FEDERAL SUPREMACY IN THE REGULATION OF NUCLEAR ENERGY: WHERE DO PUNITIVE DAMAGES LIE?

The advent of nuclear power has not been without its legal and political fallout.[1] Congressional failure to delineate the extent to which the states may involve themselves in the regulation of nuclear energy[2] is one manifestation of this problem. In the wake of this legislative shortcoming, the issue of the amplitude of damages recoverable by a party injured as a result of a nuclear incident, remains uncertain.[3] This apparent gap in legislative planning was exposed in a recent Tenth Circuit court decision, *Silkwood v. Kerr-McGee Corp.*[4] Notwithstanding its unresolved factual disputes,[5] *Silkwood* is an excellent vehicle by which to analyze the impact of federal regulation of the nuclear industry, specifically the Atomic Energy Act of 1954,[6] on the available state remedies for tortious conduct. This Comment will focus on an injured party's right to a punitive damage award[7] in the context of a nuclear incident. Emphasis will be placed on ascertaining

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[1] Judicial opinions are scattered throughout the field of nuclear energy touching many different aspects and issues. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978) (licensing of nuclear reactors); Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (impact of National Environmental Policy Act on Atomic Energy Commission); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (preemption of state regulation concerning radioactive hazards); Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975) (states' tenth amendment reservation of powers to regulate nonradioactive hazards implied through § 274(k) of the Atomic Energy Act). The committee responsible for the promulgation of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979), recognized that the courts would be called on to define the Act's scope. *See* Nothern States Power Co. v. Minnesota, 447 F.2d 1143, 1156 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *Hearings on Federal-State Relations Before the Joint Comm. on Atomic Energy Field*, 86th Cong., 1st Sess. 127, 306-08 (1959) (testimony of Robert Lowenstein, AEC, Office of the General Counsel).

[2] *See* Comment, *State Regulation of Nuclear Power Production: Facing the Preemption Challenge From a New Perspective*, 76 Nw. L. Rev. 134 (1981).

[3] *See* Comment, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 Am. U.L. Rev. 741 (1980).

[4] No. 79-1894 (10th Cir. Dec. 11, 1981).

[5] See *supra* notes 10 & 13.

[6] 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979).

[7] The availability of punitive damages depends upon the forum state. While criteria differ from jurisdiction to jurisdiction, they are generally awarded where the defendant's wrongful conduct was willful, wanton, or done in reckless disregard of the consequences. *See* Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. Rev. 1 (1980).

the extent to which such an award may be preempted by the existence of a national regulatory scheme.

SILKWOOD v. KERR-MCGEE CORP.

Karen Silkwood was employed by defendant, Kerr-McGee, as a laboratory analyst.[8] On November 5, 6, and 7, 1974, Silkwood suffered radioactive contamination as a result of exposure to plutonium, a radioactive chemical element.[9] Subsequent to her death in an unrelated incident,[10] the administrator of Silkwood's estate instituted a diversity action for personal injuries in the United States District Court for the Western District of Oklahoma.[11] The jury awarded the plaintiff $500,000 for personal injuries,[12] $5,000 in property damages,[13] and $10,000,000 in punitive damages.[14] These damage awards were sustained despite defendant's motions for judgment notwithstanding the verdict and in the alternative for a new trial.[15] Kerr-McGee had contended, *inter alia*, that the federal regulatory scheme controlling the nuclear industry preempted an award of punitive damages and that compliance with the national regulations immunized defendant from any form of liability.[16] The district court dismissed these allegations and upheld the damage awards under state tort law principles.[17]

On defendant's appeal, the United States Court of Appeals for the Tenth Circuit, in a two to one decision, sustained plaintiff's award

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[8] *Silkwood*, slip op. at 3.

[9] *Id.* It was stipulated that the plutonium originated from the Kerr-McGee plant. During the litigation, the precise method and time frame of exposure was hotly contested. These issues are not germane to the subject of this Comment, therefore discussion of them will not be included.

[10] Karen Silkwood died in an automobile accident while on her way to meet a newspaper reporter and a union leader. The accident was not a subject of the litigation. *Id.* at 2, 7.

[11] *Id.* at 1-2.

[12] *Id.* This award was for plaintiff's mental anguish, i.e., fear and anxiety suffered due to the plutonium exposure. *Id.*

[13] *Id.* The property damage occurred in Karen Silkwood's apartment due to some radioactive contamination found there. How the radioactive material passed from the Kerr-McGee plant to Silkwood's home remains unresolved. *Id.*

[14] *Id.* Exemplary damages were apparently awarded by the jury because of the reckless indifference with which Kerr-McGee trained its employees and monitored its plant. *Id.* at 2, 27.

[15] Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 570 (W.D. Okla. 1979), *aff'd in part and rev'd in part*, No. 79-1894 (10th Cir. Dec. 11, 1981).

[16] *Id.* at 571-72. The district court reasoned that an industry was not immunized from liability for conduct for which the federal government did not impose liability. Compliance with government safety regulations is a consideration, but is not dispositive of the liability issue. *Id.*

[17] *Id.* at 572, 577-80, 594.

for property damage,[18] but reversed the personal injury award[19] and the award of punitive damages.[20] In dismissing plaintiff's punitive damage award, the court of appeals adopted the defendant's claim that such a judgment was preempted by the Federal Government's exclusive regulation of radiation hazards.[21] The basis of the court's reasoning was the seminal decision in the field of nuclear energy regulation, *Northern States Power Co. v. Minnesota*,[22] which read the Atomic Energy Act of 1954[23] as preempting any state regulation of radiation hazards associated with the construction and operation of nuclear facilities. The *Northern States* decision, basically a declaratory judgment action,[24] concentrated on section 274 of the Act, which was intended to define the role of the states regarding nuclear energy regulation.[25] The *Silkwood* court extended this rationale by applying it to a remedial situation, stating that *Northern States* mandated federal preemption of punitive damages due to their regulatory effect.[26]

Defining punitive damages as an award " 'against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future,' "[27] the court of appeals concluded that such a judgment accomplished the same obtrusive result as if the state legislature had enacted stricter regulations in the area of radiation hazards.[28] Reasoning that the states had been pre-

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[18] *Silkwood*, slip op. at 22-26. The property damage award was upheld on the theory that it constituted a legitimate compensable claim under state tort law. It was reasoned that such an award did not run afoul of the purpose or intent of the federal regulatory policy, specifically the Atomic Energy Act of 1954. 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979).

[19] *Silkwood*, slip op. at 3-21. The personal injury award was reversed on the grounds that a provision of the Oklahoma Worker's Compensation Act, OKLA. STAT. ANN. tit. 85, § 12 (West 1970 & Supp. 1980), provided exclusive liability against the employer, thereby precluding the pursuance of an independent personal injury action. *Silkwood*, slip op. at 11-21.

[20] *Silkwood*, slip op. at 26-30.

[21] *Id.*

[22] 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The issue posed was "whether the United States Government has the sole authority under the doctrine of pre-emption to regulate radioactive waste releases from nuclear power plants to the exclusion of the states." *Id.* at 1144. Responding to this query affirmatively, the court interpreted § 274 of the Atomic Energy Act of 1954 as impliedly preempting any state regulation with respect to radioactive hazards. *Id.* at 1148-52. See also *infra* notes 184-92 and accompanying text.

[23] 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979).

[24] 447 F.2d at 1144.

[25] *See* Interpretation by the General Counsel: AEC Jurisdiction Over Nuclear Facilities and Materials Under the Atomic Energy Act, 10 C.F.R. § 8.4(c) (1981).

[26] *Silkwood*, slip op. at 29.

[27] *Id.* at 27 (quoting RESTATMENT (SECOND) OF TORTS § 908(1) (1979)).

[28] *Silkwood*, slip op. at 29.

cluded from so legislating,[29] the court held that a punitive damage award, because of its deterring effect, was thereby preempted.[30] The repercussions of *Silkwood* may be far-reaching,[31] although the decision itself may be subject to criticism as being analytically unsound. The frailty lies in the fact that the court took large inferential steps in reaching its conclusion,[32] thus leaving substantial logical gaps in its reasoning.[33] It is necessary, therefore, to clarify those grey areas by examining the role of punitive damages in the current preemption setting.[34] This analysis must then be imposed on the national regulatory scheme of the nuclear industry to determine its preemptive effect.

