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Punitive Damage Award Against Nuclear Power Company Threatens Exclusivity of Federal Control: Silkwood v. Kerr-McGee Corp.

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CASENOTES

Punitive Damage Award Against Nuclear Power Company Threatens Exclusivity of Federal Control: *Silkwood v. Kerr-McGee Corp.*[1] — The "Supremacy Clause" of the United States Constitution states that "the Laws 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."[2] The United States Supreme Court has held that state laws are preempted by this clause when they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[3] State laws have generally been found to be an obstacle to congressional objectives either if there is actual conflict between the state and federal laws[4] or if Congress has occupied an entire field and the state attempts to regulate in that field.[5]

The courts have found impermissible conflict between federal and state law most frequently when the two laws are contradictory on their face and compliance with both is impossible.[6] There need not, however, be a direct conflict between federal and state law for the courts to hold the state law preempted. On the contrary, if Congress has occupied an entire field, state law is preempted no matter how well it conforms to federal objectives.[7] Such "occupation," however, is not found absent persuasive reasons for doing so, that is "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[8] The willingness of the courts to find total occupation is influenced by the comprehensiveness of the federal regulatory scheme. The more pervasive the regulations are, the more likely preemption will be found.[9]

One such comprehensive federal regulatory scheme is the federal regulation of nuclear power.[10] Prior to 1954, the federal government had a monopoly over the nuclear industry; then in 1954 Congress for the first time authorized private involvement in nuclear energy.[11] The Atomic Energy Act ("AEA") of 1954 reflected the view that "the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes . . . ."[12]

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[1] 464 U.S. 238 (1984).

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

[3] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (preemption of state alien registration law because of federal law governing the same conduct).

[4] *See, e.g.*, McDermott v. Wisconsin, 228 U.S. 115, 131-32 (1913) (state syrup labeling law preempted where compliance with federal regulations required violation of state law).

[5] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

[6] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[7] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

[8] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

[9] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (1978).

[10] STASON, ESTEP & PIERCE, ATOMS AND THE LAW 1059 (1954): "The federal licensing scheme to control the development and utilization of atomic energy, as established by Congress and implemented by the AEA, is extraordinarily pervasive, probably more pervasive than any regulatory scheme considered by the Supreme Court in analogous [preemption cases]." *Id.*

[11] 42 U.S.C. §§ 2011-2296 (1982). Prior to 1954, atomic energy was governed by the Atomic Energy Act of 1946. 42 U.S.C. §§ 1801-1819 (1952). The avowed purpose of the Act was to foster the research and development of atomic energy under a program of federal control and ownership. *Id.* § 1801.

[12] Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n [hereinafter cited as *Pacific Gas*], 461 U.S. 190, 206-07 (1983) (citing H.R. REP. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). That report reads in pertinent part:

While the AEA provided for private investment in nuclear power, the Atomic Energy Commission ("AEC" or "Commission"), the predecessor of the Nuclear Regulatory Commission ("NRC" or "Commission"), retained "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials."[13]

Despite this congressional invitation, private companies were reluctant to enter the nuclear power field because of concern over the astronomical liability which could result from state law suits arising out of a nuclear accident.[14] In response to this reluctance, Congress passed the Price-Anderson Act in 1957.[15] The Act established a federally funded indemnification scheme to be triggered in the event of a nuclear incident.[16] The dual purposes of the Act were to protect potential investors from bankrupting lawsuits and to insure the availability of funds for victims of nuclear accidents.[17]

In 1959, Congress amended the 1954 AEA to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials . . . ."[18] The amendments authorized the Commission to "enter into agreements with the Governor of any state providing for discontinuance of the regulatory authority of the Commission . . . with respect to . . . (1) byproduct materials . . . ; (3) source materials; (4) special nuclear materials in quantities not sufficient to form a critical mass."[19] The states were still precluded, however, from regulating the safety aspects surrounding the construction and operation of any production or utilization facility.[20] This exclusion of safety regulation required the courts to make the difficult determination of the scope of the preemption and the types of state activity preempted. One such state activity that needed exploring was the awarding of damages in a tort action.

> It is our deep conviction, however, that this legislation will speed atomic progress and will promote the security and well being of the Nation . . . . It is our firmly held conviction that increased private participation in atomic power development, under the terms stipulated in this proposed legislation, will measurably accelerate our progress toward the day when atomic power will be a fact.

H.R. REP. NO. 2181, 83d Cong., 2d Sess. 6, 9 (1954).

[13] *Pacific Gas*, 461 U.S. at 207 (citing 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1982)).

[14] Silkwood v. Kerr-McGee Corp. [hereinafter cited as *Silkwood*], 464 U.S. 238, 251 (1984).

[15] Atomic Energy Damages Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.).

[16] *Id.* Under the Act, the Commission can require nuclear operators to purchase liability insurance. 42 U.S.C. § 2210(a) (1982). Amounts of liability in excess of that insurance are then indemnified by the federal government. *Id.* § 2210(c). The limit of liability for any one incident is the amount of insurance required by the Commission plus the $500 million federal indemnification. *Id.* § 2210(e).

[17] 42 U.S.C. § 2012(i) (1982).

[18] 42 U.S.C. § 2021(a)(1) (1982).

[19] 42 U.S.C. § 2021(b) (1982). If such an agreement was made, the state gained authority to regulate those materials for the public safety. *Id.*

[20] *Silkwood*, 464 U.S. at 250. In reaching this conclusion, the Court relied upon 42 U.S.C. § 2021(c)(4) (1982). Section 2021(c) reads in pertinent part:

> No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority . . . with respect to regulation of —
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> (1) the construction and operation of any production or utilization facility;
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> . . .
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> (4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Id.

