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DENIAL OF LAND USE TO NEW NUCLEAR POWERPLANTS IN CALIFORNIA: A CASE OF PREEMPTION?

INTRODUCTION

Since the establishment of a federalist government two centuries ago the issue of federal preemption of an area of law has remained a chronic and often difficult constitutional issue for this nation's courts. The growing controversy over nuclear powerplants lends a new context, and perhaps higher stakes, to the traditional struggle between federal and state attempts to regulate the same subject matter. At issue is a state's power to regulate or ban nuclear powerplants within its boundaries. In the aftermath of research and debate concerning the safety of nuclear powerplants, many states have augmented federal regulation with more stringent statutes of their own. Despite their focus on public safety, the state regulations may face invalidation under the supremacy clause of the United States Constitution.¹

One state which has enacted its own regulations is California. In the spring of 1976, Californians were bombarded with media propaganda on nuclear powerplants and their future use in California. Controversy centered on Proposition 15, an initiative which would have phased out nuclear power in the state unless certain conditions were met.² Meanwhile, the California Assembly Committee on Resources, Land Use and Energy, after extensive hearings, reached a consensus that the use of nuclear power had to be reassessed by the state. The committee, chaired by Assemblyman Charles Warren, approved four bills dealing with nuclear energy. These bills were considered more moderate alternatives to Proposition 15. Of the four bills,

1. U.S. CONST. art. VI, cl. 2.

2. Proposition 15 would have added a title 7.8, the Land Use and Nuclear Power Liability and Safeguards Act, to the California Government Code. See CALIFORNIA STATE ASSEMBLY COMMITTEE ON RESOURCES, LAND USE AND ENERGY, REASSESSMENT OF NUCLEAR ENERGY IN CALIFORNIA—A POLICY ANALYSIS OF PROPOSITION 15 AND ITS ALTERNATIVES (1976) [hereinafter cited as REASSESSMENT REPORT]. Under the proposition, the future existence of nuclear power within the state would have been made dependent upon the assurance of full compensation to all victims of any potential nuclear incident, and upon legislative findings by a two-thirds vote that all safety systems are effective and that radioactive wastes can be permanently and safely stored for centuries. See *id.* at 159-60. See also Carter, *Nuclear Initiative: Impending Vote Stimulates Legislative Action*, 192 SCIENCE 975, 976 (1976).

three were signed into law before the vote on the initiative.³ Since Proposition 15 failed, these bills survive as the California regulatory scheme governing nuclear powerplants.

This comment examines the provisions of the three California statutes, Public Resources Code sections 25524.1-25524.3, and explores the question of whether they are preempted by federal regulatory legislation dealing with nuclear power. In considering this question, it examines the present federal regulatory scheme, various forms of state regulation including the California statutes, and the preemption doctrine as developed by the United States Supreme Court. Following this examination, the author explores the arguments for and against preemption and concludes that the nuclear expertise possessed by an individual state may be the governing factor in determining whether its regulatory efforts are preempted.

FEDERAL REGULATION OF NUCLEAR ENERGY

Background

Federal concern over the control of nuclear energy dates back to World War II. At that time nuclear research was directed at the development of the atomic bomb in the "Manhattan Project."⁴ After the war, Congress passed the Atomic Energy Act of 1946⁵ which authorized the creation of the Atomic Energy Commission (AEC) whose members were to exercise control over the spread of nuclear power.⁶ In 1954, Congress amended the Act to permit private ownership of nuclear reactors through a licensing system under the auspices of the AEC.⁷ Pursuant to the amendments, the AEC was given the contradictory tasks of both promoting the research and

3. The bills were A.B. 2820, dealing with adequate fuel reprocessing capacity; A.B. 2821, dealing with undergrounding of reactors; A.B. 2822, dealing with permanent waste disposal; and A.B. 2823, dealing with fuel accident liability. All but A.B. 2823 were passed and signed by Governor Brown on June 3, 1976. CALIFORNIA LEGISLATURE, ASSEMBLY FINAL HISTORY, 1975-76, at 1502-03.

4. The Manhattan Project was a monumental effort to develop the atom bomb before any other country, particularly Hitler's Germany. The odds were heavily against the success of the project. One of the biggest obstacles was that there was no then existing method of producing explosive material in any significant quantity. For thorough coverage of this project and its political and human dimensions, see S. GROUEFF, *THE MANHATTAN PROJECT* (1967); L. LAMONT, *DAY OF TRINITY* (1965).

5. See Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1947) (current version at 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975)).

6. *Id.*

7. See The Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (1955) (current version at 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975)).

development of nuclear energy and of regulating and licensing it.⁸

These contradictory roles were criticized as contributing to ineffective regulation.⁹ To remedy this inherent conflict of interest and promote more effective regulation, Congress passed the Energy Reorganization Act of 1974.¹⁰ This legislation abolished the Atomic Energy Commission and established two federal agencies to replace it. The first, the Nuclear Regulatory Commission (NRC), took over the AEC's regulatory and licensing functions.¹¹ The second, the Energy Research and Development Administration (ERDA), assumed the AEC's research and development responsibilities.

Federal-State Interaction: 1959 Amendments

The only federal legislation attempting to define the respective roles of the federal and state governments in the regulation of nuclear energy is the 1959 amendments to the Atomic Energy Act.¹² Only four subsections of the complex amendments are cited with any frequency in relation to the issue of federal preemption: section 274(a), section 274(b), section 274(c), and section 274(k).¹³ Section 274(a) sets forth the following purposes of the amendments: "to establish coordination between state and federal governments and to provide for the

8. The two roles of the AEC, promotion and regulation, were contradictory because effective regulation sometimes requires refusal to approve projects, adoption of safeguards which delay and increase the costs of projects, and postponement or cancellation of projects. These regulatory decisions necessarily slow down the development and promotion of nuclear energy.

9. See generally C. OLSON, UNACCEPTABLE RISKS, THE NUCLEAR POWER CONTROVERSY (1976); J.W. GOFMAN & A.R. TAMPLIN, POISONED POWER (1971).

10. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (amended 1975, 1976) (current version codified in scattered sections of 5, 42 U.S.C.).

The intent of Congress to end the inherent conflict of interest within the AEC is stated in the Act itself:

Congressional declaration of policy and purpose.

(c) The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission

42 U.S.C. § 5801 (c) (Supp. V 1975).

11. See generally Note, *Legal Considerations in Nuclear Power Plant Siting in Light of the Energy Reorganization Act of 1974*, 10 NEW ENGLAND L. REV. 305 (1975).