FEDERAL SUPREMACY AND ITS APPLICATION TO PUNITIVE DAMAGES

A. *An Overview of the Preemption Doctrine*

The preemption doctrine stems from the supremacy clause of the United States Constitution,[35] which in essence states that laws promulgated by the Federal Government are "the supreme Law of the Land."[36] Balancing this broad grant of federal supremacy is the tenth amendment's reservation of states' rights and powers in areas not specifically designated federal.[37] To gain an understanding of the

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[29] *Id.* at 28-29. The appellate court's reasoning was based on the language of subsection 274(1) of the 1954 Act and on the *Northern States* decision. *Id.*

[30] *Id.* at 26-30.

[31] *See* Belli, *supra* note 7, at 4, noting that almost every state permits recovery for exemplary damages, the exceptions being Louisiana, Massachusetts, Nebraska and Washington. The *Silkwood* decision may affect punitive damage awards against other industries, such as the aviation and drug industries, which are heavily regulated by the federal government.

[32] See *infra* text accompanying notes 195-232.

[33] See *infra* notes 195-243 and accompanying text presenting the proposition that the court of appeals left the reader to draw too many inferences by failing to supply authoritative documentation, or simply not covering an area in sufficient detail.

[34] See *infra* notes 102-45 and accompanying text. One commentator has proposed that although it is difficult to place Supreme Court decisions regarding preemption in a tidy, categorical scheme, it is quite helpful to view the Court's attitude towards preemption within certain time frames. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975).

[35] U.S. CONST. art. VI, cl. 2 states:

> 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.

Id.

[36] *Id.*

[37] U.S. CONST. amend. X. The amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

mechanics of the doctrine, i.e., when its invocation is desirable, it is useful to analyze the character of the state regulation involved.[38] The further a state regulation deviates from protecting those persons within its borders, the less lenient the courts will be in permitting such activity where federal legislation also governs.[39] When, however, a state has exercised its police power to protect the health and safety of its citizens, the judiciary will be hard-pressed to reach a preemptive verdict.[40] Therefore, recognition of the state interest involved is a key consideration in the issue of the preemption of punitive damages since this has traditionally been a valid exercise of a state's police power.[41]

Once the character of the state regulation has been evaluated, the federal interest in the particular field must be ascertained. This is accomplished by examining the face of the federal enactment in conjunction with its legislative history.[42] Such an inquiry is required to determine the breadth of the federal statute and the extent to which Congress has sought to occupy a specific area.[43]

Initial investigation should be directed to any language in the statute constituting an express preclusion of state involvement or an "express saving" clause immunizing state action from any preemptive

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respectively, or to the people." *Id.*; *see also* Marshall v. Consumers Power Co., 65 Mich. App. 237, 243, 237 N.W.2d 266, 273 (1975) (discussing interplay between supremacy clause and tenth amendment).

[38] *See* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

[39] *Id.* The author states that:

> Laws that protect the people inside state borders from physical injury have received the greatest deference from the Court. Laws that protect the people inside state borders from other dangers have received less deference. State laws that purport to protect people mostly outside state borders have received little deference.

Id. at 363. The above distinction is especially important in an analysis of punitive damages since the state is attempting to protect the welfare of its citizens injured within its borders. *See* Rogers v. Ray Gardner Flying Service, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *infra* notes 212 & 213 and accompanying text.

[40] *See, e.g.*, Maurer v. Hamilton, 309 U.S. 598 (1940); Comment, *supra* note 2, at 141, 162; Note, *supra* note 38, at 363, 374-79.

[41] See *supra* note 39.

[42] *See* DeCanas v. Bica, 424 U.S. 351, 358 (1976); Marshall v. Consumers Power Co., 65 Mich. App. 237, 243-44, 237 N.W.2d 266, 273-74 (1975). *See generally* Note, *supra* note 38.

[43] *E.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963). The Court stated "that federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained." *Id.* at 142; *see also* DeCanas v. Bica, 424 U.S. 351 (1976).

In this initial inquiry into the federal statute it should also be determined if Congress has legislated within one of its constitutional powers. *See Northern States*, 447 F.2d at 1146; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947) (grain storage facilities involved in interstate commerce within federal domain under commerce clause).

effect.[44] An express congressional directive adopting one of these modes leaves little doubt as to the intent of Congress.[45] Absent such a declaration that either precludes or preserves state legislation, further inquiry should include a determination as to whether it is physically impossible to adhere to both the national and state regulations.[46] Where observance of a state enactment requires a violation of a federal standard or negates opportunities furnished by the national scheme, the state law must yield.[47] Lastly, where neither an express congressional directive exists nor is compliance with both schemes physically impossible, the courts may imply federal preemption.[48] When applying an implied preemption analysis the courts consider several factors: the federal legislation and its history;[49] the comprehensiveness and pervasiveness of the national regulatory design;[50] the character of the federal legislation and the need for national uniformity;[51] and whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[52]

With this background of the preemption doctrine in mind, it is necessary to examine how the courts have applied these guidelines both in the past and in the present. Specific attention will be directed

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[44] *See* Note, *supra* note 38, at 363-66. "Express preemption occurs when a national statute expressly forbids state regulation of a certain type or expressly requires that national regulation be exclusive. Express saving is present when a national statute expressly forbids courts to preempt state laws." *Id.* at 363; *see also* Marshall v. Consumers Power Co., 65 Mich. App. 237, 243-44, 237 N.W.2d 266, 273-74 (1975).

[45] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 147 (1963). The courts have required a "clear and unambiguous" congressional directive in order to find express preemption of state law by the federal enactment. *Id.; see also* New York State Dep't of Social Servs. v. Dublin, 413 U.S. 405, 413 (1973); Note, *supra* note 38, at 364-65.

[46] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963); *Northern States*, 447 F.2d at 1146.

[47] Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 530-31, 548-51; Note, *supra* note 38, at 366-69.

[48] *Northern States*, 447 F.2d at 1146; Marshall v. Consumers Power Co., 65 Mich. App. 237, 244, 237 N.W.2d 266, 274 (1975).

[49] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 147-50 (1963); *Northern States*, 447 F.2d at 1146.

[50] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *Northern States*, 447 F.2d at 1146.

[51] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 143-44 (1963); *Northern States*, 447 F.2d at 1146.

[52] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *e.g.*, Goldstein v. California, 412 U.S. 546, 561 (1973); *Northern States*, 447 F.2d at 1147.

It must be noted that within the past decade the importance and persuasiveness of the considerations cited have been questioned, and to some extent, limited. *See* Note, *supra* note 34, at 623; *infra* notes 66-99 and accompanying text.

to the recent trend of the Supreme Court when confronted with a preemptive issue.[53]

B. *Changing Attitude Toward Preemption*

While it is recognized that a precise preemptive formula cannot be developed,[54] a survey of Supreme Court decisions over the past years reveals identifiable trends in the interpretation of the doctrine.[55] Generally, the Court has vacillated between an enthusiastic promotion of state interests and a more federally directed approach.[56]

Protection of state interests was the dominant concern during the 1930's.[57] During this period, the Court required a definite and clear congressional declaration that federal regulation was to be exclusive, otherwise the state legislation would stand.[58] In 1941, however, with the decision of *Hines v. Davidowitz*,[59] the era of states' rights subsided.[60] Applying a preemption analysis, the Court in *Hines* departed from its past use of the "intent standard"[61] and invoked a ratiocination which considered the comprehensiveness of the federal scheme along with the need for a national, uniform policy.[62] Re-examining the judiciary's role when confronted with a preemption issue, the Court declared that the state law must fall where it "stands as an obstacle to

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[53] See *infra* notes 66-99 and accompanying text.

[54] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (court cannot create "an infallible constitutional test or an exclusive constitutional yardstick . . . there can be no one crystal clear distinctly marked formula"); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973) (preclusion of state law is judged on case-by-case basis, turning "on the peculiarities and special features of the regulatory scheme in question").

[55] See Note, *supra* note 34, at 623; Comment, *supra* note 2, at 138-42; *infra* notes 66-99 and accompanying text.

[56] Note, *supra* note 34, at 626.

[57] *Id.* at 626-27.