The Supreme Court, in *Silkwood v. Kerr-McGee Corp.*,[21] considered the question of whether the AEA of 1954 as amended and the Price-Anderson Act operate to preempt a state court award of punitive damages.[22] Karen Silkwood was employed by Kerr-McGee Nuclear Corp. and worked at its Cimmaron plant in Oklahoma.[23] On November 5, 1974, during a routine monitoring procedure, contamination was detected on Silkwood's left hand, right wrist, upper arm, neck, hair, and nostrils. She was decontaminated immediately and instructed to collect urine and fecal samples.[24]

On November 6, Silkwood again monitored herself and again discovered contamination.[25] Again, she was decontaminated.[26] The next day Silkwood was monitored upon her arrival at the plant.[27] High levels of contamination were detected, leading to the conclusion that the contamination had spread to her apartment.[28] Kerr-McGee dispatched a decontamination squad to Silkwood's apartment.[29] The squad discovered contamination in several rooms.[30] Silkwood's roommate, who was also an employee at the plant, was also contaminated.[31] As a result, many of Silkwood's belongings were destroyed and she was sent to Los Alamos Scientific Laboratory for examination of her vital organs for contamination.[32] She returned to work on November 13, and that night was killed in an automobile accident.[33]

Silkwood's father, as administrator of her estate, brought a diversity action under Oklahoma law[34] in United States District Court for the Western District of Oklahoma, claiming that Kerr-McGee had negligently allowed plutonium to escape from its plant, and, alternatively, that Kerr-McGee was strictly liable for Silkwood's contamination.[35] Kerr-McGee stipulated that the plutonium which caused Silkwood's injuries came from its plant,[36] but argued that Oklahoma's Workers' Compensation Act provided Silkwood's sole remedy and thus barred the lawsuit.[37] The court rejected this argument, finding the Workers' Compensation Act inapplicable because Kerr-McGee had not established that the injury took place on the job.[38] The negligence claim was thus considered on the merits.[39]

At trial the parties presented evidence of Kerr-McGee's actions in light of federal safety standards for nuclear facilities.[40] Kerr-McGee conceded that the amount of

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[21] 464 U.S. 238 (1984).

[22] *Id.* at 241.

[23] *Id.* The plant manufactured plutonium fuel pins used as fuel in nuclear power plants. *Id.*

[24] *Id.* at 241-42.

[25] *Id.* at 242.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* The conjecture surrounding Karen Silkwood's death is not relevant to the issues presented in *Silkwood*.

[34] *Id.* at 243.

[35] Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 570 (W.D. Okla. 1983).

[36] 464 U.S. at 243.

[37] 485 F. Supp. at 574. The Oklahoma Workers' Compensation Act provides the sole remedy for accidental injuries incurred in the course of employment. OKLA. STAT. tit. 85, §§ 11, 12 (1981).

[38] 485 F. Supp. at 587-88.

[39] *Id.*

[40] *Id.* at 577-87.

unaccounted-for plutonium at the plant exceeded permissible limits.[41] In addition, an NRC official testified that Kerr-McGee did not meet the "low as reasonably achievable" standard.[42] Under this standard, Kerr-McGee was required not only to meet the numerical standards for radiation exposure set out by the NRC, but to do better if possible in light of available, affordable technology.[43] The NRC's report on the incident concluded, however, that Kerr-McGee's only violation of NRC regulations throughout the incident was its failure to maintain a record of the dates on which two urine samples were submitted by Silkwood.[44]

The jury returned a verdict for Silkwood on both strict liability and negligence, awarding $505,000 in compensatory damages, consisting of $500,000 for injuries and $5,000 for property damage, and $10 million in punitive damages.[45] Kerr-McGee moved for judgment n.o.v. contending, inter alia, that its compliance with federal regulations precluded an award of punitive damages.[46] The court rejected this argument and entered judgment on the verdict, noting that Kerr-McGee "had a duty under [the Regulations] to maintain the release of radiation 'as low as reasonably achievable.' "[47] According to the trial judge, "[c]ompliance with this standard cannot be demonstrated merely through control of escaped plutonium to within any absolute amount."[48] Kerr-McGee appealed the trial court's decision to the United States Court of Appeals for the Tenth Circuit.[49]

The Tenth Circuit reversed both the award of actual damages[50] and the award of punitive damages.[51] Relying on *Northern States Power Co. v. State of Minnesota*,[52] the court held that state regulation of radiation hazards is preempted by the AEA.[53] Therefore, according to the court of appeals, since "[a] judicial award of exemplary damages under state law as punishment for bad practices . . . is not less intrusive than direct legislative acts of the state," such awards are also preempted.[54] Silkwood appealed the court's ruling only as to punitive damages.[55]

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[41] *Id.* at 586.

[42] *Id.*

[43] *See id.* at 585. The NRC regulations state in pertinent part:

> [P]ersons engaged in activities under license issued by the [NRC] pursuant to the [AEA] . . . should, in addition to complying with the requirements set forth in this part, make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable. [This] means as low as is reasonably achievable taking into account the state of technology, [economics], and . . . the utilization of atomic energy in the public interest.

10 C.F.R. § 20.1(c) (1984).

[44] 464 U.S. at 244.

[45] 485 F. Supp. at 570.

[46] *Id.* at 570, 577.

[47] *Id.* at 585. *See supra* note 43 and accompanying text.

[48] 485 F. Supp. at 585.

[49] 667 F.2d 908, 912 (10th Cir. 1981).

[50] *Id.* at 915-16. The court of appeals found that Oklahoma's Workers' Compensation statute, which provides the sole remedy for injuries on the job, creates a presumption infavor of the act's applying and that the trial judge erred in not granting Kerr-McGee the benefit of that presumption. *Id.* at 916-17. The award of $5,000 for property damages was affirmed. *Id.* at 921.

[51] *Id.* at 923.

[52] 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). For a discussion of this case see *infra* notes 67-92 and accompanying text.

[53] 667 F.2d at 923.

[54] *Id.*

[55] 464 U.S. at 246.

The Supreme Court, in a five-to-four decision, held that an award of punitive damages is not preempted by the AEA or the Price-Anderson Act.[56] While recognizing its previous decision that nuclear safety regulation was a completely occupied field,[57] the Court found in the Price-Anderson Act evidence that the preempted field does not extend to state tort remedies for injured victims of nuclear accidents.[58] Concluding further that there was no direct conflict between the punitive award and federal law,[59] the Court reinstated the punitive award.[60] In separate dissents, Justices Blackmun[61] and Powell[62] disagreed with the Court's reliance on, and interpretation of, the Price-Anderson Act, and criticized the Court for treating compensatory and punitive damages alike.[63]

The Supreme Court's holding in *Silkwood* produces the anomalous result that a lay jury may impose fines for what it considers unsafe conduct, while a state legislature may not because Congress thought the area too complex to be handled by the states. The Court attributes this "tension" to a deferential obedience to congressional intent. This tension, however, is a result of the Court's focus on the wrong statute, the Price-Anderson Act, and of the Court's consideration of that statute out of its context. This misplaced focus produces a decision which is inconsistent with precedent. The resulting tension could have been avoided by applying the principles developed in previous cases to *Silkwood*. The effect is to create dual regulation, by the NRC and by state court juries, in the field of nuclear safety, a result which Congress sought to avoid and which it should now seek to correct.

