 (codified as amended at 42 U.S.C. § 2021 (1976 & Supp. V 1981)).

6. Section 271 of the 1954 amendments, *supra* note 4, stated that the Act was not meant to interfere with existing state authority concerning electric power, which,

The state of California injected itself in 1974 into the nuclear regulatory field with the Warren-Alquist Act.⁷ No legal challenge arose, however, until 1976 amendments to the Warren-Alquist Act imposed, among other things, a moratorium on the construction and certification of nuclear power plants in California until the development of a federally approved permanent disposal program for high level nuclear wastes.⁸

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,⁹ the Supreme Court upheld California's statute against a preemption challenge brought by local utilities based on the Atomic Energy Act and its amendments. This is the first time a state statute in the nuclear area has survived a preemption challenge before the Supreme Court. In dealing with the issues asserted by the parties, the Court reached a defensible, but unpersuasive position. It can be argued, however, that California's position was molded from the beginning to withstand a preemption attack while accomplishing a preempted purpose. Further, the more

presumably, was meant to include nuclear generated electric power. Congress did not define what the state authority or permissible involvement was. See *infra* note 19. Section 274 of the 1959 amendment, *supra* note 5, expounded a program for state-federal agreements to elicit state involvement in the nuclear regulatory field. Some roles for states were set out, such as performing inspections (subsection (i)) and state assumption of some federal regulatory functions (subsection (b)). These were, however, contingent on the development by the states of competence in these areas comparable to that of the federal regulatory agency. All these contingent and discretionary grants of participation were still far from being a clear definition of state involvement. See *infra* note 19.

7. Warren-Alquist State Energy Resources Conserv. and Dev. Act, Cal. Pub. Res. Code §§ 25000-25968 (West 1977 & Supp. 1983) [hereinafter cited as Warren-Alquist Act]. This Act sets forth a regulatory scheme the purpose of which is to "establish and consolidate the state's responsibility for energy resources" (§ 25006) and "assure statewide environmental, public safety, and land use goals." (§ 25007).

8. Warren-Alquist Act, §§ 25524.1-.3.

9. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 103 S. Ct. 1713 (1983). The decision of the Court was unanimous. Justice Blackmun, joined by Justice Stevens, concurred urging the Court to extend a state's right to regulate in the nuclear field to include health and safety matters.

crucial issue in this case is a state's sovereignty over its own territory.

This note examines the legislative and common law background of non-federal involvement in the nuclear regulatory field. *Pacific Gas & Electric* is analyzed against its own historical development, as a constitutional interpretation inconsistent with precedent and authority, and as a lost opportunity to examine a vital issue in the juxtaposition of state environmental regulation against federal supremacy. The conclusion suggests that, after *Pacific Gas & Electric*, states may initiate regulation in the nuclear field if the regulation is couched in economic terms.

II. Background

A. *The Atomic Energy Act and Its Amendments*

With sharply etched images of the ruins of Hiroshima and Nagasaki in mind, Congress passed the Atomic Energy Act (AEA) of 1946 to ensure that the development and use of this new force would be regulated strictly and solely by the federal government.¹⁰ In 1946, "atomic energy was then 95 percent for military purposes, with possibly 5 percent for peacetime uses."¹¹ Eight years later the field was opened to the private sector for commercial development and further promotion of nuclear power,¹² but it was still under the tight rein of the federal Atomic Energy Commission (AEC).¹³ The states were given a gratuitous acknowledgement in a 1954 amendment that "the authority or regulations of any

10. See S. Rep. No. 1699, 83d Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Ad. News 3456, and in 1 Legislative History of the Atomic Energy Act of 1954, at 749 (1955).

11. 1954 U.S. Code Cong. & Ad. News at 3458; 1 Legislative History of the Atomic Energy Act of 1954, at 751.

12. S. Rep. No. 1699, 83d Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Ad. News 3456, 3459.

13. 42 U.S.C. § 2201 (1976 & Supp. V 1981). The Atomic Energy Commission was renamed the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 201, 88 Stat. 1233, 1242 (1974). See 42 U.S.C. §§ 5814, 5841-5891 (1976 & Supp. V 1981).

Federal, State or local agency with respect to the generation, sale or transmission of electric power” produced by facilities licensed under the Act would not be affected.¹⁴ In 1959, almost as an afterthought, the states were granted a limited and loosely defined role in the nuclear regulatory field with the inclusion of section 274 in the Atomic Energy Act.¹⁵ This amendment provided, among other things, that “[n]othing 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.”¹⁶

A search in the legislative histories of the 1954¹⁷ and 1959¹⁸ Acts for clarification of what Congress meant by “authority” and “purposes” reveals little.¹⁹ The entire

14. Atomic Energy Act of 1954, ch. 1073, § 271, 68 Stat. 919, 960 (codified as amended at 42 U.S.C. § 2018 (1976 & Supp. V 1981)).

15. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274, 73 Stat. 688 (codified as amended at 42 U.S.C. § 2021 (1976 & Supp. V 1981)). It was said by the Joint Committee on Atomic Energy that this bill is “interim legislation,” that it expected increased use of atomic energy in the future, and that the “bill is intended to encourage states to increase their knowledge and capacities....” S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2872, 2879-80. This hardly signals a well-planned and well-defined role for the states.

16. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274(k), 73 Stat. 688, 691 (codified as amended at 42 U.S.C. § 2021(k) (1976)).

17. *See generally* S. Rep. No. 1699, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Ad. News 3456.

18. S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2872, 2872-83.

19. Senator Hickenlooper, floor manager of the Senate bill, intoned the following perplexing statement of “purpose.” He said section 271 of the 1954 Act was a “positive negation of any intent...to interfere with the existing laws and existing authorities, State and Federal, that have to do with electricity.” 100 Cong. Rec. 11709 (1954), *reprinted in* 3 Legislative History of the Atomic Energy Act of 1954, at 3834 (1955). In trying to explain the state authority the new Act intended to preserve, Senator Hickenlooper said:

We take the position that electricity is electricity. Once it is produced it should be subject to the proper regulatory body, whether it be the Federal Power Commission in the case of interstate transmission, or State regulatory bodies if such exist, or municipal regulatory bodies. We feel that there is no difference and that it should be treated as all other electricity which is regulated by the public. [Section 271] is designed to keep the regulatory authority exactly as it is now, traditionally and under the law.

100 Cong. Rec. 12015 (1954). This statement also provides little guidance.

exercise may be viewed as a meaningless political gesture to the states in response to existing confusion about the division of regulatory responsibilities.²⁰

Although the legislative history of the 1959 Act as reprinted in *U.S. Code Congressional & Administrative News* is entitled "Atomic Energy-Cooperation with the States,"²¹ analysis of the Act shows the provision for federal delegation of authority to a state by agreement²² as the only specific attempt to clarify what might emerge as the new shared responsibility of state and local governments. What was perfectly clear was the specific reservation of federal authority "to regulate for protection against radiation hazards."²³ This authority ultimately encompassed the areas of nuclear safety and waste disposal²⁴ at issue in *Pacific Gas & Electric*.

In the 1959 Act's legislative history²⁵ the issue of state authority free from federal interference²⁶ was finally addressed. The Joint Committee Report announced the intent not to "impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection."²⁷ What was actually left to the states, then, was "authority" in the economics of nuclear regulation, a virgin concept at that early stage of nuclear use, and in health and safety

20. S. Rep. No. 870, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Ad. News 2872, 2872-83.

21. 1959 U.S. Code Cong. & Ad. News at 2872.

22. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274(b), 73 Stat. 688, 688-89 (codified as amended at 42 U.S.C. § 2021(b) (1976 & Supp. V 1981)).

23. S. Rep. No. 870, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Ad. News 2872, 2883.

24. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274, 73 Stat. 688 (codified as amended at 42 U.S.C. §§ 2021(c)(3), (4) (1976 & Supp. V 1981), 42 U.S.C. § 2201(b) (1976 & Supp. V 1981), and 42 U.S.C. § 2232(a) (1976)).

25. See S. Rep. No. 870, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Ad. News 2872, 2872-83.

26. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274, 73 Stat. 688 (codified as amended at 42 U.S.C. § 2021(k) (1976)).

27. 1959 U.S. Code Cong. & Ad. News 2882.

issues other than radiation hazards. The latter, however, were not specified or even suggested.

Against this background of uncertainty, it is not difficult to see why state and municipal governments attempting to assert authority in the nuclear regulatory field have met with judicial confusion and unwillingness to expand an ill-defined authority.

B. Non-Federal Ventures into the Realm of Nuclear Regulation

In the past fifteen years, state and local governments attempted to regulate nuclear activity within their borders to protect their citizens.²⁸ With few exceptions, these regulations fell to preemption challenges.²⁹ In almost every case, the state was trying to exercise its police power to protect the safety and welfare of its citizens.³⁰

28. See *South Dakota Pub. Util. Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982); *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399 (E.D.N.Y. 1983); *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983); *United States v. City of N.Y.*, 463 F. Supp. 604 (S.D.N.Y. 1978); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266 (1975).

