NUCLEAR ENERGY—FEDERAL PREEMPTION—STATE MORATORIUM ON NUCLEAR PLANT CONSTRUCTION UPHELD AGAINST PREEMPTION CHALLENGE—*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983).

In our federal system it is natural that questions arise concerning the distribution of power between the states and the federal government.[1] Such questions often concern the parameters within which a given state or federal statute will operate. The Federal Constitution's supremacy clause requires that state law yield to conflicting federal legislation.[2] When a conflict appears to exist, the preemption doctrine[3] is applied to determine if the federal law should "preempt" the state's legislation.[4]

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[5] the United States Supreme Court scrutinized certain provisions of California's Warren-Alquist Act[6] to determine if the provisions[7] were preempted by the Atomic

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[1] *See* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 686 (1979). Professor Tribe represented the respondents in this action.

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

> 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. The supremacy clause is the framework within which questions dealing with the juxtaposition of state and federal law are analyzed. *See generally* Tribe, *supra* note 1, at 686-93.

[3] In its modern usage, "preemption" describes the legal effect of the federal government's power to exclude a state from an area in which Congress has acted, or to describe the state's impotence to intrude into certain legislative areas. *See* Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 n.1 (1972).

[4] In its more recent holdings concerning the preemption doctrine, the United States Supreme Court has held that when state and federal legislation is in conflict, the task of the court is to determine "whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also* Perez v. Campbell, 402 U.S. 637, 649 (1971) (acts of a state legislature interfering with or contrary to laws of Congress are invalid). The seminal case in this area is Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), in which Chief Justice Marshall asserted that the supremacy clause requires that state laws must yield to those of Congress. *See infra* notes 44-55 and accompanying text.

[5] 103 S. Ct. 1713 (1983).

[6] The Warren-Alquist State Energy Resources Conservation and Development Act, CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1981) [hereinafter cited as Warren-Alquist Act]. The Act was adopted to further the state's perceived responsibility to coordinate energy research and regulation on a statewide basis. Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 907 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

Energy Act of 1954.[8] The Warren-Alquist Act set procedural guidelines for any utility wishing to construct an electric power generating plant,[9] and empowered the five-member State Energy Resources Conservation and Development Commission (State Energy Commission) to oversee the regulation of all power plants within the state.[10] The State Energy Commission was charged with reviewing and certifying a utility's application for permission to construct a generating plant.[11]

In 1976, in response to public concern over nuclear plant operations, amendments popularly known as the "Nuclear Laws"[12] were added to the Warren-Alquist Act.[13] These provisions imposed a moratorium on the certification of any new nuclear plants until such time as the State Energy Commission made certain findings dealing with the storage, disposal, and reprocessing of nuclear fuel and wastes.[14] The Nuclear Laws were designed to alleviate public fears concerning

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[7] The pertinent provisions were commonly known as the "Nuclear Laws"; *see infra* notes 12-14 and accompanying text.

[8] 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979). The Atomic Energy Act of 1954 ended the federal government's monopoly over the development of nuclear power by amending the Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755.

[9] Warren-Alquist Act, §§ 25000-25986.

[10] CAL. PUB. RES. CODE § 25500 (West 1977); *see* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 908 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

[11] CAL. PUB. RES. CODE §§ 25500-25525 (West 1977). The utility had to file an application containing detailed information concerning the proposed plant's design, construction, and operation, along with financial forecasts and any other data the State Energy Commission deemed necessary. *See* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 908 & n.5 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). An environmental impact statement had to be prepared, with local agencies providing input on architectural and aesthetic features of the proposed project, as well as input concerning its conformity to local zoning ordinances. *Id.* at 908. The California Public Utilities Commission then had to make recommendations regarding the rate structure and economic feasibility of the proposed plant. Following this, the State Energy Commission issued a written decision containing findings as to the plant's design and operation in light of acceptable health, safety, and environmental quality standards. *Id.*

[12] CAL. PUB. RES. CODE §§ 25524.1-.3 (West 1977 & Supp. 1981); *see infra* note 14 and accompanying text.

[13] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1718. The 1976 amendments were passed as an alternative to Proposition 15, a referendum proposal on the ballot in California which would have precluded the construction of new nuclear power plants until a permanent method of nuclear waste disposal was adopted. *Id.* at 1728 n.27.

[14] Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 908 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). CAL. PUB. RES. Code § 25524.1(a) required the State Energy Commission to find that a federally approved method of fuel reprocessing existed before the nuclear plant certification moratorium would be lifted. *Id.* Section 25524.1(b) required the

the haphazard construction and inadequate waste disposal plans of nuclear plants.[15]

The nuclear waste dilemma involved two primary concerns. The first involved the safety problems—including permanent damage to the environment and a concomitant danger to public health which might arise if improperly stored waste should leak.[16] The second concern centered on economic considerations: The absence of viable means of permanent nuclear waste disposal could result in the shutdown of reactors, thereby rendering their construction a questionable fiscal proposition.[17] The moratorium on certification was not to be lifted until findings by the State Energy Commission satisfied the legislature that safety and economic problems would soon be resolved.[18]

The Nuclear Laws caused a great deal of concern and confusion for utility companies in California.[19] In 1978, the Pacific Gas & Electric Co. (PG&E) cancelled its plans to build a nuclear plant,[20] asserting that uncertainties caused by the Warren-Alquist Act, and more specifically the Nuclear Laws, had forced the abandonment of the project.[21] Nevertheless, PG&E wished to reactivate its plans to build a nuclear plant if successful in challenging the Nuclear Laws.[22]

PG&E brought an action against the State Energy Commission in the United States District Court for the Eastern District of California,[23] alleging that certain sections of the Warren-Alquist Act were

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Energy Commission to determine whether each facility had the capacity to store their spent fuel rods. *Id.* at 909. Section 25524.3 required that a federally approved method of permanent nuclear waste disposal be found before any further plants would be certified. *Id.* at 908. Section 25524.3 prohibited the certification of any nuclear plant until the State Energy Commission completed a study on the feasibility of berm containment, which is the building of the main portion of the reactor underground. *Id.* at 908-09.

[15] *See* Tribe, *supra* note 1, at 680 n.5.

[16] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1718.

[17] *Id.*

[18] Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 909 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

[19] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1719 n.9.

[20] Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 910 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

[21] *Id.*

[22] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1719 n.9.

[23] Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 489 F. Supp. 699 (E.D. Cal. 1980), *rev'd sub nom.* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). At the district

preempted by the Atomic Energy Act of 1954.[24] The defendants replied that an anticipated decrease in electrical demand, along with financial complications for nuclear projects arising from the Three Mile Island incident, prompted the cancellation of PG&E's nuclear project.[25] Thus, they argued, PG&E lacked standing to challenge the statute because they had not met their burden of showing an actual injury resulting from enforcement of the statute.[26]

Before trial, PG&E moved for summary judgment, claiming that no genuine issues of material fact were present.[27] Judge Real of the district court ruled that the preemption issue would be decided on the motion for summary judgment, but that a trial would be necessary on the question of standing because issues of fact were in dispute.[28] At trial, Judge Real ruled that PG&E had standing, yet reasoned that, without a determination on the validity of the Nuclear Laws, the utility would be precluded from properly forecasting its future electrical generating capacity.[29] The district court also held that PG&E's motion for summary judgment should be granted,[30] because "[t]he enactment of the 1946 [Atomic Energy] Act and [its] clarification in the 1954 [Atomic Energy] Act . . . makes [sic] clear the absolutism of the congressional preemption of nuclear regulation."[31]

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court level, PG&E was joined by the Southern California Edison Co., which claimed that it had also abandoned plans to build two nuclear plants because of uncertainties caused by the Nuclear Laws. *See id.* at 701-02.