[58] *See, e.g.*, Maurer v. Hamilton, 309 U.S. 598, 614 (1940); H. P. Welsh Co. v. New Hampshire, 306 U.S. 79, 85 (1939); Mintz v. Baldwin, 289 U.S. 346, 350 (1933); *see also* Note, *supra* note 34, at 627, where the author states, "[a]bsent an 'actual conflict' between federal and state law, preemption could only occur if congressional intent to occupy the field was 'definitely and clearly' shown." *Id.*

[59] 312 U.S. 52 (1941). *Hines* involved the interplay between the Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (amended 1952), and a Pennsylvania act which imposed more elaborate criminal penalties upon an alien's failure to possess a registration card. 312 U.S. at 59.

[60] *See* Note, *supra* note 34, at 630-32; Comment, *supra* note 2, at 141-42.

[61] The term "intent standard" is used here to refer to the clear congressional intent required to sustain a preemptive judgment absent a "physical impossibility." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141, 146 (1963); *see* Note, *supra* note 34, at 626-27; Comment, *supra* note 2, at 141-42. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4 (1978).

[62] 312 U.S. at 66-67.

the full purposes and objectives of Congress."[63] This instruction had the effect of lowering the preemptive threshold, thus granting the Court almost a free hand in striking down state legislation.[64]

As the 1970's approached, this "federal-directed" application of the preemption doctrine arose in a variety of circumstances.[65] In 1973, however, the Court in *Goldstein v. California*[66] apparently de-emphasized this near blind application of federal supremacy.[67] Citing the broad language of *Hines* as the proper inquiry,[68] the national statute was narrowly construed thereby failing to preempt the state law.[69] Close attention was devoted to the concept of federalism as espoused by Alexander Hamilton in the Federalist Papers,[70] and by Justice Marshall in *Gibbons v. Ogden*.[71] The Court, adopting the language of Hamilton, stated that when reconciling state and federal regulations the state statute must be "absolutely and totally contradictory and repugnant"[72] to the federal scheme for preemption to apply.[73]

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[63] *Id.* at 67.

[64] Note, *supra* note 34, at 633, 635-36. "The adoption of a potential conflict standard accented the drift toward a federal-directed preemption doctrine, by beckoning judicial consideration of a federal statute's operational requirement and inviting preemption on speculative assessments of conflict." *Id.* at 636.

[65] *See, e.g.*, Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (copyright clause); Farmers Educ. and Coop. Union of America v. WDAY, Inc., 360 U.S. 525 (1959) (federal communications law); San Diego Bldg. Trade Council v. Garmon, 359 U.S. 276 (1959) (labor relations law); Pennsylvania v. Nelson, 350 U.S. 497 (1956) (anti-sedition laws); Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947) (regulation of licensed warehouse under federal act); *see also* Note, *supra* note 34, at 630-39.

While the court deviated from the federal-directed approach in isolated instances, *see, e.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), this ideology dominated into the 1970's. *See infra* notes 66-99 and accompanying text.

[66] 412 U.S. 546 (1973).

[67] Note, *supra* note 34, at 639.

[68] See *supra* note 63 and accompanying text.

[69] 412 U.S. at 561. The contention raised by petitioner was that the federal copyright power precluded state legislation in the field. *Id.* at 563.

[70] " 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty.' " 412 U.S. at 554-55 (quoting THE FEDERALIST No. 32, at 243 (A. Hamilton) (B. Wright ed. 1961)).

[71] 22 U.S. (9 Wheat.) 1, 195 (1824).

> The genius and character of the federal government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Id., *quoted in Goldstein*, 412 U.S. at 554.

[72] 412 U.S. at 553.

[73] *Id.*

In keeping with this renewed outlook on the protection of state interests, the Court in *New York State Department of Social Services v. Dublino*[74] upheld a state program which imposed stricter standards on welfare recipients than the federal law.[75] More importantly, the Court rejected the appellee's contention that the federal scheme was so pervasive as to preclude any state regulation.[76] Coupled with the requirement that the state law be totally repugnant to the national policy as enunciated in *Goldstein*,[77] the *Dublino* decision manifests a volition to return to a sympathetic, state-directed approach[78] while substantially disarming an implied preemption analysis.[79]

This state-directed approach was again followed in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*.[80] The Court, stating that a fine balance exists between state and federal regulation,[81] upheld a state statute that forbade practices which acted as a restraint on trade.[82] To maintain such a conclusion, the proper approach is "to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' "[83] The *Ware* decision accented the need for explicit congressional directives when employ-

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[74] 413 U.S. 405 (1973).

[75] *Id.*

[76] *Id.* at 415.

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. Given the complexity of the matter . . . a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent.

Id. (citation omitted). The Court further stated that the legislative history cited to support the implied preemptive finding was insufficient basis for such a decision. *Id.* at 417.

[77] See *supra* notes 66-72 and accompanying text.

[78] Note, *supra* note 34, at 645. The language in *Dublino* stressed that: 1) federal preemption should not be applied in a wholesale manner; and 2) a clear congressional directive is necessary. 413 U.S. at 413.

Emphasis was also placed on the consideration that state programs, such as the one in question, existed prior to the enactment of the federal legislation. It was reasoned that Congress, being aware of such programs, would have expressly preempted them had it intended to do so. *Id.* at 414, 420.

[79] See *supra* notes 48-52 and accompanying text & *infra* note 193 and accompanying text.

[80] 414 U.S. 117 (1973).

[81] The California statute invalidated " 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind. ' " *Id.* at 121 (quoting CAL. BUS. & PROF. CODE § 16600 (West 1964)). The validity of this statute was sustained over petitioners claim that it conflicted with the New York Stock Exchange rules promulgated pursuant to the Securities Exchange Act of 1934. 414 U.S. at 119, 121-22, 125.

[82] 414 U.S. at 127.

[83] *Id.* (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)). The *Silver* decision involved two conflicting federal statutory schemes. While it presented a different factual make-up from *Ware*, it presented a proper "analytical framework." 414 U.S. at 125-26.

ing a preemptive analysis in an area where a state has otherwise validly exercised its police power.[84] The rationale of *Florida Lime & Avocado Growers, Inc. v. Paul*,[85] requiring "persuasive reasons" for the courts to preempt a state regulation,[86] was cited with approval by the *Ware* Court.[87]

Reiterating its policy regarding state interests, the Court in *Kewanee Oil Co. v. Bicron Corp.*[88] reconciled a state trade secret law with the national patent policy.[89] In sustaining the validity of the state act, the *Hines* criteria was again cited as the proper supremacy clause standard.[90] In so doing, the Court further clarified its apparent deference to state interests, stating that a mere possibility that conflicts between the two schemes could be fabricated was insufficient to validate a preemptive finding.[91] It thus recognized that a degree of conflict would be tolerated absent a showing of actual conflict.[92]

Again conforming to this flexible state interest approach, *DeCanas v. Bica*[93] sustained a California law which imposed sanc-

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[84] *Id.* at 134-35. The Court stated that the areas touched by the state legislation were merely peripheral to the purpose and scope of the federal regulatory scheme. *Id.* The federal statute had provided for self-regulation in the area of securities laws, thereby permitting state participation in the regulatory plan. Considering this the Court stated, " '[w]here the Government has provided for collaboration the courts should not find conflict.' " *Id.* at 137 (quoting Union Brokerage Co. v. Jensen, 322 U.S. 202, 209 (1944)).

[85] 373 U.S. 132 (1963).

[86] *Id.* at 142. See *supra* note 43.

[87] 414 U.S. at 139; *see also* Note, *supra* note 34, at 649.

[88] 416 U.S. 470 (1974).

[89] *Id.*

[90] *Id.* at 479. *Hines*, which espoused a broad basis for a preemptive finding, stated that a state law should not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67.

[91] Specifically, the Court stated, "[i]n the case of trade secret law no reasonable risk of deterrence from patent application by those who can reasonably expect to be granted patents exists." 416 U.S. at 489. The rationale was based on the language in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), which directed the attention of the judiciary to the issue of whether the state involvement appeared to be " 'too great an encroachment on the federal patent system to be tolerated.' " 416 U.S. at 482 (quoting *id.* at 232).

[92] *See* 416 U.S. at 489-91; *see also* Note, *supra* note 34, at 646-47.

The need to uphold state interests where a mere possibility of a conflict can be fabricated was also recognized in *Goldstein*. There the Court stated that "[w]e must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States, or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise." 412 U.S. at 554 (emphasis added). The Court acknowledged that our governmental system promotes possible conflicts and that every potentiality should not call for the invocation of federal preemption. *Id.* at 558; *see also* Marshall v. Consumers Power Co., 65 Mich. App. 237, 253, 237 N.W.2d 266, 282; Note, *supra* note 34, at 650.