This casenote begins with an examination of the development of the preemption doctrine as applied to nuclear power regulation through two cases, *Northern States Power Co. v. State of Minnesota*[64] and *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.[65] These two cases demonstrate the predominance of the federal government in safety regulation of nuclear power. Next, this casenote will describe the *Silkwood* opinion, focusing on the major arguments of the majority and dissenting opinions. Finally, the casenote will analyze the *Silkwood* decision and its impact on the regulation of nuclear power, concluding that the majority inappropriately failed to follow *Pacific Gas*. This error arose from the Court's failure to view punitive damages as a safety regulation rather than as compensation, and by the Court's unwillingness to draw a line between various types of state tort law when considering the legislative history of the Price-Anderson Act.

I. The Development of the Preemption Doctrine in the Regulation of Nuclear Power

The AEA of 1954, together with its various amendments, represented a sweeping federal scheme of regulation over nuclear power.[66] The courts, however, were left with the task of determining the scope of the preempted fields and the types of traditional state

[56] *Id.* at 258.
[57] *Id.* at 249. *See infra* note 102 and accompanying text.
[58] *Id.* at 256.
[59] *Id.* at 257.
[60] *Id.* at 258.
[61] *Id.* at 258-74 (Blackmun, J., dissenting).
[62] *Id.* at 274-86 (Powell, J., dissenting).
[63] *Id.* at 258-86.
[64] 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).
[65] 461 U.S. 190 (1983).
[66] *See supra* notes 10-20 and accompanying text.

police powers which were to be left undisturbed by the federal legislation. The first important case to address this concern was the 1971 case of *Northern States Power Co. v. State of Minnesota*.[67]

In *Northern States*, the state of Minnesota had issued to the Northern States Power Company a permit to discharge cooling water and liquid waste into the Mississippi River.[68] The permit, however, contained conditions governing that discharge which the power company felt were impracticable.[69] The power company brought an action in federal district court seeking a declaratory judgment as to whether the AEC's authority to regulate nuclear safety was exclusive so as to preclude state action.[70] The district court held that the Commission's authority was exclusive and state action barred.[71] The United States Court of Appeals for the Eighth Circuit affirmed, holding that "the federal government has exclusive authority under the doctrine of preemption to regulate the construction and operation of nuclear power plants . . . ."[72]

The court of appeals identified three ways in which a finding of preemption may be compelled:[73] first, where it is impossible to comply with both the federal and the state regulations;[74] second, where Congress has expressly declared that the authority conferred by it shall be exclusive;[75] and third, where preemption may be implied.[76]

The Eighth Circuit found that since the Minnesota law was only more stringent than the federal law but did not contradict it, there was no impossibility of compliance with both.[77] Next, the court, not directly addressing the question of whether Congress expressly mandated preemption, turned to the question of whether congressional intent to preempt should be implied.[78] In doing so, the court identified four "key factors" that influence that decision.[79] First, the court identified the intent of Congress as revealed by the statute and its legislative history as an important factor in determining implied

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

[68] 320 F. Supp. 172, 173 (D. Minn. 1970).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 174.

[72] 447 F.2d at 1154.

[73] *Id.* at 1146.

[74] *Id.* (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). In *Florida Lime* the Supreme Court upheld a California statute which imposed a minimum percentage of oil by weight on all avocados sold in the state against a challenge that a federal statute preempted it because it imposed a different measure of maturity. 373 U.S. at 146. The Court found no collision between the two standards. *Id.* In dictum, the Court stated, a holding of state law preemption is "inescapable . . . where compliance with both federal and state regulations is a physical impossibility . . . ." *Id.* at 142-143.

[75] 447 F.2d at 1146 (citing Cambell v. Hussey, 368 U.S. 297, 302 (1961)). In *Cambell*, the Court held that a Georgia statute requiring a particular type of tobacco to be identified with a white tag was preempted by a federal regulation requiring the same type of tobacco to be identified with a blue tag. 368 U.S. at 302. According to the Court, Congress had expressly preempted the states when it authorized the Secretary of Agriculture "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be *the official standards of the United States*." 368 U.S. at 299 (emphasis added by Court) (quoting 7 U.S.C. § 511(b)).

[76] 447 F.2d at 1146 (citing Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 772 (1947)) (certification of union by state board held invalid when NLRB had denied certification).

[77] *Northern States*, 447 F.2d at 1147.

[78] *Id.*

[79] *Id.* at 1146-47.

preemption.[80] Second, according to the court, the pervasiveness of the federal regulatory scheme could be examined to imply congressional intent to preempt.[81] The third factor the court found important was the nature of the subject matter which Congress was regulating.[82] The final factor the court identified was whether the state law stands as an obstacle to the accomplishment of the full objectives of Congress.[83]

In applying these factors to the AEA, the court of appeals found that the 1959 amendment to the AEA[84] and its legislative history, standing alone, provide ample evidence of preemption.[85] According to the court, 42 U.S.C. § 2021(c), which prohibits the AEC from discontinuing its authority with respect to "the construction and operation of any production or utilization facility,"[86] could not be read, as Minnesota urged, as prohibiting only total relinquishment of federal control.[87] Rather, the court held that section 2021(c) banned the concurrent exercise of state and federal control over nuclear facilities.[88] The court further concluded that the regulatory scheme's pervasiveness[89] and the national flavor of the subject matter[90] provided further justification for implying congressional intention to preempt.[91] The Supreme Court granted a summary affirmance of the judgment of the court of appeals in *Northern States* and thus did not review the reasoning of the decision.[92]

In the 1983 case of *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[93] however, the Supreme Court considered fully the question of preemption in an opinion that confirmed the limited role of the states vis-a-vis nuclear power. *Pacific Gas* involved a California statute requiring a California regulatory body to find that federal regulations for waste disposal were met before allowing a nuclear plant

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[80] *Id.* at 1146 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 157-160 (1963)). For a discussion of *Florida Lime*, see *supra* note 74.

[81] 447 F.2d at 1146 (citing Pennsylvania v. Nelson, 350 U.S. 497, 502-504 (1956)(Congressional act prohibiting advocacy of the overthrow of the government found so pervasive as to preempt Pennsylvania statute prohibiting the same conduct)).

[82] *Id.* (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-44 (1963)).

[83] *Id.* at 1147 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[84] 42 U.S.C. § 2021 (1982). *See supra* notes 18-20 and accompanying text.

[85] 447 F.2d at 1152-53.

[86] *See supra* note 20.

[87] 447 F.2d at 1149.