12. Act of Sept. 23, 1959, Pub. L. No. 86-373, 73 Stat. 688 (current version at 42 U.S.C. § 2021 (1970)).

13. See *id.* § 2021(a)-(c), (k) (Supp. V 1975).

orderly transfer of some of the regulatory authority of the AEC to the states."¹⁴

Section 274(b) authorizes the AEC to turn over some of its powers to the states.¹⁵ This transfer of duties can be accomplished only through an agreement between the AEC and the governors of individual states as a state achieves the expertise and capacity to effectively and safely regulate those nuclear activities covered by the agreement. Thus, the AEC retains jurisdiction in states which do not have either the interest or the technical capacity to undertake regulation.¹⁶

Section 274(c) prohibits the AEC from entering into an agreement in which the AEC surrenders to the state its authority to regulate specified nuclear activities. The activities listed are the construction and operation of any nuclear powerplant, the export or import of nuclear materials, the disposal of nuclear materials into the ocean, and the disposal of any other nuclear materials which the AEC determines are too hazardous to be left to the limited expertise of the states.¹⁷ The impact of this section cannot be overlooked since it includes the construction and operation of nuclear powerplants among the activities which cannot be the subject of an agreement between the AEC and a state.

Finally, section 274(k) is important not for what it says, but for what it implies. The section reads as follows: "Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes *other than protection against radiation hazards*."¹⁸ The key language

14. *Id.* § 2021(a).

15. *Id.* § 2021(b). Section 2021(b) provides in part:

Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2021 of this title, with respect to any one or more of the following materials within the State—(1) byproduct materials; (2) source materials; (3) special nuclear materials in quantities not sufficient to form a critical mass. During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

16. *Id.*

17. 42 U.S.C. § 2021(c) (1970) reads in part:

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of— (1) the construction and operation of any production or utilization facility.

18. *Id.* § 2021(k) (emphasis added).

is that portion permitting states to regulate for purposes other than protection against radiation hazards, strongly implying that states may not regulate for protection against radiation hazards.

The language of the federal regulatory framework clearly contemplates some kind of national control over nuclear energy. The language also envisions a partial transfer of this regulatory authority to the states in certain specified areas. If any state statutes are to be upheld they must regulate within the limited transfer language of the 1959 amendments or be reconciled with the broad language of the energy acts which imply federal control over the proliferation of nuclear energy.

STATE REGULATORY EFFORTS

Several states, in addition to California, have considered legislation which would regulate or ban nuclear energy within their boundaries. For example, in 1975, Vermont adopted a measure which requires a state licensing agency to receive the approval of both houses of the legislature before issuing a certificate for the construction of a nuclear powerplant.¹⁹ Similarly, other states have considered various moratoriums on nuclear power.²⁰

The Oregon Approach

Oregon is among the states which have adopted a comprehensive statutory scheme for the regulation of nuclear power.²¹ The legislature created a state department of energy which is responsible for studying and estimating Oregon's energy resources and needs,²² and the Energy Facility and Siting Council (EFSC) to regulate the state's powerplants, including nuclear powerplants. The EFSC is authorized to inspect nuclear powerplants during construction and operation; to set safety standards pertaining to radiation emissions, disposal of radioactive

19. VT. STAT. ANN. tit. 30, § 248(c)(Cum. Supp. 1977) provides in part:

Before a certificate of public good is issued for the construction of a nuclear fission plant the public service board shall obtain the approval of the general assembly and the assembly's determination that the construction of the proposed facility will promote the general welfare.

20. For a thorough discussion of various bills and statutes, see Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 420-33 (1976).

21. *Id.* at 421-24.

22. *Id.* at 421.

wastes, and other plant functions; and to provide the director of the department of energy with information on the various generating plants.²³ Based on information supplied by EFSC, the director of the department of energy is empowered to reduce or curtail the operation of nuclear powerplants which the director finds to be hazardous or likely to violate safety regulations.²⁴

The California Approach

Prior to the passage of the three new statutes, California had established the State Energy Resources Conservation and Development Commission (ERCDC).²⁵ The duties of the ERCDC included forecasting the state's energy needs, providing research and development, encouraging energy insulation, and certifying powerplant sites. The newly enacted statutes, California Public Resources Code sections 25524.1-25524.3, alter the responsibilities of the ERCDC concerning powerplant sites. They accomplish this by controlling the disposal and reprocessing of radioactive waste as well as mandating safeguards to protect against the escape of radiation into the atmosphere.

Section 25524.1 prohibits the ERCDC from granting land use to any nuclear powerplant until the technology exists for construction and operation of nuclear fuel rod reprocessing plants.²⁶ However, the determination of whether such technol-

23. *Id.* at 421-22.

24. *Id.* at 422-23.

25. See Warren-Alquist Energy Resources Conservation and Development Act, § 2 CAL. PUB. RES. CODE § 25200 (West 1977). The creation of ERCDC was the culmination of a number of social, economic and environmental forces in the State of California over the previous 10 to 15 years. Energy consumption in the state was rising at an annual rate of 7 to 8%. Meanwhile, nuclear powerplants, which many saw as the solution, became embroiled in controversy, government bureaucracy and delays. Over 30 permits from federal, state and local agencies were required before construction of a nuclear powerplant could begin. In 1965, the State Power Plant Siting Committee was established to formulate uniform guidelines on powerplant sitings. However, the number of permits required continued to increase. ERCDC was finally created to streamline the permit procedure. CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, 7 CALIFORNIA ENERGY TRENDS AND CHOICES 2-3 (1977).

26. CAL. PUB. RES. CODE § 25524.1 (West Supp. 1977).

Nuclear powerplants convert radioactive fuel into radioactive waste. The reprocessing plants would convert some of this radioactive waste back into nuclear fuel. However, great difficulty has been encountered in creating a commercially practical reprocessing plant. While several have been constructed, they have encountered a litany of problems. Currently, there is no viable reprocessing plant in commercial operation. Since the used fuel cannot be reprocessed, it is being stored, but storage space is becoming scarce. See C. OLSON, *supra* note 9, at 155-60.

ogy does in fact exist, is not left to the independent judgment of the ERCDC. The statute provides that the ERCDC must find that "the United States through its authorized agency has identified and approved and there exists a technology for the construction and operation of nuclear reprocessing plants."²⁷ After the ERCDC has reported its findings to the legislature, then either house has one hundred days to pass a resolution rejecting the findings of the ERCDC. If no resolution has been passed within that time, the ERCDC may proceed to certify nuclear powerplants.

In this fashion, the legislature acts as a potential check on the findings of ERCDC. If one house rejects the ERCDC findings, it must state the reasons for the rejection and the steps necessary to conform the findings to the statute. If the ERCDC, upon reexamination, concludes that its findings are adequate, then the legislature (both houses) has one hundred days to act or the ERCDC may begin certifying nuclear power plants.²⁸

After the ERCDC has made the necessary findings and neither legislative house has rejected them within the required time, the ERCDC must review its findings on a case-by-case basis. Before certifying any individual nuclear powerplant, the ERCDC must find that there exists, or will exist when actually needed, sufficient fuel reprocessing capacity or adequate fuel storage capacity.²⁹ This case-by-case determination is not reviewed by the legislature.