[24] Pub. L. No. 83-703, 68 Stat. 919 (amending Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755) (codified at 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979)).

[25] Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 489 F. Supp. 699, 701 (E.D. Cal. 1980), *rev'd sub nom.* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

[26] *See id.*

[27] *Id.* at 700. FED. R. CIV. P. 56(c) provides that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c).

[28] Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 489 F. Supp. 699, 700 (E.D. Cal. 1980), *rev'd sub nom.* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). FED. R. CIV. P. 56(d) allows for a "partial summary judgment." Those material facts not in controversy are decided upon the motion, and those facts over which controversy does exist are left to be settled at trial.

[29] *Id.* at 701.

[30] *Id.* at 704.

[31] *Id.* at 703. Although the district court noted that the state had attempted to use 42 U.S.C. § 2021(k) (1976 & Supp. III 1979) as a justification for their regulations, the court rejected this

The Court of Appeals for the Ninth Circuit reversed the preemption decision of the district court.[32] The reviewing court found that, of all the challenged sections of the Warren-Alquist Act, only sections 25503[33] and 25524.2[34] were justiciable. The court held that "California's moratorium provision (section 25524.2) and the three site requirement (section 25503)" were not preempted as they did "not fall within the area reserved to the NRC's [Nuclear Regulatory Commission] regulatory authority under the Atomic Energy Act of 1954, and . . . [did] not impede congressional goals . . . ."[35]

The United States Supreme Court granted certiorari to determine whether sections 25524.1(b)[36] and 25524.2 of the Warren-Alquist Act were ripe for review,[37] and whether they were preempted by the Atomic Energy Act.[38] The Supreme Court found that section 25524.1(b) was not ripe,[39] but that section 25524.2 was ready for

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approach. *Id.* Section 2021(k) provided: "'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.'" *Id.* (quoting 42 U.S.C. § 2021(k)(1976)). The district court relied on the Eighth Circuit Court of Appeals' rejection of the use of 42 U.S.C. § 2021(k) as an invitation to the states to enter the area of nuclear power development or regulation. *See id.* at 702-03 (citing Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972)). The district court also found that there were overlapping requirements concerning geology, seismology, environmental impact, design, and other areas. With such a conflict between state and federal guidelines, the court asserted that preemption of the state regulations contained in the Nuclear Laws was not only advisable, but necessary. *Id.* at 704.

[32] Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). The subject case was decided along with a companion case, which also had resulted in the invalidation of certain sections of the Warren-Alquist Act, including the Nuclear Laws. *Id.* at 909-10.

[33] *Id.* at 917. Section 25503 required the utility company to designate three alternate sites upon filing its notice of intention to construct a plant. Since a controversy would be unavoidable following the filing of the notice of intention, the court found the matter justiciable. *Id.*

[34] *Id.* at 918; *see supra* note 14 and accompanying text.

[35] Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 928 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). In a concurring opinion, Judge Ferguson agreed with the majority's disposition on the merits, but questioned whether or not the utility companies had any enforcement rights under the Atomic Energy Act. *Id.* (Ferguson, J., concurring). The judge felt that Congress had intended for only the Nuclear Regulatory Commission (NRC) to have the right to challenge a state's law. *Id.* at 930 (Ferguson, J., concurring). The utility companies should only be allowed to seek judicial review of NRC decisions. *Id.*

[36] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1720. Section 25524.1(b) was concerned with the reprocessing and storing of spent nuclear fuel rods. *Id.* at 1719. The district court had found the provision ripe for review, but the court of appeals had ruled to the contrary. *Id.*

[37] *Id.* at 1720.

[38] *Id.*

[39] *Id.* As the court noted:

> The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract dis-

adjudication.[40] In *Pacific Gas & Electric*[41] the Court affirmed the Ninth Circuit decision, holding that section 25524.2 was not preempted by the Atomic Energy Act of 1954.[42]

The Supreme Court's decision in the instant case was based on its measured application of the "preemption doctrine,"[43] the standard used to determine whether a state has exceeded its power by acting within an area reserved to the federal government.[44] Although during the nineteenth and early twentieth centuries the Supreme Court routinely decided preemption questions in favor of the federal government,[45] the 1930's and subsequent decades witnessed considerable change in this practice.[46] The Burger Court has chosen to apply a "state-supportive presumption,"[47] only overturning state law where preemption of a field clearly is shown to be the intent of Congress.[48]

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agreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Id. (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)).

[40] *Id.* The Court felt that § 25524.2 was ripe because postponement of a decision could work substantial hardship on the utilities; if they were to spend millions of dollars and proceed with plans, only to be then denied certification because of the absence of the requisite waste disposal plan, financial ruin could result. *Id.* at 1720-21.

[41] *Id.* at 1713.

[42] *Id.* at 1732.

[43] *See supra* notes 2-4 and accompanying text.

[44] *See* Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study*, 13 U.C.D. L. REV. 3, 23-25 (1979). It is often difficult to ascertain the true preemptive intent of federal legislation, particularly since a clear legislative history is often unavailable. "[I]n truth the judicial resolution of preemption cases normally depends more upon subjective values about the optimal balance of state and national authority than on quotations from the Congressional Record." *Id.* at 23 (footnote omitted). *See generally* J. NOWAK, R. ROTANDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 267-70 (1978) [hereinafter cited as J. NOWAK].

[45] Tribe, *supra* note 1, at 686. "In the early nineteenth century, it was though that, when the federal government regulated a given subject, any state law purporting to govern the same area was automatically invalid." *Id.* (footnotes omitted). *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 8-18 (1824) (state law regulating interstate steamboat traffic held preempted by commerce clause).

[46] *See* Tribe, *supra* note 1, at 686. In the early 20th century, federal enactments still were preferred strongly over any state legislation. Indeed, "the Supreme Court held that once 'Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'" *Id.* (quoting Charleston W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915)).

Over a period of time the Court's position changed, until "[b]y the 1930's a state-oriented view of preemption guided the Court." *Id.* However, results in favor of federal preemption dominated during the Warren Court era of the Fifties and Sixties. *Id.* at 686-87.

[47] Wiggins, *supra* note 44, at 28.

Congress may preclude state action in an area where it has plenary power through "express" preemption[49] simply by asserting that state action in the given area is prohibited.[50] Where Congress has acted forcefully the preemption dilemma usually will not arise, but the situation often is not so clear-cut.[51] These more difficult preemption questions may be analyzed initially through a general test set forth by the Supreme Court in the 1941 case of *Hines v. Davidowitz*.[52] Under *Hines*, preemption will occur when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[53] In the 1963 decision of *Florida Lime & Avocado Growers v. Paul*,[54] the Supreme Court set forth another preemption standard: whether the federal and state regulations in question "can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."[55]

The precise nature and objective of the federal legislation must be discerned, however, before the appropriate preemption standard can be applied. Congress may intend that a federal enactment have either a substantive or a jurisdictional impact.[56] If substantive, then a given state statute is void if it is in conflict with the federal enactment.[57] This conflict may arise in one of two distinct ways. The first is when a direct conflict exists,[58] in that compliance with both the state

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[48] *See id.* at 27-29.