[88] *Id.* at 1150. In reaching this conclusion, the court relied on an excerpt of a Joint Committee report which reads:

> It [the bill] is not intended to leave any room for the exercise of dual or concurrent jurisdiction by the States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both.

S. REP. No. 870, 86th Cong., 1st Sess. 9, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2879.

[89] 447 F.2d at 1152-53 (quoting STASON, ESTEP & PIERCE, ATOMS AND THE LAW 1059 (1954)). *See supra* note 10.

[90] 42 U.S.C. § 2012(e) (1982) states:

> Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

[91] 447 F.2d at 1152-54.

[92] 405 U.S. 1035 (1972). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982).

[93] 461 U.S. 190 (1983).

to operate.[94] Public utilities brought an action in federal district court challenging the statute as an impermissible state regulation of nuclear power.[95] Relying on *Northern States*, the district court held the statute preempted because it "either [conflicts] with or substantially impede[s] the regulation of nuclear energy reserved to the federal government by the Atomic Energy Act of 1946 . . . ."[96] On appeal the United States Court of Appeals for the Ninth Circuit reversed.[97] The court of appeals held that the purpose of the California statute was economic and thus it was outside the preempted field of safety concerns.[98] The Ninth Circuit's holding was appealed by the public utilities.

The Supreme Court affirmed,[99] holding that states may regulate nuclear power other than for safety reasons.[100] Agreeing with the court of appeals that the statute's purpose was economic rather than safety-related, the Court determined that Congress had not intended to prevent the states from exercising their traditional economic role vis-a-vis public utilities.[101] In dicta, discussing the issue of safety regulation, the Court stated that the federal government has occupied the entire field of nuclear safety regulation.[102] Therefore, the Court concluded that state regulations that have as their aim the regulation of the safety of nuclear power are preempted regardless of whether they actually conflict with the federal scheme.[103] The Court found that the California statute was

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[94] *Pacific Gas*, 489 F. Supp. 699, 700 (E.D. Cal. 1980). Two sections of the statute involved were CAL. PUB. RES. CODE §§ 25524.1(b) and 25524.2 (West 1977). 489 F. Supp. at 700. Section 25524.1(b) reads in pertinent part:

> The commission shall further find . . . that facilities with adequate capacity to reprocess nuclear fuel rods from a certified nuclear facility or to store such fuel if such storage is approved by an authorized agency of the United States are in actual operation . . . provided, however, that such storage of fuel is in an offsite location to the extent necessary to provide continuous onsite full core reserve storage capacity.

Section 25524.2 reads in pertinent part:

> No nuclear fission thermal power plant . . . excepting those exempted herein, shall be permitted land use in the state . . . until . . . :
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> (a) The commission finds that there has been developed and that 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.

[95] 489 F. Supp. at 700.

[96] *Id.* at 704.

[97] Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903, 928 (9th Cir. 1981).

[98] *Id.* at 921-23.

[99] 461 U.S. 190, 223 (1983).

[100] *Id.* at 207-08.

[101] *Id.* The Court cited a number of sources to support this proposition, most importantly a section of the 1959 amendments: "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.* at 210 (quoting 42 U.S.C. § 2021(k)). The Court's view is shared by the NRC: "The [AEA of 1954] recognized no State responsibility or authority over such facilities and materials except the States' traditional regulatory authority over generation, sale, and transmission of electric power produced through the use of nuclear facilities." 10 C.F.R. § 8.4 (1984).

[102] 461 U.S. at 212-13. The Court found:

> State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts a right to act is in any way regulated by the Federal Act."

Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)).

[103] *Id.*

permissible, however, because the state was exercising its power to regulate economics, not safety.[104]

Thus, while perhaps limiting the somewhat more sweeping holding of the Eighth Circuit in *Northern States*,[105] the *Pacific Gas* Court clearly assumed the position that no role was left for the states in the purposeful regulation of nuclear safety.[106] It was against this background that the Supreme Court addressed the issue of the viability of the punitive award in *Silkwood*.[107]

II. THE *SILKWOOD* DECISION

In *Silkwood v. Kerr-McGee Corp.*, while reaffirming its position that "the federal government has occupied the entire field of nuclear safety,"[108] the Court held that the preempted field does not extend to punitive damages.[109] Relying primarily on aspects of the legislative history of the Price-Anderson Act, the Court found no intent on the part of Congress to displace state-law judicial remedies for victims of nuclear accidents.[110]

The majority, in an opinion written by Justice White, began its discussion by observing that state law is preempted either if Congress intends to occupy a given field[111] or if the law actually conflicts with federal law.[112] Considering the former of these two tests, the Court briefly reviewed the history and purpose of the AEA.[113] The Court reaffirmed its finding in *Pacific Gas* that the states could not regulate the safety of nuclear facilities,[114] and found that Congress' decision to preempt was premised on its belief that " 'the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future.' "[115] The Court concluded that absent any further expression of congressional intent, this concern would bar state law remedies for those injured in nuclear accidents.[116]

The *Silkwood* Court found additional evidence of Congress' intent, however, in the legislative history of the Price-Anderson Act.[117] The Court pointed out that the Price-Anderson Act was enacted in response to concerns over the potential for bankrupting state-law suits arising out of a nuclear accident.[118] The Court concluded, therefore, that "Congress clearly began working on the Price-Anderson legislation with the assumption that . . . state tort law would apply."[119]

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[104] *Id.* at 216.

[105] *Northern States*, 447 F.2d at 1154.

[106] 461 U.S. at 212-13. The Senate Report accompanying the 1959 amendments states in part, "the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility." S. REP. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2883.

[107] 464 U.S. 238 (1984).

[108] *Id.* at 249 (quoting *Pacific Gas*, 461 U.S. at 212).

[109] *Id.*

[110] *Id.* at 251. *See infra* notes 117-26 and accompanying text.

[111] 464 U.S. at 248.

[112] *Id.*

[113] *Id.* at 249-57.

[114] *Id.* at 250. *See supra* notes 102-03 and accompanying text.

[115] *Id.* (quoting H.R. REP. No. 1125, 86th Cong., 1st Sess. 3 (1959)).

[116] *Id.* at 250-51.

[117] *See infra* notes 122-23 and accompanying text.

[118] 464 U.S. at 251. *See supra* note 14 and accompanying text.

[119] *Id.* at 252.