29. See *South Dakota Pub. Util. Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982) (denial by Wisconsin Public Service Commission of permit to construct nuclear power plant on economic and "needs" grounds upheld); *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982) (plaintiff City of Chicago's claim under common law nuisance theory not preempted as applied to offsite dumps if hazards protested were non-radiation hazards); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266 (1975) (plaintiff's claims under Michigan Environmental Protection Act and common law nuisance theory were not preempted by federal law; however, court held plaintiff did not state a cause of action under the Michigan statute).

30. See, e.g., *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d at 578, 582 (City of Chicago's claim that "dumping of hazardous material as fill constitutes...the creation of a public nuisance" is within the authority of the local government to prosecute); *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. at 516 ("deference should be given to state highway safety regulations because the state generally knows best how to handle problems unique to the area."); *United States v. City of N.Y.*, 463 F. Supp. at 607, 613 (City of New York, in defense of its denial of an operating license to a Columbia University nuclear reactor, argued that "the decision denying Columbia a certificate [was a] proper exercise of their police power to regulate [siting] on the fringe of a federally preempted area...."); *Marshall*

The leading and first case of its type was *Northern States Power Co. v. Minnesota*.³¹ Minnesota's standards for waste disposal permits, imposing more stringent requirements than those specified by federal law,³² succumbed to the permit-seekers' challenge.³³ The Eighth Circuit announced that the "states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement surrendering federal control" where such an agreement was authorized by federal law.³⁴ Minnesota's plea that it be allowed to exercise its police power to protect the health and safety of its citizens from nuclear waste in the state fell on deaf ears.³⁵

The reasoning in *Northern States* has been a consistent and effective roadblock to non-federal attempts to regulate nuclear hazards.³⁶ In *United States v. City of New York*, the district court invalidated a dual system of licensing and regulation under both federal and city laws.³⁷ The city's purpose was found to be the prevention of "injury resulting from an accidental release of radiation" and the resulting regulation was preempted.³⁸ In *Illinois v. General Electric Co.*, the Seventh Circuit declared unconstitutional on preemption grounds the Illinois Spent Fuel Act, that prohibited most imports of spent nuclear fuel.³⁹ The First

v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d at 282 ("The Atomic Energy Act has allowed for [state common law remedies] for the health, safety and welfare of its citizens.").

31. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

32. *Id.* at 1145.

33. *Id.* at 1149-51.

34. *Id.* at 1149.

35. *Id.* at 1153.

36. See *Illinois v. General Elec. Co.*, 683 F.2d at 206 (7th Cir. 1982); *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d at 579 (7th Cir. 1982); *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. at 404 (E.D.N.Y. 1983); *United States v. City of N.Y.*, 463 F. Supp. at 608-09, (S.D.N.Y. 1978); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266, at 274, 279 (1975).

37. 463 F. Supp. at 605.

38. *Id.* at 614.

39. 683 F.2d 206 (7th Cir. 1982).

Circuit affirmed the district court in *National Tank Truck Carriers v. Burke* which declared Rhode Island regulations governing the transportation of hazardous materials through its boundaries to be preempted.⁴⁰ A state referendum in Washington also sought to prohibit the transportation and storage within Washington of radioactive waste from outside the state. It, too, was found to be preempted by the Atomic Energy Act.⁴¹ The City of New York tried to invalidate the final rule promulgated by the Department of Transportation for transportation of radioactive materials. Judge Sofaer of the district court found the one purpose of the federal rule was to "override local prohibitions against the shipment of radioactive materials...."⁴² He suggested that this rule was aimed particularly at the New York City efforts.⁴³

Some localities, attempting to be less direct in their regulation in the hope of averting preemption challenges, were fairly inventive. Rhode Island's requirement of a twenty year bond to be posted by a nuclear power company to cover possible decontamination costs was exposed as an indirect regulation in the federally preempted field.⁴⁴ Even the complaint of the New York County of Suffolk was found to be preempted when it tried to prevent the operation of a nuclear power plant within its borders by asserting that there were deficiencies in the design and construction of the plant, evidence of noncompliance with Nuclear Regulatory Commission (NRC) standards.⁴⁵ The court found that "since the allegations of the complaint involve the construction and operation of a nuclear reactor, they

40. 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

41. *Washington State Bldg. Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

42. *City of N.Y. v. United States Dep't. of Transp.*, 539 F. Supp. 1237, 1241, *rev'd on other grounds*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1403 (1984).

43. *Id.* at 1241.

44. *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982).