[93] 424 U.S. 351 (1976).

tions on employers of illegal aliens over objections that the Federal Government had reserved exclusive control over the regulation of immigration.[94] The argument that the national enactment was so comprehensive that it necessarily precluded any form of state regulation was rejected as in *Dublino*.[95] The Court emphasized that a "clear and manifest purpose of Congress" must be demonstrated to preempt any state involvement.[96]

The state-directed preemption concept, apparently resurrected in *Goldstein*,[97] gained momentum through 1976 with the *Dublino*, *Ware*, *Kewanee Oil*, and *DeCanas* decisions.[98] The refusal to invalidate state legislation unless Congress evidences a clear, preemptive intent has come to be identified as a characteristic of the Burger Court.[99] The application of such a preemptive doctrine, in the context of punitive damages, should be thoroughly scrutinized, carefully weighing the competing policies and interests involved.

C. *Damage Awards in a Preemptive Setting*

An appreciation of legitimate state interests is important in a discussion of damage awards,[100] for in applying a preemptive analysis to an award of punitive damages, the courts are dealing with a traditional state remedial power.[101]

Inspection of the treatment of punitive damages in a preemptive setting discloses the possible precedential impact of the *Silkwood* decision. The concept equating punitive damages with state regulatory action because of their deterrent effect, has rarely been discussed.[102]

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[94] *Id.*

[95] *Id.* at 359-60. See *supra* note 75 and accompanying text.

[96] 424 U.S. at 357. The federal regulation was inspected on its face, along with its legislative background, for "any specific indication" that Congress had precluded any attempt at state legislation. *Id.* at 358.

[97] See *supra* notes 66-72 and accompanying text.

[98] See *supra* notes 73-96 and accompanying text.

[99] *See* Comment, *supra* note 2, at 157-61; Note, *supra* note 34, at 653.

[100] The court of appeals in *Silkwood* failed in this respect. They neglected in their written opinion to: 1) inspect adequately the legislative history of the entire Atomic Energy Act of 1954; 2) emphasize the distinction between a mere possibility of conflict and actual conflict; 3) identify the current purpose behind the development of nuclear energy; and 4) reconcile the two schemes due to their qualitative differences instead of completely ousting one. See *infra* notes 196-244 and accompanying text.

[101] See *infra* text accompanying notes 212 & 213.

[102] Only two Supreme Court decisions have been uncovered that mentioned the issue whether a damage award was preempted as a form of state regulation. The cases are: UAW v. Russell, 356 U.S. 634, 650 (1958) (Warren, C.J., dissenting), and San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242, 246-47 (1957). See *infra* text accompanying notes 103-07 for a discussion of these decisions.

In the dissenting opinion in *UAW v. Russell*,[103] Chief Justice Warren espoused his fear that a punitive damage award constituted the type of regulation forbidden by the congressional grant of exclusive jurisdiction to the National Labor Relations Board.[104] A similar concern was opined by the majority in *San Diego Building Trades Council v. Garmon*.[105] In a five to four decision, the Court reasoned that the power to award damages can be used to discourage or prevent certain conduct and therefore should be precluded by the NLRB's sole jurisdiction over the field.[106] So, while the fairly novel assertion that an award of punitive damages constitutes a form of state regulation has received some endorsement, it has not by any means found general acceptance. In fact, the rationale and language of *Garmon* have rarely been cited to support such a proposition.[107]

While few courts have expressly stated that a punitive damage award constitutes state regulation, the issue of their availability has arisen in a federal regulatory setting on a number of occasions.[108] The courts have generally ascertained the overall purpose of the federal statutory scheme and then determined whether a punitive damage award would be consistent with that purpose.[109] Although an *ad hoc* preemption approach has been applied to damage awards,[110] some basic principles can be ascertained and applied to this analysis.

Punitive damages, however, have been rejected in certain instances because they were not consistent with the purposes behind the federal policy. *E.g.*, International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979).

[103] 356 U.S. 634 (1958).

[104] *Id.* at 650-53.

[105] 359 U.S. 236 (1959).

[106] *Id.* at 246-47. Specifically, the Court stated:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Id.

[107] The Supreme Court has never recited this language. Even in the court of appeals decision in Nader v. Allegheny Airlines, 512 F.2d 527 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976), the court, stating in dictum that the deterrent effect of punitive damages constitutes impermissible regulation, failed to cite *Garmon* or any other authority in support of its proposition. *See* Comment, *supra* note 3, at 759-62.

[108] See *infra* notes 110-25 and accompanying text.

[109] See *infra* notes 110-45 and accompanying text.

[110] See *supra* notes 102-07 & *infra* notes 110-45 and accompanying text.

In *United Construction Workers v. Laburnum Corp.*,[111] the issue was whether, under a common law tort action, a victim of an unfair labor practice could recover both compensatory and punitive damages, despite the National Labor Relations Board's presence in that area.[112] Recognizing that exemplary damages are traditionally a valid exercise of a state's police power, the state court's award of punitive damages was upheld.[113] In discussing the proper preemptive analysis, the Court stated that a valid exercise of state power should only be precluded "where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "[114] Interestingly, the Court noted that the national scheme failed to provide an alternative remedial plan for "injuries caused by tortious conduct."[115]

Repeating the argument raised in *Laburnum*, the appellant in *UAW v. Russell*[116] objected to an award of punitive damages, alleging that the NLRB's exclusive jurisdiction regarding unfair labor practices dictated their preclusion.[117] Rejecting petitioner's contention and quoting *Laburnum*, the Court recognized that although a potential for conflict existed, it was insufficient to warrant a preemptive finding.[118] The punitive damage award was sustained on the basis that an injured party has all available state remedies at his disposal, absent a clear congressional directive.[119]

While commentators,[120] and in one decision the Court itself,[121] have attempted to narrowly interpret the holdings of *Laburnum* and

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[111] 347 U.S. 656 (1954).

[112] *Id.* at 657, 658-59, 663.

[113] *Id.* at 663-65.

> To the extent, however, that Congress has not prescribed a procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated . . . . The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

Id. at 665.

[114] *Id.* at 663 n.5 (quoting Kelly v. Washington, 302 U.S. 1, 10 (1937)). This approach, reconciling the competing regulatory schemes, is consistent with the current trend of the Supreme Court. The approach protects the state interest unless it is 1) repugnant to, or 2) actually conflicts with, the federal regulation, or 3) Congress has clearly manifested an intent to preclude such a state enactment. *See supra* notes 66-101 and accompanying text.

[115] 347 U.S. at 663-64.

[116] 356 U.S. 634 (1958).

[117] *Id.* at 640.

[118] 356 U.S. at 644.

[119] *Id.* at 646.

[120] *See* Comment, *supra* note 3, at 758.

[121] *See Garmon*, 359 U.S. at 247-49.

Russell, the rationale of those decisions is still quite persuasive. Those who have sought to confine the application of *Russell* and *Laburnum* have focused on the violent or threatening conduct condemned in both instances.[122] The Court's rationale in each case, however, should not be so restricted.[123] For example, the decision in *Laburnum*, which permitted a state exemplary award absent an alternative remedy or a clear preclusion, has been cited in many non-violent situations.[124] The Court's statement in *Russell*, that a mere possibility of a federal-state conflict is insufficient to invoke a preemptive finding, should likewise not be so confined.[125]

Examining the availability of state remedies given the existence of a national regulatory policy, the Court in *Vaca v. Sipes*[126] recognized that traditional remedial schemes should not be preempted where local interests are involved absent a congressional mandate, or where a conflict merely touched upon the outer fringe of a federal concern.[127] Language to this effect has often been repeated by the Court in support of state remedial powers.[128] One instance in which the Court expressed a great concern for state interests was *Nader v. Allegheny Airlines*,[129] where the Court followed the view that a preexisting right is to be granted the utmost deference unless it renders the federal enactment inoperative.[130] While *Nader* did not directly ad-

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[122] *See id.*

[123] *See id.* at 249-54 (Harlan, J., concurring).

[124] *See, e.g.*, International Assn. of Machinists v. Gonzales, 356 U.S. 617, 621-22 (1958); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 477 (1955).

[125] See *supra* note 121.

[126] 386 U.S. 171 (1967).