Section 25524.2 prohibits the ERCDC from granting land use to any nuclear powerplant until the ERCDC has determined that technology exists for the disposal of high-level nuclear waste.³⁰ This does not mean that the process for disposal

27. CAL. PUB. RES. CODE § 25524.1(a)(1) (West Supp. 1977).

28. *Id.* § 25524.1(a)(2).

29. *Id.* § 25524.1(b).

30. *Id.* § 25524.2.

Nuclear powerplants use radioactive materials, such as Uranium 235, as fuel. These radioactive materials give off heat as they undergo nuclear reactions. This heat is used to boil water into steam, which in turn is, by a number of means, used to operate an electrical generator. Over time, these radioactive materials convert themselves into other kinds of radioactive materials and are no longer useful for electric power generation. These other kinds of radioactive materials are nuclear waste. Some of these materials which are particularly dangerous are classified as high-level waste. Although not useable for fuel, they are extremely radioactive and dangerous. These wastes may soon be able to be partially reprocessed into useable fuel. However, some waste materials will have to be permanently stored for centuries. As of yet, there is no solution to the problem of how to safely and permanently dispose of these wastes. See C. OLSON, *supra* note 9, at 160-65.

must be in actual operation, but only that the technology exists for such an operation. The procedure for determining whether such technology exists is the same as provided by section 25524.1. That is, the ERCDC looks to the federal agency for confirmation of the existence of such disposal technology, and reports its findings to the legislature. However, under section 25524.2 there is no case-by-case determination requirement.³¹

Section 25524.3 provides that the ERCDC shall not grant land use to a nuclear powerplant until it completes a preliminary investigation into the necessity, effectiveness, and economic feasibility of "undergrounding and berm containment" of nuclear reactors.³² The ERCDC is to hold public hearings during the course of its investigation and present recommendations to the legislature based on its findings. After submitting its recommendations, the ERCDC is prohibited from granting land use for nuclear powerplants until the legislature has had one year to study its proposals.³³

Although the coverage of the newly enacted statutes is comprehensive in the areas they regulate, the California regulatory approach is somewhat limited in scope. The statutes do not address the issue of liability in the case of accident.³⁴ Addi-

31. CAL. PUB. RES. CODE § 25524.2 (West Supp. 1977).

32. *Id.* § 25524.3.

The California Assembly Committee on Resources, Land Use and Energy defined "berm containment" as placement of powerplant components in a scooped out hole and backfilling over all the structures with removed dirt. REASSESSMENT REPORT, *supra* note 2, at 56.

33. CAL. PUB. RES. CODE § 25524.3 (West Supp. 1977).

34. Proposition 15, § 67503, *reprinted in* REASSESSMENT REPORT, *supra* note 2, at 159-60 app. The federal liability provisions are found in the Anderson-Price Act, Act of Sept. 2, 1957, Pub. L. No. 85-256, 71 Stat. 576 (amending Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919) (Current version at 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975)). Under the Act, utilities are required to maintain \$125 million in private insurance. 42 U.S.C. § 2210(b) (Supp. V 1975); 10 C.F.R. 140.11 (1977). The amendment also limits the power company's liability for any nuclear accident to \$560 million. 42 U.S.C. § 2210(c) (Supp. V 1975). Finally, the federal government is obligated to pay damages not covered by private insurance up to the maximum liability limit of \$560 million. 42 U.S.C. § 2210(e) (Supp. V 1975).

The liability provisions have been the subject of much controversy. Proponents maintained the regulations were necessary if nuclear power was to become commercially practical. Opponents have argued that by limiting total liability to \$560 million, the provisions do not adequately protect the public. C. OLSON, *supra* note 9, at 55-56. Resolution of this controversy may be forthcoming since a challenge to the constitutionality of the \$560 million liability limitation is now pending before the United States Supreme Court. See *Carolina Env't'l Study Group v. United States Atomic Energy Comm'n*, 431 F. Supp. 203 (W.D.N.C. 1977), *prob. juris. noted sub nom.*, *United States Nuclear Regulatory Comm'n v. Carolina Env't'l Study Group*, 46 U.S.L.W. 3306 (Nov. 8, 1977) (No. 77-375).

tionally, only new construction is affected by the statutes, while existing facilities are apparently left unregulated. Further, the statutes make no attempt to deal with reactor safety. Section 25524.3 does require a study of the feasibility of undergrounding and berm containment of nuclear powerplants. However, it does not require the study of safety systems used in existing nuclear powerplants. Finally, the *safety* of radioactive waste disposal is also left untouched by the sections. The language of section 25524.2 requires only that technology exist for disposal; there is no requirement that the technology be safe. However, it is possible that safety may have to be considered nevertheless. It can be argued that an obviously unsafe method of disposal is no method at all.

Notwithstanding the narrowness of the statutory coverage, the California legislature still purports to regulate in an area ostensibly left to federal control—nuclear power. Thus, the California regulatory effort gives rise to a classic preemption problem. Since the fate of the legislation hangs on the resolution of this problem, it becomes important to examine the conceptual underpinnings of the doctrine of preemption.

PREEMPTION

Express Preemption

The doctrine of preemption arises out of the supremacy clause of article VI, section 2 of the United States Constitution, which reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.³⁵

The Supreme Court first confronted a preemption issue in *McCulloch v. Maryland*.³⁶ In resolving the issue, Chief Justice Marshall stated simply that federal law within its field of authority is supreme.³⁷ Problems have not arisen from disagreement with that basic principle. It is well understood that if a

35. U.S. CONST. art. VI, cl. 2.

36. 17 U.S. (4 Wheat.) 316 (1819).

37. *Id.* at 405.

federal law and a state law conflict such that it is impossible to obey both, the state law must give way. However, numerous controversies have arisen in trying to decide when a state law so conflicts with a federal provision that it should be struck down.³⁸ In certain instances, Congress will plainly preempt an area of law by inserting a preemption clause in a statute. In other instances, there will clearly be a direct conflict between a state and federal law. In either case, there is express preemption, and the state law must give way.

Implied Preemption—Traditional Criteria

Generally, it is not clear what impact Congress intends its legislation to have on a given area.³⁹ In most cases, if states also regulate in that area, courts are left to consider⁴⁰ a variety of factors in assessing whether Congress impliedly intended to preempt a particular field.⁴¹ In making this assessment, courts commonly examine the legislative history, as expressed in debates and committee reports, to determine if any intent existed which was not expressed in the statute. Alternatively, the courts may study an act itself to see if preemption may be implied from the wording.⁴² If Congress has provided detailed

38. See generally D. ENGBAHL, CONSTITUTIONAL POWER 317-45 (1974).

39. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. F. 515, 542-43; Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 (1959). See also D. ENGBAHL, *supra* note 38, at 322.

