Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission: Broadening the Scope of State Authority to Control the Development of Nuclear Energy

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NOTE

PACIFIC GAS AND ELECTRIC CO. V. STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION: BROADENING THE SCOPE OF STATE AUTHORITY TO CONTROL THE DEVELOPMENT OF NUCLEAR ENERGY

The authority to control nuclear energy was once within the exclusive province of the federal government.1 As states have acquired technical expertise, however, Congress has authorized the Nuclear Regulatory Commission (NRC)2 to delegate selected aspects of nuclear regulation3 to the states. Moreover, certain states have attempted to assume authority over aspects of nuclear regulation that Congress has not authorized the NRC to delegate.4


The growing participation of states in the regulation of nuclear energy, combined with the rapid growth of the nuclear energy industry, has complicated the law surrounding nuclear energy regulation. Despite this increasing complexity, prior to last term, the United States Supreme Court had never directly addressed the extent to which federal law preempts state attempts to regulate nuclear energy.

Recently, in Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, the Supreme Court attempted to clarify the division of nuclear regulatory power between federal and state government. The Pacific Gas Court upheld a California statute that prohibits construction of new nuclear power plants until the federal government develops and approves a safe method of nuclear waste disposal.

Analysis of the Pacific Gas decision reveals that the Court reaffirmed the federal government's exclusive regulatory authority over nuclear energy's unique safety issues. Yet, that analysis also reveals that Pacific Gas broadened the legitimate scope of state authority by permitting California to ban con-

5. The first commercially operated power reactor began operating in 1953. E. Rolph, Nuclear Power and the Public Safety 55 (1979). By 1974, 46 nuclear power plants were licensed to operate in the United States, 54 more were being built, and an additional 133 plants were at various planning stages. Id. at 188.

6. Several commentators have written on the issue of state regulation of nuclear power. See, e.g., Murphy & LaPierre, Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption, 76 Colum. L. Rev. 392 (1976) (questioning whether states' attempts to declare moratorium on nuclear reactors will survive judicial review); Parenteau, Regulation of Nuclear Power Plants: A Constitutional Dilemma for the States, 6 Env'tl. L. 675 (1976) (state regulations might be carefully drawn so as to avoid preemption); Tribe, California Declines the Nuclear Gamble: Is Such a State Choice Pre-empted?, 7 Ecology L.Q. 679 (1979) (California legislation should not be preempted because it is unconcerned with protection against radiation hazards); Note, Nuclear Power Regulation: Defining the Scope of State Authority, 18 Ariz. L. Rev. 987 (1976) (as risks and benefits of nuclear power become clearer, courts may allow greater state participation in regulation); Note, Nuclear Power and Preemption: Opportunities for State Regulation, 27 Clev. St. L. Rev. 117 (1978) (states risk preemption by imposing safety standards more stringent than federal government's).


struction of nuclear power plants for economic reasons. In addition to analyzing the Court’s decision in *Pacific Gas*, this Note will suggest an alternative analysis that would uphold California’s statute, while more clearly delineating the division of regulatory authority between state and federal government.

**BACKGROUND**

The doctrine of federal preemption is based upon the supremacy clause of the United States Constitution. Under that doctrine, a state law is invalid if it conflicts with federal legislation or regulation. This conflict often becomes apparent when congressional intent is examined. Accordingly, when the conflict between state and federal legislation is not obvious on the face of the laws, courts look to the intent of Congress to determine whether a state law is preempted by federal legislation or whether the law is a valid exercise of concurrent authority.

Congressional intent to preempt state law may be either explicit or implicit. Such intent is explicit when the federal statute declares that it supersedes any and all state laws dealing with the same subject matter. If Congress fails to include such explicit language in a statute, courts nevertheless may infer a congressional intent to preempt state law. Such inferences generally occur when the “scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” Congressional intent to preempt also may be inferred when

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10. The supremacy clause states: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; any the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, para. 2; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (New York law regulating interstate ferry traffic preempted by federal act regulating coasting trade).

12. See Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963) (in determining whether Congress had precluded state enforcement of state laws “[t]he purpose of Congress is the ultimate touchstone’’); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (“Congress may . . . take unto itself all regulatory authority . . ., share the task with the States, or adopt as federal policy the state scheme of regulation . . . The question in each case is what is the purpose of Congress was.”).
13. See, e.g., Jones v. Ruth Packing Co., 430 U.S. 519, 525 (1977) (federal law which explicitly prohibited requirements in addition to, or different from, federal requirements preempted California law regulating weights and measures stated upon packaged commodities).
there is a paramount federal interest in a particular field.\textsuperscript{16}

The intentions of Congress, however, are not the only guidelines that courts have employed to preempt state laws. For example, a federal law will be upheld, and a conflicting state law preempted, if compliance with both laws is impossible.\textsuperscript{17} A state law will also be preempted if it "stands as an obstacle" to the attainment of Congress's goals or objectives.\textsuperscript{18} Consequently, a preemption analysis of a state nuclear energy regulation must begin with a discussion of federal nuclear power legislation.

Federal regulation of nuclear energy developed in response to the military potential of atomic fission.\textsuperscript{19} To prevent the diversion of nuclear materials and technology to nonpeaceful uses, Congress passed the Atomic Energy Act of 1946 (1946 Act),\textsuperscript{20} which created the Atomic Energy Commission (AEC). Although the stated policies of the 1946 Act included encouraging the development of peaceful uses for nuclear energy, the primary goal of the Act was to maintain the defense and security of the United States.\textsuperscript{21} To achieve this goal, the 1946 Act established a federal monopoly over all aspects of nuclear energy.\textsuperscript{22}

Under the federal monopoly, all research in the field of nuclear power was conducted under the auspices of the federal government, either by federal agencies or private industry under government contracts.\textsuperscript{23} In the early 1950's, Congress recognized that reliance solely on governmental research and development had not resulted in sufficiently rapid progress toward the goal of developing peaceful uses for nuclear energy.\textsuperscript{24} Instead, Congress concluded,