45. *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399 (E.D.N.Y. 1983).

concern radiological hazards and safety, a field that the AEA's legislative history and judicial construction indicate is preempted by federal law."⁴⁶

III. *Pacific Gas & Electric*

Against this history of federal preemption California passed the Warren-Alquist Act in 1974. As stated in the Act, the purpose of the legislation was to:

employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, thereby reducing the rate of growth of energy consumption, prudently conserve energy resources, and assure statewide environmental, public safety, and land use goals.⁴⁷

In 1976, the California Legislature passed three amendments to the Warren-Alquist Act "to discourage the passage of Proposition 15, a voter initiative that would have eliminated nuclear power in California for the foreseeable future."⁴⁸ Perhaps ironically, the amendment which was to prove most controversial, and the only one to be reviewed by the Supreme Court, would have effectively blocked new construction or certification of nuclear power plants in California. Section 25524.2 prohibited "land use" by or certification of a nuclear power plant until the State Energy Resources Conservation and Development Commission "finds that there has been developed and that the United States through its authorized agency has approved and

46. *Id.* at 404.

47. Warren-Alquist Act, § 25007.

48. Note, *California's Nuclear Power Regulations: Federal Preemption?*, 9 Hastings Const. L.Q. 623, 623 (1982). The Ninth Circuit, in *Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n*, 659 F.2d 903, 924 (9th Cir. 1981), said the following about Proposition 15:

Proposition 15 would have ultimately barred any nuclear plants in California, unless (1) the federal limit on liability for nuclear accidents...[the Price-Anderson Act], was removed; (2) the California Legislature determined reactor safety systems to be adequate; and (3) the California Legislature determined that nuclear waste could be stored without danger to the public.

there exists a demonstrated technology or means for the disposal of high-level nuclear waste.”⁴⁹ As “this technology does not presently exist and is not expected to exist until the mid-1990’s”⁵⁰ this section’s effect was to ban certification and construction of new nuclear power plants in California.⁵¹

Prior to applying to the state for a construction permit, Pacific Gas and Electric Company, a California utility company, had already spent \$10,000,000 and several years in planning a nuclear powered generating facility.⁵² It now faced a major legal battle. At this point in the development of California’s scheme, the utility and its co-complainants challenged the amendments. The preemption challenge was sustained in the district court,⁵³ but failed at the circuit court⁵⁴ and Supreme Court⁵⁵ levels.

The Supreme Court found only section 25524.2 of the challenged provisions ripe for review.⁵⁶ This is the section that actually imposed the moratorium on new use and construction of nuclear power plants. The state claimed economic infeasibility of temporary storage of nuclear waste as the rationale for the challenged statute.⁵⁷ The

49. Warren-Alquist Act, § 25524.2.

50. Note, *supra* note 48, at 624 (citing Report to the President by the Interagency Review Group on Nuclear Waste Management 35 (1979)).

51. It was at this point that the California Assembly Subcommittee on Energy asked its Special Counsel, Prof. Laurence H. Tribe of Harvard Law School, to prepare a report on the constitutionality of California’s nuclear laws. See Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 Ecology L. Q. 679 (1979) (hereinafter cited as Tribe).

52. Petitioners’ Brief at 10, *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 103 S. Ct. 1713 (1983).

53. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 489 F. Supp. 699 (E.D. Cal. 1980).

54. *Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm’n*, 659 F.2d 903 (9th Cir. 1981), *aff’d sub nom. Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 103 S. Ct. 1713 (1983).

55. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 103 S. Ct. 1713 (1983).

56. *Id.* at 1720.

57. Respondents’ Brief at 2-8, *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 103 S. Ct. 1713 (1983).

major thrust of the preemption challenge was that the statute was an attempt by California to regulate nuclear hazards for safety reasons, a function reserved to the Nuclear Regulatory Commission.⁵⁸

Specifically, the utility company petitioners, along with the United States as *amicus curiae*, claimed the statute was preempted by the Atomic Energy Act because it regulated construction of nuclear plants,⁵⁹ because it was "predicated on safety concerns—ignores the division between federal and state authority created by the Atomic Energy Act,"⁶⁰ because it conflicted "with decisions concerning the nuclear waste disposal issue made by Congress and the Nuclear Regulatory Commission,"⁶¹ and because it "frustrates the federal goal of developing nuclear technology as a source of energy."⁶² In holding that the statute was not preempted, the Court easily disposed of the utility companies' objections.⁶³

Disagreeing with the assertion that the statute invaded an exclusive federal regulatory realm, the Court pointed out the traditional role of the states in the regulation of electric utilities in questions concerning "need, reliability, cost, and other related state concerns."⁶⁴ Citing the seminal case of *Rice v. Santa Fe Elevator Corp.*, the Court noted that when Congress legislates in a field traditionally reserved to the states, the assumption exists 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.'"⁶⁵ As stated before, there is nothing in the legislative history of the Atomic Energy Act and its amendments that indicates exactly what the state role

58. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274, 73 Stat. 688 (codified as amended at 42 U.S.C. §§ 2021(c)(4) (1976 & Supp. V 1981), 2021(k) (1976).