However, this is not to say that it is unusual for Congress to expressly specify its intent in regard to preemption. As part of the federal statutes protecting employees whose wages are garnished by creditors from dismissal by employers, Congress inserted a provision specifically not preempting state laws which offer the employee greater protection, provided they were approved as such by the Secretary of Labor. See 15 U.S.C. § 1965 (Supp. IV 1974). Also, the Magnuson-Moss Consumer Warranty Act, §§ 2301-2312 *id.*, has explicit provisions regarding preemption. *Id.* § 2311.

40. An example of a factor which may be considered is the legislative history of the federal legislation. Sometimes this will indicate either that Congress intended to preempt state laws or that Congress had an objective which is frustrated by the state law. In either case, preemption will be implied and the state regulation will be invalidated under the supremacy clause. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

41. See D. ENGBAHL, *supra* note 38, at 317-45. The Supreme Court has preempted state law in numerous cases without finding any direct conflict between federal and state law. For example, on occasion, the Court has held that the need for uniform laws on a subject of national character is sufficient to preempt state law. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 639 (1973); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Preemption has also been found by the Court where the state law in question would frustrate the accomplishment of the full purposes of the federal legislation. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

42. D. ENGBAHL, *supra* note 38, at 332-39. Congress sometimes does express an

regulation in an area, this gives rise to an inference that it intended to dominate the field.⁴³ The need for uniform laws governing a multistate activity may also be given consideration.⁴⁴ Further, courts may find a state law preempted because it interferes with the purpose of the federal law, a purpose stated expressly in the act or deduced from the legislative history.⁴⁵ Finally, some deference might be given to the opinion of an administrative agency created to enforce a particular enactment.⁴⁶

However, short of an express statement by Congress of intent to preempt, no one factor will be determinative. As Justice Douglas noted in *City of Burbank v. Lockheed Air Terminal*: "Our cases on preemption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question."⁴⁷ Therefore, it is always important to consider the facts of each case.

intent on preemption. In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), the Court found that language in the Federal Aviation Act did not expressly preempt state laws limiting the hours during which jet aircraft could take off from airports. However, because the Act did expressly preempt state laws governing flying aircraft, in order to give effect to the congressional purposes in passing the Act, the Supreme Court felt compelled to preempt state laws which, by regulating airports, interfere with airspace management.

43. Among the areas which the Supreme Court has decided were fully occupied by congressional regulation to the exclusion of state regulation are the following: aircraft noise (*City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973)); certain aspects of railroad labor disputes (*Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969)); trading with Indians on reservations (*Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)); domestic espionage (*Pennsylvania v. Nelson*, 350 U.S. 497 (1956)); certain warehouses (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

44. In *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167 (1942), the court stated that the manufacture and distribution of renovated butter, already federally regulated, does not permit state regulation because of the multistate nature of the butter industry.

45. See *Perez v. Campbell*, 402 U.S. 637 (1971). In *Perez*, Arizona law provided for revocation of one's driver's license if an individual were involved in a motor vehicle accident and did not have insurance. The statute so provided even if the individual later received a discharge of the debt stemming from the accident in federal bankruptcy proceedings. This law was determined to interfere with a major purpose of the bankruptcy act, namely to give the bankrupt a fresh start. See also *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

46. See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 532-33 (1959). In *Farmers*, the Federal Communications Commission's opinion on preemption was an important factor in the Court's holding that aspects of North Dakota's defamation law were preempted.

47. 411 U.S. 624, 638 (1973).

Traditional Criteria Applied

In recent decisions,⁴⁸ the Supreme Court has demanded a strong showing of congressional preemptive intent before forcing a state regulatory scheme to give way.⁴⁹ In fact, the Court has overturned or distinguished some of its precedents, and has upheld state legislation where some of the traditional preemptive factors were clearly present.

Foremost among these cases is *New York State Department of Social Services v. Dublino*, which involved the federal program, Aid to Families with Dependent Children (AFDC).⁵⁰ Under federal law, employable individuals who qualified for AFDC could be required to participate in the Work Incentive Program (WIN), which trained aid recipients for employment. Because the WIN program could not accommodate the large numbers of recipients eligible to participate, New York established a similar program and conditioned AFDC eligibility on cooperation with its program.⁵¹ Thus, New York added an eligibility requirement to the federal program. The state program was challenged on the grounds that it was preempted by the federal WIN program. The Supreme Court rejected the challenge, specifically repudiating an argument that Congress had given such detailed and comprehensive coverage to problems of assistance to the poor, that it could be inferred that Congress left no room for concurrent regulations. Instead, the Court found the two programs complementary⁵² and reasoned that where federal and state efforts combine in pursuit of common goals the case for federal preemption is less persuasive than in situations involving conflict.⁵³ Further, the Court demanded a greater showing of congressional intent, making it more difficult to rely on traditional criteria which gave rise to an implied preemption. In the words of the Court:

If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a

48. See *De Canas v. Bica*, 424 U.S. 351 (1976); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973); *Goldstein v. California*, 412 U.S. 546 (1973).

49. For a thorough discussion of this trend, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

50. 413 U.S. 405 (1973).

51. *Id.* at 406-09.

52. *Id.* at 418-22.

53. *Id.* at 421.

federal statute was intended to supercede the exercise of state power unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.⁵⁴

Taken at face value, this logic would virtually eliminate implied preemption.⁵⁵

Several additional cases have reinforced the approach taken in *Dublino*. For example, in *Goldstein v. California*,⁵⁶ the Court permitted California to grant copyright protection to records and tapes. In reaching this decision, the Court found that the copyright clause of the Constitution⁵⁷ did not preempt California from doing so and stated that preemption would only be found if the matter was "necessarily national" in character and if conflicts from concurrent regulation "will necessarily arise."⁵⁸ The language of *Goldstein* suggests a new and more difficult test, one that will allow considerable concurrent regulation.⁵⁹

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*⁶⁰ also reflects the approach outlined in *Dublino*. Indeed, *Ware* involved an actual conflict between a federal and a California statute relating to arbitration clauses contained in employment contracts. The Court considered the conflict insubstan-

54. *Id.* at 413 (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

55. In a later case, *De Canas v. Bica*, 424 U.S. 351 (1976), the Burger Court again rejected a claim of implied preemption based upon the theory that Congress had occupied the field because of its detailed treatment of the subject. In *De Canas*, a California law prohibiting an employer from hiring illegal aliens was held not to have been preempted by congressional legislation on immigration.