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\item \textsuperscript{16} See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (when Congress has enacted laws for regulation of aliens, dominant federal interest requires that state law in same field yield to federal law).
\item \textsuperscript{17} Perez v. Campbell, 402 U.S. 637 (1971) (Arizona law preempted because it was impossible to comply with both Arizona law, which provided that discharge in bankruptcy following an automobile accident shall not relieve judgment debtor, and federal Bankruptcy Act, which provides that a discharge in bankruptcy fully discharges debtor).
\item \textsuperscript{18} Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Pennsylvania act requiring alien registration preempted by federal law because it was as an obstacle to accomplishment of purposes and objectives of Congress).
\item \textsuperscript{19} E. ROLPH, supra note 5, at 12. For a history of the early development of nuclear power, see generally Hogerton, \textit{The Arrival of Nuclear Power}, 218 Sci. Am. 21 (1968). For a history of federal regulation of nuclear power, see generally W. BERMAN & L. HYDEMAN, supra note 1, at 64-149; E. ROLPH, supra note 5, at 21-29.
\item \textsuperscript{21} See Atomic Energy Act of 1946, Pub. L. No. 79-585, § 1(a) 60 Stat. 755, 756 (current version at 42 U.S.C. § 2011 (1976 & Supp. V 1980)). The Act stated as follows: [It] is hereby declared . . . that, subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall . . . be directed toward improving the public welfare . . . and promoting world peace.
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optimum development would result from a partnership between the federal government and private industry. Consequently, Congress enacted the Atomic Energy Act of 1954 (1954 Act).

The 1954 Act terminated the federal monopoly over nuclear technology by allowing private ownership of nuclear reactors, private use of nuclear fuel, and industrial access to technical information. To a greater extent than its predecessor, the 1954 Act emphasized peaceful uses of nuclear energy. In addition, the later act reflected congressional awareness that protection of the public’s health and safety should be a paramount concern of the AEC. Nevertheless, the 1954 Act did not fully clarify the AEC’s role in regulating the nuclear industry for public safety. In particular, the AEC was given no guidelines concerning the regulation of radiation hazards. Furthermore, the 1954 Act did not address the relationships between the AEC, the states, and other agencies, with respect to health and safety matters.

In 1959, Congress amended the 1954 Act to delineate the relationship between the AEC and the states. One purpose of the 1959 amendments was to clarify the nuclear energy regulatory responsibilities of both the AEC and the states. A second purpose of those amendments was to establish a cooperative program between the AEC and the states to control radiation hazards. Subsection 274(b) of the 1959 amendments allowed the AEC to enter into agreements that would permit states to assume regulatory authority over specified nuclear materials. Subsection 274(c), however, mandated that...

25. See id.
28. Id. § 2073(a).
29. Id. § 2163.
32. The only section of the 1954 Act dealing with the relationship between the AEC and states or other agencies was § 271. Section 271 provided that the 1954 Act was not to affect the authority of state, local, or federal agencies with respect to the generation, sale, or transmission of electric power produced by nuclear facilities. Id. § 2018.
35. See id. § 2021(a)(2), (3).
36. Id. § 2021(b). This section authorizes the AEC to enter into agreements with the governor of any state. These agreements provide for the AEC to discontinue regulation of specified materials and give the state authority to regulate those materials. The materials subject to such a cooperative agreement are byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. Id.
the AEC retain authority over the construction and operation of nuclear power plants, the import and export of nuclear materials, and the disposal of nuclear waste materials. Yet, Congress did not intend the 1959 amendments to affect state authority to regulate AEC licensees in areas of traditional state power. Accordingly, subsection 274(k) declared that the amendments were not to be construed as affecting state authority to regulate all aspects of nuclear energy other than radiation hazards.

Subsections 274(b), (c), and (k) of the 1959 amendments have become the focal points of debate as states have enacted a variety of measures in efforts to control nuclear energy within their borders. In response to these efforts, the nuclear industry has asserted that subsection 274(c) totally prohibits states from regulating any facet of nuclear plant construction and operation, nuclear material importation and exportation, or nuclear waste disposal. In contrast, the states have contended the subsection 274(k) allows them to regulate nuclear energy for any reason unrelated to radiation safety.

Generally, state court decisions addressing the issue of federal preemption of state nuclear energy regulations have invalidated state laws aimed at radiation hazards. Conversely, state regulations that are not directed at radia-

37. Id. § 2021(c).
38. See S. REP. No. 870, 86th Cong., 1st Sess. 2, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2872, 2882-83. Thus, the amendments were not intended to impair state authority to regulate activities of AEC licensees with respect to economics and non-radiation related health and safety concerns. Id.
43. See, e.g., Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App. 3d 800, 284 N.E.2d 342 (3rd Dist. 1972) (state statute authorizing regulation of radiation from nuclear plants preempted by federal statute); Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975) (state courts preempted by federal law from considering plaintiff's allegation regarding the workability of a nuclear reactor's emergency core cooling system); Missouri
tion hazards generally have been upheld. Lower federal courts have similarly found preemption of state laws regulating radiation hazards. Prior to *Pacific Gas*, the Supreme Court had never directly confronted the issue of state regulation of nuclear power plants.

*Northern States Power Co. v. Minnesota* presented the Supreme Court with an opportunity to address the state regulation issue. The Court declined this opportunity and instead affirmed, without opinion, the decision of the United States Court of Appeals for the Eighth Circuit. The court of appeals held that Minnesota Pollution Control Agency regulations were preempted by the Atomic Energy Act. The preempted state regulations imposed requirements, stricter than those imposed by the AEC, on radioactive water and gas emissions from nuclear power plants. Relying on subsection 274(c) of the 1959 amendments, which requires the AEC to retain control of the construction and operation of nuclear plants, the Eighth Circuit reasoned that Minnesota's attempt to control radioactive emissions was an effort to regulate nuclear power plant operation. Hence, in *Northern States Power*, the court concluded that subsection 274(k) of the 1959 amendments implicitly reserved regulation of radiation hazards to the federal government, because that statutory provision explicitly allowed state regulation for only non-radiation related purposes.

