January 1984

Nuclear Plant Construction After Pacific Gas: A Pyrric Victory for the States?

Derek G. Howard

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

Part of the Environmental Law Commons

Recommended Citation
http://digitalcommons.law.ggu.edu/ggulrev/vol14/iss2/6

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.
NUCLEAR PLANT CONSTRUCTION AFTER PACIFIC GAS: A PYRRIC VICTORY FOR THE STATES?

I. INTRODUCTION

Since the world's first atomic explosion in Alamogordo, New Mexico in 1945, Congress has attempted to maintain a regulatory system aimed at protecting the population from the hazards of the use of nuclear energy. In passing the Atomic Energy Act of 1946,1 and the Atomic Energy Act of 1954,2 Congress erected a complex regulatory scheme that initially safeguarded military interests3 and subsequently, in the early 1950's, promoted the development of a nuclear industry in the private sector. Despite development of nuclear energy as a source of commercial power, however, Congress continued to safeguard the public from the dangers of an uncertain technology and required that fissionable materials4 and nuclear technology continue to be regulated by

3. The Congressional declaration of policy stated:

 Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that —

(a) the development, use and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and . . .

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.


4. Fission is a process by which a heavy element, such as uranium or plutonium, is used to absorb a neutron, and subsequently splits into two lighter elements, releasing more neutrons. A chain reaction develops as one of the released neutrons initiates another fission. The releasing of the neutrons produces a large amount of energy; the speed of the reaction can be controlled to produce a constant stream of energy. See generally Nuclear Energy Policy Study Group, Nuclear Power Issues and Choices;
Along with this development of nuclear energy as a source of commercial electrical power, the amount of spent nuclear fuel began to increase. Unfortunately, the nuclear industry's vision of the development of a spent fuel reprocessing industry failed to materialize for a variety of reasons and the federal government failed to develop a safe long-term method to dispose of spent fuel. As a result, the nuclear


5. The 1954 Senate bill noted that in 1946 there was little experience concerning the health hazards of atomic energy. This in itself was reason to keep atomic power a government monopoly. See S. REP. No. 1699, 83d Cong., 2nd Sess. (1954); reprinted in 1954 U.S. CODE CONG. & AD. NEWS 3456, 3458-59.

By 1954, the United States had had nuclear capabilities for almost a decade. The primary purpose of the Senate was to bring the previous Act of 1946 into accord with the scientific, technical, economic and political changes that had occurred since 1946. See S. REP. No. 1699, 83d Cong., 2nd Sess. (1954); reprinted in 1954 U.S. Code Cong. & Ad. News 3456, 3457. Additionally, Congress felt that these health problems had been diminished enough to allow greater private participation in atomic power. The Congress looked to the first experimental plant in Idaho, and the success of the U.S.S. Nautilus atomic submarine, among others. While it was recognized that many technological problems remained, Congress was convinced that use of atomic energy to produce electricity would be achieved more quickly if private enterprise were encouraged to participate. Id. at 3458.

6. The term “spent nuclear fuel” refers to highly radioactive fuel, which must be removed from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing. See generally 42 U.S.C. § 10101 (23) (1983); OFFICE OF TECHNOLOGY ASSESSMENT, MANAGING COMMERCIAL HIGH-LEVEL WASTE (April, 1982).

7. The U.S. Supreme Court noted that “some 8000 metric tons of spent nuclear fuel have already accumulated, and it is projected by the year 2000 there will be some 72,000 metric tons of spent fuel.” Pacific Gas & Electric Co. v. Energy Resources Commission, 103 S.Ct. 1713, 1717 (1983). See also OFFICE OF TECHNOLOGY ASSESSMENT, MANAGING COMMERCIAL HIGH LEVEL WASTE, 9 (April 1982); 128 CONG. REC. H8166 (Sept. 30, 1982) (remarks of Rep. Winn) (twenty-eight plants may be forced to close for a lack of storage); id. at H8533 (Nov. 29, 1982) (remarks of Rep. Broyhill) (only 1900 metric tons of spent fuel can be stored in “last resort” fuel storage areas provided by federal government; this is less than three percent of the total spent fuel projected to be generated by commercial power plants by the year 2000).

8. See Nuclear Waste Policy Act of 1982, P.L. 97-425, H. REP. 97-491, 97th Cong., 2d Sess. 26-29 (“confidence that the technical issues affecting nuclear waste disposal were easily resolvable for decades rendered Federal officials responsible for providing the facilities apathetic towards addressing those technical issues, and unprepared for the immense social and political problems which would obstruct implementation of a serious repository development program.”)

The NRC has determined that the earliest date for one or more geological repositories is 2007-2009. See 48 Fed. Reg. 22730 (May, 1983). Long term disposal at the present time, “refers to the storage of highly radioactive waste products that pose the most severe potential health hazard” until they detoxify sufficiently that they do not present an environmental or health hazard. There are currently no known methods of detoxification, other than the passage of hundreds of thousands of years. See generally U.S.
industry, and both state and federal government, face the possibility of an occurrence of both a health and an economic nightmare brought on by the eventual necessity of disposal of the fuel.

In partial response to this multifaceted problem, the California legislature, in 1976, amended a portion of the Public Resources Code (known as the Warren-Alquist Act) by conditioning the construction of nuclear power plants on findings by the State Energy Resources Conservation and Development Commission ("the Energy Commission") that adequate storage facilities and means of disposal are available for nuclear waste. Specifically, section 25524.1(b) addresses the interim storage problem by providing that before a nuclear plant may be constructed, the Energy Commission must determine on a case-by-case basis that there will be adequate capacity for the storage of a plant's full core "at the time such nuclear facility requires such . . . storage." Under section 25524.1(b), the utility must provide full core reserve storage capacity in order that the entire reactor core may be stored in the event it must be removed. Section 25524.2 addresses the long term storage problem of nuclear

---

9. Section 25524.1(b) states:

The commission shall further find on a case-by-case basis 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 or will be in operation at the time such nuclear facility requires such reprocessing or storage; provided, however, that such storage of fuel is in an off-site location to the extent necessary to provide continuous on-site full core reserve storage capacity.

10. Section 25524.2 provides in relevant part:

No nuclear fission thermal powerplant, including any to which the provisions of this chapter do not otherwise apply, but excepting those exempted herein, shall be permitted land use in the state, or where applicable, be certified by the commission until both conditions (a) and (b) have been met:

(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.

(b) The commission has reported its findings and reasons therefor pursuant to paragraph (a) to the Legislature . . . .

(c) As used in this section, "technology or means for the disposal of high-level nuclear waste" means a method for the permanent and terminal disposition of high level nuclear
waste. Under this section, the Energy Commission will not issue a land use certificate to any utility seeking to construct a plant until the Energy 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 [permanent] disposal of high-level waste." In *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, the United States Supreme Court addressed the question of whether California Public Resources Code sections 25524.1(b) and 25524.2 were preempted by the Atomic Energy Act of 1954. In a unanimous opinion, the Pacific Gas Court upheld the validity of section 25524.2 on the grounds that it was within the traditional role of a state's authority to regulate electricity production by determining the future economic viability of a nuclear power plant. Despite the holding as to section 25524.2, the court held that the challenge to section 25524.1(b) was not ripe for judicial review since the Energy Commission had not found any nuclear plant's storage facilities to be inadequate.

It shall not necessarily require that facilities for the application of such technology and/or means be available at the time the commission makes its findings. Such disposition shall not necessarily preclude the possibility of an approved process for retrieval of such waste.

(d) The commission shall continue to receive and process notices of intention and applications for certification pursuant to this division but shall not issue a decision pursuant to Section 25523 granting a certificate until the requirements of this section have been met. All other permits, licenses, approvals or authorizations for the entry or use of the land, including orders of court, which may be required may be processed and granted by the governmental entity concerned but construction work to install permanent equipment or structures shall not commence until the requirements of this section have been met.

(e) Any nuclear fission power plant is exempted from the provisions of this section if prior to the date on which this section is chaptered an electric utility has performed substantial construction on such powerplant and has incurred substantial expense for construction and for necessary materials for such powerplant, including, but not limited to, the following sites and facilities.

11. Under Section 25524.2(c), "Disposal" is defined as a "method for the permanent and terminal distribution of high-level nuclear waste . . . ."

12. ___ U.S. ___, 103 S.Ct. 1713 [hereinafter cited as Pacific Gas].

13. Pacific Gas at ___, 103 S.Ct. at 1731-32.

14. Id. at ___, 103 S.Ct. at 1720.
The topic of preemption, and the application of this doctrine to this case, has been oft discussed among legal commentators prior to the final ruling on the case by the Supreme Court. This Note will not discuss the history of the preemption doctrine, but instead will analyze the Pacific Gas decision and then consider the option left to a state once the state has concluded that it is not satisfied with the federal resolution of the waste crisis facing the country in the 1990's.

II. BACKGROUND

A. The Warren-Alquist Act

The Warren-Alquist Act was enacted by California in 1974. This act was adopted in furtherance of the legislature's perception of the state's responsibility to ensure a reliable source of electrical energy, and to require coordination of energy research and regulation at the state level.

The legislature created a five-member State Energy Resources and Conservation and Development commission in 1974 (the Energy Commission) to coordinate regulation and research to accomplish the objective. The Energy Commission has broad authority, and holds hearings and investigations necessary to carry out its duties. The duties of the Energy Commission include energy planning and forecasting (such as assessment of alternative energy sources), conservation, and research and development.