Although conceding that the Price-Anderson Act did not apply to Kerr-McGee,[120] the Court nonetheless cited references to state law in several joint committee reports to support its conclusion that Congress intended no preemption of state tort law.[121] One such report quoted by the Court reads in part that "[s]ince the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed [the statutory limit]."[122] Another report cited by the Court also maintains that the "rights of persons who are injured are established by State law."[123] According to the majority, these references clearly indicated that Congress assumed that state remedies for injured victims of nuclear accidents were available notwithstanding the NRC's exclusive regulatory authority.[124] The absence of a federal remedial scheme for victims was also indicative of congressional intent, according to the Court. Congress, the Court reasoned, would not remove state remedies from victims without providing a federal remedy[125] or, in any event, would not do so "without comment."[126]

In response to Kerr-McGee's contention that Congress made no reference to punitive damages, the Court replied that punitive damages are part of state tort law.[127] According to the Court, since Congress intended to preserve all state tort remedies for injured victims,[128] the burden was on Kerr-McGee to show a specific reference which demonstrated Congress' intent to preempt that remedy.[129] Absent any clear indication that Congress intended to do so, the Court found no relevant distinction between compensatory and punitive awards.[130]

The Court also rejected the argument that an award of punitive damages conflicts with the NRC's authority to impose civil fines.[131] The Court noted that it was possible for a company to pay both an NRC fine and a punitive award.[132] The Court also found that a punitive award would not frustrate Congress' desire to foster the development of atomic energy.[133] The Court quoted its determination in *Pacific Gas* that "the promotion of

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[120] *Id.* at 251. Under the Act, the NRC may, but does not have to, require licensees to maintain insurance. *See supra* note 16. The NRC, in 1974, did not require plutonium processing plants such as Kerr-McGee's to maintain insurance. *Id.* at 251 n.12.

[121] *Id.* at 252-53.

[122] *Id.* at 252 (quoting S. REP. No. 296, 85th Cong., 1st Sess. 9 (1957)).

[123] S. REP. No. 1605, 89th Cong., 2d Sess. 25, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3226.

[124] 464 U.S. at 252-53.

[125] The possibility of creating a federal tort was apparently considered and rejected by Congress when considering the 1966 amendments to the Price-Anderson Act which required licensees covered by federal indemnification to waive certain defenses: "The vast majority of witnesses testifying before this committee strongly favored this approach in lieu of enactment of a new Federal tort." S. REP. No. 1605, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3201, 3210. The waiver of defenses provision of the 1966 amendments may be found at 42 U.S.C. § 2210(n)(1) (1982).

[126] 464 U.S. at 251 (citing United Constr. Workers v. Laburnum Corp., 347 U.S. 656, 663-64 (1954)).

[127] *Id.* at 255.

[128] The Price-Anderson Act defines "public liability" as "any legal liability arising out of or resulting from a nuclear incident . . . ." 42 U.S.C. § 2014(w) (1982).

[129] 464 U.S. at 255.

[130] *See id.* at 255-56.

[131] *Id.* at 257. The NRC is authorized to levy fines for violations of federal standards. 42 U.S.C. § 2282 (1982).

[132] 464 U.S. at 257. *See supra* notes 4 and 74 and accompanying text.

[133] *Id. See supra* note 3 and accompanying text.

nuclear power is not to be accomplished 'at all costs.' "[134]

Justice Blackmun, in a dissent joined by Justice Marshall,[135] found fault with the majority in several respects. He criticized as irreconcilable the Court's conclusions that Congress preempted state safety regulation of nuclear power because of the complexity of the problem,[136] but that Congress, nevertheless, intended lay juries to levy penalties for failure to meet the juries' standards of adequate safety procedures.[137] Justice Blackmun did not accept the Court's assessment that this paradox was the result desired by Congress. Rather, the Justice blamed the paradox on the majority's failure to follow *Pacific Gas*.[138]

In *Pacific Gas*, according to Justice Blackmun, the relevant distinction made by the Court was between the state action's purpose and its effect.[139] Justice Blackmun noted that the California statute was upheld in *Pacific Gas* despite its obvious effect on the safety of nuclear plant operations and despite the Court's finding that the entire field of safety regulation of nuclear power was occupied by the federal government to the complete exclusion of the states.[140] The reason for the statute's survival, Justice Blackmun asserted, was that state action was not preempted merely for having an effect on nuclear safety.[141] Rather, Justice Blackmun concluded, only when the state acts for the purpose of regulating nuclear safety is that action preempted.[142]

Justice Blackmun used this purpose-effect distinction to respond to the assumption, implicit in the majority's opinion, that if punitive damages are preempted, then so are compensatory damages. The majority had implied that the two awards would be treated the same since each has the effect of modifying the nuclear plants' safety precautions.[143] Therefore, if all damages are precluded because of their effect on nuclear safety, the majority appeared to reason, then the victim is left uncompensated, a result clearly precluded by the Price-Anderson Act.[144] According to Justice Blackmun, however, under the purpose-effect distinction of *Pacific Gas* compensatory damages would survive while punitive damages would fail because, while compensatory damages may have a regulatory effect in that they provide a deterrent to unsafe conduct, their primary purpose is to compensate victims.[145] Thus, Justice Blackmun concluded, compensatory damages are analogous to the California statute in *Pacific Gas* and are, under the rule of that case, not preempted,[146] while punitive damages are preempted because their very purpose is regulatory.[147] Justice Blackmun's dissent concluded, therefore, that the "tension" created by the majority between the holdings of *Pacific Gas* and *Silkwood* was unnecessary.[148]

In Justice Blackmun's opinion, the Court's failure to see this difference between a

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[134] *Id.* (quoting *Pacific Gas*, 461 U.S. at 222).
[135] *Id.* at 258 (Blackmun, J., dissenting).
[136] *See supra* note 115 and accompanying text.
[137] 464 U.S. at 259 (Blackmun, J., dissenting).
[138] *Id.*
[139] *Id.* at 259-60 (Blackmun, J., dissenting).
[140] *Id.* at 260 (Blackmun, J., dissenting).
[141] *Id.* at 263 (Blackmun, J., dissenting).
[142] *Id.*
[143] *See id.* at 250-51.
[144] *See id.*
[145] *Id.* at 263 (Blackmun, J., dissenting).
[146] *Id.* at 263-64 (Blackmun, J., dissenting).
[147] *Id.*
[148] *Id.* at 265-66 (Blackmun, J., dissenting).