The Supreme Court faced a different issue in *Train v. Colorado Public...*

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44. See, e.g., *Northern Cal. Ass'n v. Public Util. Comm'n*, 61 Cal. 2d 126, 390 P.2d 200, 37 Cal. Rptr. 432 (1964) (state may consider safety questions apart from radiological hazards such as location of nuclear plant near active earthquake fault zone); *Marshall v. Consumers Power Co.*, 655 Mich. App. 237, 237 N.W.2d 266 (1975) (state is not preempted from considering non-radiological hazards of nuclear plant, such as the creation of steam, fog, or ice from cooling pond, under common law nuisance theory).

45. See cases cited supra note 7; *In re TMI Litig.* Gov't Entities Claims, 544 F. Supp. 853 (M.D. Pa. 1982) (federal law preempts claim alleging public nuisance arising out of nuclear accident at Three Mile Island nuclear plant); *United States v. New York*, 463 F. Supp. 604 (S.D.N.Y. 1978) (New York City requirement that university obtain a city operating license to operate a nuclear reactor was preempted by federal authority to license for radiological health and safety).

46. 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1036 (1972).

47. 405 U.S. 1035 (1972). The Supreme Court's affirmance of *Northern States Power* provided little guidance for the lower federal courts. A summary affirmance is an affirmance only of the judgment below and "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel v. Williams*, 457 U.S. 55, 64 n.13 (1982).

48. 447 F.2d at 1154.

49. Id. at 1149.

50. Id.

51. Id. at 1150.
Interest Research Group. Train did not address the relationship between the authority of the AEC and the states. Instead, the Train decision addressed the authority of the AEC in relation to another federal agency, the Environmental Protection Agency (EPA). In Train, a public interest group claimed that under the Federal Water Pollution Control Act, the EPA had responsibility for regulating the emission of nuclear fuel materials into waterways. Refusing to include nuclear fuel materials on the agency’s list of monitored substances, the Administrator of the EPA contended that inclusion of such materials would infringe upon the AEC’s authority. The Supreme Court agreed with the EPA Administrator that the control of nuclear fuel materials was within the exclusive province of the AEC.

The Northern States Power and Train decisions suggested how the Court might later interpret the relationship between the states and the federal government regarding control over nuclear energy. The Supreme Court’s action in Northern States Power indicated that there was a limit to the states’ authority to regulate nuclear power; it also revealed that Minnesota’s regulation of radioactive emissions from nuclear plants went beyond that limit. Yet, the Court’s summary affirmance did not delineate the bounds of valid state authority. Similarly, while it did not directly address the question of state authority, Train revealed that certain aspects of nuclear regulation were to be exercised only by the federal agencies responsible for regulating nuclear power. The Train Court, however, did not catalogue all of the aspects of nuclear regulation that were within the exclusive province of such agencies. It was not until 1983, in Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, that the Supreme Court further defined the extent of state authority to regulate nuclear power.

FACTS AND PRIOR PROCEEDINGS

In 1974, the California legislature enacted the Warren-Alquist State Energy Resources Conservation and Development Act (Warren-Alquist Act), which established the State Energy Resources Conservation and Development Commission (Energy Commission) to coordinate energy research and regulation at the state level. The Act requires that a utility obtain certification from

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52. 426 U.S. 1 (1976).
54. 426 U.S. at 4.
55. Id. at 26.
56. Until the Pacific Gas decision in 1983, Northern States Power and Train were the only Supreme Court cases dealing with the nature of federal authority under the Atomic Energy Act.
57. See supra notes 46-51 and accompanying text.
58. 426 U.S. at 23-24 & n.20.
60. CAL. PUB. RES. CODE §§ 25000-25968 (West 1977).
61. Id. § 25200. To fulfill its statutory obligations, the Energy Commission was given authority over energy planning, conservation, resource management, research and development, and the regulation of power plants. Id. § 25216.
the Energy Commission before constructing or modifying any power plant.\textsuperscript{62} In 1976, the California legislature amended the Warren-Alquist Act by adding three sections applying only to nuclear power plants.\textsuperscript{63} One of these amendments, section 25524.2 of the California Public Resources Code, prohibits certification of a nuclear plant until the state legislature determines that the federal government has adopted a method for the permanent disposal of high-level nuclear waste.\textsuperscript{64}

In 1978, Pacific Gas and Electric and Southern California Electric (the utilities) filed suit in the United States District Court for the Eastern District of California, challenging several sections of the Warren-Alquist Act, including section 25524.2.\textsuperscript{65} The utilities alleged that California's plan for

\textsuperscript{62} The certification procedure is set forth in \textit{Cal. Pub. Res. Code} §§ 25500-25542 (West 1977). The procedure, which is required for non-nuclear as well as nuclear power plants, encompasses two steps. First, any utility planning the construction or modification of a power plant must file a notice of intention with the Energy Commission. This notice must include information about the need for additional generating facilities, the proposed design of the facilities, and the location and merits of alternative sites for the facilities. \textit{Id.} §§ 25502, 25504. The Energy Commission then is required to hold hearings and make findings based on the data gathered by the Energy Commission. \textit{Id.} §§ 25505-25516.5 If the notice of intention is approved, the utility must apply to the Energy Commission for certification before beginning construction. \textit{Id.} § 25517. The application must contain a detailed description of the proposed plant's design, construction, operation, safety, and reliability, as well as a specification of fuel to be used and a projection of fuel and generating costs. \textit{Id.} § 25520.

Once the utility has applied for certification, there is a second set of Energy Commission hearings. The Commission then prepares an environmental impact statement, invites comments from local agencies and the California Public Utility Commission, and makes recommendations regarding rate structure and economic reliability. \textit{Id.} § 25579. Finally, the Energy Commission must issue a written decision, including specifications regarding how the plant is to be designed and operated to protect public health and safety and environmental quality. \textit{Id.} § 25523.