16. See infra note 124 and accompanying text.


18. Id. at § 25001-25007.

19. Id. at § 25200.

20. Id. at § 25210.

21. California's system of regulatory power plants is similar to that employed by other states. See Pacific Legal Foundation v. State Energy Resources Commission, 659 F.2d 903, 907, n.2 (9th Cir. 1981).
Section 25500 of the California Public Resources Code gives the Energy Commission the authority to certify all construction or modification of nuclear or non-nuclear power plants. To obtain certification, the utilities must follow a two-step procedure. First, any utility planning to construct a power plant must at an early stage submit a "notice of intention" (NOI). Each NOI must contain at least three alternative sites for the prospective plant, only two of which may be near the coast. After hearings and investigations by the Energy Commission and an analysis of the data, the Energy Commission will approve the NOI only if at least two of the proposed sites are acceptable, or one site is acceptable and a good faith effort to find an alternative has been made.

If the NOI is approved, the applicant must then file an "application for certification" (AFC), after which the Energy Commission conducts a further review process not to exceed eighteen months. The AFC must contain a description of the proposed plant's design, safety and reliability, projections of the fuel costs and generating costs, and any other information that the Energy Commission may require. The Energy Commission will then release findings which must address the applicant's compliance with land use, health, environmental and other standards established by the Energy Commission. As a condition of certifica-

22. Section 25502 provides: "[T]he notice shall be an attempt primarily to determine the suitability of the proposed sites to accommodate the facilities and to determine the general conformity of the proposed sites and related facilities with standard of the commission . . . ." Section 25504 requires that the NOI include the location of the proposed plant, a summary of the design, the type of fuels to be used and, among other things, a preliminary statement of the relative economic, technological and environmental advantages and disadvantages of the proposed and alternative sites. CAL. PUB. RES. CODE § 22503 (West 1977 & Supp. 1984).

23. As noted by the Ninth Circuit, this section implements the concept of "site banking." If more than one of the proposed sites is found to be acceptable, the unused sites are to be "banked" by the Energy Commission and made available to future applicants seeking certification. Pacific Legal Foundation v. State Energy Resources Commission, 659 F.2d 903, 907 (9th Cir., 1981).

24. CAL. PUB. RES. CODE § 22516. Additionally, the Energy Commission, in making its findings, shall seek out comments and recommendations from the Public Utilities Commission, and the California Coastal Conservation Commission. The Energy Commission should take into account proposed emergency systems, the threat of seismic hazards, ability of controlling population densities in surrounding areas, and any applicable land use laws. See generally CAL. PUB. RES. CODE §§ 25505-25514.

25. Id. § 25517.
26. Id. § 25520.
27. Id. §§ 25216.3, 25402(d), 25523.
tion, the Energy Commission may require the utility to obtain development rights to property surrounding the plant so as to maintain population densities at a safe level. The Energy Commission is also directed to monitor certified plants once they become operational under Public Resources Code Section 25532.


In 1976, the California legislature added several provisions to the Warren-Alquist Act (known collectively as "The Nuclear Laws") that are applicable only to nuclear plants. These provisions imposed a moratorium on the certification of any new nuclear plants until the Energy Commission makes certain findings and submits them to the California legislature for approval. Section 25524.1(a) prohibits the certification of nuclear plants requiring fuel reprocessing until the Energy Commission finds that a federally approved method of fuel reprocessing exists; section 25524.1(b) requires a case by case analysis of whether facilities to store spent fuel rods are available. Section 25524.2 prohibits the certification of all types of nuclear plants until the Energy Commission finds that a federally approved method of disposing of nuclear wastes exists; section 25524.3 prohibits the certification of all types of nuclear plants until the Energy Commission has completed and submitted to the legislature a study on the feasibility of undergrounding and berm containment.

These amendments require the Energy Commission to determine on a case by case basis whether facilities are available to store spent fuel rods, but direct the Energy Commission to continue to process NOI's and AFC's even though, until the findings required by section 25524.2 are made, the applications cannot be certified.

28. "Id. § 25528.
29. "Id. §§ 25524.1, 25524.2, 25524.3.
30. Berm containment is a method of "placing [a nuclear] reactor in a scooped out hole and backfilling with dirt . . . to increase the margin of safety in the event of an accident which breached the containment building." See Pacific Legal Foundation v. State Energy Resources Commission, 659 F.2d at 909, n.8 (9th Cir., 1981).
31. CAL. PUB. RES. CODE § 25524(b).
32. "Id. §§ 25524.1(c), 25524.1(d), 25524.3(c). See also §§ 25500, 25517 (West 1977 & Supp. 1984) cited in Pacific Legal Foundation v. State Energy Resources Commission, 659 F.2d at 909 [hereinafter cited as PLF].
C. The Lower Court Decisions

The petitioners in PG & E v. Energy Res. Comm'n, Pacific Gas and Electric Company and Southern California Edison Company (SCE), both claimed that uncertainties caused by the amendments to the Warren-Alquist Act had caused them to cancel plans to build nuclear plants. PG & E cancelled a specific project known as “Stanislaus.” SCE spent no money but abandoned general plans to build plants only known then as “Nuclear 1” and “Nuclear 2.”33 The utilities brought suit claiming that sections 25524.1, 25524.2 and 25524.3 were preempted by the Atomic Energy Act of 1954.34 The federal court for the Eastern District of California agreed with the utilities and held that insofar as the challenged provisions regulate nuclear plants, they were preempted by the Atomic Energy Act of 1954.35 The Ninth

35. This case originally involved consolidated appeals from two district court cases, Pac. Gas & Elec. v. SERC, 489 F. Supp. 698 (E.D. Cal. 1980) [hereinafter cited as PG&E] and Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n, 472 F. Supp. 191 (S.D. Cal., 1979). In the latter case, the petitioners challenged the validity of § 25524.2 only. In addressing this challenge, the trial court, relied on the analysis used in Duke Power Company v. Carolina Environmental Group, Inc., 438 U.S. 59, 74 n.20 (1978) and found that only one plaintiff, Richard Thornberry, had standing to sue. Thornberry was a nuclear engineer hired by San Diego Gas and Electric Co. (“SDG & E”) to work on a proposed nuclear plant known as Sundesert, which was abandoned by SDG & E’s board of directors.

The trial court’s reason for finding standing was that in Duke Power, the United States Supreme Court held that a plaintiff is allowed standing by establishing that even though the casual connection for injury is indirect, the connection is sufficient to provide standing. According to the trial court, only Thornberry presented concrete injury traceable to the Nuclear Laws, as Thornberry alleged that he lost his job because the Nuclear Law moratorium on certification forced SDG & E to cancel the Sundesert project. The trial court found there was a “substantial likelihood” that the project would have proceeded absent the Nuclear Laws, and thus Thornberry’s position would not have been terminated. Pacific Legal Foundation v. State Energy Resources & Development Comm’n, 472 F.Supp. 191, 195.

By granting the engineer’s motion for summary judgment, the trial court found Thornberry’s challenge to §§ 25524.1 and 25524.3 to be moot, but declared § 25524.2 to be preempted by the Atomic Energy Act of 1954. Id. at 197. The Court of Appeal reversed. The standing doctrine established by the United States Supreme Court also requires a “substantial likelihood” that the relief requested will redress the injury claimed. See PLF, 659 F.2d at 914, citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595, 612 (1978). The Energy Commission’s contentions that Thornberry had not demonstrated that the Sundesert project would be restarted or, if that occurred, whether he would be rehired by SDG & E caused the Ninth Circuit to determine that under Federal Rule of Civil Procedure 56(c),...
Circuit reversed, finding that only two of the challenged provisions, sections 25503 and 25524.2 were ripe for review. Section 25524.1(b) was held not to present a justiciable controversy because the Energy Commission has never taken direct action to require that any plant provided a specified amount of storage space. In addressing the merits, the Ninth Circuit first held that the nuclear moratorium provisions of section 25524.2 were not preempted because sections 27187 and 274(k)86 of the Atomic Energy Act of 1954 constitute a Congressional authorization for states to regulate nuclear power plants "for purposes other than protection against radiation hazards." Second, the Ninth Circuit held that section 25524.2 was not designed to provide protection against radiation hazards, but because "uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source of energy." Third, the court held that section 25524.2 was not invalid as a barrier to fulfillment of the federal goal of encouraging the development of atomic energy in the private sector. Instead, the court noted that Congress did not intend that nuclear power be developed "at all costs," but only that it proceed consistently with other priorities, subject to controls traditionally exercised by the states and expressly preserved by federal statute.

The Supreme Court granted certiorari on the issues of whether the petitioner's challenges to section 25524.1(b) and summary judgment was inappropriate. Id. at 913. The United States Supreme Court denied certiorari, 102 S.Ct. 2959.

36. PLF 659 F.2d at 913.
37. 42 U.S.C. § 2018 provides:

Nothing 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: Provided, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission.

38. 42 U.S.C. § 2021(d) states: "(k) 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."