[49] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1722 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). *See generally* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973) (analyzing how Congress exercises its preemptive powers).

[50] *See, e.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146-47 (1963); *see also* J. NOWAK, *supra* note 44, at 267.

[51] *See* Wiggins, *supra* note 44, at 23.

[52] 312 U.S. 52 (1941).

[53] *Id.* at 67; *accord* Perez v. Campbell, 402 U.S. 637, 649 (1971) (state motor vehicle accident liability law found in conflict with federal bankruptcy provisions); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (state flour packing regulations differed impermissibly from federal requirements); *cf.* Tribe, *supra* note 1, at 688-89.

[54] 373 U.S. 132 (1963).

[55] *Id.* at 142.

[56] Tribe, *supra* note 1, at 688.

[57] *See id.*

[58] *See* Wiggins, *supra* note 44, at 42. This process of statutory analysis in search of direct conflict may seem at first glance not to be of great difficulty. "In the great majority of conflict preemption cases, however, this description of the judicial function is oversimplified and oftentimes masks difficult constitutional policymaking which is highly dependent upon judicial value preferences regarding the state and federal interests presented." *Id.*

and federal enactments is not possible or is extremely impractical.[59] The second type arises when a state statute presents an obstacle[60] to congressional design, such as when a state statute impedes the objectives which induced Congress to pass the federal legislation.[61]

If Congress intends an enactment to have a jurisdictional impact, such as the expansion of the regulatory authority of a federal administrative agency, then a state statute will be preempted where Congress has "occupied" the field covered by that statute.[62] Once Congress evinces its intention to occupy a field which it is constitutionally empowered to control, then state action in that field is precluded.[63] Preemption by occupation bars state control despite the fact that Congress has not enacted legislation dealing with the precise subject in question.[64]

The history of federal nuclear power legislation reveals that Congress' first attempt to promote the peaceful uses of nuclear energy, the Atomic Energy Act of 1946,[65] gave the federal government a monopoly on nuclear energy facilities.[66] This situation changed with the passage of the Atomic Energy Act of 1954,[67] under which the private sector was encouraged to join in the effort to research and develop uses for nuclear energy.[68] Although the Atomic Energy Commission (AEC) retained exclusive control over licensing the use and possesion of nuclear materials,[69] neither the AEC nor its successor, the Nuclear

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[59] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1946) (state warehousing regulations held to be in conflict with, and superseded by, federal warehousing requirements).

[60] *See Hines*, 312 U.S. at 67-68 (Court examined whether state alien registration law impeded congressional objectives); *see supra* notes 52-53 and accompanying text.

[61] *See* Tribe, *supra* note 1, at 688.

[62] *Id.* at 689.

[63] *See generally* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-31 (1947) (Court analyzed manifestations of congressional intent to preempt state authority).

[64] Wiggins, *supra* note 44, at 30. In addition, the Court will usually place heavy emphasis on the "state-supportive presumption" in occupation preemption cases. *Id.* at 30-31. "[F]ederal regulation of a field of commerce 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 unmistakably so ordained." *Florida Lime*, 373 U.S. at 142.

[65] Pub. L. No. 79-585, ch. 724, 60 Stat. 755. This Act evidenced Congress' intent to promote the nonmilitary uses of atomic energy. *See* Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-48 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). The Act established the Atomic Energy Commission and provided funding towards research and development. *Id.*

[66] *See* Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

[67] Pub. L. No. 83-703, 68 Stat. 919 (codified at 42 U.S.C. §§ 2011-2281 (1976)).

[68] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1723.

[69] *Id.* at 1724. "The AEC . . . was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." *Id.* (citing 42 U.S.C. §§

Regulatory Commission (NRC), had authority over the actual generation of electricity or over the economic viability analysis which determined the need for new generating facilities.[70] A review of section 271 of the Atomic Energy Act of 1954[71] clearly shows that, under the law, ratemaking and need questions were still under state control.[72] The 1959 Amendments to the Act further clarified this division of authority,[73] and in fact widened the scope of the states' authority over certain nuclear materials.[74]

Recently, Congress has shown concern with the issue of nuclear waste disposal through its passage of the Nuclear Waste Policy Act of 1982 (NWPA).[75] The NWPA is an attempt by Congress to provide a comprehensive solution to the disposal dilemma,[76] and to convince state authorities that it is safe to resume the licensing of nuclear reactors.[77] This does not mean that Congress intended the NWPA to be a binding imposition on state authority.[78] In fact, the McClure Amendment to the NWPA bill[79] provided that the NWPA would satisfy "any legal requirements for the existence of an approved technology and facilities for disposal of spent fuel and high-level nuclear waste."[80] Although the Amendment was successful in the Senate, the House was strongly opposed to this language, and it was deleted from the final House version,[81] as well as from the bill as signed into

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2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 & Supp. IV 1980)). The states were given no authority in these matters. *See id.*

[70] *Id.* at 1723.

[71] Pub. L. No. 83-703, ch. 1073, 68 Stat. 919 (codified at 42 U.S.C. § 2018 (1976)). Section 271 states that "[n]othing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission." *Id.*

[72] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724. The Court found that statements made by members of Congress clearly demonstrated that the legislative intent was for the federal government to retain full control over the safety of nuclear technology, but not to displace the states' authority over the production of electricity. *See id.* & n.19.

[73] *Id.*

[74] *Id.* at 1724-25. The NRC was authorized to transfer its control over certain nuclear materials to the states, thereby further enlarging the sphere of state authority. *See* § 274(b) (codified at 42 U.S.C. § 2021(b) (1976)).

[75] Pub. L. No. 97-425, 96 Stat. 2201 (1982).

[76] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730. The bill authorizes the construction of repositories for high-level nuclear wastes and spent nuclear fuel, and for an increased amount of interim storage capability. A plan for financing these projects is included in the NWPA. *Id.*

[77] *Id.*

[78] *See id.*

[79] S. 4310, 128 CONG. REC. (Apr. 28, 1982).

[80] *Id.* (citing 128 CONG. REC. 54310 (daily ed. Apr. 29, 1982)).

[81] *Id.* In the House Committee it was argued that the McClure language be deleted so as not to affect the outcome of the subject case, which was pending at the time. *Id.*; *Nuclear Waste*

law.[82] It would seem that Congress did not intend the states to read the passage of the NWPA as clearing the way for unbridled nuclear plant construction.[83]

Observing that the field of electrical energy generation historically has been regulated by the states,[84] the Supreme Court in *Pacific Gas & Electric* asserted that the initial assumption should be " 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "[85] The Court also noted that states have traditionally determined the need for power facilities, and also have dealt with the questions concerning a utility's rates and services.[86] Further, the *Pacific Gas & Electric* Court found that state regulation of electrical power generation is extensive,[87] and that the economic aspects of power generation have been overseen by the states for most of this century.[88] Thus, the Court concluded that the state concern for fair rates and efficient service is a " 'clear and substantial governmental interest.' "[89]

In *Pacific Gas & Electric*,[90] the utility company-petitioners presented all three implied preemption arguments: first, that the nuclear

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Disposal Policy. Hearings Before the Subcomm. on Energy Conservation and Power. Comm. on Energy and Commerce, 97th Cong., 2d Sess. 356, 406, 553-54 (1982). The bill's floor manager in the House, Rep. Richard Ottinger, in fact stated that the deletion of the McClure language was necessary "to insure that there was no preemption." 128 CONG. REC. H8797 (daily ed. Dec. 2, 1982).