\textsuperscript{63} \textit{Id.} § 25524.1-3. These three 1976 amendments became known as the "Nuclear Laws." Section 25524.1 prohibits construction of nuclear plants requiring the reprocessing of fuel rods, until the federal government approves a technology for reprocessing such rods. In addition, § 25524.1 requires that nuclear plants have temporary storage for nuclear waste materials. \textit{Id.} § 25524.1. Section 25524.3 prohibits construction of nuclear plants until the Energy Commission completes a study of underground and berm (earthen mound) containment of nuclear reactors. \textit{Id.} § 25524.3. For the text of § 25524.2, see infra note 64.


No nuclear fission thermal power plant . . . 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 the reasons therefore pursuant to paragraph (a) to the Legislature.

\textit{Id.}

regulating the certification of nuclear power plants was preempted by the Atomic Energy Act of 1954. The district court ruled that the challenged sections of the Warren-Alquist Act were preempted by the Atomic Energy Act of 1954 and, consequently, granted the utilities' motion for summary judgment on that issue. Relying upon Northern States Power, the court concluded that the Atomic Energy Act of 1954 gave the federal government exclusive authority to regulate the construction and operation of nuclear power plants.

The Energy Commission appealed the district court decision to the United States Court of Appeals for the Ninth Circuit, which held that only section 25524.2 and one other challenged section were ripe for review; the remaining sections challenged by the utilities were declared to be either moot or not ripe for review. Reversing the district court's summary judgment with respect to the sections found ripe for review, the Ninth Circuit held that the challenged sections were not preempted by federal regulation. In contrast to the district court ruling, the Ninth Circuit interpreted the Atomic Energy Act of 1954 as indicating Congress's intent to preempt only state regulation of the radiation hazards associated with nuclear power. According to the court of appeals, state regulation for purposes other than control of radiation hazards specifically was not preempted. Therefore, whether

66. 489 F. Supp. at 700. Pacific Gas and Electric asserted standing to sue based on an injury in fact argument, claiming that the Warren-Alquist Act and its 1976 amendments forced the company to cancel plans for a specific nuclear plant on which it had already spent several million dollars in preliminary planning. Id. at 701. Similarly, Southern California Electric claimed it had abandoned tentative plans to build two nuclear plants because of the uncertainties created by California's regulatory scheme. Id. at 702.
67. Id. at 704.
68. 447 F.2d 1143 (8th Cir. 1977). For a discussion of Northern States Power, see supra notes 46-51 and accompanying text.
69. 489 F. Supp. at 703. Based on the Supreme Court's affirmance of Northern States Power, the district court rejected the contention that the 1959 amendments to the Atomic Energy Act ended exclusive federal control over the construction and operation of nuclear plants. Id.
71. 659 F.2d at 917-18. The second section the court found to be ripe for review was § 25503, which requires a utility to submit three alternate sites in its notice of intention to construct or modify a plant. See Cal. Res. Code § 25503 (West 1977 & Supp. 1980).
72. 659 F.2d at 915-18. Section 25524.3 imposed a moratorium on the construction of nuclear plants until a study of the feasibility of underground and berm (earthen mound) containment was submitted to the California legislature. Since the specified report was adopted before the Ninth Circuit's decision, the challenge to § 25524.3 was declared moot. The remaining statutes challenged in the district court were held not ripe for review either because the issues presented required further factual development, or because the statutes had no present effect. Id. at 916-17.
73. Id. at 928.
74. Id.
75. Id. at 922.
76. Id. at 921. In support of its finding that state regulation for purposes other than radiation control is not preempted, the court of appeals cited examples of valid authority in other
the challenged sections were aimed at radiation hazards was crucial to the appellate court's decision.

To determine whether the challenged sections were directed at radiation hazards, the Ninth Circuit examined the legislative history of the 1976 amendments to the Warren-Alquist Act.\textsuperscript{77} The court relied on a report, published by the California Assembly Committee on Resources, Land Use, and Energy (the Committee),\textsuperscript{78} which classified the problem of no federally approved method of nuclear waste disposal as an economic, and not a safety related, problem.\textsuperscript{79} According to the court, the Committee report determined that the lack of an approved method of waste disposal could disrupt the operation of nuclear power plants.\textsuperscript{80} This potential for disruption led the Committee to conclude that without an approved waste disposal method, nuclear power is an uneconomical and uncertain source of energy.\textsuperscript{81} Thus, the Ninth Circuit concluded that the California legislature had chosen to require utility companies to rely upon other energy sources until "the economic uncertainties associated with nuclear power are resolved."\textsuperscript{82}

Although the Ninth Circuit determined that Congress neither explicitly nor implicitly intended to preempt the challenged state statutes,\textsuperscript{83} the court subjected the statutes to two additional tests of federal preemption. First, the court examined the statutes to determine if compliance with both federal and state regulations was impossible; if so, the state statutes would be preempted.\textsuperscript{84} In addition, the court held that the statutes would be preempted if they stood as an obstacle to achievement of federal objectives.\textsuperscript{85}

The court of appeals summarily concluded that compliance with both federal and state regulations was possible.\textsuperscript{86} The court then examined Congress's objectives in passing the Atomic Energy Act of 1954 to determine

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\item \textsuperscript{77} 659 F.2d at 924-25.
\item \textsuperscript{78} The California Assembly Committee on Resources, Land Use, and Energy was the committee that introduced the bills which ultimately became § 25524.1-3. Id. at 924.
\item \textsuperscript{79} Id. at 924-25.
\item \textsuperscript{80} Id. at 924. For example, without an approved method for waste disposal, a nuclear power plant may be forced to shut down operation when it runs out of temporary storage space for nuclear waste. Id. See generally R. NADER & J. ABOTTS, THE MENACE OF NUCLEAR ENERGY, 143-47 (1977).
\item \textsuperscript{81} 659 F.2d at 924.
\item \textsuperscript{82} Id. at 925.
\item \textsuperscript{83} Id. at 926.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. On appeal to the Supreme Court, this contention was apparently uncontested by the parties.
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whether California's challenged statutes impermissibly obstructed those objectives. According to the court, Congress "struck a balance between state and federal power to regulate." This balance indicated that Congress did not intend to promote nuclear energy at all costs. In addition to the Atomic Energy Act of 1954, the court of appeals considered recent Congressional action to be indicative of the "balanced approach." In several instances, Congress had explicitly allowed states to regulate nuclear power plants. Thus, the Ninth Circuit concluded that the challenged California statutes did not obstruct congressional goals.