59. Petitioners' Brief, *supra* note 52, at 41-42.

60. 103 S. Ct. at 1722; Petitioners' Brief, *supra* note 52, at 46, 49.

61. 103 S. Ct. at 1722; Petitioners' Brief, *supra* note 52, at 39.

62. 103 S. Ct. at 1722; Petitioners' Brief, *supra* note 52, at 33-35.

63. 103 S. Ct. at 1722.

64. *Id.* at 1723.

65. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

would be in relation to its traditional exercise of power in the area.⁶⁶ The states are merely reassured that they can continue to exercise that power.⁶⁷ The Court found from this lack of legislative direction that the states are not expressly required to construct or authorize nuclear power plants. They are not even prohibited "from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors."⁶⁸ Even the later amendments to the Atomic Energy Act, providing only a minimal amount of additional direction, were found by the Court to allow continued exercise of state traditional authority in this field.⁶⁹ Further, the Court rejected the contention that the true motive for the statute was concern for safety, not economic infeasibility as asserted.⁷⁰ Relying on this least defensible position, the Court found the statute "outside the occupied field of nuclear safety regulation."⁷¹

The Court found in NRC's licensing powers the authority to decide whether or not a particular facility should be built.⁷² It did not find NRC authority to mandate the building.⁷³ The NRC, it said, makes safety, not economic, determinations.⁷⁴

While acknowledging that the Atomic Energy Act's purpose is to promote the development of commercial use of nuclear power, the Court refused to see this objective as a mandate to states to construct nuclear power plants.⁷⁵ The Court's analysis of the Nuclear Waste Policy Act of 1982 (the new law),⁷⁶ passed in the middle of this litigation, revealed that Congress, while thoroughly committed to

66. See *supra* notes 15-17 and accompanying text.

67. *Id.*; see also 103 S. Ct. at 1723-26.

68. 103 S. Ct. at 1722.

69. *Id.* at 1725.

70. *Id.* at 1728.

71. *Id.* at 1728.

72. *Id.* at 1725.

73. *Id.* at 1722.

74. *Id.* at 1729.

75. *Id.* at 1731.

76. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 2201 (to be codified at 42 U.S.C. § 10101).

proper storage and treatment of nuclear waste,⁷⁷ has never retreated from its commitment to "further development of nuclear power for electricity generation."⁷⁸ However, it was also clear to the Court that the new law was not meant to force the states to perform any affirmative acts.⁷⁹ As the Court pointed out, the final language of the new federal law was developed to avoid preempting this challenged state provision.⁸⁰ However, "Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-à-vis a fossil fuel plant should be built."⁸¹ The Court found that the authority of states to choose not to build nuclear power plants because they were economically infeasible was not preempted by Congress.⁸²

IV. Analysis of *Pacific Gas & Electric*

Present throughout the Court's analysis is the naive acceptance of California's position that its statute was not based on safety concerns.⁸³ The adroit urging of this theory made little impression on the district court, which held the entire regulatory scheme duplicative of and preempted by federal regulations.⁸⁴ The Ninth Circuit, however, found that section 25524.2 and its companion amendments concocted by the State Energy Resources Conservation and Development Commission as an alternative measure if a referendum requiring similar state action was defeated,⁸⁵

77. 103 S. Ct. at 1730.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1731.

82. *Id.* at 1732.

83. The California regulatory scheme is replete with references to health and safety of the people of the state. See Warren-Alquist Act, §§ 25001, 25007, 25309, 25511, 25520, 25523.

84. *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 489 F. Supp. at 704.

85. *Lodge, Melting Down Preemptive Federal Regulation of Nuclear Power—Pacific Legal Foundation v. State Energy Resources Commission*, 14 Tol. L. Rev. 57, 62 (1982) and *Tribe, supra* note 51, at 680 n.5.

“is directed towards purposes other than protection against radiation hazards.”⁸⁶ The Supreme Court not only accepted the circuit court’s conclusion, it declined any inquiry of its own into the legislative purpose.⁸⁷

A preemption analysis must be based on examination of either the effect or potential effect of a statute.⁸⁸ It is logical

86. *Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm’n*, 659 F.2d at 925; see also *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. at 404.