state action's purpose and effect caused it to devote its attention to the wrong issue — whether Congress intended to leave victims without any judicial recourse — an issue, Justice Blackmun asserted, that was never in dispute.[149] Justice Blackmun then stated that "[h]aving focused on the wrong issue, the Court seeks to support its wrong result by focusing on the legislative history of the wrong statute."[150] The question, according to Justice Blackmun, was not whether the Price-Anderson Act preempted the punitive award, but whether the AEA preempted it.[151] Concluding that the Price-Anderson Act left state tort law intact, the dissent asserted, does not answer the question of how much tort law had already been displaced with the passage of the AEA.[152] Justice Blackmun claimed the reasoning of *Pacific Gas* compelled a finding that the AEA preempted punitive damages and, therefore, that when Congress indicated that the Price-Anderson Act did not affect state tort law, Congress meant only that the Act did not further the already existing displacement caused by the AEA.[153] Furthermore, Justice Blackmun argued, the Court's conclusion that all state tort law remains intact goes too far.[154] According to Justice Blackmun, torts such as nuisance and trespass, which under state law could lead to injunctions against operation of a plant, could not survive preemption analysis.[155] Justice Blackmun concluded that this demonstrates the error made by the Court in treating tort law as an indivisible body of law.[156]

Finally, Justice Blackmun argued that the Court's holding may hinder the operation of the Price-Anderson Act if a nuclear accident occurred generating liability of over $60 million, thus triggering the federal indemnification plan.[157] Justice Blackmun pointed out that if that liability included punitive damages, the Court's holding would put the federal government in the position of having to pay punitive damages because of a statute whose purpose was compensatory.[158] Second, according to Justice Blackmun, in the event liability exceeds the federally imposed limit,[159] punitive awards could result in some victims being denied full compensation for their injuries while others would receive a windfall.[160]

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[149] *Id.* at 266 (Blackmun, J., dissenting).

[150] *Id.* at 269 (Blackmun, J., dissenting).

[151] *Id.* at 270-71 (Blackmun, J., dissenting).

[152] *Id.*

[153] *Id.* Justice Blackmun pointed out that the Court, in relying on the joint committee report, failed to realize that the committee, in the quoted section, was discussing only the principles "underlying the bill," not describing the relationship between all federal nuclear law and state tort law. *Id.* at 270 (Blackmun, J., dissenting). *See supra* note 122 and accompanying text.

[154] 464 U.S. at 271 (Blackmun, J., dissenting).

[155] *Id.*

[156] *Id.* The majority opinion held, "it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Id.* at 256.

[157] *Id.* at 271-72 (Blackmun, J., dissenting). *See supra* note 16.

[158] 464 U.S. at 271-72 (Blackmun, J., dissenting).

[159] *See supra* note 16.

[160] 464 U.S. at 272 (Blackmun, J., dissenting). Blackmun hypothesized that if the excessive award is prorated as authorized by 42 U.S.C. § 2210(o)(3) (1982), then a person receiving a large punitive award could be overcompensated, causing someone else to be undercompensated. For example, suppose *A* has actual damages of $100,000 and receives a verdict for that amount plus $1 million in punitive damages; and *B* has actual damages of $500,000 and receives a verdict for that amount but no punitive award. If all awards must then be reduced by 10% to stay under the statutory limit, *B* will be left with $50,000 of uncompensated injury while *A* receives $890,000 over and above the amount of his injury.

Justice Powell, in a dissent joined by Chief Justice Burger and Justice Blackmun,[161] also stressed the regulatory purpose of the punitive award and found the award inconsistent with *Pacific Gas*.[162] Justice Powell found that the *Pacific Gas* decision left no role for the states in regulating the safety of nuclear power[163] and that punitive awards should therefore be preempted as they are imposed to " 'punish' the 'offender for the general benefit of society.' "[164]

Justice Powell's preemption analysis, like Justice Blackmun's, criticized the Court's use of the Price-Anderson Act, finding "neither the . . . Act itself or its purposes are relevant to this case."[165] Justice Powell also found fault with the Court's distribution of the burden of proof. Justice Powell pointed to the determination in *Pacific Gas* that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states."[166] This sweeping preemption, Justice Powell suggested, placed the burden on Silkwood to show that the power to levy punitive damages was "expressly ceded" by Congress.[167] Therefore, Justice Powell concluded, the majority's finding that Kerr-McGee had the burden of pointing to some expression of Congressional intent to preempt punitive damages specifically was erroneous.[168]

Finally, Justice Powell speculated that the Court's holding "will leave this area of the law in disarray."[169] According to Justice Powell, juries motivated by what the Justice sees as uninformed anxieties about nuclear power will, on an ad hoc basis, punish nuclear power companies despite adherence to all legally prescribed precautions.[170] The effect, Powell stated, could be to chill investment in nuclear power, which the Justice had found to be an avowed purpose of the Price-Anderson Act.[171]

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[161] 464 U.S. at 274 (Powell, J., dissenting).

[162] *Id.* at 274-75 (Powell, J., dissenting).

[163] *Id.*

[164] *Id.* at 276 (Powell, J., dissenting) (quoting *Silkwood*, 485 F. Supp. at 603 (Jury Instruction No. 19)).

[165] *Id.* at 280 (Powell, J., dissenting).

[166] *Pacific Gas*, 461 U.S. at 212.

[167] 464 U.S. at 276 (Powell, J., dissenting).

[168] *Id.*

[169] *Id.* at 285 (Powell, J., dissenting).

[170] *Id.* at 282, 284-86 (Powell, J., dissenting).

[171] *Id.* at 279, 286 (Powell, J., dissenting). *See* 42 U.S.C. § 2012(i) (1982). Justice Powell also felt the facts did not warrant a punitive award. *Id.* at 275-78, 283-84 (Powell, J., dissenting). Because the court of appeals did not reach the issue of whether the facts supported an award of punitive damages, the Court remanded the case for determination of that question. *Id.* at 258. Justice Powell criticized the trial judge's charge to the jury that it was free to ignore Kerr-McGee's compliance with NRC regulations. *Id.* at 283-84 (Powell, J., dissenting). The jury was instructed:

> [R]egulations of a governmental agency on conduct in a given field . . . are based on the government's views of the best scientific and technical knowledge available at the time of their issuance or promulgation. Thus, in a democracy . . . where the government responds to citizens' desires through the elective process, such regulations . . . are entitled to a high degree of respect and belief. On the other hand, you, as jurors, and as fact finders in a trial in our judicial system, have a duty of finding truth under the evidence. In this context, . . . such regulations do not have to be accepted by you as right or accurate if they defy human credence, are questionable under best scientific knowledge, or can be shown not to accomplish their intended purpose.