THE SUPREME COURT OPINION

In 1982, the United States Supreme Court granted Pacific Gas and Electric Company's petition for certiorari. The Court limited its inquiry to the issue of the ripeness and validity of two sections of the 1976 amendments to the Warren-Alquist Act. By upholding the Ninth Circuit's conclusion that the issues surrounding subsection 25524.1(b) were not ripe for review, the Pacific Gas Court reached the merits only of the utilities' challenge to
section 25524.2. That challenge presented the Court with the issue of whether section 25524.295 was preempted by federal law.

In holding that section 25524.2 was not preempted by federal law,96 the Court ruled that states have the authority to prohibit construction of nuclear power plants when such prohibitions have an economic rationale.97 To reach its holding, the Court addressed three distinct preemption issues.

First, the Court considered whether Congress intended to preempt state nuclear energy regulations that condition new plant construction upon the availability of a federally approved waste disposal site. The Court examined the Atomic Energy Act of 1954, its history, and its amendments, and rejected the utilities' contention that the Act was "intended to preserve the federal government as the sole regulator of all matters nuclear. . . ."98 Instead, the Court stated that Congress intended to establish a dual regulatory system in the field of nuclear energy.99 Under this system, the federal government regulated the radiation safety aspects of the construction and operation of nuclear plants while the states retained their authority over issues of need, reliability, cost, and related traditional state concerns.100

Acknowledging this division of regulatory authority, the Pacific Gas Court next declared that section 25524.2 was not an attempt "to regulate the construction or operation of a nuclear power plant";101 such a regulation would conflict with exclusive Nuclear Regulatory Commission102 authority over plant construction and operation and, hence, would be preempted.103 Furthermore, the Court stated that a statute, such as section 25524.2, would be preempted if it were enacted to regulate safety concerns because the federal government has exclusive authority over radiation safety.104 The Supreme Court concluded, however, that Congress did not intend to preempt laws prohibiting the construction of nuclear plants if those laws were directed toward concerns other than radiation hazards.105 Accordingly, the existence of a non-safety rationale for section 25524.2 became a dispositive factor in the Pacific Gas holding.

To determine whether a non-safety rationale existed, the Pacific Gas Court reviewed the California legislative report upon which the Ninth Circuit relied

95. Section 25524.2 conditioned certification of new nuclear plants upon a finding by the Energy Commission that the United States had approved a technology for the disposal of nuclear waste. See supra note 64.
96. 103 S. Ct. at 1732-33.
97. Id. at 1731-32.
98. Id. at 1722.
99. Id. at 1726.
100. Id. Traditional state concerns include determinations regarding land use, ratemaking, and the type of generating facilities to be licensed. Id.
101. Id.
102. See supra note 2.
103. 103 S. Ct. at 1726.
104. Id. at 1726-27. The Court, however, excepted the limited powers expressly delegated to the states by the federal government. See supra note 3.
105. 103 S. Ct. at 1725-26.
to conclude that section 25524.2 was directed at economic concerns.\textsuperscript{106} Although the utilities contested the Ninth Circuit’s interpretation,\textsuperscript{107} the Supreme Court adopted California’s avowed economic purpose as the rationale for section 25524.2.\textsuperscript{108} Consequently, the Court concluded that the statute did not intrude upon the exclusive federal authority existing under Congress’s dual regulatory system.\textsuperscript{109}

Another preemption issue that the \textit{Pacific Gas} Court addressed was whether section 25524.2 conflicted with federal regulation of nuclear waste disposal.\textsuperscript{110} The Court determined that the responsibilities Congress delegated to the Nuclear Regulatory Commission and the Department of Energy established exclusive federal authority in the field of nuclear waste disposal.\textsuperscript{111} Nuclear Regulatory Commission regulations, however, were directed toward ensuring that nuclear waste storage and disposal were safe, not necessarily that they were economical.\textsuperscript{112} Because the Court accepted the rationale that section 25524.2 was directed at economic problems, the Court found no conflict with Nuclear Regulatory Commission authority to provide safe nuclear waste disposal.\textsuperscript{113} Moreover, the Court emphasized that in enacting section 25524.2, California had not sought to impose its own standards on nuclear waste disposal, but rather it had recognized that it was the federal government’s responsibility to resolve the nuclear waste storage and disposal problem.\textsuperscript{114}

\textsuperscript{106} Id. at 1727; see also supra note 78 and accompanying text.
\textsuperscript{107} The petitioner-utilities and the United States, as amici curiae, presented four arguments. First, they contended that § 25524.2 was not concerned with the economics of nuclear power because it failed to consider the cost of permanent disposal once a technology had been approved by the federal government. Brief of United States as amicus curiae at 22 n.23, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 103 S. Ct. 1713 (1983). The Court dismissed this contention by noting that cost estimates for the disposal of nuclear waste cannot be made until a technology has been selected. 103 S. Ct. at 1727.

Second, the amici curiae maintained that if California was concerned with economics, it would have prohibited California utilities from building nuclear power plants outside of the state. The Court found no indication that California utilities were planning to build plants outside the state and concluded that California need not solve purely hypothetical problems. Id.

Third, the United States and the utilities suggested that the presence of another body, the California Public Utilities Commission, which considers the economies of proposed power plants, indicated that § 25524.2 could not have been directed toward economic concerns. According to the Court, the existence of a procedure to determine economic reliability on a case-by-case basis does not preclude a state from making judgments that apply in all circumstances. Id.

Finally, the amicus curiae claimed that because § 25524.2 arose in response to an anti-nuclear public referendum, and because §§ 25524.1 and 25524.3 seemed to have been written as safety measures, § 25524.2 must have been enacted in response to safety concerns. In response, the Court declared that the intent behind provisions not before it did not taint § 25524.2. Id.