87. 103 S. Ct. at 1728. Whether or not the Supreme Court reviews the intended or stated purpose of a statute depends on which constitutional grounds the statute was challenged. It is not necessary that the Supreme Court review the legislative purpose behind a state statute in an equal protection challenge, only that the statute bear a “rational relation to the State’s objectives.” (*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981)). However, in the areas of environmental protection and resource conservation, the stated purpose of the legislation must be reviewed against any effects limited by the Commerce Clause. *Id.* at 471. In *Philadelphia v. New Jersey* the Court examined the purposes of the legislation to determine its intended effect. 437 U.S. 617, 624 (1978). It was the intended effect that the Court found objectionable. See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In preemption analysis the Court will examine the purpose of a state statute when there is no existing, but only a possible conflict with a federal statute, as is the case here. Note, *supra* note 48, at 630. In *Pacific Gas & Electric*, 103 S. Ct. 1713 (1983), the Court disdained its own inquiry into the legislative purpose of the state’s moratorium. It accepted the conclusion of the Ninth Circuit that the statute was based on economic concerns, well within the state’s authority. Since the validity of the statute hinged on whether it was based on nuclear safety concerns, a field in which the state had no jurisdiction, it might have behooved the Court to look more deeply into the purpose and intended effect of the statute. As stated above, the Court in the past has examined legislative purpose when ruling on the constitutionality of a state statute.

88. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court examined the constitutionality of a California statute restricting the marketing of avocados, an area in which the federal government had also legislated. The Court, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) stated the test of preemption as “whether the state regulation ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ...’” 373 U.S. at 141. In other words, a state statute could be preempted if the court found its potential effect would be an “actual conflict between the two schemes of regulation [so] that both cannot stand in the same area....” *Id.* at 141. In *Perez v. Campbell*, 402 U.S. 637 (1971), the Court examined the effect on the federal bankruptcy laws of an Arizona regulatory scheme to ensure compensation for automobile accident victims. The Court found that the effect of the state legislation would be to override a discharge in bankruptcy by a federal court, a

that analysis of a statute that has not yet taken effect would have to include examination of its intended effect. It seems ludicrous to assert that any interest in the storage of nuclear waste excludes a safety-related concern.⁸⁹ Professor Tribe, who analyzed the constitutionality of California's nuclear scheme at the request of its legislature in 1978,⁹⁰ said at that time that the state's concern with permanent disposal of nuclear waste stemmed from public anxiety about "indefinite accumulation of highly radioactive materials [which] would pose problems of uncertain, but certainly mounting magnitude."⁹¹ By its insistence on a federally approved permanent waste disposal program, Professor Tribe said, "the State of California protects its citizens not only from the hazards of radiation but also from the anxieties of uncertainty."⁹² California's brief, however, asserted that the California laws "reflect no more than the State's determination, given its already heavy commitment to nuclear power, to defer dependence on further increments of nuclear generation to the day when obstacles to the reliable operation of nuclear plants have been removed."⁹³

result clearly in violation of the Supremacy Clause. Thus, preemption analysis can also be based on the effect of the statute in question.

89.

High-level radioactive wastes...are so radiotoxic that they must be permanently removed from the biosphere....While these high-level wastes remain stored in surface or near-surface facilities awaiting the development of a technology for their permanent disposal, they carry an immediate potential for immeasurable devastation as a result of accident or vandalism or terrorism.

Tribe, *supra* note 51, at 706-07. High-level radioactive wastes, which consist of spent fuel, are so highly radioactive that "[t]he radioactivity decreases by a factor of 1000 over the first ten years, but it takes one thousand more years for the radioactivity to decrease by another factor of 1000. For permanent disposal, these wastes...must be isolated in a stable environment for time spans on the order of a quarter of a million years." Note, *supra* note 48, at 645.

90. Tribe, *supra* note 51, at 679.

91. *Id.* at 708.

92. *Id.* at 709.

93. Respondents' Brief at 40-41. It is interesting to note that Professor Tribe represented California before the Supreme Court in this case.

V. The Real Issue: State Sovereignty

Curiously, California's position throughout the course of this litigation never included that of sovereignty over its own land. This concept, well-founded in common law and federal history, might have been successfully asserted in support of California's right to ban construction and certification of new nuclear power plants.