Silkwood, 485 F. Supp. at 606 (Jury Instruction No. 27). Powell indicated that he would hold that compliance with federal regulations bars a factual finding of reckless or wanton conduct. 464 U.S. at 283-84 (Powell, J., dissenting). It may not be a blanket rule that compliance with federal regulations

III. *Silkwood's* Conflict with *Pacific Gas*

The Supreme Court, in *Silkwood*, departed from the established doctrine that the safety of nuclear power was an exclusively federal concern. The Court's resolution of the issue presented in *Silkwood* was inappropriate because it conflicts with the principle established by *Pacific Gas* that state action may only affect the safety of nuclear power if that action has some other legitimate nonsafety-related purpose and may not regulate safety if the impact on safety is itself the purpose of the state action.[172] This conflict results from two flaws in the Court's analysis. First, the Court failed to focus on the important differences between punitive and compensatory damages, opting instead to treat the two as functional equivalents. Second, the Court improperly focused on the Price-Anderson Act, viewing that statute's legislative history out of context and inappropriately expanding its scope. The result of these flaws in the Court's decision is that nuclear power is now subjected to dual regulation by the NRC and by lay juries. This dual regulation runs counter to the intent of Congress[173] and that body's determination that nuclear safety is too complex to be regulated by the states.[174]

A. *The Nature of a Punitive Award*

The Supreme Court determined in *Pacific Gas*[175] that all state attempts to regulate nuclear safety are preempted unless the power to regulate has been expressly ceded by Congress.[176] Therefore, the *Silkwood* decision is only appropriate either if the punitive damages involved were not a safety regulation or if the power to impose them has been expressly ceded by Congress. These two possibilities will be considered in turn, beginning with the former.

The Supreme Court has recognized that "regulation can be as effectively exerted through an award of damages as through some form of preventative relief" and that "[t]he obligation to pay compensation can be . . . a potent method of governing conduct and controlling policy."[177] As pointed out by Justice Blackmun's dissent in *Silkwood*, however, *Pacific Gas* compels preemption only if the purpose of the state action is safety regulation, not if the impact on safety is merely an effect incidental to some other permissible purpose.[178] Compensatory awards, therefore, despite their recognized regula-

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bars punitive damages. In *Gryc v. Dayton-Hudson Corp.*, the Minnesota Supreme Court considered the question of whether compliance with the Flammable Fabrics Act of 1953, Ch. 164, § 4, 67 Stat. 111 (1954), insulated a manufacturer from punitive damages. 297 N.W.2d 727, 733 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980). First, the court found that the statutorily proscribed test for flammability was known to be unreliable and that Congress had not been so comprehensive as to attempt to protect the public from all unreasonably dangerous clothing. *Id.* at 733-34. Second, the court subjected the statute in question to the *Northern States* analysis. *See supra* notes 74-76 and accompanying text. The court found no Congressional intent to preempt because the Act did not seek to protect the public from the particular risk which was the basis of the award. 297 N.W.2d at 737. In doing so, however, the court distinguished the AEA saying, "this act is unlike the federal law addressed in the *Northern States Power* case which was all-encompassing and adequately sought to deal with the safety problems surrounding nuclear activity." *Id.* at 738.

[172] *Pacific Gas*, 461 U.S. at 216.

[173] *See supra* note 88.

[174] *See supra* note 115 and accompanying text.

[175] 461 U.S. 190 (1983).

[176] *Id.* at 212.

[177] San Diego Bldg. Trade Council v. Garmon, 359 U.S. 236, 247 (1959) (Court finding compensatory award preempted by National Labor Relations Act).

[178] *Silkwood*, 464 U.S. at 260 (Blackmun, J., dissenting).

tory effect, are not affected by *Pacific Gas* since their primary purpose is to make the tort victim whole. Punitive damages, by contrast, serve a wholly different function. The Supreme Court has recognized that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct . . . . These damages are assessed over and above the amount necessary to compensate the injured party."[179] Thus, the Court has in the past recognized both the regulatory effect of all damages and the regulatory purpose of punitive damages. Where punitive damages are a state-created device whose purpose in the context of *Silkwood* is to regulate nuclear safety, those damages fall squarely within the terms of the prohibition in *Pacific Gas*. Thus, the punitive damages in *Silkwood* should have escaped preemption under *Pacific Gas* only if the power to award them was "expressly ceded to the states" by Congress.[180]

B. *The AEA and the Price-Anderson Act*

The Court, partly because of its lack of emphasis on the nature of punitive damages, purported to find an affirmative grant of power to the states in the Price-Anderson Act. In reaching this result, the Court misinterpreted the relationship between that Act and the AEA of 1954. The Court appears to have accepted the fact that damage awards may come within the scope of preempted regulation when it concluded, "If there were nothing more [beyond Congress' express recognition of the states' inability to deal with the complexities of nuclear power, Congress'] concern over the states' inability to formulate effective standards and the foreclosure of the states from conditioning the operation of nuclear plants on compliance with state-imposed safety standards arguably would disallow resort to state-law remedies . . . ."[181] The Court further held, however, that Congress evidenced an intent to preserve state-law remedies in the Price-Anderson Act.[182] The error the Court made was in failing to focus properly on the limited scope of the Act. The *Pacific Gas* Court had defined the relationship between federal and state nuclear law when it found that all state action whose purpose was to regulate nuclear safety was preempted by the AEA save those actions expressly empowered by Congress.[183] It was therefore unnecessary and inappropriate for the *Silkwood* Court to view the Price-Anderson Act as defining the relationship between federal nuclear law and all of state tort law.[184] Rather, the Court should have recognized that to whatever extent tort law is aimed at regulating nuclear safety, that law is subject to the *Pacific Gas* analysis and is thus preempted. This

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[179] City of Newport v. Fact Concerts Inc., 453 U.S. 247, 266-67 (1981) (reviewing an award of punitive damages against a municipality under 42 U.S.C. § 1983). Punitive damages require conduct more faulty than mere negligence:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

W. PROSSER & W. KEETON, THE LAW OF TORTS 9-10 (5th Ed. 1984). Four states do not allow punitive damages in tort: Washington, Louisiana, Nebraska, and Massachusetts. Appellant's Jurisdictional Statement at 26 n.38, *Silkwood*, 464 U.S. 238 (1984).

[180] *Pacific Gas*, 461 U.S. at 212.

[181] *Silkwood*, 464 U.S. at 250-51.

[182] *Id.* at 251.

[183] *Pacific Gas*, 461 U.S. at 212.

[184] *See Silkwood*, 464 U.S. at 256.

alternative view is completely consistent with the Price-Anderson Act when read in its proper context.