\textsuperscript{108} 103 S. Ct. at 1727.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1729. Petitioners claimed that storage and disposal of nuclear waste was exclusively regulated by federal authority and that § 25524.2 infringed upon that exclusive authority. Id.
\textsuperscript{111} Id. at 1730.
\textsuperscript{112} Id. at 1729-30.
\textsuperscript{113} Id. at 1730.
\textsuperscript{114} Id. In addition, the Court concluded that passage of the Nuclear Waste Policy Act
The final preemption issue addressed by the Pacific Gas Court was whether section 25524.2 impermissibly frustrated the goals or objectives of Congress. The Court examined the Atomic Energy Act and other legislation to determine Congress's objectives with respect to nuclear energy. Although the Supreme Court disagreed with part of the Ninth Circuit's interpretation of Congress's objectives in this area, it accepted the lower court's conclusion that "the promotion of nuclear power is not to be accomplished 'at all costs.'" Moreover, the Court noted that Congress has given the states authority to slow or stop the development of nuclear power for economic reasons. The Court reasoned that because Congress has allowed the states to retain this authority, it was for Congress, and not for the courts, to determine when this state authority obstructs a federal objective.

The Pacific Gas Court found section 25524.2 to be within the state's legitimate authority to regulate nuclear power. Additionally, the Court concluded that by enacting section 25524.2, California had not attempted to enter the exclusively federal province of nuclear waste disposal regulation. Finally, the Court stated that Congress, not the Court, should determine what kind of state regulation obstructs congressional objectives. Consequently, the Supreme Court held section 25524.2 to be a valid exercise of California's authority to regulate nuclear power.
According to the Pacific Gas Court, the classification of section 25524.2 was determinative.\textsuperscript{125} The Court would have found section 25524.2 preempted had it been unable to establish a non-safety rationale for the challenged law.\textsuperscript{126} Instead, the Court concluded that an economic rationale supported section 25524.2.\textsuperscript{127}

This conclusion was significant for two reasons. First, the finding of an economic rationale for section 25524.2 was significant because it indicated the Supreme Court's acceptance of the proposition that nuclear waste disposal is an economic problem. Although it has been acknowledged that disruption of the nuclear fuel cycle has economic consequences,\textsuperscript{128} the attention given to the issue of nuclear waste storage and disposal has most often focused on the hazards to public safety, rather than on the cost of generating electricity.\textsuperscript{129} Indeed, one study concluded that the costs of spent fuel storage and disposal would not contribute substantially to the cost of electricity.\textsuperscript{130} The Pacific Gas Court, however, seemed to accept the idea that economic consequences are a primary reason for concern over nuclear waste disposal.\textsuperscript{131} Thus, the Court's acceptance of an economic rationale represented a departure from the predominant perception of the nature of the nuclear waste disposal issue.

Second, finding an economic rationale for section 25524.2 was significant because the Supreme Court did not attempt to determine California's legislative motive or intent in enacting the law. Although the Court referred to the legislative history of section 25524.2\textsuperscript{132} and cited the Ninth Circuit's interpretation of that section,\textsuperscript{133} the Court did not attempt to ascertain independently the state's true motive.\textsuperscript{134} The Court's failure to do so was consistent with the established view that the Supreme Court should not inquire to permit construction belonged to the states, and that the decision should include a consideration of nuclear energy's safety risks. \textit{Id.} (Blackmun, J., concurring).

\textsuperscript{125} \textit{Id.} at 1726.

\textsuperscript{126} \textit{Id.} at 1726-27. As the Court declared, "A state moratorium on nuclear construction grounded in safety concerns falls squarely in the prohibited field." \textit{Id.}

\textsuperscript{127} \textit{Id.} at 1728.

\textsuperscript{128} See R. NADER \& J. ABBOTS, supra note 80, at 147.

\textsuperscript{129} See, e.g., \textit{id.} at 148-50; Cohen, \textit{The Disposal of Radioactive Wastes from Fission Reactors}, 236 Sci. Am. 21 (June 1977). It has also been noted that it is virtually impossible to separate health and safety issues from the economic issues of nuclear waste. Murphy \& LaPierre, \textit{supra} note 6, at 453.


\textsuperscript{131} \textit{103 S. Ct.} at 1727-28; see also \textit{supra} text accompanying notes 106-09.

\textsuperscript{132} \textit{103 S. Ct.} at 1727.

\textsuperscript{133} \textit{Id.} (citing Pacific Legal Found. v. State Energy Resources Conservation \& Dev. Comm'n, 659 F.2d 903, 925 (9th Cir. 1980)).

\textsuperscript{134} See \textit{id.} at 1728. The Pacific Gas Court refused to undertake this task for two reasons. First, it noted the difficulty inherent in ascertaining the collective motive of a group of individuals. Second, the Court found such an inquiry to be pointless because the state had sufficient authority to stop construction of nuclear power plants on economic grounds. \textit{Id.}
into legislative motive.\textsuperscript{135} Despite contentions that it is proper for the Court to inquire into legislative motive,\textsuperscript{136} whether California was truly motivated by economic concerns seemed immaterial to the Pacific Gas Court's holding.

Although the Court did not independently ascertain California's true motive, the legislative history of section 25524.2 suggested what the Energy Commission had argued: the regulation was aimed at economic problems. Yet, because the Pacific Gas Court failed to disclose whether it was influenced by the rationale proffered by the State of California, it is uncertain whether the state law would have been upheld regardless of the apparent aims of the state legislature. If the Supreme Court applied a "rational relation" test,\textsuperscript{137}

\textsuperscript{135} See, e.g., Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970). Professor Ely suggests that judicial inquiry into motive is appropriate in two situations. First, inquiry is appropriate when the challenged governmental choice is random. A random choice involves selecting a group for different treatment when there is no basis for selecting one particular group as more qualified than another. Examples of random choices are the selection of jurors and the drawing of boundary lines for voting districts. \textit{Id.} at 1230-35.