56. 412 U.S. 546 (1973).

57. U.S. CONST. art. 1, § 8, cl. 8.

58. 412 U.S. at 553-55.

59. In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), the Court concluded that state trade secret laws did not conflict with federal patent law. This case involved former employees of the plaintiff corporation who, after signing agreements not to compete with it, formed their own corporation in competition with the plaintiff. Being former employees, they had access to trade secrets of the plaintiff corporation which they utilized. Hearing an appeal from a successful action by the plaintiff corporation, the court of appeals for the Sixth Circuit ruled that the state trade secret laws conflicted with federal patent laws. The United States Supreme Court reversed, holding that trade secret laws do not impede the purposes of the patent laws (encouraging invention and public disclosure of inventions).

60. 414 U.S. 117 (1973). An employee of a business regulated by the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78hh (1970 & Supp. V 1975), resigned to work for a competitor. Under his prior employment contract, he forfeited certain benefits. A California statute voided the clause in the employment contract. However, a New York Stock Exchange Rule required arbitration of the contract. There was also a California statute voiding arbitration clauses in certain wage disputes.

tial and not related to the purposes of the federal statute, whereas the California statute reflected a strong state interest. This type of balancing approach to preemption had been expressly disapproved in an earlier decision.⁶¹ *Ware* illustrates the Court's greater tolerance of state regulation even in situations involving actual or potential conflict. Taken as a whole, this series of cases can be seen as limiting those instances in which the traditional factors of implied preemption will be utilized to force state regulation to give way. In the absence of an express statement by Congress to preempt a particular field or a direct conflict with an important purpose of a federal regulatory scheme, the state regulatory program will probably be upheld.

Traditional Criteria and Nuclear Power

There have been two major decisions dealing directly with the issue of federal preemption in the context of state attempts to regulate nuclear power. The cases achieved diverse results and both serve to indicate the complexity of the preemption issue in the area of nuclear energy regulation.

Bodega Head & Harbor. In the first case, *Northern California Association to Preserve Bodega Head & Harbor, Inc. v. Public Utilities Commission*,⁶² Pacific Gas and Electric Company filed an application for permission from the Public Utilities Commission (PUC) to build a nuclear powerplant at Bodega Bay, prior to seeking approval from the AEC. As part of the PUC approval procedure public hearings were held, where environmental groups, such as the Sierra Club, opposed the proposed plant. However, the opponents claimed that they were hampered in their presentation and that not all safety issues were adequately discussed. The PUC eventually unanimously approved the powerplant. The environmental groups repeatedly petitioned for new hearings, but the PUC rejected their requests. The environmental groups then filed a petition for a writ of review with the California Supreme Court challenging the PUC's decision.⁶³

After accepting the writ, the first issue faced by the court

61. See *Perez v. Campbell*, 402 U.S. 637 (1971).

62. 61 Cal. 2d 126, 390 P.2d 200, 37 Cal. Rptr. 432 (1964). Bodega Bay is in California, north of San Francisco.

63. There were no lower court dispositions since, upon denial of the motion for a new hearing by the PUC, the environmental groups petitioned directly to the California Supreme Court.

was whether the question of the safety of the location of nuclear reactors was controlled by federal law. In concluding that Congress had not preempted this field, the court relied on the language of the 1959 amendments.⁶⁴ The court made no attempt to analyze the amendments' legislative history, rather it simply cited section 274(a) to show the congressional purpose to establish cooperation between federal and state governments; to clarify the respective responsibilities of each, while recognizing the legitimate interests of the state in regulating nuclear power; and finally to establish a state regulatory system for less hazardous nuclear activities. Then the court cited section 274(k) for the proposition that the states retained power to regulate nuclear powerplants for nonradiation concerns. Based on the language of these two sections, the court reasoned that the PUC could regulate the location of nuclear powerplants, at least where it was not concerned with radiation hazards.⁶⁵

By implication, the California Supreme Court has concluded that states may not consider radiation hazards in making land use decisions about nuclear powerplants. To that extent the decision has made it more difficult to uphold the recently enacted California statutes. While the new statutes may be distinguishable, they may arguably run afoul of this decision by conditioning future nuclear development within the state on advances in nuclear technology.⁶⁶

Northern States Power. By far the most significant and oft-quoted decision in the area of nuclear preemption is *Northern States Power Co. v. Minnesota*,⁶⁷ which was decided by the Eighth Circuit in 1971 and summarily affirmed by the Supreme Court in 1972. The facts of the case are fairly straightforward. In 1969, Northern applied to the Minnesota Pollution Control Agency for a permit to operate a nuclear facility. Before issuing a permit, Minnesota required compliance with regulations which limited the amount of radiation which could escape from a powerplant. They dealt with the same type of emissions that are the subject of AEC regulations, however,

64. 61 Cal. 2d at 133, 390 P.2d at 204, 37 Cal. Rptr. at 436. The section cited by the court was 42 U.S.C. § 2021(a), (k).

65. *Id.* The California Supreme Court ruled against the environmental groups because it found that they had waited too long before filing for a rehearing and let the statutory time period pass. The court also ruled that, regardless, the PUC had not abused its discretion in denying a rehearing. *Id.* at 134-36, 390 P.2d at 204-06, 37 Cal. Rptr. at 436-38.

66. See text accompanying notes 25-33 *supra*.

67. 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

Minnesota's regulations were much more stringent.

In 1971, the AEC granted an operating license to Northern. Northern then sought a declaratory judgment in the federal district court to the effect that the State of Minnesota was preempted from regulating radiation emission standards. The district court found that the Atomic Energy Act, as amended in 1959, expressly preempted state regulation on radiation hazards.⁶⁸ The court of appeals affirmed the district court, but on the ground of implied, not express, preemption. The court analyzed the Atomic Energy Act and its amendments and concluded that a congressional intent to preempt could be gathered from the Act as amended without any resort to legislative history.⁶⁹

Additionally, the appellate court analyzed the history of the Act, as originally enacted in 1946, noting that it mandated complete federal control and ownership of nuclear facilities. The court then observed that in 1954, Congress had provided for a turnover of ownership of nuclear facilities to private entities, but only under strict federal control. The court pointed out that no grant of power was given to the states to regulate these privately owned power companies and that therefore all regulatory power remained with the federal government. It was only through the 1959 amendments, the court argued, that the states received any regulatory capacity at all over nuclear activities.⁷⁰ Under this view, no power was taken from the states by the 1959 amendments. The states were merely permitted to share a previously exclusive federal power.⁷¹

68. Northern States Power Co. v. Minnesota, 320 F. Supp. 172, 179 (D. Minn. 1970), *aff'd*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

69. 447 F.2d at 1148-50. In analyzing the statutes, the court examined sections 274(a), 274(b), 274(c), and 274(k) of the Act. Looking at section 274(a), 42 U.S.C. § 2021(a) (Supp. V 1975), the court observed that the purpose of the Act, at least in part, was to allow the AEC to turn over its regulatory power to the states pursuant to agreements to that effect. The court then noted that construction and operation of nuclear powerplants are not among the categories of activities for which section 274(b), *id.* § 2021(b), authorizes such agreements and that section 274(c), *id.* § 2021(c), specifically names nuclear powerplants as an activity not to be turned over to state regulation. The court ruled out concurrent jurisdiction by reference to section 274(k), *id.* § 2021(k), which allows states to regulate any activity for purposes other than protection from radiation hazards, thereby implying states cannot regulate for radiation hazards without an agreement.