39. PLF, 659 F.2d at 921.
40. Id. at 925.
41. Id. at 926.
42. Id. at 928.
43. 102 S.Ct. 2956.
section 25524.2 were ripe for judicial review and whether sections 25524.1(b) and 25524.2 were preempted by the Atomic Energy Act of 1954. In its decision the Supreme Court affirmed, agreeing with the Ninth Circuit that section 25524.2 was ripe for judicial review, but that the questions concerning section 25524.1(b) were not.44

II. THE UNITED STATES SUPREME COURT OPINION

A. The Majority

1. Ripeness

Justice White, delivering the unanimous opinion of the Court, began by affirming the procedural holding of the Ninth Circuit that the utilities' challenge to section 25524.2 was ripe for judicial review, but that the questions concerning section 25524.1(b) was not. The Court observed that the basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements 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."45

2. Preemption: State Authority and Purpose

Before addressing the substantive issues of the utilities' challenge, the Court reiterated three circumstances defining when Congress may constitutionally preempt state authority. First, it is well established that Congress may preempt state authority by so stating in express terms.46 Second, the Court noted, in the absence of explicit preemptive language, Congress' intent to supersede state law altogether may be surmised from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it."47

The third scenario occurs when Congress has not entirely displaced state regulation, yet compliance with state law would conflict with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility,"48 or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."49

In addressing the substantive merits, the Court noted the absence of any express language in the Atomic Energy Act of a requirement that the states must construct or authorize nuclear power plants, or alternatively, prohibit the states from deciding as an absolute or conditional matter not to permit the construction of any further reactors.50 The Court rejected the petitioners' argument that the Atomic Energy Act was intended to preserve the federal government as the sole regulator of all matters dealing with nuclear or fissionable material, thereby causing section 25524.2 to fall within the scope of an impliedly preempted field. Instead, the Court began its analysis with the assumption that the historical powers of the states were not to be superseded by the Atomic Energy Act absent a clear and express intent of Congress.51 Accordingly, the Court found the passing of the 1954 Act and the subsequent amendments to be an indication that Congress intended that the federal government continue to regulate the radiological aspects involved in the construction and operation of nuclear power plants, but that the states keep the traditional responsibility of determining the need for new power facilities, their economic feasibility and rates and services.52 As authority for this assumption, the Court looked to Vermont Yankee Nuclear Power Corp. v. NRDC,53 where the Court stated: "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."54 Moreover, the court found the Atomic Energy Act of

50. Pacific Gas at ___, 103 S.Ct. at 1722.
52. Pacific Gas at ___, 103 S.Ct. at 1722-23.
54. Id. at 550.
1946 and the Atomic Energy Act of 1954 gave exclusive jurisdiction to the federal government only to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. The Court noted that the Atomic Energy Commission (AEC) was not given authority over either the generation of electricity itself or the decision concerning the economic viability of the construction of a future nuclear plant. The Court also noted that the successor to the AEC, the Nuclear Regulatory Commission (NRC), has stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety. The Court concluded its discussion on the right of states to determine the economic viability of the construction of a new nuclear plant by examining the language of the Atomic Energy Act itself and its subsequent amendments. Specifically, section 271 provides: "Nothing 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." The Court, in examining the 1959 Amendments, also found that the goal of the Amendments was to increase the states' role. The Court observed that while the authority of the federal government to continue to regulate the construction and operation of nuclear plants was reserved by the 1959 Amendments by section 274(c), Congress clearly confirmed by legislating in section 274(k) that state power over the production of electricity was not to be otherwise eliminated. Section 274(k) states: "Nothing

57. Pacific Gas at ____, 103 S.Ct. at 1723-1724.
58. Id. at ____, 103 S.Ct. at 1724.
59. Id. at ____, 103 S.Ct. at 1724. Congress also noted in the Senate and House Reports of the Joint Commission on Atomic Energy that section 271 preserved the power of local regulatory agencies with regard to the sale, generation or distribution of electric power. S.Rep.No. 1699, 83d Cong. 2d Sess. 31 (1954); H.R. Rep. No. 2181, 83d Cong. 2d Sess. 31 (1954).
60. Pacific Gas at ____, 103 S.Ct. at 1724. The Court noted that § 274(b), [42 U.S.C. 2021(b)] authorized the NRC by agreements with state governors to discontinue its regulatory authority over certain nuclear and lower level nuclear material "in quantities not sufficient to form a critical mass." Id. at ____, n.20, 103 S.Ct. at 1725, n.20.
61. § 274(c), 42 U.S.C. § 2021(c) provides in part: "The Commission shall retain authority and responsibility with respect to regulation of: (1) the construction and operation of any production or utilization facility; . . . ." Id.
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.\textsuperscript{63}

The Court concluded "that from the passage of the Atomic Energy Act of 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: 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 facilities to be licensed, land use, rate making and the like."\textsuperscript{64}

In the next major portion of the preemption discussion, the Court emphasized that it did not interpret section 25524.2 as seeking to regulate the construction or operation of a nuclear power plant, but instead was aimed at economic hazards.\textsuperscript{65} Accordingly, the Court held that the statute lies outside the federally occupied field of nuclear safety regulations.\textsuperscript{66} The Court held it would be clearly impermissible for California to attempt to regulate the construction or operation of a nuclear power plant, even if done out of non-safety concerns, due to the NRC's

\textsuperscript{63} Pacific Gas ___ U.S. at ___, 103 S.Ct. at 1725. The Court observed that: "§ 274(k) by itself limits only the preemptive effect of § 274, and does represent an affirmative grant of power to the states. But Congress by permitting regulating 'for purposes other than protection against radiation hazards' underscored the distinction drawn in 1954 between the spheres of activity left respectively to the federal government and the states." \textit{Id.}

Moreover, the opinion holds that this regulatory structure has remained unchanged for purposes of this case until 1965, when the following proviso was added to section 271: "Provided, that this section shall not be deemed to confer upon any Federal, State or Local agency any authority to regulate, control or restrict any activities of the Commission."

The opinion noted that the provision was added to overrule a Court of Appeals opinion, \textit{Maun} v. United States, 347 F.2d 970 (9th Cir. 1966). In \textit{Maun}, the court interpreted § 271 to allow a municipality to prohibit transmission lines necessary for the AEC's own activities. The Supreme Court referred to the reports and documents of the 1965 Amendment to conclude that the purpose of the 1965 provision "was to make it absolutely clear that the Atomic Energy Act's special provisions on licensing of reactors did not disturb the status quo with respect to the then existing authority of Federal, State, and local bodies to regulate generation, sale, or transmission of electric power." See \textit{Pacific Gas at ___ U.S. ___}, 103 S.Ct. at 1726.

\textsuperscript{64} Pacific Gas at ___, 103 S.Ct. at 1726.

\textsuperscript{65} \textit{Id.} at ___, 103 S.Ct. at 1727.

\textsuperscript{66} \textit{Id.} at ___, 103 S.Ct. at 1728.
exclusive authority over the entire field of nuclear safety concerns except the limited powers expressly delegated to the states. In dismissing any questions as to whether a state may completely prohibit construction of a nuclear plant until that state's safety concerns are satisfied by the federal government, the Court referred to the well established preemption test which is applied when the federal government completely occupies a given field or an identifiable portion thereof: "[T]he test of preemptions is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " In applying the test, the Court held that a conflict would arise with a judgment that nuclear power is not safe enough to be further developed, and that in effect, any state prohibition on nuclear construction for safety reasons would conflict with the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use. In deciding whether there was a non-safety rationale for section 25524.2, the Court first looked to the report by the California Assembly Committee on Resources, Land Use, and Energy ("the Committee"). In that report, the Committee essentially viewed the problem as one where non-disposable wastes accumulate with no permanent disposal sites available, thereby creating a "clog" in the nuclear fuel cycle. The Committee determined that, without a permanent means of disposal, the nuclear waste problem made nuclear power an economically uncertain and unpredictable source of power which could lead to the creation of high costs to contain the problem or closure of already existing plants. The Court agreed with the Ninth Circuit's reliance on the Committee Report to find that the statute


69. Pacific Gas at ___, 103 S.Ct. at 1726.

70. Id. at ___, 103 S.Ct. at 1727.

71. Id. at ___, 103 S.Ct. at 1727.


73. Id.

74. Id. at 156.
was directed towards purposes other than protection against radiation hazards and stated that "California is concerned not with the adequacy of the method, but rather with its existence."\textsuperscript{75}

The opinion reiterated that the Court places "considerable confidence in the interpretations of state law reached by the federal courts of appeals."\textsuperscript{76} In support of the Ninth Circuit's interpretation of California's intent, the Court found sufficiently specific the language of the statute which states that the "development" and "existence" of a permanent disposal technology approved by federal authorities will lift the moratorium. The Court held the language of the statute evinced sufficient concern with the economics of nuclear power by observing that "[o]nce a technology is selected and demonstrated, the utilities and the California Public Utilities Commission would be able to estimate costs; such cost estimates cannot be made until the federal government has settled upon the method of long-term waste disposal."\textsuperscript{77} The Court held meritless the suggestion by the petitioners that California, if concerned with economics, would have banned California utilities from building plants outside the state.\textsuperscript{78} The Court noted there was no indication that California utilities were contemplating such construction and accordingly that the California legislature was not "obligated to address purely hypothetical facets of a problem."\textsuperscript{79} The Court also held that the statute was not invalidated simply because the California Public Utilities Commission was authorized, on a case by case basis, to determine on economic grounds whether a nuclear power plant should be constructed. The Court observed that California was not foreclosed from reaching the same decision through a legislative judgment because the economic uncertainties involved with nuclear waste disposal do not differ from facility to facility. The Court concluded that "the issue readily lends itself to more generalized decision making and California cannot be faulted for pursuing that course."\textsuperscript{80} The Court rejected the suggestion the statute be invalidated on the ground that section

\textsuperscript{75} PLF, 659 F.2d at 925.
\textsuperscript{76} Pacific Gas at ___, 103 S.Ct. at 1727.
\textsuperscript{77} Id. at ___, 103 S.Ct. at 1727.
\textsuperscript{78} Id. at ___, 103 S.Ct. at 1727.
\textsuperscript{79} Id. at ___, 103 S.Ct. at 1728.
\textsuperscript{80} Id. at ___, 103 S.Ct. at 1728.
25524.2 arose after the defeat of Proposition 15, a voter initiative that, along with the Nuclear Laws, was clearly written with safety purposes in mind. The Court observed that Proposition 15 was not passed by the voters of California and was not before the Court. In concluding, the Court stated “these provisions and their pedigree do not twist other parts of the Warren-Alquist Act.”