When California entered the Union, the terms of its entrance included the cession of federal land to that already possessed by the territory, to become the state's own sovereign land.⁹⁴ Under the Supremacy,⁹⁵ Property,⁹⁶ and Commerce Clauses,⁹⁷ and even the treaty power of the United States Constitution,⁹⁸ the federal government has infringed many times on state sovereignty,⁹⁹ especially in

94. Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (1862); see *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 277 (1982); *California v. Arizona*, 440 U.S. 59, 60 (1979); *California v. United States*, 438 U.S. 645, 675 (1978); *United States v. California*, 436 U.S. 32, 35 n.7, 37, 41 (1978); *United States v. California*, 332 U.S. 19, 36 (1947); *Donnelly v. United States*, 228 U.S. 243, 259, 260, 263 (1913); see also *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *Christianson v. King County*, 239 U.S. 356 (1915); *Ward v. Race Horse*, 163 U.S. 504, 513 (1896); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

95. U.S. Const. art. VI, cl. 2. See *supra* note 28.

96. U.S. Const. art. IV, § 3, cl. 2. See *Kleppe v. New Mexico*, 426 U.S. 529, *reh'g denied*, 429 U.S. 873 (1976), (upholding the Wild Free-roaming Horses and Burros Act).

97. U.S. Const. art. I, § 8, cl. 3. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (invalidating Oklahoma law prohibiting export of minnows caught in the state's waters).

98. U.S. Const. art. II, § 2, cl. 2. See *Missouri v. Holland*, 252 U.S. 416 (1920) (invalidating a state action interfering with a treaty with Great Britain concerning migratory birds).

99. *E.g.*, *Aminoil U.S.A., Inc. v. California State Water Res. Control Bd.*, 674 F.2d 1227 (9th Cir. 1982) (federal government did not have to get state permit to build a water project in California); *Hayfield N.R.R. Co. v. Chicago & North Western Transp. Co.*, 693 F.2d 819 (8th Cir. 1982) (state law allowing condemnation of railroad property preempted by plenary power of the Interstate Commerce Commission over abandoned railroad property); *United States v. City of Pittsburg, Cal.*, 661 F.2d 783 (9th Cir. 1981) (municipal trespass ordinance requiring U.S. Postal Service letter carriers to get express permission from residents before crossing their lawns preempted); *City of Blue Ash v. McLucas*, 596

the areas of wildlife and environmental protection.¹⁰⁰ There is no evidence in case law, however, indicating a state has ever been forced to allow undesired construction by a private concern not in partnership with the federal government.¹⁰¹ Even the establishment of federal military bases must be by consent of the state, according to the United States Constitution.¹⁰²

If the Supreme Court had held the California moratorium preempted, it would have, in effect, ordered the state to allow construction of new nuclear plants by utility companies. A private, profit-making venture, a nuclear power plant could

F.2d 709 (6th Cir 1979) (for purposes of regulation of the flight of airplanes to control noise, regulation of air space above a state was preempted); *Trailer Train Co. v. State Bd. of Equalization*, 511 F. Supp. 553 (N.D. Cal. 1981) (state power to tax railroad property within its borders was preempted by the Railroad Revitalization and Regulatory Reform Act of 1976); *United States v. Town of Windsor, Conn.*, 496 F. Supp. 581 (D. Conn. 1980) (state and town could not impose building requirements on a construction project jointly sponsored by the federal government and a private contractor).

100. *E.g.*, *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978) (regulation of oil tankers by state of Washington preempted by the Ports and Waterways Safety Act of 1972); *Kleppe v. New Mexico*, 426 U.S. 529, *reh'g denied*, 429 U.S. 873 (1976) (upholding the Wild Free-roaming Horses and Burros Act); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (local noise regulation preempted by federal Quiet Communities Act of 1978); *Missouri v. Holland*, 252 U.S. 416 (1920) (upheld treaty protecting migratory birds); *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (court would not sustain a state challenge to the Boundary Waters Canoe Area Wilderness Act of 1978—the state maintained that the Act's regulations affected its own land as well as the federal land—the court said Congress had the power to regulate conduct off the public land that menaced the public land); *Anderson Seafoods, Inc. v. Graham*, 529 F. Supp. 512 (N.D. Fla. 1982) (state coastal waters fishing regulation largely preempted by a federal coastal waters fishing statute except within a specifically designated area of state authority). *See generally* Environmental Law Institute, *The Evolution of National Wildlife Law* (1977).

101. *Compare* *United States v. Town of Windsor, Conn.*, 496 F. Supp. 581 (D. Conn. 1980) (state and town could not impose building requirements on a construction project jointly sponsored by the federal government and a private contractor). The author acknowledges that a state defeat in a controversy over construction on a wetland might indirectly constitute "forcing" a state to allow undesired construction by a private concern. This situation, however, would reflect more strongly the defeat of a state's siting preference, rather than defeat of a state's desire to prohibit that construction anywhere within its borders.

102. U.S. Const. art I, § 8, cl. 17.

be installed within the state's borders at the order of a federal court. Manifestly, such an order would be beyond the power of the federal government.