70. 447 F.2d at 1149-50.

71. The court utilized the wording of the amendments to show that the states previously had no regulatory power and acquired only that power which the AEC had delegated to them. To support this outlook, the court quoted portions of section 274(b):

[D]uring the duration of such agreement it is recognized that the state

The court concluded that only regulation of nuclear energy which was motivated by concerns apart from radiation was exempt from preemption and that no regulation of radiation hazards by the states was contemplated absent an agreement with the AEC. Minnesota, therefore, had no authority to establish its own radiation emission standards.

Unlike the *Bodega Head & Harbor* decision, the court of appeals in *Northern States* buttressed its opinion with an extensive examination of the legislative history of the Act and its amendments.⁷² The language of the opinion persuasively argues that nuclear power, by its nature, requires uniform national regulation.⁷³ This language could have broad preemptive implications.

The exact impact of the *Northern States* decision on the California statutes is difficult to predict. However, it is certain that the decision makes preemption more likely. If the reasoning and conclusions are accepted fully, then the California statutes would almost certainly be preempted. However, the facts of *Northern States* can be distinguished. Minnesota was regulating the actual operation of nuclear powerplants by setting its own radiation standards. California however, is not regulating the internal operation of nuclear powerplants. Instead, California is withholding land use until three conditions are met, none of which relate to radiation standards.

On the other hand, the rationale of *Northern States* may fit the California statutes, because the state legislature appears

shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

42 U.S.C. § 2021(b) (Supp. V 1975). The emphasized wording is supposed to illustrate that the 1959 amendments gave only a limited grant of power and that the state had no inherent authority. The court of appeals also cited section 274(c), *id.* § 2021(c), which states that the AEC cannot turn over to the states its power to regulate, among other things, nuclear powerplants, and section 274(k), *id.* § 2021(k), which states that nothing in section 274, *id.* § 2021, shall be construed to affect state authority to regulate nuclear powerplants for purposes other than protection against radiation hazards. 447 F.2d at 1149.

72. The court of appeals quoted at length from S. REP. No. 870, 86th Cong., 1st Sess. 6 (1959), reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2872. [hereinafter cited without parallel citation as SENATE REPORT]. See 447 F.2d at 1151-52.

73. See 447 F.2d at 1153-54. If one assumes that Congress has vested the AEC with the sole power to balance nuclear safety against the nation's energy needs, then virtually all state regulation of nuclear powerplants with nuclear safety as a goal is preempted. Critics of nuclear power are usually most concerned about the safety aspects. Proponents, in addition to giving assurances of the safety of nuclear powerplants, generally cite the nation's growing need for energy. If states cannot consider these two factors in regulating nuclear power, they are then virtually eliminated from the controversy.

to have balanced the public safety against the need for the development of new energy sources. That is precisely the balance which *Northern States* ruled was within the exclusive domain of the AEC.⁷⁴

As has been noted, a string of recent United States Supreme Court cases suggests a move toward allowing greater concurrent regulation between state and federal governments.⁷⁵ Therefore, it cannot be assumed that the Supreme Court will accept the *Northern States* outlook in future litigation. While it is true that the United States Supreme Court summarily affirmed the *Northern States* decision, two factors tend to negate the importance of that fact. First, while a summary affirmance is technically an adjudication on the merits, in reality it is little more than a refusal to hear the case.⁷⁶ Second, the previously discussed new preemption cases were decided after the summary affirmance of the *Northern States* decision.

THE CALIFORNIA STATUTES AND PREEMPTION

Background

In examining the question of preemption, it is important to remember two points. First, the California statutes have the effect of banning all nuclear powerplants which are not specifically exempted until the three conditions prescribed by the statutes exist.⁷⁷ Second, the objective of the Atomic Energy Act of 1954 was to further the development of nuclear power consistent with the general welfare.⁷⁸ It has been argued that Congress intended that any state action which impedes the spread of nuclear power necessarily frustrates the objectives of the Act

74. See text accompanying note 73 *supra*.

75. See text accompanying notes 48-61 *supra*.

76. The California Supreme Court has stated, "It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari." *Serrano v. Priest*, 5 Cal. 3d 584, 616, 487 P.2d 1241, 1264, 96 Cal. Rptr. 601, 624 (1971) (quoting D. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 n.365 (1964)). In deciding whether to grant a petition for a writ of certiorari, the primary consideration is whether the case is of general interest or would resolve conflicts between intermediate reviewing courts. R.L. STERN & U. GRESSMAN, *SUPREME COURT PRACTICE* 154, 167 (4th ed. 1969).

77. See text accompanying notes 25-33 *supra*. It will be remembered that the three conditions are the existence of technology for reprocessing of fuel, permanent storage of wastes, and the completion of a study on undergrounding nuclear powerplants by the ERCDC.

78. 42 U.S.C. §§ 2011-2296 (1970 & Supp. V 1975).

and is preempted.⁷⁹ If this congressional intent argument is accepted, the effect would be to preempt all state laws, such as California's, excluding or significantly limiting the spread of nuclear power.

If it is accepted that the states are not preempted from excluding or impeding the development of nuclear powerplants, the question remains whether they may do so out of concern for radiation hazards. As discussed previously, the conditions imposed by the California statutes seem to reflect a concern for radiation hazards.⁸⁰ However, there is also evidence that the economic reliability of nuclear powerplants was a factor in their passage.⁸¹ It will be recalled that the language of the 1959 amendments to the Atomic Energy Act strongly implies that a state may regulate nuclear energy, subject to an agreement with the AEC, only for purposes other than protection against radiation hazards.⁸²

State Power to Regulate Nuclear Energy

To answer the question whether states are free to establish regulations that may directly or indirectly impede the development of nuclear energy it is necessary to examine the Atomic Energy Act of 1954 to determine if Congress exhibited an express or implied intent to preempt the area. Interestingly, a close look at the 1954 Act suggests that Congress did not even consider the impact it might have on the states. There is nothing in the Act which indicates a congressional intent to force nuclear power upon the states.⁸³ Also, in two hundred hours of debate, the Senate never directly addressed the effect of the Act on state power over land use.⁸⁴ Apart from the obvious possibility that the state-federal controversy did not exist at the time due to the lack of proliferation of nuclear technology, this silence probably reflects the fact that the congressional purpose was not very ambitious. Arguably, the purpose of the

79. See Note, *Application of the Preemption Doctrine to State Laws Affecting Nuclear Power Plants*, 62 VA. L. REV. 738, 778-79 (1976); 42 U.S.C. § 2011 (1970).