The Court provided two additional reasons for declining to overturn the Ninth Circuit’s interpretation of California’s intent in enacting Section 25524.2. First, “the Court declined to inquire into the motive of the legislature.” The Court noted that it would be difficult to determine the motivation of each and every legislator. Second, the opinion concluded that it would be inappropriate for the court to engage in speculation as to the motivation of the legislature in light of the well established state authority to not only determine the need for electrical generating facilities, but also to halt the construction of new nuclear plants by refusing on economic grounds to issue certification of public convenience.

3. Preemption: Conflict Between Regulations

The Court found that section 25524.2 does not conflict with federal regulations of nuclear waste disposal, notwithstanding the decision in *Natural Resources Defense Council, v. NRC*

81. The subject nuclear provisions were passed by the California legislature before the people voted on Proposition 15 (California Nuclear Initiative). Proposition 15 would have banned nuclear plants absent a determination by the California legislature that nuclear wastes could be “stored and disposed of with no reasonable chance of intentional or unintentional escape of nuclear wastes or radioactivity into the environment which would adversely affect the land or the people of California. See generally PLF 659 F.2d at 925. Had Proposition 15 passed, the Nuclear Laws would not have become operative. See 1976 Cal.Stats, chs. 194, § 2; 195, § 2; 196 § 2. See generally Tribe, *California Declines The Nuclear Gamble: Is Such a Choice Preempted?*, Ecology L.Q. 679, 680 n.5 (1979).
82. Pacific Gas at —, 103 S.Ct. at 1728.
83. Id.
84. Id.
85. 582 F.2d 166, 168-169 (2nd Cir. 1978). The NRC refused to halt nuclear reactor licensing until it had developed a method of permanent waste disposal. Pursuant to the language of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2071-2075, 2111-2114, both the AEC and its successor, the NRC, have promulgated extensive regulations concerning both the handling of nuclear materials and the operation of civilian and military nuclear facilities. Under 10 CFR 50.34(b)(20)(i)-(II), an applicant seeking to receive a NRC oper-
that it was appropriate for the NRC to conclude that it could continue to license new reactors given the availability of interim storage and the progress toward the development of long term disposal facilities. In support of its conclusion, the Court first noted that, despite the NRC's finding that it is safe to continue to license new reactors, the NRC's finding does not suggest that it is economically wise to do so. Compliance with both section 25524.2 and federal regulation would be possible because the NRC order does not and could not compel a utility to develop a nuclear plant. The Court observed that the NRC's regulations are not aimed at determining the economic feasibility of the construction of a new nuclear plant, but are aimed at insuring that nuclear plants are safe. The Court again noted that the statute acknowledges that it is the federal responsibility to develop and license the technology surrounding nuclear waste disposal; thus California did not attempt to impose its own standards on nuclear waste disposal and did not improperly attempt to enter an occupied field. In addressing an issue not previ-
ously discussed in the lower court decisions, the Court held that the passage of the Nuclear Waste Policy Act of 1982\(^{90}\) did not create a conflict between federal regulation of waste disposal and section 25524.2. The Court examined the purpose of this act\(^{91}\) and noted that the bill, *inter alia*, provides financing for research and development, and authorizes repositories for disposal of high level waste and spent nuclear fuel, along with provisions for the licensing and expansion of interim storage.\(^{92}\) However, the Court concluded through an examination of the legislative history that "while 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 ..."\(^{93}\)

4. Preemption: Frustration of Purpose

The Court held that section 25524.2 does not frustrate the Atomic Energy Act's purpose of developing the commercial use of nuclear power.\(^{94}\) The Court enunciated the well established test that "state law is preempted if it 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"\(^{95}\) While the Court acknowledged that "the primary purpose of the Atomic Energy Act was, and continued to be, the promotion of nuclear power,"\(^{96}\) the Court held that the promotion of nuclear power is not to be accomplished "at all costs."\(^{97}\)

91. Section 111(b) lists the following purposes:

(1) to establish a schedule for the siting, construction and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level wastes and ... spent nuclear fuel ... .

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel ... .

Id.
92. Pacific Gas at ___ , 103 S.Ct. at 1730.
93. Id.
94. Pacific Gas at ___ , 103, S.Ct. at 1730-31.
95. Id. at ___, 103 S.Ct. at 1730-1731; Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Florida Lime & Avocado Growers, Inc. v. 373 U.S. 132, 142-143 (1963); Fidelity Federal Savings and Loan Assn'n v. de la Cuesta, ___ U.S. ___, ___, 102 S.Ct. 3014 (1982).
96. Pacific Gas at ___, 103 S.Ct. at 1731.
97. Id. at ___, 103 S.Ct. at 1731.
The Court, however, refused to follow the Ninth Circuit's suggestion that legislation since 1974 has indicated a change in congressional outlook. The Court essentially relied on the rationale that Congress has allowed the States to determine as a matter of economic feasibility whether a nuclear plant should be built. In concluding the opinion, the Court stated that it would not assume the role of Congress and left it to Congress to rethink the division of regulatory authority since the existing regulatory structure in effect allows the states to undercut a federal objective.

B. Concurring Opinion

Justice Blackmun, joined by Justice Stevens, concurred in the judgment, but focused his analysis on the Court's suggestion that a state may not prohibit the construction of nuclear power plants solely out of concern for the safety aspects of such a plant. In noting that the Court had found that California's motivation for enacting section 25524.2 had been a desire to avoid a potentially economically unfeasible project, he observed that such language was unnecessary to the Court's holding.

Justice Blackmun noted that "Congress has occupied not 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." In noting that states traditionally have had the authority to choose which technologies will meet their energy needs, the concurrence found no evidence that Congress had a "clear and manifest purpose" to "force States to be blind to whatever special dangers are posed by nuclear plants." Essentially, Justice Blackmun adopted the view that if States were preempted from making an evaluation of the feasibility of a plant on safety grounds, a regulatory vacuum would be created, and thus the decision whether to build a nuclear facility would ultimately be made by the utility seeking

98. Id. at ___, 103 S.Ct. at 1731.
99. Id. at ___, 103 S.Ct. at 1731.
100. Id. at ___, 103 S.Ct. at 1731-32.
101. Id. at ___, 103 S.Ct. at 1732.
102. Id. at ___, 103 S.Ct. at 1732.
103. Id. at ___, 103 S.Ct. at 1732.
its construction, rather than the state affected.

Justice Blackmun observed that a flat ban on the construction of nuclear plants for health and safety reasons would not conflict with the NRC's judgment that construction of nuclear plants may safely proceed. He reasoned that because the NRC has only held that construction may safely proceed, and neither the NRC or Congress had mandated the states to construct nuclear plants, compliance with both state and federal regulation would still be possible.

Justice Blackmun voiced the opinion that a safety-initiated ban on the construction of new plants would not stand as an obstacle to accomplishment and execution of the objective of Congress to make nuclear energy available to the states. The Justice reasoned that "the Atomic Energy Act was intended to promote the technological development of nuclear power, at a time when there was no private nuclear industry." Moreover, Justice Blackmun observed that "Congress did not compel states to give preference to the eventual product of that industry or to ignore the peculiar problems associated with the product." Justice Blackmun noted that the legislative history of the Energy Reorganization Act of 1974 expressed concern about a pro-nuclear bias in the regulatory agency. With the passage of the Act, promotional and regulatory functions in the area of nuclear power were separated by the creation of the NRC and the Energy Research and Development Administration (ERDA). The Justice added that the Reorganization Act and subsequent legislation allowing the states to prohibit the construction of nuclear plants for non-nuclear reasons are manifestations of Congress' intent that nuclear power remain an option to the states but "that the decision whether to build nuclear plants remains

107. Pacific Gas at ___, 103 S.Ct. at 1733.
108. Id. at ___, 103 S.Ct. at 1733.
109. Id. at ___, 103 S.Ct. at 1734.
111. Id. at ___, 103 S.Ct. at 1734.
112. The Act provided that the NRC would assume the regulatory and licensing function of the AEC. See 42 U.S.C. § 5341. Under Section 5801(a), ERDA was created to "develop, and increase the efficiency and reliability of use of, all energy sources." In 1977, ERDA's functions were transferred to the Department of Energy. 91 Stat 577, 42 U.S.C. § 7151(a) (1976 ed., Supp. IV).
with the States."113 Justice Stevens concluded by asserting that "a ban on construction of nuclear plants would be valid even if its authors were motivated by fear of a core meltdown or other nuclear catastrophe."114

IV. CRITIQUE

The Court’s decision in *Pacific Gas*115 is a sound but conservative interpretation of Congress’ intent in enacting the Atomic Energy Act of 1954 and its subsequent amendments. Justice White’s application of the *Rice v. Santa Fe Elevator Corp.*116 preemption test shows that Congress intended to maintain a dual regulatory system which restricts the NRC’s authority to national security, health, and safety, while preserving the traditional state police power to regulate its utilities and the generation of electrical power. Despite this thorough preemption analysis, many questions concerning this delicate state-federal balance remain.