[127] *Id.* at 180 (citing *Garmon*, 359 U.S. at 243-44). *Vaca* involved a suit by an employee against his union for breach of its duty of representation in connection with the employee's wrongful discharge allegation against his employer. *Id.* at 173. It was held, that the damages awarded against the union for a violation of its duty of fair representation were improper. The Court found that the employer, not the union, was principally responsible for the damages claimed. Therefore, the award of compensatory and punitive damages against the union was reversed. *Id.* at 195-98. The injured party's right, however, to seek punitive damages was not foreclosed by the Court. After recognizing that the union was not the sole culprit, Justice White stated that, "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Id.* at 195.

[128] *See id.* at 180; *see, e.g.*, Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (state remedies applicable in libel action despite federal labor legislation); Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (presence of federal labor legislation does not preclude state jurisdiction regarding mass picketing).

[129] 426 U.S. 290 (1976).

[130] *Id.* at 298.

> [A] common-law right, even absent a saving clause, is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute that the survival of

dress the area of punitive damages,[131] its language is instructive. Strong statements, such as those reiterated in *Goldstein*,[132] *Dublino*,[133] and *DeCanas*,[134] were incorporated into the *Nader* discussion of the application of a state's common law remedies.[135]

The Court's analysis in *Nader* also provides insight to when possible conflict between a federal act and a common law remedy will be tolerated. It was reasoned that in sustaining an application of a state remedial scheme, the courts are not imposing their regulatory judgments upon the federal policy,[136] but are merely allowing the injured parties the right to seek redress for the wrongs committed, outside the scope of the national law.[137] An after-the-fact redress for injuries incurred must be distinguished from federal enactments regulating the operation of a particular industry.[138] Too much emphasis should not be placed on the blind compliance with a federal regulatory scheme while the actual effects on the public go ignored.

In *International Association of Machinists v. Gonzales*,[139] the above rationale was invoked in sustaining a damage award to a former union member for illegal expulsion, over objections that such an award interfered with the NLRB's implementation of national

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such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.'

Id. (quoting Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907)).

Similar language can be found in Marshall v. Consumers Power Co., 65 Mich. App. 237, 252, 237 N.W.2d 266, 281 (1975), where the court stated that a mere impingement upon the federal act should not preclude the application of traditional state remedies.

[131] 426 U.S. at 296.

[132] See *supra* text accompanying notes 66-73 for a discussion of *Goldstein*.

[133] See *supra* text accompanying notes 74-79 for a discussion of *Dublino*.

[134] See *supra* text accompanying notes 93-99 for a discussion of *DeCanas*.

[135] Specifically, the forceful expressions used by the Court were: 1) "repugnant," 2) "deprive . . . of its efficacy," and 3) "render . . . nugatory." 426 U.S. at 298 (quoting Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)). This language is consistent with the state interest presumption currently applied by the Court. *See* notes 66-101 and accompanying text; *Dublino*, 413 U.S. at 413 (requiring a "clear manifestation" of congressional intent, "federal supremacy is not lightly to be presumed") (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)); *DeCanas*, 424 U.S. at 358 (requiring any specific indication of legislative intent); *Kewanee Oil*, 416 U.S. at 482 (whether the state act "constitutes 'too great an encroachment' "); *Goldstein*, 412 U.S. at 553 ("absolutely and totally contradictory and repugnant").

[136] 426 U.S. at 299.

[137] *Id.*

[138] *See* Rosadail v. Western Aviation, 297 F. Supp. 681, 683-84 (D. Colo. 1969) ("civil remedies for damages as a means of enforcing the act were not envisioned by Congress"); Marshall v. Consumers Power Co., 65 Mich. App. 237, 252, 237 N.W.2d 266, 281 (1975) (AEC regulations applied to safe operation while state judicial remedies are "to insure the welfare of its citizens"). *See generally* Annot., 82 A.L.R. 3d 729 (1978).

[139] 356 U.S. 617 (1958).

policy.[140] Noting the Board's power to grant what would amount to partial relief, the Court refused to preclude the pursuance of a state cause of action.[141] Absent a compelling congressional declaration, states will not be deprived of vindicating a party's right to damages, even in the face of potential conflict with the federal scheme.[142] Both *Laburnum* and *Russell* were cited approvingly.[143]

In assessing an individual's right to punitive damages, the courts should take a tough stand against preempting such damage awards since they constitute a traditional remedy under many state tort laws.[144] The courts should be aware that such a remedial power is central to a state's protection of its citizens' welfare and tremendous deference should be accorded the discharge of a state's police power.[145]

PUNITIVE DAMAGES AS THEY RELATE TO THE REGULATION OF NUCLEAR POWER

A. *Atomic Energy Regulation*

The birth of the Atomic Energy Commission (AEC), through the promulgation of the Atomic Energy Act of 1946[146] (AEA), evidenced a congressional intent to explore the use of nuclear power in the production of energy.[147] The Federal Government under the 1946 Act main-

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[140] *Id.* The federal statute involved in *Gonzales* was the National Labor Relations Act, 29 U.S.C. §§ 151-187 (1976). Under the Act the NLRB was authorized to award back pay to a victim of an unfair labor practice. It was not empowered to grant the relief provided for under state law, sought in *Gonzales* for damages for breach of contract. 356 U.S. at 620-21. 620-21.

[141] 356 U.S. at 621.

[142] *Id.* at 620, 621-22. " 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states.' " *Id.* at 622 (quoting Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A.B.A. J. 415, 483 (1956)).

[143] 356 U.S. at 620-21.

[144] See *supra* note 39 and accompanying text.

> [A] court, seeking a remedy to match [a] wrong, has at its disposal the full panoply of tools traditionally used by courts to do justice between parties. Punitive damages, being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise.

International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring); *see also* Belli, *supra* note 7, at 4-5, 23.

[145] See *supra* notes 39-41 and accompanying text.

[146] Ch. 724, 60 Stat. 755, *amended by* Atomic Energy Act of 1954, Pub. L. No. 703, 68 Stat. 919.

[147] The purpose of the AEC under the 1946 Act was to coordinate the development of nuclear weapons and to investigate the potential of atomic fission as an energy source. *See* Comment, *supra* note 2, at 143; Frampton, *Radiation Exposure—The Need for a National Policy*, 10 STAN. L. REV. 7, 17 (1957).

tained a monopolistic ownership over the development, production, and utilization of fissionable materials.[148]

An in-depth study of nuclear development and its related problems began in 1952.[149] Extensive hearings commenced in 1953[150] which culminated in the Atomic Energy Act of 1954.[151] This Act reflected the rapid technological advancement of nuclear power's use for peaceful purposes[152] and incorporated congressional policy changes encouraging private industries' participation in nuclear energy production.[153] The Federal Government, however, was not willing to completely relinquish its firm grip on the industry, and therefore authorized the AEC to closely regulate nuclear facilities in the private sector.[154] A licensing scheme was established requiring the issuance of a permit by the AEC to the private enterprise before the latter could utilize nuclear energy for commercial purposes.[155]

One of the more crucial changes in the 1954 Act was the Price-Anderson Act (Price-Anderson),[156] an amendment which was the Government's response to the private sector's fear of unlimited liability in the face of a nuclear accident.[157] The crux of Price-Anderson

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[148] Atomic Energy Act of 1946, ch. 724, §4(b), 60 Stat. 755, 759, *amended by* Atomic Energy Act of 1954, Pub. L. No. 703, § 41, 68 Stat. 919, 928; *see also Northern States*, 447 F.2d at 1147; S. REP. No. 1211, 79th Cong., 2d Sess. 15, *reprinted in* 1946 U.S. CODE CONG. SERV. 1327, 1331; S. REP. No. 1699, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3456.

[149] S. REP. No. 1699, *supra* note 148, at 5, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3456, 3460.

[150] *Id.*

[151] Pub. L. No. 703, 68 Stat. 919 (current version at 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979)).

[152] S. REP. No. 1699, *supra* note 148, at 3-4, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS at 3456, 3459. The 1954 Act permits the private sector to build, maintain and operate its own nuclear facilities for peaceful purposes. 42 U.S.C. §§ 2073-2078 (1976 & Supp. III 1979).

[153] S. REP. No. 1699, *supra* note 148, at 2-4, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3456, 3457-59.

[154] *See* 42 U.S.C. § 2132 (1976); Comment, *supra* note 3, at 745-46; Comment *supra* note 2, at 144.