[82] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730.

[83] *Id.*

[84] *See id.* at 1723.

[85] *Id.* (quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 748-49 (1942) (Congress' passage of National Labor Relations Act seen not to preclude state regulations concerning union activity, as intent to exclude states was not clearly manifested); Napier v. Atlantic Coast Line R., 272 U.S. 605, 612 (1926) (power conferred upon Interstate Commerce Commission to regulate locomotive equipment evinced Congress' intent to supersede states' police powers).

[86] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1723. Justice White noted that Justice Brandeis had once remarked that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." *Id.* (quoting Frost v. Corporation Comm'n, 278 U.S. 515, 534 (1929) (Brandeis, J., dissenting)).

[87] *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (nature of government regulation of private utilities is restrictive and in excess of regulation covering other businesses)). Other than the authority held by the Federal Power Commission (now the Federal Energy Regulatory Commission), the energy generation field is regulated pervasively by the states. *Id.*

[88] *Id.* The regulation of electrical utilities by the states goes back as far as 1920. *Id.* at 1723 n.17. Today, every state has a regulatory agency dealing with the cost and the adequacy of electrical service. *Id.*

[89] *Id.* (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980)).

[90] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1713.

energy field was occupied;[91] second, that the statute was in conflict with congressional and NRC decisions;[92] and finally, that the statute was an obstacle to the federal goal of promoting nuclear energy.[93] Justice White began the majority's analysis of the occupation issue by noting that the field of energy generation regulation traditionally has been within the ambit of the states' police powers.[94] Additionally, the Court observed that state power commissions should have broad discretion to determine whether the residents in a given area are in need of an additional power plant. The state commissions also should govern in the area of a utility's rate structure and its operational mode.[95] The Court stated that the state's traditional authority in the field of energy production regulation was counterbalanced by the historical federal superintendence over the use, control, and ownership of nuclear technology.[96] Indeed, the majority pointed out that the Atomic Energy Act of 1954 signalled the beginning of private sector involvement in the field, noting that this involvement was to be "under a program of federal regulation and licensing."[97] The Court found that federal regulatory power in the nuclear energy field was further evinced by the fact that the AEC (and later, the NRC) never had relinquished its exclusive control over the licensing of those companies wishing to use or possess nuclear materials.[98]

In further assessing the congressional intent concerning control in this regulatory field, Justice White pointed out that the NRC does not have authority over the generation of electricity or the economic viability of electrical generating facilities.[99] Concluding that Congress

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[91] *Id.* at 1722. The petitioners asserted that the federal government has preserved this field for its exclusive control, and that the state statute ignored the dividing line between state and federal authority given in the Atomic Energy Act of 1954. *Id.*

[92] *Id.* Petitioners claim that Congress and the NRC have made dispositive decisions concerning the nuclear waste disposal issue, and that the Nuclear Laws are in conflict with those decisions. *Id.*; *see infra* notes 112-13, 124-26 and accompanying text.

[93] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1722.

[94] *Id.* at 1723; *see supra* note 86.

[95] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1723. "'There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power.'" *Id.* (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 550 (1970)).

[96] *See id.*

[97] *Id.*

[98] *Id.*; *see supra* note 69.

[99] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724. The *Pacific Gas & Electric* Court conceded that it is the states who are to decide the necessity and economic viability of additional power generating facilities. *Id.*; *see supra* notes 86-88. In further clarifying this dichotomization of federal and state regulatory authority, it is useful to note that "[t]he [Nuclear Regulatory]

would not allow an administrative power vacuum to exist in this area, the Justice reasoned that Congress must have intended the states to retain control over need and economic questions.[100] The Court declared that this view was bolstered by a review of section 271 of the Atomic Energy Act of 1954 which preserved the existing state authority over the generation, sale, or transmission of electrical power produced by a nuclear generating plant.[101] Further, the majority observed that the 1959 amendments to the Atomic Energy Act were enacted primarily "to 'clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials.' "[102] The Court concluded by acknowledging that the authority of the states over nuclear materials was increased by these amendments.[103]

Thus, the *Pacific Gas & Electric* Court found that the parameters of this dual regulatory system were distinct: "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facility to be licensed, land use, ratemaking, and the like."[104] A more difficult question, according to the Court, was the manner in which section 25524.2,[105] the moratorium provision of California's Nuclear Laws, should be construed in light of this dual regulatory scheme.[106]

The Court began its analysis by observing that the statute did not purport "to regulate the construction or operation of a nuclear power-

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Commission's prime area of concern in the licensing context, on the other hand, is national security, public health, and safety [U.S.C.] §§ 2132, 2133, 2201." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 550 (1978).

In fact, the NRC recently repealed regulations addressing the financial stability of utilities preparing to construct nuclear generating facilities. *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724. The NRC stated that "utility financial qualifications are only of concern to the NRC if related to the public health and safety." *Id.* Additionally, "[s]tates retain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as a lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site." *Id.* at 1724 n.18 (quoting NRC Atomic Safety and Licensing Appeal Bd., *In re* Consolidated Edison Co., 7 N.R.C. 31, 34 (1978)). The admission by the NRC Atomic Safety and Licensing Board offers further proof that the states already do play a significant role in determining matters affecting the construction of nuclear plants.

[100] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724.

[101] *Id.*; *see supra* note 71.

[102] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724 (quoting 42 U.S.C. § 2021 (a)(1)); *see* S. REP. No. 870, 86th Cong., 1st Sess. 8, 10-12 (1959), *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872.

[103] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724; *see supra* note 74 and accompanying text.

[104] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1726.

[105] CAL. PUB. RES. CODE § 25524.2 (West 1977 & Supp. 1981); *see supra* note 14.

[106] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1726.

plant."[107] The Court noted that it would have been forced to invalidate the provision if such had been the case. State safety regulations also would have been precluded, as the Court proclaimed that "the federal government has occupied the entire field of nuclear safety concerns, except the limited power expressly ceded to the states."[108] The *Pacific Gas & Electric* Court rejected the utility companies' argument that section 25524.2 was aimed primarily at safety concerns,[109] and accepted California's contention that the statute focused on economic matters.[110] Thus, the majority concluded that the moratorium provision was "outside the occupied field of nuclear safety regulations."[111]

The *Pacific Gas & Electric* majority then examined the utility companies' contention that section 25524.2 was in direct conflict with federal legislative and administrative enactments, and should therefore be preempted.[112] The alleged conflict was based on three points: first, that section 25524.2 conflicted with federal regulation of nuclear waste disposal; second, that it contravened the NRC's decision to continue licensing reactors; and finally, that it ran counter to recent congressional legislation aimed at the nuclear waste disposal problem.[113] The majority rejected the utilities' argument that the state

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[107] *Id.* The Court noted that the statute did not seek to regulate within the NRC-dominated areas of construction or operation of such facilities, and that any state attempt to set guidelines in these areas would be stricken, even if enacted for nonsafety related concerns. *Id.*; *see* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) (state effort to regulate radioactive waste discharge fell within field of safety regulation reserved to federal government).