A. When State Law Will be Preempted

The *Pacific Gas* Court impliedly indicated that the three-part *Rice* test should be applied to all state legislation that directly or indirectly affects the construction or operation of nuclear power plants. Hence, the traditional powers of the States to regulate electrical power will not be superseded unless the States’ legislation is aimed at regulating the construction or operation of the plant themselves,117 or in fact affects the NRC’s


It is also well established the States have the authority to establish siting and land use requirements for nuclear plants that are more stringent than those of the NRC. Cf., NRC Authorization Act for Fiscal 1980, Pub. L., 96-295, § 103(f), 94 Stat. 783 (1980), and under the 1977 Clean Air Act amendments, the States may regulate radioactive air emissions and impose more stringent standards than those of the NRC. See 42 U.S.C. §§ 7416, 7422 (1983 Ed. & Supp. IV).

114. *Pacific Gas* at ___, 103 S.Ct. at 1734.

115. *Pacific Gas* at ___, 103 S.Ct. at 1731.


117. See *e.g.*, County of Suffolk v. Long Island Lighting Co., 554 F.Supp. 399, 404-
authority to regulate the construction or operation of a nuclear power plant, or would stand as an obstacle to the “promotion of nuclear power.” Referring to the Vermont Yankee decision, the Court stated: “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.” While the Court found that sections 271 and 274 of the Act expressly allowed the states to retain this power, the Court also found that the “federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly limited to the States.” This language suggests that state action regulating nuclear plants will be preempted if the federal government has not provided an exception for this type of regulation.

Additionally, despite finding that “a primary purpose of the Atomic Energy Act was, and continues to be the promotion of nuclear power,” the Court concluded that section 25524.2 did not “stand as an obstacle to the accomplishment of the full purposes and objectives of Congress,” since the “promotion of nuclear power is not to be accomplished at all costs.” Therefore the analysis applied to section 25524.2 acknowledges that states have retained the right initially to decide the need for the construction of nuclear plants on economic reasons, but prevents state regulation in any area not expressly ceded to the states that would arguably either affect the NRC’s authority to regulate the safety aspects of the construction and operation of a plant or would stand as an obstacle to the “promotion of nuclear power.” This analysis suggests that once a plant is built, the state is powerless to regulate a commercial plant which the state

405 (E.D.N.Y. 1983).
118. Pacific Gas at ___, 103 S.Ct. at 1731.
120. Id. at 550.
121. 42 U.S.C. 2018, see Pacific Gas at ___, 103 S.Ct. at 1724.
122. 42 U.S.C. 2021(c), see Pacific Gas at ___, 103 S.Ct. at 1724.
123. Pacific Gas at ___, 103 S.Ct. at 1724, In addition to the authority under § 274(c) to regulate certain low-level radiological materials, Congress has allowed the states to impose certain siting and land use requirements for nuclear plants. See e.g., Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2) ALAB-453, 7 N.R.C. 31, 34 n.13 (1978).
124. Pacific Gas at ___, S.Ct. at 1731.
125. Id. at ___, 103 S.Ct. at 1730-1731.
126. Id. at ___, 103 S.Ct. at 1731.
believes to be harmful to its citizens.

Notwithstanding the application of this preemption analysis, the extent of state power still remains unclear. While the dicta in the opinion suggests that "safety" is an area in which the states may not regulate nuclear facilities, the Court nevertheless observed that the legislative history of the Atomic Energy Act allows the states to exercise their "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking and the like." In conjunction with this, however, the Court broadly stated that the states will be preempted, if "the matter on which the state asserts the right to act is in any way regulated by the federal government."

The Court also specifically observed that a prohibition on nuclear construction for safety reasons would be an obstacle to Congress' objective "that nuclear technology be safe enough for widespread development and use." This suggests that any future legislation which for health and safety concerns attempts to either prohibit construction of a new plant, or, alternatively, to decommission existing plants, would be preempted not only as conflicting with a field already occupied by the NRC, but for blocking the federal goal of promoting nuclear power. Accordingly the language of the opinion suggests that only by finding that the continued operation of a plant will be economically unfeasible would a state have a proper rationale to prohibit construction or independently request the decommission of a nuclear power plant out of health concerns for the nuclear waste.

127. Id. at ___, 103 S.Ct. at 1726.
128. Id. at ___, 103 S.Ct. at 1730-31.
129. Id. at ___, 103 S.Ct. at 1731.
130. In a June, 1983 NRC study, the Commission estimated that thirty-nine plants in nineteen States will be required to shut down for lack of storage space. See H. Rep. 97-735, 97th Cong., 2d Sess. 20 (1982) (federal govt. waste management policies can be seen to have exacerbated or created a spent fuel bottleneck; growing inventories of spent fuel at the power nuclear sites have heightened public concern); 128 Cong. Rec. H8169 (Sept. 30, 1982) (remarks of Rep. Broyhill); 128 Cong. Rec. H8170 (Sept. 30, 1982) (remarks of Rep. Moorhead) ("comprehensive nuclear waste disposal must provide not only for the long-term problem of nuclear waste but it must also alleviate the short-term problem of a lack of interim storage capacity for spent nuclear fuel").
131. The NRC currently expects to issue in 1984 a proposed rule dealing with decommissioning of nuclear power plants. See In the Matter of Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station) 18 NRC 152 (1983). The NRC has
disposal problem.

B. The Court's Analysis of the Nuclear Waste Policy Act of 1982

These guidelines do not at the present time suggest that other states will be powerless to act to prohibit construction, or, in the event of a critical storage problem, request that a commercial plant be closed down. The Court observed that, subsequent to the Ninth Circuit's opinion, Congress passed the Nuclear Waste Policy Act of 1982 (Waste Policy Act). The Waste Policy Act expresses a federal commitment to create more short-term spent fuel storage and to provide for the development of long term disposal through a federally financed research and development program. In conjunction with this, the Court's inquiry centered on whether or not the Waste Policy Act preempted California's legislation by exhibiting enough of a federal commitment to the storage problem, that the accumulation of fuel would not pose an economic problem and construction would be able to resume. The Court concluded that, despite this federal commitment, Congress itself had not intended to make the decision for the states that the nuclear waste disposal system problem had been resolved.

Therefore, a legislature which conducts the proper economic studies and concludes that it would be economically infeasible to continue to operate a plant could conceivably pass a valid law requesting a moratorium on construction or, in the event of a severe storage problem, decommission. All of this would depend on the technological advances of the federal government in searching for the solution to the problem of long term disposal.

determined in the "Waste Confidence" Rulemaking Decision, 44 Fed. Reg. 61372, that there is a "reasonable assurance" that spent fuel can be stored safely in storage basins at reactor sites for an extended period of time until the availability of geologic repositories for safe, permanent disposal. See 48 Fed. Register 22730 (May 20, 1983).

132. See supra note 124, 130; see also note 167, infra.


135. Pacific Gas at ——, 103 S.Ct. at 1730-1731.

136. See supra note 124, 130; see also infra note 167 and accompanying text.
A NRC determination that an adequate long term disposal method exists could prohibit such a law from being valid.137

C. Pacific Gas Compared to Earlier Preemption Decisions

The Supreme Court in Pacific Gas rendered a judgment which is consistent with other preemption decisions. However, the Court's dicta prohibiting states from acting out of safety concerns that might arguably affect plant construction or operation in an ancillary manner unnecessarily deprives the states of their traditional regulatory power left to the states under the dual regulatory system created by Congress.

During the late 1960's, the AEC urged that environmental concerns were the “exclusive concerns” of the states and could not be taken into account during AEC licensing. However, in New Hampshire v. AEC,138 the First Circuit held that the AEC would not be relieved of its duty to comply with authorities who must deal with thermal effects of atomic power plant discharges.139 Similarly, in Northern States Power Co. v. Minnesota,140 the Eighth Circuit held that Minnesota was preempted from imposing more stringent standards on the level of radioactive discharges than required by the AEC.141 However, in focus-

137. See supra note 125, 131.
139. 406 F.2d at 175-76, cert. den., 397 U.S. 962.
140. 447 F.2d 1142 (8th Cir., 1971), aff'd mem. U.S. 1035. Despite an acknowledgment by the Supreme Court that the Pacific Gas opinion was “fully consistent” with Northern States, the Court included the caveat that the summary affirmance of the Northern States holding “is not to be read as an adoption of the reasoning supporting the judgments under review.” Id.
141. 447 F.2d at 1150. Other courts have viewed the Atomic Energy Act as preempting only state regulations aimed at radioactive hazards. See e.g., Marshall v. Consumers Power Co., 65 Mich. App. 237 N.W. 2d 266 (1975) (plaintiff had standing to sue nuclear plant for nuisance due to steam, fog and ice carried by the plant's cooling pond); New Jersey Dept. of Environmental Protection v. Jersey Central Power and Light Co., 69 N.J. 102, 351 A.2d 337 (1976) (state regulation conflicting with the AEC preempted, but not all state regulations of nuclear plants for all purposes); Northern California Ass'n to Preserve Bodega Head and Harbor, Inc. v. Public Utilities Comm'n, 61 Cal.2d 126, 133, 37 Cal. Rptr. 432, 436, 390 P.2d 200, 204 (1964) (State can prevent reactor from being built in an earthquake zone since "safety considerations in addition to radiation hazards were involved."). But see Commonwealth of Pennsylvania v. General Public Utilities Corp. 710 F.2d 117, 120 (3rd Cir. 1983) (plaintiff who based a public nuisance claim arising out of Three Mile Island incident could not obtain injunctive relief to close the plant since the federal government has, under Pacific Gas holding, "sole and exclusive" jurisdiction.").
ing on the power of the States to regulate non-radiation hazards, the Northern States court observed that "[C]ongress was not by [including] subsection (c) of the 1959 Amendment, in any way further limiting the power of the States to regulate activities, other than radiation hazards . . . ."[142]