In promulgating a regulatory policy, the AEC was to be "consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(d) (1976).

[155] *See* 42 U.S.C. § 2073 (1976 & Supp. III 1979) (special nuclear material); *id.* §§ 2092, 2093 (source material); *id.* §§ 2111, 2112 (by-product material); *id.* §§ 2131-2140 (utilization and production facilities). The above provisions represent the various licensing provisions under the 1954 Act. See Power Reactor Dev. Co. v. International Union of Elec. Radio & Mach. Workers, 367 U.S. 396, 400-08 (1961) for an outline of the licensing procedure.

[156] Pub. L. No. 85-256, 71 Stat. 576 (1957) (current version at 42 U.S.C. § 2210 (1976 & Supp. III 1979)). The Price-Anderson Act was added as § 170 to the Atomic Energy Act of 1954 and has been amended eight times. *See* 42 U.S.C. § 2210 (1976 & Supp. III 1979).

[157] S. REP. No. 1605, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206.

was an insurance plan whereby AEC licensees were indemnified by the Federal Government from liability in excess of their private insurance sources.[158] It set a limit of $560 million on the aggregate liability for a single nuclear incident.[159] If an accident were to occur, Price-Anderson has left the applicable state tort law virtually unaltered.[160] In the event, however, of what is termed an "extraordinary nuclear occurrence" (ENO),[161] Price-Anderson stipulates that particular fundamental defenses be waived for those licensees falling under the indemnity and private source insurance requirements.[162] By enacting this provision Congress sought to streamline the recovery process for victims of an ENO, and to avoid conflicts involving the state tort law application of strict liability.[163] Thus, Price-Anderson, absent an ENO, maintains a claimant's right to pursue a cause of action under a

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[158] 42 U.S.C. § 2210(a)-(c) (1976 & Supp. III 1979).

[159] *Id.* § 2210(e). Price-Anderson requires those persons licensed by the Commission to obtain as much private insurance as possible and to thereafter execute an indemnification agreement with the government via the AEC to insure against claims which exceed the private coverage limits. *Id.* § 2210(b), (c).

It should be noted that the Nuclear Regulatory Commission (NRC) has taken over the duties of the AEC under the Energy Research and Development Act, 42 U.S.C. § 5801 (1976).

[160] S. REP., *supra* note 157, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206.

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various states . . . .

Id. The language used when discussing the policies behind Price-Anderson are key to an analysis of punitive damages. For it is the only section of the 1954 Act which speaks to the indemnification of injured parties under tort law principles. See *infra* notes 208-11 and accompanying text discussing Price-Anderson and the reservation of state tort law rules.

[161] 42 U.S.C. § 2210(n)(1) (1976 & Supp. III 1979). The criteria defining an ENO is located in 10 C.F.R. §§ 140.81-.85 (1982). Basically, to be classified as an ENO a nuclear incident must cause a substantial discharge of radioactive materials resulting in substantial damage to persons or property. *Id.* Substantial damage is defined as: 1) death or hospitalization to 5 or more persons within 30 days of the incident; 2) $2.5 million or more in property damage suffered by any one person, or $5 million or more of such damage in the aggregate; or 3) at least 50 persons each sustain $5,000 or more in property damage and the aggregate of damage totals $1 million or more. *Id.* § 140.85.

[162] 42 U.S.C. § 2210(n)(1) (1976 & Supp. III 1979). The Commission can require those involved in the financial protection scheme to: "[W]aive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations." *Id.*

[163] S. REP., *supra* note 157, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206. The number and geographical range of injuries which could result from an ENO, considered in conjunction with the varying state attitudes toward strict liability, required Congress to devise a plan accommodating the injured parties. *Id.*

state's "traditional rules of tort law."[164] For this reason, it is basic to an analysis of punitive damages.[165]

In 1959, Congress again amended the 1954 Act by adding section 274.[166] The purpose of this section was to delineate the role of the states in cooperating with the national policy.[167] An understanding of section 274 is important since it, coupled with the decision in *Northern States*, formed the basis for the court of appeals decision in *Silkwood*.[168]

B. *Section 274 and* Northern States

Subsections 274(b), and (c)[169] of the 1959 amendment provide for "turn over" agreements between the Commission and the governor of the state involved, regarding certain specified materials.[170] Subsection 274(b) allows the Commission to relinquish control to the state over the regulation of certain types of by-product material,[171] source materials,[172] and special nuclear materials in quantities insufficient to form a critical mass.[173] The Government again, however, did not surrender

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[164] *Id.* at 11, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3211. "In essence, the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages . . . . " *Id.* at 9, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3209; *see also supra* note 160.

[165] Price-Anderson is virtually the only section of the Atomic Energy Act of 1954 that devotes some discussion to liability principles to be applied following a nuclear incident. Price-Anderson is critical when analyzing the possible preemption of an award of punitive damages as it defers to the states their traditional tort law principles which embody the granting of such damages. See *infra* notes 212-23 and accompanying text.

It is also noteworthy that the Joint Committee on Atomic Energy, when reviewing Price-Anderson, recognized that an injury could occur without anything out of the ordinary transpiring. The committee stated:

> The inclusion of the "extraordinary nuclear occurrence" concept in the bill stems in major part from the desire of industry to preserve its customary legal defenses in situations where nothing untoward or unusual has occurred in the conduct of nuclear activities.

S. REP., *supra* note 157, at 11, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3211. From this statement it may be inferred that an injury or claim could arise against a nuclear plant even though no federal regulations had been violated.

[166] Act of Sept. 23, 1959, Pub. L. No. 86-373, 72 Stat. 688 (current version at 42 U.S.C. § 2021 (1976 & Supp. III 1979)).

[167] 42 U.S.C. § 2021(a)(1) (1976); *see* Interpretation by the General Counsel: AEC Jurisdiction Over Nuclear Facilities and Materials Under the Atomic Energy Act, 10 C.F.R. § 84(c) (1981).

[168] See *supra* notes 22-30 and accompanying text.

[169] 42 U.S.C. § 2021(b), (c) (1976 & Supp. III 1979).

[170] *Id.*

[171] *Id.* § 2021(b)(1), (2).

[172] *Id.* § 2021(b)(3).

[173] *Id.* § 2021(b)(4).

total control, retaining the power to terminate or suspend such agreements and to reinstate federal regulatory controls to protect the public health and safety.[174]

A further limitation on the nature or content of such agreements is found in subsection 274(c).[175] This prohibits any turn over agreements which yield to the states the power to regulate the construction and operation of any production or utilization facility,[176] export or import of by-product, source or special nuclear materials,[177] the disposal of the above waste materials into the ocean or sea,[178] and the disposal of other such materials.[179] It was felt that the risks inherent in these activities mandated the continued application of the Federal Government's more sophisticated technology.[180]

One other subsection which should be analyzed when attempting to determine the state's posture in the field of nuclear energy is 274(k).[181] It provides that "[n]othing in this section [274] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[182] This subsection takes on increased significance when read in light of its interpretation in *Northern States* and *Silkwood*.[183] The court in *Northern States* placed heavy emphasis on the phrase " 'other than protection against radiation hazards.' "[184] This language, when read in conjunction with the theory that the Government would not have gone to the extent of promulgating federal-state cooperative legislation if it did not believe it already had exclusive control of the area, enabled the court to preempt Minnesota's attempted regulation of radioactive releases.[185] In *Silkwood* this rationale was taken one

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[174] *Id.* § 2021(j).

[175] *Id.* § 2021(c).

[176] *Id.* § 2021(c)(1).

[177] *Id.* § 2021(c)(2).

[178] *Id.* § 2021(c)(3).

[179] *Id.* § 2021(c)(4).

[180] *See* JOINT COMM. ON ATOMIC ENERGY, 86TH CONG., 1ST SESS., SELECTED MATERIALS ON FEDERAL-STATE COOPERATION IN THE ATOMIC ENERGY FIELD 3, 26 (Comm. Print 1959).

[181] 42 U.S.C. § 2021(k) (1976).

[182] *Id.*

[183] See *supra* notes 22-26 and accompanying text & *infra* notes 184-92 and accompanying text discussing *Northern States'* use of § 274(k) and *Silkwood's* reliance on the court's interpretation of that provision in *Northern States*.

[184] 447 F.2d at 1149-50 (quoting 42 U.S.C. § 2021(k)).