When viewing the legislative history of the Price-Anderson Act, the Court should have paid closer attention to the purposes of that Act. The dual purposes of the Price-Anderson Act are to encourage investment in nuclear power and to provide compensation for injuries received by victims of nuclear accidents.[185] It was with the latter purpose that Congress was concerned when it referred to tort law in the legislative history.[186] In that reference Congress was merely recognizing that the vehicle through which compensation would be provided was state tort law. By referring to state tort law, Congress was not altering the scope of the preemption mandated by the AEA. On the contrary, Congress was simply recognizing in drafting the Price-Anderson Act what the Court recognized years later in *Pacific Gas* — that valid exercises of state power are not preempted if their effect on nuclear safety is incidental to some other permissible state purpose. The Price-Anderson Act, therefore, effected no change in the result which would have been reached in an inquiry into the validity of compensatory awards under the AEA alone. No change was necessary because under the AEA, state compensatory damage awards would not be preempted because their purpose is not regulatory.[187]

If no alteration of the AEA was necessary to allow for compensatory awards, it is hard to see why Congress would alter the scope of the preemption to provide for punitive awards. The purposes of the Price-Anderson Act are to encourage investment in nuclear power and to provide for compensation for victims. To hold that the Act expressly cedes the power to levy punitive damages is to find that Congress took an action which not only bears no relationship to compensation but also directly provides a strong disincentive to investment. For Congress to take such action would be irrational. This irrationality is further compounded by the fact that the lay juries that award punitive damages would be performing a regulatory function which Congress has prohibited the state legislatures from performing because "the technical safety considerations are of such complexity [that no state can deal with them]."[188] The Court attributed this "tension" between the limits on state legislators and the freedom of state juries to Congressional mandate.[189] But, for the reasons expressed above, the true cause is the Court's overly expansive reading of the Price-Anderson Act, and its insistence on treating state tort law as an indivisible body of law,[190] thus failing to distinguish properly between compensatory and punitive damages. This failure to differentiate among the various types of tort law has produced the type of dual regulation of nuclear power that Congress wished to prevent[191] and has introduced a degree of uncertainty into the field of nuclear safety regulation.

C. *The Ramifications of* Silkwood

The Court through *Silkwood* has introduced into the field of nuclear safety regulation a very potent weapon, the punitive damage award. No further evidence of the award's

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[185] 42 U.S.C. § 2012(i) (1982).

[186] *See supra* notes 122-23 and accompanying text.

[187] The Court's suggestion in *Silkwood*, therefore, that in the absence of the Price-Anderson Act, compensatory damages would be preempted, is erroneous. They would not be preempted because their purpose is compensatory, not aimed at regulating nuclear safety. *See Silkwood*, 464 U.S. at 250-51.

[188] *Id.* at 250. *See supra* note 115and accompanying text.

[189] 464 U.S. at 256.

[190] *See id.*

[191] *See supra* note 88.

potency is needed than the $10 million figure awarded by the jury in the *Silkwood* case. As Justice Blackmun pointed out, that award is more than ten times the largest fine the NRC has ever imposed.[192] The result is that lay juries, free to impose safety standards that are much more stringent than those required by the NRC,[193] may force compliance with their view of what is safe through the use of fines larger than those used by the federal government.[194] This would seem at odds with the basis for the "occupation" theory of preemption. Under that theory, if regulations in an occupied field are more permissive than they could be, it is because the federal government, after weighing the competing interests, decided they should be more permissive.[195] The NRC regulations represent a weighing of interests, a balancing of the dangers of nuclear power against the benefits of that alternative power source. While the Court correctly observed that nuclear power was not to be achieved at all costs, Congress through the NRC has decided to allow some costs. Juries, on the other hand, motivated by what Justice Powell called uninformed anxieties about nuclear power,[196] may not be willing to accept any costs, especially when presented with an injured plaintiff and a deep-pocket corporate defendant. If compliance with more stringent standards is compelled by punitive awards, the federal standards become meaningless and the policy decisions which prompted those standards are undermined. The result is that the field is no longer occupied.

Furthermore,, the Court's insistence that all tort remedies for those injured by nuclear power are available could conceivably open the door to other types of tort actions such as nuisance and trespass, as pointed out by Justice Blackmun's dissent.[197] Such an expansive reading of the *Silkwood* Court's language to permit injunctive relief would completely undermine the AEA by making a nuclear plant's very operation conditional upon meeting a trial court's possibly higher safety standards. The Second Circuit Court of Appeals, in a case decided soon after *Silkwood*, held that a claim for injunctive relief grounded in tort is preempted to the extent it is motivated by safety concerns.[198] That decision reaches the desirable result but conflicts with the *Silkwood* Court's language about tort law.[199] Because the Second Circuit case was argued before the Supreme Court decided *Silkwood*, however, it remains to be seen how the lower courts will read the expansive language in the *Silkwood* opinion. A narrow reading is necessary if the federal regulations are to have any continued validity, but the courts will have to struggle to justify a narrow reading because of the *Silkwood* Court's failure to include any limiting language, and because the Court rested its holding on the proposition that all tort law is preserved.

IV. Conclusion

Silkwood v. Kerr-McGee Corp. raised the question of whether punitive damages are within the scope of the field preempted by the Atomic Energy Act. The Supreme Court decided they are not. In doing so, the Court has created uncertainty and exposed the

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[192] 464 U.S. at 263 (Blackmun, J., dissenting) (citing N.Y. Times, Oct. 22, 1983, at 26, col. 5).

[193] *See* trial judge's charge to jury, *supra* note 171.

[194] This problem is compounded by the fact that when a jury awards punitive damages, no clear standard is enunciated. Rather, the standard setting is ad hoc.

[195] *See* L. Tribe, American Constitutional Law § 6-23 (1978).

[196] 464 U.S. at 282 (Powell, J., dissenting).

[197] *Id.* at 271 (Blackmun, J., dissenting).

[198] County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 60 (2d Cir. 1984).

[199] *See* 464 U.S. at 256.

nuclear industry to a potent, sometimes arbitrary, and ad hoc regulatory weapon, the punitive damage award. This can serve only to deter the investment of large sums of money in nuclear power. While some may see this as a desirable result, it is clearly not the path chosen by Congress. This conflict with Congressional intent flows from the Court's misreading of legislative history and its unwillingness to differentiate among various classes of state tort law. Congress should now act to prevent the possible negative consequences of *Silkwood* by amending the AEA to clarify the scope of the preemption and correct the uncertainty caused by the Court.

GUY V. AMORESANO