The Pacific Gas opinion is not consistent with the policy underlying these lower court opinions. While the Court acknowledges that states have traditionally possessed the express authority to determine what type of commercial plant an individual state needs to construct in order to meet its energy needs,[143] the Court nevertheless concludes that a state may not exercise its traditional police powers by considering any health and safety factors when deciding what type of technology is appropriate, due to the pervasiveness of the federal government in the safety area. Thus, while Congress has never expressly indicated that the states may not consider these factors when deciding if it is appropriate to built a commercial nuclear plant, states seeking to avoid this judicially created roadblock to the consideration of the health and safety or environmental effects must provide an economic rationale since "the matter on which the State asserts the right to act is . . . regulated by the federal government but there has been no federal regulation of the economic considerations of nuclear power."[144]

This departure from the approach of the two prior decisions is unsettling because the Court is, in essence, denying the states the traditional authority to decide when the social, political, environmental and health benefits of a power plant (as well as economic) are outweighed by those same risks. As Justice Blackmun stated in his concurring opinion, "the Court has read too much into the Act, in suggesting that the Act prohibits the States from determining what types of electrical power to utilize."[145] Moreover, by concluding that the federal government has occupied the"entire field of safety,"[146] the Court will have essentially shifted the burden to the States to prove that their legislation occupies a narrow enough area to be considered as not con-

---

142. 447 F.2d at 1150.
143. Pacific Gas at ___, 103 S.Ct. 17-23.
144. Id. at ___, 103 S.Ct. at 17-26.
145. Id. at ___, 103 S.Ct. at 1713.
146. Id. at ___, 103 S.Ct. at 1730-1731.
flicting generally with the established federal regulatory areas of construction and operation, or not conflicting specifically with the NRC determination that nuclear energy is "safe". Hence, despite Congress' intent that the states not lose any traditional powers, states must avoid the "entire area" of safety that is not expressly provided for as an exception by Congress.

Thus, the Pacific Gas court's narrowing of the preemption inquiry not only suggests a departure from previous decisions that states may enact health or environmental legislation which does not conflict with federal safety regulation, but sends a clear message to the States on how to avoid this judicially created obstacle.

D. The Moratorium As A Frustration of Congressional Purpose

1. Majority Opinion

Concerning the petitioner's challenge that a moratorium on construction would frustrate the Atomic Energy Act's purpose to develop the commercial use of nuclear power, the Court concluded that the primary purpose of the Act continues to be the promotion of nuclear power.147 While there is little doubt that Congress sought to encourage private industry to enter the field, the Court failed to follow its own rule stated in Pennhurst School and Hospital v. Halderman:148 "[I]n expounding a statute, we must not be guided by a single sentence, but look to the provisions of the whole law and its object and policy."149 In this respect, the Ninth Circuit failed to convince the Court that the Congressional goal of promoting development of alternative energy sources and the restructuring of the federal regulatory agencies by the Energy Reorganization Act of 1974 was an indication of a change in the Congressional outlook for a more "balanced approach" to nuclear power development.

Viewed as a whole, this portion of the Court's findings are the least sound. This portion of the Court's opinion is the most conservative and indicates a political posture in support of nu-

147. Id. at ___, 103 S.Ct. at 1730-31.
149. Id.
clear power. The Act gives the states the authority to keep the plants from being built if the planned plant is inconsistent with a state's power needs, or environmental or other interests. Moreover, as the Court noted, a state may through its zoning powers deny a land use permit or could refuse to issue certificates of public convenience. These powers are themselves indicia of Congress' intent to allow a state to decide not only whether a plant is economically feasible, but if it is appropriate for their citizens. In Vermont Yankee, the Court states: "Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment." Notwithstanding this dicta and the Pacific Gas Court's concession that "nuclear power is not to be accomplished "at all costs," the Pacific Gas Court appears to have retreated from a neutral position by concluding that recent legislation has not changed the federal goal of promoting nuclear power.

Congress' recent activities in this area, such as the reorganization of the federal regulatory agencies in 1974, the permitting of states to subject nuclear plants to state health regulations no less stringent than those applicable to other energy sources, and the Nuclear Waste Act of 1982, could not real-
istically indicate a desire by Congress to promote the industry. Rather, the preemption of state regulation was necessary to protect the public from the radiological hazards of nuclear power.\textsuperscript{157} Despite Congress' recent legislation, the Court has chosen to interpret Congress' inaction in amending the Act as indicating that Congress never intended the states to provide protection to citizens. Thus, any state action in the 1980's has a strong chance of conflicting with a federal goal mandated in 1954, if that state action contains "anti-nuclear sentiment" or questions the policies of the industry as a whole.

2. Concurrence

Justice Blackmun would have refused to find that a safety-motivated prohibition on construction would be preempted, opting to reach that issue when it is necessary to disposition of the case.\textsuperscript{156} Additionally, Justice Blackmun disagreed with the majority that such a prohibition would be improper. In support of his finding that the dicta was wrong, Justice Blackmun found that the area occupied by the federal government was limited to the "narrower area of how a plant should be constructed and operated to protect against radiation hazards"\textsuperscript{159} and the Act void of any language indicating a clear and manifest purpose to prohibit states from considering safety aspects when exercising their traditional authority to choose which technology to rely on in meeting their energy needs.\textsuperscript{160} This concurrence voices the concerns of other commentators that unless the states are allowed to address the risks associated with nuclear power, the decision of whether to build a plant, and the benefits of continuing to operate it will be left to the utilities seeking to build and operate a plant.\textsuperscript{161}


\textsuperscript{158} Pacific Gas at —, 103 S.Ct. at 1732.

\textsuperscript{159} Id. at —, 103 S.Ct. at 1732-1733.

\textsuperscript{160} Id.

In criticizing the majority's conclusion that a ban on construction for safety reasons would stand as an obstacle to the goals of Congress to encourage the development of nuclear power, Justice Blackmun took a more balanced view of the goals of Congress by focusing on the recent acts of Congress. Justice Blackmun, in observing that Congress has not evidenced a dictatorial intent for every State to build nuclear plants,"162 would have found that the recent legislation not only allows states to prohibit the construction of nuclear plants, but indicates a Congressional purpose to "place greater relative emphasis on non-nuclear energy."163 Yet, Justice Blackmun avoided the issue of whether a state prohibition on safety grounds would conflict with a NRC judgment that it was safe to construct or operate a plant by stating that a "flat ban for safety reasons . . . would not make compliance with federal and state regulations . . . a physical impossibility."164

While Justice Blackmun correctly notes that neither the NRC nor Congress has mandated that the states conclude that construction is "safe,"165 the concurrence leaves unanswered how a conflict would be avoided should a state conclude that a plant's construction would be unsafe in light of the unresolved disposal problems. Thus, Justice Blackmun's failure to articulate which safety motivated legislation would cause a conflict which arguably undermines his position.

V. THE TROUBLES WITH STOCKPILED WASTE: WHAT CHOICES REMAIN FOR THE STATES IN THE FUTURE?

As the midpoint of this decade approaches, states and their consumers are faced with the prospect of nuclear power plants being decommissioned due to a lack of interim storage space caused by the federal government's inability to develop a permanent disposal method.166 The possibility of shutdowns will com-

162. Id. at ___, 103 S.Ct. at 1734.
163. Id. at ___, 103 S.Ct. at 1733.
164. Id. at ___, 103 S.Ct. at 1733.
165. Id. at ___, 103 S.Ct. at 1733-34.
166. See supra note 130 and accompanying text; See also, U.S. Charts Plans for Nuclear Waste Disposal, CHEM. & ENG. NEWS v. 61, July 18, 1983 (describing controversy surrounding disposal of spent fuel; first waste depository not scheduled to open until 1998).
pel states to reexamine their economic commitments to nuclear power. In conjunction with this, the states may also move to protect the health and safety of its citizens in the event that the federal government is unable to develop a permanent method of disposal contemplated by the Nuclear Waste Policy Act. Thus, the disposal problem may bring about litigation in which some states will attempt to exercise their traditional police power by ordering the utilities to close or decommission plants. This section will consider the consequences if, in the future, California’s nuclear provisions result in the de facto exclusion of nuclear power plants.

A. A Finding by the Energy Commission that Adequate Facilities to Store Spent Fuel Rods Does Not Exist

Due to the federal government’s rejection of reprocessing as a viable alternative, states such as California will ultimately have to silence the assertions by critics of nuclear power that accumulating nuclear wastes pose both a health risk and financial burden on the ratepayers. In the event that the fed-

167. The estimate of the number of plants that will be required to close down due to a lack of space vary. See e.g. 7 ENVIR. REP. (DNA) 839 (1977) (twenty three plants by 1987). However in a June, 1983 study, the NRC estimated that thirty-nine plants in nineteen states will be required to shutdown for lack of storage space. See infra note 130.