Courts have not questioned the authority of the states in the area of property and land use law as long as no conflict with a federal governmental interest arose.¹⁰³ Sometimes, even in the presence of conflict, the federal government has to defer to or at least comply with state property law.¹⁰⁴

When the federal government has interest in a state's land, "the States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders...."¹⁰⁵ The federal government may also assert its power of eminent domain.¹⁰⁶ Generally, however, the federal government respects the sovereignty of a state over its own land.

Most of these property matters are deemed to be the exclusive jurisdiction of the states. Distribution of the estates of deceased persons within its borders is a matter exclusively reserved to the states.¹⁰⁷ Distribution of marital property within a state is its own exclusive jurisdiction.¹⁰⁸

103. N. Robinson, *Environmental Regulation of Real Property* (1982). Prof. Robinson summarized the state of the law in this field: "While Congress traditionally has left land use controls to state government as a matter of policy, it has not hesitated to ignore its policy preference whenever it wished." *Id.* at 3-4. He cites the imposition of federal environmental laws such as the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. V 1981), whose air quality standards, in some cases, cannot be met by land use control. *Id.*

104. *California v. United States*, 438 U.S. 645 (1978) (federal government cannot impound unappropriated water for a federal reclamation project without complying with state law—note that water and water rights are considered property). *See also* G. Thompson, *Courts and Water: The Role of the Judicial Process 7* (National Water Commission Monograph No. NWC-L-72-055, 1972).

105. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938).

106. *Id.* at 530.

107. *Christianson v. King County*, 239 U.S. 356, 365 (1915).

108. *See McCarty v. McCarty*, 453 U.S. 210, 228 (1981) (acknowledged state sovereignty in this area but invalidated community property award of part of husband's federal military retirement pay only because Congress specifically exempted it from being "attached to satisfy a property settlement incident to the dissolution of a marriage."); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)

Zoning laws, except those that offend constitutional notions of equal opportunity and due process¹⁰⁹ are the states' own domain.¹¹⁰

Against this background of judicial deference to state sovereignty in the areas of property and land use, it is difficult to understand why this issue was not raised by either the parties or the courts. Although Professor Tribe referred to them in the study he prepared for the California State Legislature,¹¹¹ it was not raised at any level of the *Pacific Gas & Electric* litigation. Perhaps it was too risky to allow the Supreme Court a chance to say that the states, even in the absence of a specific federal exertion of eminent domain or supremacy, cannot control construction on their own sovereign land.

VI. Conclusion

In *Pacific Gas & Electric*, the Supreme Court upheld a California statute which purported to regulate, but, in

(invalidated community property award of part of husband's benefits under the Railroad Retirement Act because Congress specifically excluded ex-spouses from receiving them. The Court said "state family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966))). See also *Buckholz v. Buckholz*, 197 Neb. 180, 248 N.W.2d 21 (1976).

109. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (zoning ordinance excluding grandsons as "family" for purposes of being a member of a single family unit violated the Due Process Clause). Cf. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (no violation of Equal Protection Clause by a zoning pattern whose impact was racially discriminatory. However, the Court left the impression that if proof of discriminatory intent was offered, it would have found the zoning practice unconstitutional). Cf. *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (no violation of the Equal Protection Clause by an ordinance restricting land use to one family dwellings which defined members of the family as those related by blood, marriage or adoption. However, if the Court had not found a rational state purpose for the classification, it would have had grounds for a finding of unconstitutionality).

110. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

111. "Since California seeks to eliminate land-use which creates a continuing source of public fear and unrest, it is exercising a traditional land-use power...." Tribe, *supra* note 51, at 709-10.

effect, prevented the operation and construction of new nuclear power plants in California. The traditional preemption challenge to state initiated legislation in this field, previously successful in almost every case, failed. California built a defense around the economics of nuclear power, the only realm of authority Congress clearly left to the states. This defense disowned the actual language throughout the statutory scheme of the Warren-Alquist Act which clearly sets forth the state's preoccupation with the health and safety of its citizens, an area specifically reserved to the federal nuclear agency to protect. Despite this clear conflict between state and federal authority, the Supreme Court held the statute to be a valid exercise of the state's powers. The threshold question, that of the state's sovereignty over its own territory, was never reached.

The decision, however, actually extended state authority in the nuclear regulatory field further than ever before—perhaps beyond where consideration of state sovereignty would have led. If economic reasons are now sufficient for a state to initiate previously prohibited regulation, there could be a major erosion of federal preemption in the nuclear regulatory field. For example, could a state now refuse a siting permit for a nuclear powered facility because of the potential adverse impact on the local land values resulting from fears about nuclear safety? If the answer is yes, there may ultimately be little left of preemption in this area unless Congress further extends the scope of the authority of the Nuclear Regulatory Commission.

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