[108] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1726. Thus, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field." *Id.* at 1727.

[109] *Id.* at 1727-28. Petitioners argued alternatively that § 25524.2 was not concerned with the economics of nuclear power; that California would have banned California utilities from building nuclear power plants outside the state if it really found nuclear energy economically unsound; that the California Public Utilities Commission was already empowered to determine on economic grounds whether a nuclear power plant should be constructed; and finally, that § 25524.2 was reminiscent of Proposition 15, the public initiative which the Warren-Alquist Act had supplanted, and which clearly had addressed safety purposes. The Court rejected each of these arguments in turn, finding each based on conjecture or political speculation. *See id.*

[110] *Id.* at 1728. The petitioners argued that the Supreme Court had previously held that a state law cannot frustrate the operation of a federal law simply because it was not the purpose of the state legislature to do so. *Id.* at 1728 n.28 (citing Perez v. Campbell, 402 U.S. 637, 651 (1971)). The *Pacific Gas & Electric* Court noted that in *Perez* an actual conflict existed between the state and federal laws. This would serve to distinguish *Perez* from the instant case. *Id.*

[111] *Id.* at 1728.

[112] *Id.* at 1729-30; *see supra* notes 57-59 and accompanying text. *See generally Florida Lime*, 373 U.S. at 141-43 (because actual collision between regulations was not inevitable, state regulations were not preempted by federal regulations).

[113] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1729.

statute was in conflict with current federal regulations.[114] The statute stated that it is the federal government's burden to develop and license nuclear waste disposal technology.[115] Focusing on statutory language which evinced no attempt to enter the waste disposal field, the Court determined that preemption was improper.[116] The Court also rejected the utilities' contention that the California statute countermanded the NRC decision to continue the licensing of new reactors.[117] The majority stated that the NRC had indicated only that it was "safe" to proceed with new nuclear plants,[118] not that it was economically sagacious to do so.[119] Since the Court found the coexistence of federal safety concerns and state economic concerns to be viable, it reasoned that dual compliance was possible, thus rendering preemption unnecessary.[120]

The final conflict argument advanced by the utilities involved the federal Nuclear Waste Policy Act of 1982,[121] which was Congress' first attempt at a comprehensive solution to the waste disposal problem.[122] Yet, the *Pacific Gas & Electric* Court did not find that Congress intended the NWPA to be binding on the states.[123] Indeed, the Court noted that "[w]hile the passage of this new legislation may convince state authorities that there is now a sufficient federal commitment to fuel storage and waste disposal . . . it does not appear that Congress intended to make that decision for the states through this legisla-

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[114] *Id.*

[115] *Id.*; *see* Warren-Alquist Act, CAL. PUB. RES. CODE § 25524.2(a) (proposing that State of California not license any further nuclear plants until "the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste."). The state was not attempting to usurp the federal government's role in controlling the storage and disposal of nuclear waste, but was attempting to deal with the problems which are certain to arise if the accumulation of radioactive waste continues without the development of a means of disposal. *See* Tribe, *supra* note 1, at 708.

[116] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730.

[117] *Id.* at 1729. The Court examined those federal provisions relevant to the licensing question, including the "safety analysis report" requirement. *Id.* (citing 10 C.F.R. § 50.34 (b)(20)(i), (ii) (1982)). It noted that virtually all of the NRC licensing requirements were based on safety considerations and that none of the requirements dealt with economic criteria. *Id.*

[118] *See* Natural Resources Defense Council, Inc. v. NRC, 582 F.2d 166, 171 (2d Cir. 1978), where the Second Circuit Court of Appeals asserted that Congress has stayed well abreast of the waste disposal problem, and that the NRC has not violated the Atomic Energy Act by continuing to grant new licenses without permanent disposal facilities.

[119] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730.

[120] *Id.* The *Pacific Gas & Electric* Court noted that economic matters are of primary importance and within the ambit of the states' powers, not within the NRC's primary area of concern. *See supra* note 99.

[121] Pub. L. No. 97-425, 96 Stat. 2201 (1982); *see supra* notes 75-83 and accompanying text.

[122] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730; *see supra* text accompanying notes 76-78.

[123] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1730.

tion."[124] Thus, the Court reasoned that it would be improper to rule that recent legislation countenanced preemption when the intent of Congress was clearly shown to have been to the contrary.[125]

The final proposition considered by the *Pacific Gas & Electric* Court was the utilities' argument that because California's Nuclear Laws frustrated "the federal goal of developing nuclear technology as a source of energy,"[126] the state laws should be stricken on obstacle preemption grounds.[127] The Court agreed with the petitioners' assertion that one of the foremost goals of the Atomic Energy Act is the promotion of nuclear energy,[128] and noted that there is express language to that effect in the Act.[129] The majority declared that despite

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[124] *Id.* (footnote omitted).

[125] *Id.*

[126] *Id.* at 1722.

[127] *Id. See generally* Wiggins, *supra* note 44, at 43-56 (discussion of Court's role in analyzing congressional intent with obstacle preemption cases). As Professor Tribe noted:

> A more subtle form of actual conflict arises where a state law is an obstacle to the objectives underlying federal enactments. For example, state law may be preempted if it discourages conduct that federal law seeks to encourage, or if it encourages conduct which would impede effectuation of the federal scheme. Recent Supreme Court cases have indicated, however, that conflicts must be real and substantial in order to merit judicial resolution.

Tribe, *supra* note 1, at 688-89 (footnotes omitted). The question arises as to what standard will be used to measure "potential conflict," in determining just how much of an obstacle the Court will tolerate. *See* Wiggins, *supra* note 44, at 44. Professor Wiggins denotes the process as "federalism balancing." *Id.* "As the degree of unavoidable conflict required by the Court increases, it becomes more likely that state regulation will be tolerated." *Id.*

[128] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1731.

[129] *Id.* The Atomic Energy Act states as one of its goals the following: "'to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.'" *Id.* (quoting 42 U.S.C. § 2013(b) (1976)).

Further, House and Senate Reports referring to the Atomic Energy Act have noted that a major goal of the United States is the involvement of private industry in the "development of the peaceful uses of atomic energy." *Id.* (citing H.R. REP. No. 883, 89th Cong., 1st Sess. 4 (1965); H.R. REP. No. 2181, 83d Cong., 2d Sess. 9 (1954); S. REP. No. 1699, 83d Cong., 2d Sess. 9 (1934)). *But see* Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983). The court of appeals in *Pacific Legal Foundation* asserted that there had been a change in congressional outlook regarding the promotion of nuclear energy, as evinced by the reorganization of the Atomic Energy Commission in 1974. *Id.* at 926-27. The AEC's regulatory functions were transferred to the NRC, while the AEC's promotional functions were given to the Energy Research and Development Administration (ERDA). *Id.* at 926. This reorganization was accompanied by a Senate Report which indicated that a provision prohibiting favoritism toward any one energy source was inserted due to "'deep concerns regarding the possibility of a pro-nuclear bias in ERDA.'" *Id.* at 927 (quoting S. REP. No. 93-980, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5470, 5476).