In California, the Humboldt Bay plant closed in 1976 for “overall review” and possible strengthening of the seismic supports. In December, 1980, Pacific Gas and Electric withdrew its application to reopen the plant, leaving the status of the plant in limbo. See Decommissioning Nuclear Plants Isn’t Easy, San Francisco Chronicle, March 14, 1982. There are three accepted methods of decommissioning: Immediate dismanteling, mothballing it for thirty years or so, and entombing it in a substance like concrete for a century. Id. As for the costs of a shutdown, while it is clear that the consumers will pay for it, the amount to be paid in millions of dollars is still unclear. See e.g., The Cost of a Shutdown: An Unclear Bottom Line, N.Y. Times, May 6, 1983 at 1, col. 1 (describing the consequences if the Nuclear Regulatory Commission ordered the shutdown of Indian Point Unites 2 and 3).

168. During the 1975-1976 legislative session, fifty bills were introduced in twenty-four state legislatures having the effect of restricting or prohibiting the development and use of nuclear power. See Murphy and Lapierre, Nuclear “Moratorium” Legislation In The States And The Supremacy Clause: A Case of Express Preemption, 76 COLUM. L. REV. 392 (1976); See also Justices Uphold States In Barring Nuclear Plants, Wall Street J., April 21, 1983, at 4, col. 1 (describing how Pacific Gas ruling implicitly clears laws in five other states and probably will encourage other legislatures to pass similar laws).

169. See supra note 130.

170. See e.g., San Onofre A-Plant Pains, ENGINEERING NEWS RECORD, v. 211, at 38 (1983) (describing how Public Utilities Commission is investigating seismic and safety benefits); Showdown at Diablo Canyon, Newsweek, August 10, 1981 at 51-52 (describing
eral government fails to meet the deadlines set in the Nuclear Waste Policy Act of 1982, California could, under section 25524.1(b), find that one or several of the plants lack sufficient interim storage space. Alternatively, California arguably could decide that the benefits its ratepayers receive by having an operating reactor are outweighed by the potentially unsafe and economically staggering consequences of allowing waste to stockpile at an ever-increasing rate. If California unilaterally decides to order the decommissioning of one or several nuclear reactors, the delicate regulatory scheme reviewed by the Pacific Gas court will again have to be evaluated.

1. Closure of a Plant on Economic Grounds

It is indisputable after the Pacific Gas opinion that under subsection k of section 274 of the Atomic Energy Act, the states retain authority to regulate nuclear energy activities for a variety of non-radiation purposes that relate to the generation, sale, or transmission of electric power. However, in conjunction with this, a state order to close a nuclear plant may imply an ancillary concern over radiation for two reasons. First, a state arguably would be instructing the federal government how to operate the plant by ordering the utility or NRC to close the plant. Second, an order by a state to close the plant could arguably conflict with the Congressional goal of “the promotion of nu-

---

171. Even where all nuclear power plants shut down, there still would be forty years accumulation of radioactive work to deal with. See, U.S. Charts Plans for Nuclear Waste Disposal, CHEMICAL & ENG. NEWS, July 18, 1983 at 20.

172. In Pacific Gas, Section 25524.1(b) was found not to be ripe for review. See supra notes 1-42 and accompanying text.

173. Pacific Gas at —, 103 S.Ct at 1725.
clear power."\textsuperscript{174}

However, in light of the language in \textit{Pacific Gas}, a statute or referendum to close a nuclear plant should be within the power of a state, despite a challenge on grounds of preemption. In reviewing the Atomic Energy Act, one finds that the Act and its amendments are void of any express preemptory language. Second, while federal regulation of the operation of a commercial plant is pervasive, a request by a state to close down a plant would not physically interfere with the actual operation. Moreover, even the utilities would be hard pressed to argue successfully that the scheme of federal regulation is so pervasive as to infer that Congress intended that states, under section 274(k), could not exercise their traditional power to supply adequate service at reasonable rates. In conjunction with this, it would seem illogical for a reviewing court to determine that a state could decide, under section 274(k), the initial need for a generating facility, but after the construction of the plant, the same state would be prevented from deciding that its continued operation would be uneconomical.

Notwithstanding the holding in \textit{Pacific Gas} that California's decision to prohibit construction did not conflict or stand as an obstacle to Congress' purpose to "develop nuclear power," a state attempting to close plants would face a challenge that the state action stands as an obstacle to Congress' goal. In addressing this argument, the states should reiterate that the NRC has not determined that it would be economically wise to continue to operate a commercial plant, nor has the NRC the power to compel a state to continue to operate a plant.\textsuperscript{175} Thus, if California eventually seeks to halt the operation of a plant, it would be well-advised to develop an economic rationale for doing so.

2. Closure of a Plant on Safety Grounds

In the wake of the Three Mile Island incident\textsuperscript{176} and other

\textsuperscript{174} Id. at ___, 103 S.Ct. at 1730-31. See supra note 96.
\textsuperscript{175} See supra note 86 and accompanying text.
\textsuperscript{176} See \textit{Fantasy Island}, 75 Philadelphia Magazine, March 1984 at 86 (Describing the state of conditions at the Three Mile Island plant, five years after the worst nuclear accident in American history).
reports of danger associated with the use of nuclear power,\textsuperscript{177} public support for nuclear power has dropped steadily; people throughout the nation are opposed to nuclear power for safety reasons.\textsuperscript{178} The possibility of another mishap similar to Three Mile Island, or a new environmental crisis spurned by neglect of stockpiling waste remains engrained in the consciousness of both scientist and civilian alike. State action to close nuclear plants out of environmental or even psychological concerns\textsuperscript{179} (arising from the stress associated with a hazard among the community), remains a viable and realistic alternative to states dissatisfied with nuclear power.

Under \textit{Pacific Gas}, such a state action would be subject to a preemption challenge. The \textit{Pacific Gas} Court stated in dicta that "the federal government maintains complete control of the safety and 'nuclear' aspects of the construction and operation of a plant."\textsuperscript{180} Hence, \textit{Pacific Gas} can be interpreted to hold that if a conflict would arise as to a judgment of whether nuclear power was "safe," the states would be preempted from pursuing a state action grounded in safety concerns.\textsuperscript{181} However, this dicta is subject to challenge on several grounds.

\textsuperscript{177} See e.g., 5 Atomic Plants Ordered Shut to Inspect Pipes for Cracks, \textit{N.Y. Times}, July 15, 1983 at 52, col. 1 (describing order to close five plants due to cracks in cooling pipes; order follows discovery of cracks in cooling pipes in thirteen other plants, seven of which were also closed). \textit{See also U.S. Sees Questions For Three Mile Island}, \textit{N.Y. Times}, May 21, 1983 at 9, col. 1 (describing conclusions of Nuclear Regulatory Commission staff members that they can no longer vouch for the integrity and ability of the operators of the Three Mile Island nuclear power plant. \textit{See, also Bleak Future Described For Nuclear Power}, San Francisco Chron. Feb. 7, 1984 (Polls show a drastic drop in public acceptance with twice as many people now opposing the building of new plants).

\textsuperscript{178} See e.g., Hundreds Arrested at New Hampshire Atom Protest, \textit{N.Y. Times}, May 2, 1977 at 1, col. 1; 150 Protestors at A-Plant Arrested, \textit{Los Angeles Times}, Aug. 7, 1983, at 3, col. 1. \textit{See also Silkwood v. Kerr McGee Corp., ___ U.S. ___, n.12, 104 S.Ct. 615, 639 n.12, in which Justice Powell acknowledged the dramatic increase in public concerns over all nuclear activities.}

\textsuperscript{179} \textit{See, Fantasy Island}, 75 Philadelphia Magazine, March, 1984, at 86. (Describing effects of accident on local populace); \textit{See also Metropolitan Edison Company v. People Against Nuclear Energy, ___ U.S. ___, 103 S.Ct. 1556 (1983). In that case, the Supreme Court reversed a finding by the Third Circuit that NEPA required the NRC to consider the psychological health damage from the risk of nuclear accidents to local residents that restarting one of the units would cause. Id. at ___, 103 S.Ct. at 1562-63.}

\textsuperscript{180} \textit{Pacific Gas at ___, 103 S.Ct. at 1726.}

\textsuperscript{181} \textit{See supra} note 70 and accompanying text.
First, as Justice Blackmun noted in the *Pacific Gas* concur-
rence,\textsuperscript{182} Congress has only decided how a plant should be built
and operated to protect against radiation hazards; the Atomic
Energy Act is void of any clear and manifest purpose to require
states to ignore dangers which pose an environmental threat, or
impose psychological stress on its citizens. Moreover, as the *Pa-
cific Gas* Court noted, the NRC has not determined that states
\textit{must} operate nuclear plants, only that it is safe to do so.\textsuperscript{183}

A challenge to a state action to close down a plant for safety
reasons would find strong support in the dicta of *Pacific Gas*,
where the majority stated:

At the outset, we emphasize that [section 25524.2]
does not seek to regulate the construction or op-
eration of a nuclear power plant. It would clearly
be impermissible for California to attempt to do
so, for such regulation, even if enacted out of non-
safety concerns, would nevertheless directly con-
flict with the NRC’s exclusive authority over
plant construction and operation. Respondents do
broadly argue however, that although safety regu-
lation of nuclear plants by states is forbidden, a
state may completely prohibit new construction
until its safety concerns are satisfied by the fed-
eral government. We reject this line of reasoning.
State safety regulation is not preempted only
when it conflicts with federal law. Rather, the fed-
eral 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 preemption is whether “the matter on
which the state asserts the right to act is in any
way regulated by the federal government.”\textsuperscript{184}