Second, inquiry into motive is appropriate when the attacked governmental choice is discretionary. A discretionary choice is one in which the government must make a value choice, such as determining the appropriate attire for high school students, or one in which the government must select among equally acceptable goals, such as determining tax rates and subsidies. Even in these instances, when inquiry into motive is appropriate, the existence of an illicit motive does not invalidate the choice; instead, it triggers the need for a legitimate justification. In most cases, a legitimate justification is a rational relationship between the choice under attack and a legitimate goal. If the group disadvantaged by the choice is a suspect class, then legitimate justification will require a compelling defense of the governmental choice. In all other cases, Professor Ely maintains, inquiry into legislative motive is inappropriate because a legitimate justification for the governmental choice is required from the beginning. Hence, there is no need to investigate the legislative motivation. \textit{Id.} at 1235-49.

The governmental choice made under § 25524.2, and challenged in Pacific Gas, was neither random nor discretionary as those terms are used by Professor Ely. Therefore, his model merely required a legitimate justification for the choice, and inquiry into California's motive was not appropriate. The Court found an economic rationale to be a legitimate justification for § 25524.2; consequently, § 25524.2 was a valid governmental choice. \textit{See also} A. BICKEL, THE LEAST DANGEROUS BRANCH 208-21 (1962). \textit{But see} Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95 (1971). Professor Brest's conclusion is that courts should inquire into motive whenever a governmental action is alleged to be the result of an illicit motive. If clear and convincing evidence shows that the illicit motive played an affirmative role in the decision-making process, then the action should be invalidated. The illicit motive need not have been the sole or even dominant factor in the decision. \textit{Id.} at 130-31.

Under Professor Brest's model, the result in Pacific Gas might have been different. While the Court found an economic rationale for § 25524.2, it did not state whether safety motives played an affirmative role in its passage. If safety motives affected the passage of § 25524.2, then it would be invalid under Professor Brest's approach.

\textsuperscript{136} The Supreme Court itself has engaged in motivational inquiries. \textit{See}, e.g., Stone v. Graham, 449 U.S. 39, 41 (1980) (Court looked beyond avowed secular purpose and held that the preeminent purpose of the law was plainly religious, rendering the law invalid under the establishment clause); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267-68 (1977) (historical background, departure from normal procedure, and legislative history are proper subjects of judicial inquiry to determine discriminatory purpose).

\textsuperscript{137} \textit{See}, e.g., United States v. Moreno, 413 U.S. 528, 533-38 (1973) (statute invalidated because challenged classification furthered no legitimate governmental interest); Allied Stores
requiring only that the statute bear a rational relation to a legitimate state interest, it would not be necessary for that interest to be articulated by the state. Almost every attempt to control nuclear power plants could be rationalized in economic terms sufficient to satisfy this minimal requirement. Thus, section 25524.2 might have been upheld even if its legislative history suggested that it was directed towards control of radiation hazards, a purpose that would conflict with federal law.

The dual system of nuclear power regulation summarized by the Pacific Gas Court created a gap between state and federal regulatory authority. The Court concluded that among the traditional powers retained by the states was the authority to determine the type of generating facility to be licensed; yet, it denied states the power to consider radiation safety when exercising that authority. Moreover, the Court further concluded that the federal government had no authority to determine the type of facility to be licensed. Thus, in the wake of Pacific Gas, while states cannot consider safety when determining whether to permit construction of nuclear power plants, the federal government cannot make any determination as to the type of facility to be constructed. Consequently, no regulatory agency may consider the radiation safety of nuclear power when determining the choice of technology a state should use to meet its energy needs.

The existence of this regulatory vacuum was recognized by Justice Blackmun and by various commentators. One commentator has suggested that if laws that allow states to consider safety factors when determining the type of facilities to be built are invalidated on preemption grounds, the ultimate decision of whether to build a nuclear power plant will be made

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138. For example, a state could argue that the presence of a nuclear plant within its borders would create a risk, however slight, that a catastrophic accident might occur. In order to be prepared for such an accident, the state might argue, it would be required to spend state resources to improve its disaster and public health facilities. This required expenditure would have an adverse impact on state finances and could arguably provide a rationale to prevent the construction of nuclear power plants.

139. See supra notes 100 & 104 and accompanying text.

140. See supra notes 98-100 and accompanying text.

141. 103 S. Ct. at 1726.

142. See supra note 103 and accompanying text.

143. See 103 S. Ct. at 1726. The Pacific Gas Court cited to Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 435 U.S. 519 (1978), in which the Court stated that the prime concern of the Atomic Energy Commission in the context of licensing was "national security, public health, and safety." Id. at 550.

144. See 103 S. Ct. at 1733 (Blackmun, J., concurring).

only by the utility company seeking to build new facilities.\textsuperscript{146} It is inappropriate to leave such an important decision to the utility companies.\textsuperscript{147} It has also been suggested that when preemption of a state law would create such a regulatory gap, the Court should uphold the state law, leaving Congress the option to reverse the Court through subsequent legislation.\textsuperscript{148} Indeed, the Court's own interpretation of the Atomic Energy Act was that "it is almost inconceivable that Congress would have left a regulatory vacuum."\textsuperscript{149}

To avoid creating this vacuum, the \textit{Pacific Gas} Court should have drawn a different line between state and federal authority. One alternative to the Court's interpretation of the dual regulatory system would have been to allow the states exclusive authority to make the initial determination as to whether nuclear plants can be constructed within their boundaries. Under this alternative, exclusive federal authority over construction and operation of nuclear plants would not begin until after a state had decided to permit such plants.\textsuperscript{150} While this alternative would not eliminate the distinction drawn in \textit{Pacific Gas} between safety related and non-safety related state regulations, it would make that distinction irrelevant when a state law regulated the initial determination regarding whether to permit nuclear plant construction.\textsuperscript{151} Since the law challenged in \textit{Pacific Gas} regulated this determination, the Court would not have been required to classify section 25524.2 as either safety or non-safety related under this alternative division of regulatory authority.