the congressional promotion of alternative energy source development, there were indications that Congress had retreated from its commitment to nuclear power as an important energy source.[130] The *Pacific Gas & Electric* Court agreed with the view of the Ninth Circuit Court of Appeals that "the promotion of nuclear power is not to be accomplished 'at all costs.' "[131] The Court once again emphasized the congressional policy of permitting the states to employ economic concerns in determining whether a nuclear power plant should be built.[132] In light of this congressional approval of state action, the Court reasoned that Congress and not the judiciary should determine whether the banning of a nuclear power plant is an impermissible obstacle to federal objectives.[133] Thus, the Court refused to find that California's Nuclear Laws should be preempted as an obstacle to the goals underlying federal legislation.[134]

Justice Blackmun, concurring, agreed that preemption of California's legislation was not proper, but disagreed with the majority's view that the states could not prohibit the construction of nuclear power plants for purely safety-related reasons.[135] Since the majority eventually found that the moratorium imposed by section 25524.2 was not motivated solely by safety concerns, Justice Blackmun believed this was dictum "unnecessary to the Court's holding."[136] Moreover, the Justice proceeded to refute the majority's reasoning on each of the three preemption arguments.

In their review of the lower decision, the *Pacific Gas & Electric* Court did not adopt this argument, stating that "[t]he evident desire of Congress to prevent safety from being compromised by promotional concerns does not translate into an abandonment of the objective of promoting nuclear power." *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1731.

[130] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1731.

[131] *Id.* The court of appeals had expressed their belief that Congress did not intend that promotion of nuclear energy be afforded a greater priority than development of alternative energy sources, "but has instead regarded nuclear power as one option which the states may choose." Pacific Legal Found. v. State Energy Resources Conserv. & Dev. Comm'n, 659 F.2d 903, 928 (9th Cir. 1981), *aff'd sub nom.* Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 103 S. Ct. 1713 (1983).

[132] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1731.

[133] *See id.* at 1732. As the Court postulated:

> [T]he legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective.

Id.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1732 (Blackmun, J., concurring).

The concurrence asserted that Congress had not occupied "the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards."[137] Justice Blackmun found nothing in the Atomic Energy Act of 1954 to prevent states from considering features such as safety concerns when deciding whether to grant permission to build an electrical generating facility.[138] Relying heavily on Professor Wiggins' analysis of California's Nuclear Laws,[139] the Justice noted that the consequence of precluding the states from determining the feasibility of nuclear plant construction would be to leave such determination to the utilities.[140] The concurrence noted Professor Wiggins' observation that preemption questions regarding section 25524.2 should be analyzed by distinguishing between *whether* to build the nuclear plant, a decision which should be left to the state, and *how* to build the plant, which is the area occupied by federal legislation.[141] Justice Blackmun proclaimed that the crucial question in the instant case was *whether* the plant should be built, and even if safety concerns were considered, the decision still should have been left to the state.[142]

Justice Blackmun agreed that a conflict was not present in *Pacific Gas & Electric*, but he disagreed with the majority's assertion that a conflict would be present should the state be allowed to consider safety factors.[143] The majority stated that such consideration might contravene the NRC's judgment that construction of nuclear plants

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[137] *Id.* Justice Blackmun felt that the majority had given an inconsistent and overly broad interpretation of Congress' intent to occupy the nuclear safety field. *Id.* The concurring Justice pointed out the wide discrepancy within the majority opinion, noting that the federal nuclear power role is first described in limited terms, but later in the opinion is described in more expansive terms. *Id.* at 1732 n.1 (Blackmun, J., concurring).

First, the majority asserts: "Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant. . . ." *Id.* at 1723. Later, the majority described congressional intent more broadly: "A state prohibition on nuclear construction for safety reasons would . . . be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use. . . ." *Id.* at 1727.

[138] *Id.* at 1733 (Blackmun, J., concurring).

[139] *Id. See generally* Wiggins, *supra* note 44, at 57-86.

[140] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring).

[141] *Id.* The "whether" question entails such factors as the availability of alternative sources of energy, cost-benefit analysis, and social and ideological policy. *Id.* The "how" question would cover such matters as the choice of proper safety devices, the methodology of reactor construction, and design specifications. Wiggins, *supra* note 44, at 63.

[142] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring).

[143] *Id.*

could proceed safely.[144] The concurring Justice argued to the contrary, declaring that *Florida Lime's* "dual compliance" conflict test[145] was not applicable here, because a state safety ban would not necessarily conflict with federal regulations.[146] He stated that although the NRC had expressed its belief that it was safe to proceed with the construction and operation of nuclear power plants, "neither the NRC nor Congress has mandated that States do so."[147] Since Congress was unwilling to order further plant construction, and the NRC probably was not empowered to do so, Justice Blackmun reasoned that conflict preemption based on safety concerns would not be appropriate in the instant case.[148]

Although Justice Blackmun also agreed with the majority that the California statute did not constitute an obstacle if based on economic concerns, he strongly objected to the majority's contention that a state ban for safety reasons should be construed as an obstacle.[149] The concurrence adopted Professor Wiggins' view that Congress did

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[144] *See supra* note 121 and accompanying text.

[145] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring); *see Florida Lime*, 373 U.S. at 142. The Court in *Florida Lime* reasoned that in areas where Congress has plenary power, state law must be excluded "where compliance with both federal and state regulations is a physical impossibility." *Id.* at 142-43; *see also supra* notes 54-55 and accompanying text.

In conflict decisions such as *Pacific Gas & Electric*, the Supreme Court often examines the feasibility of dual compliance, where a certain degree of conflict is inevitable. *See, e.g.*, First Iowa Hydro-Elec. Corp. v. Federal Power Comm'n, 328 U.S. 152, 167-68 (1946) (Federal Power Act separated subjects according to whether they were under state or federal control, for purposes of limited dual authority). Where conformity to both standards would be impossible, the Court is likely to rule that the state regulations are preempted. *First Iowa*, 328 U.S. at 168. In *First Iowa*, it was noted that "it was the intention of Congress to secure a comprehensive development of national resources . . . . The detailed provisions of the Act providing for the federal plan or regulation leave no room or need for conflicting state controls." *Id.* at 180-81 (footnote omitted). As a result, the Federal Power Commission was held to have regulatory jurisdiction over licensing provisions that encroached upon the states' existing regulatory powers. *Id.* at 182.

[146] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring).

[147] *Id.* Justice Blackmun pointed out that the majority had acknowledged that neither Congress nor the NRC had made a determination that nuclear power plant construction "must" proceed. *See id.* As the majority had stated:

> Even a brief perusal of the Atomic Energy Act reveals that, despite its comprehensiveness, it does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors.

Id. at 1722. Indeed, since the majority opinion noted expressly that Congress intended for the states to determine questions of need in regard to electrical utilities, it does not seem reasonable to assert that the NRC could require the building of nuclear plants which a state felt were not necessary. *See id.* at 1723.

[148] *See id.* at 1733 (Blackmun, J., concurring); *see also supra* note 150.