Clearly, the dicta in *Pacific Gas* is dangerously broad and
could deprive states of a lawful exercise of their police power. By
requesting the closure of a plant for safety reasons, California
would not be seeking to interfere with the technically difficult

\begin{itemize}
\item \textsuperscript{182} Pacific Gas at 1732-1733.
\item \textsuperscript{183} See id. at \underline{\_\_\_\_}, 103 S.Ct. at 1724.
\item \textsuperscript{184} Id. at \underline{\_\_\_\_}, 103 S.Ct. at 1726 (citation and footnote omitted).
\end{itemize}
job of operating a plant and containing the waste from it; rather, a state would be deciding that the physical health of its citizens endangered by potential radiation leaks and the intangible psychological problems created state-wide by the anxieties surrounding a potential public hazard are not worth the continued operation of a plant. As the Pacific Gas Court observed, states have been given the opportunity to impose more stringent standards in the area of air pollution, and siting and land use requirements. It appears arbitrary for the Pacific Gas Court to hold that California may prevent a nuclear power plant from being constructed in a densely populated or seismically unstable area and thereafter regulate emissions from the plant, but that same state could not protect its citizens for health and psychological reasons only because Congress, through its inaction, has failed to include such an express delegation of power in the Atomic Energy Act. Moreover, a state seeking to close a plant could argue that their action is a rejection of a source of electric power; clearly under section 271 a state has the power to make such a traditional regulatory decision. As long as it is uncertain what permanent disposal method the federal government will develop, the increasing volume of stored wastes poses an environmental hazard to its citizens of both present and future generations. A state should not be deprived of the power to decide what method of generating electricity is most appropriate for its environment, simply because of federal occupation of the safety of operating a plant.

B. Impact of the Pacific Gas Dicta After the Silkwood Decision

There are further considerations of consequences of the wide reaching dicta of the Pacific Gas court that the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. In Silkwood v. Kerr-McGee Corp. the Court concluded in a five to four decision that a state-authorized award of punitive dam-

185. See supra note 155, and accompanying text.
186. See supra note 117, and accompanying text.
187. See supra, note 59.
ages, which arose out of the escape of plutonium from a federally-licensed nuclear facility, was not preempted by the Atomic Energy Act or the Price Anderson Act. In Silkwood, the majority observed that the Pacific Gas holding "that the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states," was not dispositive of the issue of whether the state authorized award of punitive damages was preempted, since inter alia, "the right of the State courts to establish . . . liability . . . [was] maintained, even though [Congress] was aware of the NRC's exclusive authority to regulate safety matters.

In conjunction with this, while the majority noted that there would be instances in which the federal law would preempt the recovery of damages based on state law, the majority observed that "preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed, but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a dam-

190. An award of punitive damages was considered by the Tenth Circuit to be "regulatory" for two reasons. First, "any state action that competes with the AEC (NRC) in its regulation of radiation hazards "[is] impermissible." Silkwood, 667 F.2d 908, 923 (10th Cir. 1981). Second, because "a judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices . . . is not less intrusive than direct legislative acts of that state. Id.

191. Karen Silkwood was employed by Kerr McGee Nuclear Corp., a subsidiary of Kerr McGee Corp., as a laboratory analyst at an Oklahoma plant which fabricated plutonium fuel pins for use as reactor fuel in nuclear power plants. Silkwood was contaminated by plutonium over a three day period in 1974; on the third night she was killed in an unrelated accident. The administrator of her estate brought a diversity action, based on common law tort principles under Oklahoma law, in order to recover for the injuries to Karen's person and property. See, ___ U.S. ___, 104 S.Ct. 615, 618 (1984); See also RACHKE, THE KILLING OF KAREN SILKWOOD (1982)

192. Pub. L. 85-256, 71 Stat. 576 (1957). See Silkwood at ___, 104 S.Ct. at 623. "The Price Anderson Act was passed in response to the nuclear industry's concern over potentially bankrupting state-lawsuits arising out of a nuclear incident. The Act required that operators of a commercial facility obtain $60 million in private financial protection; the government would then provide indemnification for the next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident."

193. Pacific Gas at ___, 103 S.Ct. at 1726.
194. Silkwood at ___, 104 S.Ct. at 624.
195. Id. at ___, 104 S.Ct. at 625.
ages action would frustrate the objectives of the federal law." Hence, after *Silkwood*, the analysis of a majority of the Court does not appear to be an inquiry into whether a specific state action was expressly ceded to the states, but whether the state action will conflict with the federal standards or frustrate the purposes or objectives of the Atomic Energy Act.

C. *State Action to Close Nuclear Plants As An Obstacle To Congressional Intent*

Under both *Pacific Gas* and *Silkwood*, a reviewing court must consider whether the state action conflicts with federal law by making compliance with both laws impossible or by the state law standing as an obstacle to the accomplishment of a purpose of Congress. In addressing this problem, a court should not simply confine its inquiry to the question of whether both laws can be physically complied with, for it is clear that the utilities and the NRC have the capability of turning a plant off or keeping it on line. Rather, the real issues before a reviewing court are social, political and economic. In addressing such issues the court must consider the opposition of the people themselves to nuclear power, for such opposition has become increasingly vocal over the past decade. The court must also consider the concern of the state and its obligation to protect the unborn of future generations. In conjunction with this, however, the court must consider the reality of economics and the billions of dollars that have been invested in the industry to the utilities and the rate-payers themselves.

196. Id. at ___, 104 S.Ct. at 626.

197. In a strong three point dissent, Justice Powell, joined by the Chief Justice and Justice Blackmun, first reiterated the dicta in *Pacific Gas* that "Congress has occupied entirely the field of nuclear safety concerns." *Silkwood* at ___, 104 S.Ct. at 634-635. Second, Justice Powell noted that there was no express language in either the Atomic Energy Act or the Price-Anderson Act which allowed a state-authorized punitive damage award against the nuclear industry. Id. at ___, 104 S.Ct. at 637. Third, the dissenters rejected as unfounded the majority's reliance on 'indirect evidence' of a congressional intent not to preempt the state-authorized award. Id.

In a separate dissent, Justice Blackmun, joined by Justice Marshall, concluded that the *Silkwood* decision "wrecks havoc" with the federal regulatory system. Id., at ___, 104 S.Ct. at 627. In addressing the *Pacific Gas* decision, Justice Blackmun observed that "the fundamental teaching of *Pacific Gas* is that state regulation of nuclear power is preempted to the extent that its purpose is to regulate safety." Id. at 104 S.Ct. at 628.

198. See supra note 178.
Despite the language of the Pacific Gas court and the Silkwood dissent, for a number of reasons the issue is one of the states’ power to determine their destiny. Clearly, there is no express language in the Atomic Energy Act which states that the individual states must have nuclear power; the only edict from the federal government has been the NRC’s determination that nuclear power is “safe.” In conjunction with this, the reviewing court should consider that the Atomic Energy Act was drafted in the mid-1950’s in a different economic setting and at a time when no single member of Congress anticipated the waste problems that exist today. A review of the legislative history reveals that the federal government maintained strict control over the infant industry for defense purposes and to assure that the technical difficulties associated with commercial nuclear generation of electricity would be met. In light of serious waste problems associated with nuclear power, a court should not conclude that the purpose of Congress is to “promote nuclear power” simply because Congress has not rewritten the Atomic Energy Act.

It has been suggested that a reviewing court must also consider whether Congress constitutionally may exercise its power to force directly upon the states Congress’ choice as to how essential decisions regarding the conduct of integral governmental functions are to be made. In National League of Cities v. Usery, the United States Supreme Court found invalid Congress’ command (pursuant to its Commerce Clause authority) to state governments to pay certain state employees minimum wage. In Usery, the Court inquired as to whether the minimum wage attempted to “devour the essentials of state sovereignty,” and whether the determination of the minimum wage was “[a] function essential to separate and independent existence.” If the Usery court concluded that minimum wage was

---

199. Pacific Gas at ____, 103 S.Ct. at 1729.
200. See supra notes 1-7 and accompanying text.
202. Id. at 855. See United States v. Darby, 312 U.S. 100, 115 (1941) where the Court observed: “Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred by Congress by the Commerce Clause.”
203. Usery at 845 (quoting Mr. Justice Douglas, dissenting in Maryland v. Wirtz, 392 U.S. 133, 205 (1968)).
204. Usery at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580, (1911)).
a traditional aspect of state sovereignty, a reviewing court must also conclude that the manner in which a state will regulate the generation of electricity as a vital aspect to a state's separate and independent existence. Thus, even if a court finds that Congress has impliedly required California to accept and continue to operate nuclear reactors, proponents of nuclear power will have shown that this federal mandate is justified by "an extremely serious problem which endanger[s] the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." In light of the decline of the nuclear industry, and the public and state governmental opposition to nuclear power, a reviewing court should consider Congress's inaction as implied consent to a state's decision to reduce its dependence on nuclear power.

V. Conclusion

The United States Supreme Court's validation of section 25524.2 was premised on the state's traditional police power to regulate the need for and generation of electrical power. The preemption analysis employed in Pacific Gas may be viewed as a straightforward application of the Rice preemption test to an industry regulated primarily by the federal government. However, the unanimous decision in Pacific Gas suggests the Court's willingness to prohibit the powers of the States from regulating the construction and operation of a nuclear plant if the attempted regulation either conflicts with a federal determination as to the safety of a plant or if the states' law could conceivably interfere with the continued development of nuclear power. In light of the controversy surrounding the nuclear industry, the dicta in Pacific Gas will likely be subject to litigation in the future years.

Derek G. Howard *

---


* Third-year student, Golden Gate University School of Law.