80. See text accompanying notes 25-33 *supra*.

81. See REASSESSMENT REPORT, *supra* note 2, at 154-55. The report mentions how California Public Resources Code sections 25524.1 and 25524.2 would serve to resolve problems concerning the fuel cycle. An inadequate fuel cycle results in less reliable and more expensive sources of fuel.

82. See text accompanying notes 12-18, 62-66 *supra*.

83. Lemov, *State and Local Control over the Location of Nuclear Reactors under the Atomic Energy Act of 1954*, 39 N.Y.U. L. REV. 1008, 1011 (1964).

84. See *id.* at 1017.

Act was simply to provide for private development of the then nonexistent nuclear power industry without regard to conflicts which might occur in the future. This view is borne out by an address given by the chairman of the Joint Committee on Atomic Energy, Congressman Sterling Cole, in which he stated that the problem of future ground rules for a then fledgling atomic power industry was not before the Congress.⁸⁵ Further, Congressman Cole noted that the purpose of the legislation was to get the nuclear power industry on its feet.⁸⁶ In 1954 then, it seems clear that it was not the express intent of Congress to displace the general power of the sovereign states to control their own land use in regard to nuclear powerplants.

Developments since 1954 also tend to support the view that the nuclear power industry is subject to some state control. The 1959 amendments to the Act, concerning the regulation of radiation hazards, do not displace the states' power to regulate so long as the state bases its decisions on the development of nuclear power on factors other than radiation hazards.⁸⁷ Similarly, the Energy Reorganization Act of 1974 emphasized a "go slow" attitude towards the development of nuclear energy as exemplified by its splitting of the developmental and regulatory functions of the AEC. Additionally, the 1974 Act contains the following proviso: "Congress intends that all possible sources of energy be developed consistent with warranted priorities."⁸⁸ This cautious statement again illustrates the congressional unwillingness to perceive the 1954 Act as a mandate to spread nuclear power into every state.

In light of the foregoing analysis, it seems unlikely that state laws which directly or indirectly deny land use to nuclear powerplants are preempted by a congressional policy in favor of spreading the use of nuclear energy. However, the question remains whether such a denial can be founded on a state regu-

85. Congressman Cole stated:

Several years from now, I presume that the Congress will be required to stake out the ground rules for an atomic power industry—to set forth the terms and conditions under which the American people will enjoy the benefits of electric power developed from nuclear sources. That problem however, is not the concern of the bills now before the Joint Committee. I emphasize with all the force of my command that the problem before us in 1954 is not the formulation of federal policy for a non-existent atomic power industry.

Id. at 1018.

86. *Id.*

87. See 42 U.S.C. § 2021(k) (1970); text accompanying note 18 *supra*.

88. Energy Reorganization Act of 1974, 42 U.S.C. § 5801(b) (Supp. V 1975).

lation concerned with radiation hazards. To answer this question one must turn to the 1959 amendments, the only portion of the federal regulatory program that addresses the problem of state-federal relations.

State Regulation Based on Radiation Hazards

At the outset, the scope of the four relevant subparts of section 274 of the 1959 amendments should be reexamined. Section 274(a) establishes a congressional purpose to define state and federal roles in regulating nuclear power. It also states a purpose to turn over certain AEC functions to the states.⁸⁹ Section 274(b) allows the AEC to turn over to the states its regulatory authority over certain nuclear activities which present low level health risks.⁹⁰ Section 274(c) prohibits the AEC from releasing its authority over more hazardous activities including nuclear powerplants.⁹¹ Finally, section 274(k) says that nothing in the statute should be read so as to take away state authority to regulate nuclear activities for purposes *other than* protection from radiation hazards.⁹²

Section 274(k) clearly implies that the states may not regulate nuclear powerplants in the area of radiation protection. However, the express language of the statute is insufficient to gauge those types of state regulation that are actually preempted.⁹³ The report of the Joint Committee on Atomic Energy, accompanying the legislation provides a more meaningful interpretation of precisely what types of regulations are involved.⁹⁴ It indicates that the primary reason for not transferring power to the states to regulate radiation hazards is the concern for public safety. This concern was prompted by the states' lack of technical expertise to regulate some of the more hazardous aspects of nuclear energy.⁹⁵ The report quotes from a letter received by then AEC General Manager, A.R. Luedecke, in which he explained the purpose of an AEC sponsored bill with provisions similar to the bill that eventually passed:

Essentially, the objectives of this proposed bill are to provide procedures and criteria whereby the Commission may

89. 42 U.S.C. § 2021(a) (1970).

90. *Id.* § 2021(b).

91. *Id.* § 2021(c).

92. *Id.* § 2021(k); see text accompanying note 19 *supra*.

93. 42 U.S.C. § 2021(a) (Supp. III 1973).

94. SENATE REPORT, *supra* note 72, at 6.

95. *Id.*

"turn over" to individual States, *as they become ready*, certain defined areas of regulatory jurisdiction. . . . [C]ertain areas would be excluded because the technical safety considerations are of such complexity that it is not likely that any state would be prepared to deal with them during the foreseeable future.⁹⁶

Significantly, the report also stated that the amendments of 1959 were not intended as the final word on allocation of federal and state responsibility.⁹⁷ The amendments were seen as transitional measures and the intent was to enact further legislation giving the states more authority as state expertise increased.⁹⁸

Against the backdrop of the legislative history, it seems clear that lack of state expertise was the primary reason for limiting state responsibilities under the Act. Consequently, states should be free to regulate nuclear powerplants in those areas which do not involve technical expertise, particularly when the contemplated state action may increase the public safety. Similarly, it is arguable that those states which have acquired the requisite technical expertise, based on an agreement with the AEC, should be free to regulate even in the area of radiation protection. If the expertise exists, the caution which prompted the passage of section 274(k) is no longer a legitimate rationale for denying a state the freedom to regulate.

Even if the federal government retains the power to control the construction and operation of nuclear powerplants, it can be contended that this does not necessarily preempt the states'

96. *Id.* at 3 (emphasis added).