[149] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring).

not compel a state to give preference to the "nuclear energy eventual product of [the industry] or to ignore the peculiar problems associated with that product."[150] Justice Blackmun noted the variety of ways that a state could prohibit construction of a nuclear power plant,[151] and the fact that Congress never has disallowed any of these means of prohibition.[152] The Justice found this refusal to narrow the aforementioned state options to be contraindicative of a congressional intent that states be required to " 'go nuclear.' "[153]

In conclusion, Justice Blackmun declared that the Court should have left the decision concerning the construction of nuclear power plants to the states, rather than permitting the matter to "rest on the elusive test of legislative motive."[154] Thus, he reasoned that a state ban based on safety concerns is no more of an obstacle than a ban based on economic or other grounds.[155]

The *Pacific Gas & Electric* Court's decision to uphold the court of appeals' ruling[156] was well-conceived. Nevertheless, despite the fact that all nine Justices agreed that the states are empowered to place a moratorium on the construction of new nuclear-powered electric generating facilities,[157] the members of the Court differed as to where the jurisdictional line between the regulatory powers of a state and the NRC should be drawn.[158] Although the results were similar, the analytical criteria employed by the majority and the concurrence were significantly different.

The majority's distinction between safety concerns and economic concerns was at the heart of its decision.[159] The majority reasoned

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[150] *Id.* at 1734; *see* Wiggins, *supra* note 44, at 78. "Far more likely, what was to be 'promoted' was not nuclear power at the expense of alternatives but the development of the technology that would permit nuclear power plants to be one of the alternatives." *Id.* (emphasis in original).

[151] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1734-35 (Blackmun, J., concurring). The means which the states could use to deter construction include stringent land use requirements, the establishment of prohibitive air emission standards, and the denial of certificates of need. *Id.*

[152] *Id.*

[153] *Id.* at 1735 (Blackmun, J., concurring). "In subsequent legislation Congress has continued to promote many sources of energy without giving preference to nuclear power." *Id.* at 1734 n.6 (Blackmun, J., concurring).

[154] *Id.* at 1735 (Blackmun, J., concurring).

[155] *Id.*

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

[157] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1713.

[158] *See supra* notes 96-103 and accompanying text (regarding majority's view on boundaries of regulatory power). *But see supra* notes 112-14 (Justice Blackmun's discussion of boundary of authority).

[159] *See supra* note 99.

clearly in examining the special nature of nuclear energy regulation,[160] particularly in noting that Congress had initially reserved strong federal control in an area traditionally governed by the states.[161] Yet, the key issue in *Pacific Gas & Electric* was the discernment of Congress' intent in drafting the original legislation in 1946,[162] as well as the intent behind the supplemental legislation passed in 1954[163] and 1959.[164] The question remains whether the Court's breakdown of *Pacific Gas & Electric* into a "safety versus economics" dichotomy truly reflects Congress' objectives in drafting this regulatory legislation.

The Court's determination that the states could not regulate the actual construction or operation of a nuclear power plant appears well-grounded.[165] On the other hand, Congress' desire to increase the scope of state involvement in the general field of nuclear power regulation is evidenced by recent federal legislation.[166] Whether the "safety versus economics" test will be sufficient to settle future disputes over regulatory jurisdiction is questionable.

In *Pacific Gas & Electric*, the Court repeatedly pointed out that the NRC has retained authority over "the construction and operation of any production or utilization facility."[167] At no time, however, did the Court point specifically to a statute or legislative report which precludes a state moratorium for the commencement of construction on nuclear power plants, whether for safety, economic, or other

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[160] *See supra* text accompanying notes 96-103.

[161] *See supra* text accompanying notes 96-98. The *Pacific Gas & Electric* Court felt that the division of authority arose directly from congressional refusal to transfer state control over energy generation to the AEC (or NRC), even for nuclear-powered generating facilities. *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1725-27. *But see id.* at 1732-35 (Blackmun, J., concurring) (Congress has not occupied entire field of nuclear safety concerns).

[162] Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755.

[163] Atomic Energy Act of 1954, 68 Stat. 919 (codified at 42 U.S.C. §§ 2011-2281 (1976)).

[164] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724-25 (discussing 1959 amendments to Atomic Energy Act of 1954).

[165] *Id.* at 1726; *see also* Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1150-52 (8th Cir. 1971) (discussing congressional Joint Committee report indicating intent that federal government retain exclusive control over construction and operation of nuclear reactors), *aff'd*, 405 U.S. 1035 (1972).

[166] *See, e.g., Pacific Gas & Elec. Co.*, 103 S. Ct. at 1735 (discussing state power over radioactive air emissions under Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7416-7422 (Supp. III 1979)). Professor Tribe has noted the dramatic increase which recent legislation provides for state involvement, going so far as to assert that "recent federal legislation . . . has reversed any possible presumption in favor of federal preemption." Tribe, *supra* note 1, at 698.

[167] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1725 (quoting § 244 (c)(1), 42 U.S.C. § 2021 (c)(1) (Supp. III 1979)).

reasons.[168] Thus, the Court overlooked the basic difference between *whether* to construct a nuclear plant, and *how* to construct and operate a plant.[169] The Court correctly asserted that the federal government retains complete control over "the safety and 'nuclear' aspects of energy generation."[170] Nevertheless, the Court neglected to consider fully the question concerning the precise point at which "energy generation" becomes operative. Until the moment that it is affirmatively decided to construct a plant, the potential "energy generation" of such plant remains an intangible factor.

The Court already has conceded that a state retains the power to prevent construction of a nuclear power plant, even after the NRC has issued a construction permit, if the state does so for environmental or energy requirement reasons.[171] It does not follow logically that "safety" concerns should be construed as an impermissible impediment to "energy generation," while "environmental" or "need" concerns are not. All three factors deal with the determination of whether to allow construction at all, which is seemingly extraneous to the NRC's jurisdictional parameters.[172] Clearly, the *Pacific Gas & Electric* majority's reasoning on safety "occupation" clashes with its earlier assertion that the AEC "was not given authority over the generation of electricity itself."[173]

The Court also failed to acknowledge that safety and economic concerns are often inextricably entwined.[174] Thus, the *Pacific Gas &*

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[168] To the contrary, the *Pacific Gas & Electric* Court indicated that even though it is comprehensive in nature, the Atomic Energy Act "does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors." *Id.* at 1722.

[169] *See id.* at 1733 (Blackmun, J., concurring); *see also* Wiggins, *supra* note 44, at 61; *cf.* Note, *May a State Say "No" to Nuclear Power?* Pacific Legal Foundation *Gives a Disappointing Answer*, 10 ENVTL. L. 189 (1979) (an examination of subject case at district court level).

[170] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1726; *see supra* text accompanying notes 107-08.

[171] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724 n.18. "States retain the right, even in the face of the issuance of an NRC construction permit, to preclude construction on such bases as a lack of need for additional generating capacity or the environmental unacceptability of the proposed facility or site." *Id.* (quoting *In re* Consol. Edison, 7 N.R.C. 31, 34 (1978)).

[172] *See infra* notes 181-84 and accompanying text.

[173] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1724.