\textbf{IMPACT}

The Supreme Court decision in \textit{Pacific Gas} is significant because it suggests that states have some authority under the Atomic Energy Act of 1954 to control the construction of nuclear power plants. The \textit{Pacific Gas} Court upheld the right of states to ban the construction of nuclear power plants on economic grounds. According to the Court, however, states have no authority to prevent the construction of nuclear plants when motivated by safety concerns.\textsuperscript{152}

\textsuperscript{146} Wiggins, \textit{supra} note 145, at 64.
\textsuperscript{147} See \textit{id.}
\textsuperscript{149} 103 S. Ct. at 1724.
\textsuperscript{150} This alternative was suggested by Justice Blackmun. See \textit{id.} at 1733 (Blackmun, J., concurring). Other courts and commentators have made similar observations. See, \textit{e.g.}, Missouri \textit{ex rel. Utility Consumers Council v. Public Serv. Comm'n}, 562 S.W.2d 688, 698 (Mo. Ct. App. 1978) ("The federal government regulates how nuclear power plants will be constructed and maintained; the State of Missouri regulates whether they will be constructed.") (emphasis in original); Wiggins, \textit{supra} note 145, at 64; Note, \textit{Disappointing Answer, supra} note 145, at 199.
\textsuperscript{151} Under the alternative proposed in this Note, states could choose not to permit construction for any reason. After permission had been given for construction of a nuclear plant, states would be limited to regulation for non-safety related reasons.
\textsuperscript{152} In addition to its conclusion regarding the division of federal and state authority, the Supreme Court suggested two reasons why a safety-motivated moratorium would be preempted. First, the Court stated that a measure regulating nuclear plant construction in response to safe-
It is difficult to predict the impact of *Pacific Gas*. Although the Court reaffirmed the system of dual regulation, as established under the Atomic Energy Act, the acceptance of an economic rationale for section 25524.2 broadened the scope of state power to control nuclear energy. As a result of this wider scope, state statutes controlling construction of nuclear plants will likely be upheld in future cases if an economic rationale is advanced for the challenged statutes. Yet, if the division of authority between state and federal government is to have any meaning, state measures directed solely at safety problems must continue to be found preempted as a usurpation of exclusive federal authority. *Pacific Gas*, however, failed to indicate the extent to which a state could exercise its valid authority before it invaded the province of exclusive federal control.

Several states have passed statutes attempting to control the construction of nuclear power plants. Whether a particular statute will be preempted depends upon whether the courts find that the statute has a safety or a non-safety rationale. State statutes that appear to be directed solely at economic concerns will most likely be upheld as valid exercises of state authority under the *Pacific Gas* decision. No state statutes currently in force appear to be directed solely at safety concerns. If a state were to pass such a statute, it would most likely be preempted as an intrusion into an area of exclusive federal authority. Most of the existing state statutes, however, either indicate no legislative purpose or

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153. See infra notes 154-56.

154. See Or. Rev. Stat. § 469.590-.601 (1981). Oregon is the only state to declare that nuclear plants can be safely constructed. 103 S. Ct. at 1727. Yet, the judgment of the NRC is that such plants can be safely constructed, not that nuclear power is the safest energy option available to states. A state should be allowed to consider the relative safety of nuclear power when choosing among the available alternative energy sources. A judgment that another source of energy may be safer than nuclear power does not conflict with the NRC assertion that nuclear power is safe.

The *Pacific Gas* Court also stated that a safety-motivated moratorium would “be in the teeth of the . . . objective to insure that nuclear technology be safe enough for widespread development and use. . . .” *Id.* Such a moratorium, however, would not interfere with that objective. The refusal to utilize nuclear energy does not prevent the federal government from insuring that nuclear energy is safe when it is used. As noted above, a state may enact a moratorium not because it has determined that nuclear power is unsafe but because there are safer sources of energy available. Further, in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the Court held that general policy statements encouraging the use of coal did not preempt all state legislation with an adverse impact on that energy source. Therefore, even if a safety-motivated moratorium had an adverse impact on the objectives of the Atomic Energy Act, that impact would not mandate the preemption of such a moratorium.


None of these states, however, has expressly stated a rationale or motivation for their laws.
indicate more than one such purpose. In those cases with no single apparent purpose, further litigation will be necessary to delineate fully the limits of state authority to control nuclear power plant construction.

Any further impact of *Pacific Gas* depends upon congressional reaction to the Court's decision. If Congress concludes that *Pacific Gas* broadened the scope of state power beyond that intended by the Atomic Energy Act, Congress might enact legislation restricting state power to regulate nuclear energy; as of yet, no such legislation has been introduced. Until Congress takes such action, *Pacific Gas* establishes the authority of states to control the construction of nuclear power plants for economic purposes.

**CONCLUSION**

In *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, the Supreme Court clarified and expanded the states' authority to regulate construction of nuclear power plants. The Court extended the purview of state authority to include the ability to prohibit construction of new nuclear plants when the prohibition is based on economic considerations. The Court's analysis, however, did not provide guidance for future decisions in which the rationale offered by a state to support its challenged law is not accepted as readily as California's economic rationale. Nevertheless, *Pacific Gas* unquestionably gives states expanded authority to control the development of nuclear power within their borders.

*John Fredrickson*

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156. See Mass. Gen. Laws Ann. ch. 164, app. § 3-3 (West Supp. 1983-1984). Massachusetts requires the approval of both a majority of the voters voting in a public election and the legislature before a nuclear plant can be built. The legislature must find that a nuclear plant is the best means for meeting energy needs considering the factors of overall cost, reliability, safety, environmental impact, and land use planning. *Id.*; see also Mont. Code Ann. §§ 75-20-1201 to -1205 (1983). Montana's statute declares that the state is concerned with providing jobs, minimizing energy costs, the radiological hazards of nuclear waste, and the possibility of catastrophic accidents at nuclear plants. *Id.* § 75-20-1201. Construction is prohibited: (1) unless there are no legal limits regarding the rights of persons to recover full compensation in the event of liability; (2) until safety systems have been demonstrated to the satisfaction of the state; and (3) until it has been demonstrated to the satisfaction of the state that radioactive materials from the plant can be effectively contained. *Id.* § 75-20-1203. Montana's statute seems to be more obviously directed at safety concerns than any other existing state law controlling the construction of nuclear plants. Vermont requires approval of the legislature before a plant may be constructed and implies a variety of concerns including aesthetics, air and water purity, the natural environment, and public health and safety. See Vt. Stat. Ann. tit. 10, § 6503 (Supp. 1983).