[185] 447 F.2d at 1150. "Unless the federal government possessed exclusive authority over radiation hazards, the inclusion of the ['other than radiation hazards' language] would have been meaningless and unnecessary." *Id.*

It was necessary for the court to go into a detailed analysis of the Atomic Energy Act and its legislative history because it was unable to locate a form of express preemption. *Id.* at 1147.

step further and applied to a punitive damage award as if it constituted a regulation of radiation hazards.[186] Thus, subsections 274(b), (c), and (k), and their respective legislative histories, are fundamental to punitive damage analysis because construction of these provisions formed the basis of the *Northern States* decision which was later expanded upon by the *Silkwood* court.[187]

Northern States involved a requirement of the Minnesota Pollution Control Agency that the Northern States Monticello plant conform to state radioactive effluent regulations.[188] The state standards in fact imposed significantly more stringent release levels than those of the AEC.[189] Determining that neither an express prohibition against such state legislation existed nor was compliance with both schemes[190] a physical impossibility, the court found that the Federal Government's role with respect to radiation hazard regulation was exclusive.[191] A state, therefore, is precluded from regulating radioactive effluents in any manner, even to protect the health and welfare of its citizens.[192] Assuming, *arguendo*, that the analysis in *Northern States* is still viable,[193] it is a tenuous proposition to extend this holding to support the preemption of punitive damage awards.[194] A step-by-step analysis of the reasoning in *Silkwood* will aid in illustrating this position.[195]

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[186] See *supra* notes 22-30 and accompanying text.

[187] *See Northern States*, 447 F.2d at 1145; *Silkwood*, slip op. at 26-30. See *infra* notes 188-92 and accompanying text for a discussion of the *Northern States* decision.

[188] 447 F.2d at 1145.

[189] *Id.* at 1147.

[190] *Id.* at 1147-48.

[191] *Id.* at 1154.

[192] *Id.*

[193] The implied preemption analysis invoked by the *Northern States* court has been significantly diluted by recent developments in the nuclear field, and by the current state-directed attitude of the Supreme Court toward preemption. For instance, the contention that a federal statutory scheme is so pervasive as to preclude state involvement, relied on by *Northern States*, 447 F.2d at 1150, 1152-53, has been criticized by the Supreme Court. *See DeCanas*, 424 U.S. at 359-60; *Dublino*, 413 U.S. at 415; *supra* notes 73-78 & 93-96 and accompanying text.

Another consideration in *Northern States* was the determined effort by Congress to promote nuclear energy in the private sector by the 1954 Act. *See* 447 F.2d at 1154. Under the Energy Reorganization Act, 42 U.S.C. §§ 5801-5891 (1976), Congress took the promotional emphasis off nuclear energy and directed it toward all energy sources. *See* COMMENT, *supra* note 2, at 154-71, where the author discusses similar arguments limiting the underlying rationale of *Northern States*.

[194] See *infra* notes 196-244 and accompanying text.

[195] See *infra* notes 196-232 and accompanying text. The court of appeals in *Silkwood* broke down its analysis into four parts: 1) the Price-Anderson Act, which did not apply in *Silkwood*, was interpreted as only allowing the victim to be compensated; 2) punitive damages' function as a deterrent; 3) this deterrent effect amounts to state regulation; and 4) the *Northern States* decision specifically precludes such state regulation. *See Silkwood*, slip op. at 26-30.

Commencing its preemption discussion, the *Silkwood* court noted that the purpose of the Price-Anderson Act[196] was to compensate victims of a nuclear incident.[197] It then inferred that Price-Anderson limits plaintiffs to compensatory damages only,[198] and stated that the Act is only applicable when an ENO occurs.[199] Thus, one is left confused as to what damages should be available when an accident falls short of an ENO as in *Silkwood*.[200] Moreover, in its preemptive dialogue, the court appears to guide the reader to the conclusion that only compensatory damages are recoverable for injuries sustained due to any type of nuclear incident.[201] This result is antithetical to the legislative history of Price-Anderson.[202] The failure to further discuss congressional intent that Price-Anderson not interfere with the application of traditional state tort law principles, absent an ENO, is a major shortcoming in the court's analysis.[203]

In reviewing the relevant legislative background of Price-Anderson, emphasis again must be focused on the distinction between regulations governing the operation of an industry and a remedial plan correcting any wrong committed against an injured party.[204] Price-Anderson concentrates on the latter.[205] The Legislature, when reviewing Price-Anderson, was concerned with the question of the appropriate tort law to apply upon the occurrence of a nuclear incident.[206] Rejecting the need for a federal tort law, a plan was devised which provided for the waiver of key defenses if the accident is classified as an ENO.[207] Otherwise, the forum state's "traditional rules of tort law"[208] are to apply. It appears that the underlying goal, therefore, during the promulgation of Price-Anderson and the amendments

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[196] Pub. L. No. 85-256, 71 Stat. 576 (1957) (current version at 42 U.S.C. § 2210 (1976 & Supp. III 1979)).

[197] *Silkwood*, slip op. at 26-27.

[198] *Id.*

[199] *Id.*

[200] *See id.* at 24.

[201] *See id.* at 26-30.

[202] *See infra* notes 204-11 and accompanying text.

[203] See *infra* notes 204-16 and accompanying text.

[204] See *supra* notes 136-38 and accompanying text.

[205] *See* Comment, *supra* note 3, at 746-47. The Joint Committee on Atomic Energy investigating Price-Anderson wanted to assure itself " 'that the public will receive prompt and adequate financial compensation for any damage resulting from potential nuclear hazards.' " S. REP., *supra* note 157, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206.

[206] S. REP., *supra* note 157, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206-08.

[207] *Id.* at 10-11, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3209-10.

[208] *Id.* at 11, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3211.

thereto,[209] was to interfere with state law as little as possible.[210] This is evidenced by the numerous references made throughout the legislature's discussion to the fact that the state tort law should remain undisturbed.[211]

Price-Anderson's legislative history is acute to a preemption analysis of traditional tort law remedies which have consistently included punitive damages under appropriate circumstances.[212] Such an exercise of a state's police power, concerned with the welfare of its citizens,[213] is the type of state pursuit which should be given significant deference.[214] Yet, the court of appeals in *Silkwood* passed over Price-Anderson, failing to give it the attention it deserves. When dealing with an injured party's rights, the only section of the AEA addressing the issue to any meaningful degree, has reserved to the states all their "traditional rules of tort law."[215]

The *Silkwood* court, after briefly touching upon Price-Anderson, continued its preemptive analysis by accenting the deterrent or punitive effects of exemplary damages.[216] It then equated this form of deterrence with the type of state regulation forbidden by the *Northern States* interpretation of the AEA.[217] In taking this step, the court further blurred the necessary regulatory-remedial dichotomy[218] without furnishing sufficient information to support its conclusion. As discussed earlier, the concept equating a punitive damage award with

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[209] See *supra* note 156.

[210] S. REP., *supra* note 157, at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206.

[211] *Id.* at 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3206. "Under . . . Price-Anderson . . . the claimant's right to recover . . . is left to the tort law of the various States. . . . " *Id.* at 9, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3209. "[T]he plan adopted permits the retention of State law with respect to the cause of action and the measure of damages." *Id.* at 11, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3211. "The bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law." *Id.* "[S]ituations which are not exceptional . . . can well be taken care of by the traditional system of tort law." *Id.* "[I]n the absence of some extraordinary occurrence . . . traditional concepts should be allowed to prevail."

> Absent such a determination [that a nuclear incident can be classified as an ENO], a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights.

Id. at 12, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 3201, 3212.

[212] *Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring); *see* Belli, *supra* note 7, at 4, 5, 23; Comment *supra* note 3, at 743.

[213] See *supra* note 212.

[214] See *supra* notes 38-41 and accompanying text.

[215] See *supra* notes 196-214 and accompanying text & 208-11 and accompanying text.

[216] *See Silkwood*, slip op. at 27.

[217] *Id.* at 27-28.

[218] See *supra* notes 136-38 and accompanying text.

state legislative regulation is far from gaining the widespread acceptance the *Silkwood* court seems to imply.[219] Whereas the primary purpose of awarding punitive damages is to prevent wrongful conduct, it also serves less frequently annunciated purposes.[220] A wholesale bar to the imposition of such damages in the area of nuclear incidents would, therefore, impinge on areas not justified by the *Silkwood* decision.[221] The question still remains as to whether the deterrent effect of punitive damages has the same regulatory end feared, and thereby precluded, in *Northern States*.