[174] The number of nuclear plants which have brought utility companies to the brink of financial ruin because of safety-related cost overruns is growing continuously. *See A $1.6 Billion Nuclear Fiasco*, TIME, Oct. 31, 1983, at 96-99. An example is the Zimmer Nuclear Power Station in Moscow, Ohio, which has been under construction since 1972 and is now 97% completed. *Id.* at 96. The original cost estimate in 1969 was $240 million; the three Ohio utility companies which own the plant have spent $1.6 billion to date; because of 15,000 violations of NRC safety regulations, it is estimated that proper completion will cost a staggering $3.1 billion. *Id.* The

Electric decision may encourage otherwise avoidable litigation over whether a future construction moratorium was imposed for "safety" or "economic" reasons by its failure to develop a bright-line test in this nebulous jurisdictional area. This pitfall could have been avoided through the use of the "how versus whether" test enunciated by Professor Wiggins,[175] and relied upon in Justice Blackmun's concurrence.[176]

Justice Blackmun's concurring opinion averred that a state-imposed moratorium on nuclear plant construction should not be preempted if based on safety concerns.[177] He argued against preemption for safety-related moratoriums on "occupation,"[178] "conflict,"[179] or "obstacle"[180] grounds. Simply, the concurrence asserted that the majority opinion had confused the actual construction and operation of nuclear power plants, over which the NRC clearly has jurisdiction, with the entirely distinct decisionmaking process preceding the commencement of the construction of a nuclear generating facility.[181]

Had the Court resolved this regulatory preemption dispute by means of Wiggins' "whether versus how" standard,[182] as enunciated in

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Pacific Gas & Electric Court's contention that safety and economic concerns are clearly distinguishable does not seem tenable when applied to this real life situation.

There are many other examples of economic dilemmas resulting from safety-related problems in nuclear plant construction. *See id.* at 99. Because of safety and design difficulties at the Clinton Nuclear Power Plant No. 1 in Clinton, Illinois, the completion cost estimate has risen from $429 million in 1976 to the current figure of $2.8 billion. *Id.* The South Texas Nuclear Plant in Bay City, Texas, has an estimate that has risen from $1 billion in 1976 to $5.5 billion today. *Id.* at 101. Finally, the Diablo 2 power plant in Diablo Canyon, California, has had safety-design modifications that have increased the cost from $420 million to $4 billion, and delayed its opening by 10 years. *Id.*

The assertion that the state should not be allowed to consider safety concerns in determining whether to ban nuclear plant construction temporarily is tantamount to a refusal to analyze the true nature of the safety-economic dilemma. "After Three Mile Island, the prospect of having to abandon a next-to-new and hugely expensive nuclear facility because of radioactive contamination may make nuclear power economically unattractive." Wiggins, *supra* note 44, at 62.

[175] *See* Wiggins, *supra* note 44, at 61-67; *supra* text accompanying notes 139-42.

[176] *Pacific Gas & Elec. Co.*, 103 S. Ct. at 1732-35 (Blackmun, J., concurring).

[177] *Id.* at 1732 (Blackmun, J., concurring).

[178] *See supra* notes 136-42 and accompanying text.

[179] *See supra* notes 143-48 and accompanying text.

[180] *See supra* notes 149-55 and accompanying text.

[181] *See Pacific Gas & Elec. Co.*, 103 S. Ct. at 1733 (Blackmun, J., concurring). "[T]here is an important distinction between the threshold determination whether to permit the construction of new nuclear plants and, if the decision is to permit construction, the subsequent determinations of how to construct and operate those plants." *Id.*

[182] *See supra* notes 139-42 and accompanying text. Professor Wiggins noted that Congress has occupied the field of determining how nuclear generating facilities are to be constructed and operated, and that this is the area which they intended for the AEC (and later, the NRC) to regulate. *See* Wiggins, *supra* note 44, at 61. On the other hand, he noted that Congress "has not

Justice Blackmun's opinion, rather than by the majority's "safety versus economics" test,[183] it would have set clear applicable precedent in this area.

The "whether versus how" test would draw a bright-line distinction by requiring that all factors comprising the "whether" decision would have to meet the state's standards, while all subsequent factors would be under the NRC's regulatory purview. In deciding future disputes, the courts would not have to set arbitrary lines in order to disentangle fact-sensitive questions to determine whether a state moratorium is motivated by economic or by safety concerns. A "whether versus how" test thus would be more intelligible and easier for the courts to apply. Although factors such as ease of application and clarity should not be the only considerations in determining a viable analysis for regulatory preemption problems, they are deserving of considerable weight.

In addition, use of Wiggins' "whether versus how" test would spare the courts the difficult task of determining legislative intent. The Supreme Court in recent years has decided that in preemption cases they will refuse "either to presume or infer intent."[184] Since the intent of Congress to preclude a state moratorium for safety reasons was not clearly articulated by the *Pacific Gas & Electric* Court, the "state-supportive presumption"[185] would seem to mandate that states be allowed to preclude the construction of nuclear plants because of safety concerns.

Since the decision in *Hines v. Davidowitz* in 1941, the Supreme Court has held that preemption will not be found in an area of traditional state control "unless that was the clear and manifest purpose of Congress."[186] The *Pacific Gas & Electric* Court noted that the

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even entered the field of determining *whether* they should be constructed in the first place." *Id.* (emphasis in original). Wiggins listed those factors which comprised the "whether" decision. *Id.* These included social, economic, safety, environmental, and ideological concerns. He then observed that ideally, the NRC should only address "protection against 'radiation hazards.' " *Id.* In light of this allocation of relevant factors, along with the aforementioned "state-supportive presumption," Professor Wiggins inferred that the states should make this initial decision. *Id.* at 64-65.

[183] *See supra* notes 99-104 and accompanying text.

[184] J. NOWAK, *supra* note 44, at 270. *See generally* Goldstein v. California, 412 U.S. 546 (1973) (Court refused to infer congressional intent to occupy copyright field absent clear showing of such intent); New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) (comprehensiveness of federal statute alone held insufficient to show clear manifestation of congressional intent that statute superceded state action).

[185] *See supra* text accompanying notes 45-48.

[186] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *accord* New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973).

NRC does not have authority over the generation of electricity in general.[187] In addition, the 1959 amendments to the Atomic Energy Act, the Clean Air Act amendments of 1977, and other pieces of federal legislation evince an intent on the part of Congress to expand, not restrict, the role of the states in matters concerning the generation of electricity through nuclear energy.[188] The "how versus whether" test would serve to increase the states' role in making such determinations, since they would always make the primary decision on whether to allow construction after considering all pertinent ideological, need, safety, environmental, and economic concerns. In addition, the "how versus whether" test would result in greater clarity in making nuclear plant construction decisions, and would be far easier to apply than the majority's test.[189] Finally, after considering that Congress has not shown an intent to preempt in this area, it must be recalled that "[i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so."[190] In light of the "state-supportive presumption," Justice Blackmun's "whether versus how" test stands out as the most efficacious standard for determining where the jurisdictional line should be drawn in future nuclear regulatory disputes. Should this type of jurisdictional question present itself once again, the Supreme Court hopefully will be swayed to modify its stance in accordance with Justice Blackmun's concurring opinion in the instant case.

Robert W. Ross

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[187] *See supra* text accompanying note 99.

[188] *See, e.g., Pacific Gas & Elec. Co.*, 103 S. Ct. at 1735 (Blackmun, J., concurring) (citing NRC Authorization Act for Fiscal 1980, Pub. L. No. 96-295, § 108(f), 94 Stat. 783 (1980) (states may establish siting and land use requirements for nuclear plants more stringent than those of NRC)).

[189] *See supra* notes 182-84 and accompanying text.

[190] New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).