97. In the following passage of the report of the Joint Committee, states are encouraged to increase their expertise in order to be ready for such future legislation: "The bill recognizes that this is interim legislation. The committee believes that the uses of atomic energy will be so widespread in future years that States should continue to prepare themselves for increased responsibilities." *Id.* at 9. It should be noted that the reference to increased use is not a policy statement. It is phrased as a prediction rather than as a declaration of policy. The passage as a whole does emphasize that state expertise was the primary consideration, as does the following passage taken from the analysis portion of the report: "The purpose, as redrafted by the committee, also provides for coordination of the development of radiation standards . . . and recognizes that this is *interim legislation* in that, as the states improve their capabilities, additional legislation may be needed, perhaps in approximately 5 years." *Id.* (emphasis added).

98. This designation of the 1959 amendments as interim legislation is specifically expressed in the amendment at section 274(a)(6), which provides that one of the purposes of section 274 is to "recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable." 42 U.S.C. § 2021(a)(6) (1970).

power to deny land use to powerplants.⁹⁹ Denial of land use is a policy decision made by legislators which does not require the technical expertise necessary to regulate the construction and operation of nuclear powerplants. Additionally, a state's decision to grant or deny land use to nuclear powerplants can be viewed as a condition precedent to the commencement of activities which are regulated by the federal government.¹⁰⁰ Thus, even if section 274(k) is read to preempt state regulation of radiation hazards, it should have no effect on state laws that merely deny land use, regardless of their reason for so doing.

State Regulation Based on California Model

The California Public Resources Code purports to deny land use to nuclear powerplants in the event any one of three circumstances exists: there is no technology permitting the construction and operation of nuclear fuel rod reprocessing plants; or there is no technology permitting the disposal of nuclear waste; or there is no effective way to permit the underground containment of nuclear reactors.¹⁰¹

Argument for preemption. Basically, an argument contending that the California regulatory scheme is preempted would begin with the rationale of the *Northern States* decision. This case assumed that atomic energy is federally controlled and that in 1954, when private utilities were given certain rights,

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

100. On this point, the Joint Committee defined the word "regulate" to include licensing:

Amendment No. 1, in subsection b., strikes out the words "and license" after the word "regulate." The words "and license" were not considered necessary because, as used elsewhere in the bill, the word "regulate" includes the licensing function. Thus, for reasons of consistency, the words "and license" in this subsection were deleted as being unnecessary.

SENATE REPORT, *supra* note 72, at 2. Since one aspect of licensing under the AEC licensing procedure is approving the site of nuclear powerplants, it is perhaps arguable that exclusion is a licensing procedure which is preempted. However, licensing involves a very technical analysis of the site and the proposed plant. In addition, licensing involves many things other than site approval. The entire design and operation of the proposed plant is checked. It includes all the AEC regulation which occurs prior to actual commencement of operations. A state decision to deny land use seems very unlike the technical procedure called "licensing." Also, the word "regulate" has connotations of monitoring and controlling on-going activities. Such monitoring and controlling call for expertise and this interpretation comports with the legislative history. Thus, it is unlikely that "regulate" was intended to refer to denials of land use.

101. See text accompanying notes 25-33 *supra*.

no express grant of power was made to the states to regulate nuclear energy.¹⁰² The argument would then turn to the 1959 amendments to the Act which imply that the states had no regulatory power over nuclear energy apart from that delegated by the AEC. Moreover, the 1959 amendments explicitly suggest that states could not regulate nuclear powerplants out of concern for radiation hazards. Therefore, since California is attempting to deny land use to nuclear powerplants based on reasons relating to radiation hazards, and since this denial is a form of regulation, the California scheme is impliedly preempted.

Argument against preemption. Though the preceding argument is conceptually sound it ignores some of the realities surrounding federal regulatory power in general and the nuclear regulatory program in particular. First, state police power exists of its own right since states are governments of general powers. Unless preempted, they have the power to regulate activities within their borders.¹⁰³ With the passage of the Atomic Energy Act of 1954, private companies were allowed to own and develop nuclear reactors. Since private companies are not protected by sovereign immunity, states should be free to regulate them under their police power, unless a congressional preemptive intent can be found to the contrary. As noted earlier, no such intent existed with the passage of the Act in 1954; Congress did not even consider the federal-state problem.¹⁰⁴ In 1959, preemptive intent did emerge with respect to radiation hazards, however such preemptive intent has never been shown with regard to state laws denying *land use* to nuclear powerplants. Even as to radiation hazards, the concerns which supported the passage of section 274(k) are largely absent when applied to a state like California, which possesses the expertise to regulate all facets of nuclear power.

Second, the argument for implied preemption is weakened by the fact that the federal regulatory program is simply not a very ambitious one. It is only in the relatively complex areas of construction and operation that the program takes on a pervasive quality. However, in areas not requiring technical expertise this quality is absent. Thus, state decisions which require no technical expertise—such as to have no powerplants or to

102. 447 F.2d at 1150.

103. U.S. CONST. amend. X.

104. See text accompanying notes 93-98 *supra*.

restrict their number—should not be preempted, regardless of the reasons behind the ban or restriction. Only a complex federal scheme of energy production priorities could provide a colorable basis for implied preemption of state laws that ban or restrict the development of nuclear energy. This would indicate a congressional intent to carry nuclear energy to every state. Until such a scheme exists, the only areas which should be preempted are the construction of new nuclear powerplants which a state is willing to permit the operation of those plants which now exist.

In the wake of this two-pronged attack on the argument for implied preemption, California's regulatory approach should survive. It does not purport to affect existing nuclear facilities, nor does it purport to regulate those which might be constructed out of concern for radiation hazards. The California approach simply attempts to apply the state's inherent police power to the spread of nuclear energy within its borders. This conclusion also finds support in the recent Supreme Court decisions allowing concurrent regulation without preemption.

CONCLUSION

California's legislative effort to regulate activity related to nuclear power within its borders has created a classic problem of federal preemption. This problem exists on two levels. One level presupposes that the purpose of the Atomic Energy Act was to develop nuclear energy as a national energy source to be used in every state and that state legislation interfering with that goal is preempted. However, the language of the Act itself and its legislative history simply do not contain evidence of such a broad congressional purpose.

The second level of the problem assumes that states have retained limited power to regulate nuclear power within their borders, but questions whether they can regulate to protect against radiation hazards. This issue is important both because the California statutes reflect a concern for radiation hazards and the 1959 amendments to the Act imply that states are not permitted to regulate in this area. However, an examination of the legislative history of the amendments reveals that nuclear powerplants were exempted from state regulation because of concern that states did not then possess sufficient expertise to regulate the complex activity of constructing and operating nuclear powerplants. It can be argued that this concern does not logically extend to preempt state statutes, such as Califor-

nia's, that merely deny land use to nuclear powerplants, since this denial does not call for extensive expertise and is not regulation within the meaning of the amendments. Under this view, California's statutes could be upheld.

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