Punitive damages in *Silkwood* were awarded to restrain reckless or wanton acts which result in a radiation-related injury.[222] The award was aimed at punishing the wrongdoers for tortious conduct.[223] Kerr-McGee's substantial compliance with regulatory standards was not dispositive on the issue of reasonable care, but was merely a factor to be considered when assessing liability.[224] Thus the court, by awarding punitive damages, is not judging or commenting on the reasonableness of the regulatory scheme, but is simply applying available remedial law to the wrong committed, seeking to redress it as effectively as possible. This type of situation did not exist in *Northern States*.[225]

As previously mentioned, *Northern States* involved state pollution control regulations which imposed stricter standards than the

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[219] See *supra* notes 102-07 and accompanying text.

[220] *See* C. McCORMICK, DAMAGES § 77, at 275 (1935); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971); Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 199 (1977-78); Belli, *supra* note 7, at 5-7. The other purposes are 1) revenge, 2) public justice through a private attorney general concept, 3) compensation where the actual award is insufficient, and 4) public outrage. *Id.*

[221] The court of appeals in *Silkwood* determined that the punitive award was only to deter such future actions. This was implied from the district court judge's instruction to the jury. *See Silkwood*, slip op. at 27. Therefore, the influence of a complete ban of punitive damages on the alternative rationales for their invocation was not considered. See *supra* note 220.

[222] *Silkwood*, slip op. at 27.

[223] *Id.*; *see also* Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), *aff'd in part and rev'd in part*, No. 79-1894 (10th Cir. Dec. 11, 1981).

[224] 485 F. Supp. at 572, 577-78. The courts have given substantial compliance the same weight in cases dealing with aviation and drug regulation. *See* Schneider v. United States, 188 F. Supp. 911 (E.D.N.Y. 1960); Berkebile v. Brantly Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971) (both dealing with aviation); Tinnerholm v. Parke-Davis, 285 F. Supp. 432 (S.D.N.Y. 1968), *aff'd*, 411 F.2d 48 (2d Cir. 1969); Yarrow v. Sterling Drug, 263 F. Supp. 159 (D.S.D. 1967), *aff'd, 408 F.2d 798 (8th Cir. 1969); Stromsodt v. Parke-Davis*, 257 F. Supp. 991 (D.N.D. 1966), *aff'd*, 411 F.2d 1390 (9th Cir. 1969); Love v. Wolf, 226 Cal.App.2d 378, 38 Cal.Rptr. 183 (1964) (all involving drug industry).

[225] See *supra* notes 184-92 and accompanying text discussing the rationale behind the holding in *Northern States* and *supra* notes 136-38 and accompanying text discussing the distinction between regulatory and after-the-fact remedial schemes.

national law.[226] The distinction between prospective regulation and after-the-fact remedies must be called to mind.[227] The Federal Government, while promulgating extensive regulations in order to decrease radiation hazards,[228] has failed to provide a complementary remedial scheme for injuries suffered under the guise of those federal standards.[229] Clearly, the AEC cannot award damages to the injured party for tortious acts committed within the scope of the regulatory plan.[230] Therefore, since Congress has left the issue of providing available remedies to the states,[231] and has failed to express a clear directive placing limits on this power,[232] a punitive damage award should be permitted.

An opposing argument is that such an award does, in fact, have the type of regulatory influence barred by *Northern States*,[233] since exemplary damages will influence the standard of care exercised[234] in the handling of radioactive materials. This standard, however, is merely a peripheral concern of the national Government's regulation of radiation hazards, which primarily focuses on the overall safety of the public with regard to the construction and operation of nuclear facilities.[235] The Government did not legislate in the area of reasonable care within its regulatory scheme, thereby leaving this issue to the application of state tort law.[236] Thus, punitive damage awards do not touch upon the areas encompassed by the national law, but rather concern themselves with an area in which Congress has not intricately legislated outside of a situation involving an ENO.[237]

Additionally, exemplary damages may indirectly affect the operation of a nuclear plant, but they do so only by requiring those involved in the industry to act reasonably toward the public.[238] Such

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[226] See *supra* notes 184-92 and accompanying text.

[227] See *supra* notes 136-38 and accompanying text.

[228] 10 C.F.R. §§ 1-199 (1982). *See generally* E. STASON, S. ESTEP & W. PIERCE, ATOMS AND THE LAW 1059 (1954); *Silkwood*, slip op. at 29-30.

[229] *Silkwood*, slip op. at 23.

[230] *Id.*

[231] See *supra* notes 204-11 and accompanying text.

[232] The clear and unambiguous congressional directive required by the state-directed approach is absent when attempting to impliedly preempt a punitive damage award. See *supra* notes 66-101 and accompanying text.

[233] *See* Comment, *supra* note 3, at 742-43.

[234] *Id.*

[235] *See* 42 U.S.C. § 2021(a)(1) (1976); *Northern States*, 447 F.2d at 1154; *Silkwood*, slip op. at 16 (Doyle, J., dissenting).

[236] See *supra* notes 204-11 and accompanying text.

[237] *Silkwood*, slip op. at 23.

[238] To award punitive damages the wrongdoer must have the requisite state of mind, i.e., willful, wanton, or reckless disregard for the safety of others. *See supra* note 7.

an award neither undermines nor replaces the federal regulations, but merely helps ensure diligent compliance. This application of punitive damages serves to complement one of the purposes of the AEA provisions: to protect the public's health and welfare.[239] Even if such an award is viewed as conflicting with the national standards by imposing stricter criteria, it is merely peripheral to the areas encompassed by the federal policy and is, therefore, insufficient grounds upon which to base a preemptive finding.[240] It also must be noted that the mere possibility of a conflict and its adverse effects will not justify preemption.[241]

It is, therefore, difficult to picture the overriding conflict between a punitive damage award and the national Government's regulation of radiation hazards as necessitating a preemptive verdict. The two types of regulation, assuming that punitive damages are so classified, are qualitatively different.[242] Exclusive federal regulation of radiation hazards pursuant to subsections 274(b), (c), and (k) of the 1954 Act involves the safe construction and operation of nuclear facilities and handling of nuclear materials.[243] This, however, should not be read to overlap with, and thereby preempt, a state's power to ensure the welfare of its citizens through its judicial process.[244]

CONCLUSION

A simple, concise formula regarding the issue of preemption cannot be developed, yet it is helpful when conducting a preemptive analysis to recognize a court's attitude toward the doctrine over a given time period. Recently, the Supreme Court has indicated a deference toward state interests. This state-directed approach requires Congress to manifest a clear intent to either exclusively control an area or to preclude certain types of state involvement in order to invoke the preemption doctrine. The courts are even more particular, requiring the clearest declaration by Congress, when a state has exercised its police power to protect its vital, territorial interests, i.e., the health and welfare of its citizens. An award of punitive damages is such a vital interest and has traditionally played a role in most state remedial schemes.

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[239] 42 U.S.C. § 2013(d) (1976).

[240] See *supra* notes 226-32 and accompanying text discussing the two distinctly different areas addressed by the federal and state actions.

[241] *Silkwood*, slip op. at 15-16 (Doyle, J., dissenting). See *supra* notes 91-96 and accompanying text.

[242] See *supra* notes 136-38 and accompanying text.

[243] See *supra* note 235 and accompanying text.

[244] See *supra* notes 136-38 & 226-32 and accompanying text.

The courts, when confronted with a punitive damage-preemption issue, must distinguish between the regulation of the industry and the conventional remedies available to the injured parties. Although it is conceivable that such an award may influence areas under federal control, its predominant thrust is qualitatively different. Congress has legislated extensively with respect to radiation hazards, yet it has left the fashioning of a remedial package for injuries caused by such materials to the customary principles of state tort law. Viewed in a light most favorable to a preemptive finding, the existing legislative directives are ambiguous. The Price-Anderson Act reserves to the states the right to apply their traditional tort rules, while subsection 274(k) of the 1954 Act precludes state regulation of radioactive hazards. Absent the necessary, clear, and unambivalent declaration of preemptive intent by the federal government, there exists nothing in the Atomic Energy Act of 1954 or its legislative history which impliedly mandates the preemption of a punitive damage award in the field of nuclear injury.

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