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## Legislative Intent to Trick: Three Decades on, why Vermont Yankee's Outcome Demands a Re-Working of Pacific Gas

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## Legislative Intent to Trick: Three Decades on, why Vermont Yankee’s Outcome Demands a Re-Working of Pacific Gas

*[P]reemption may be the most important issue for modern federalism theory . . . . Constricting state regulatory authority reduces states’ capacity to provide benefits to their citizens, which in turn diminishes states’ effectiveness at checking national expansionism in the political process.*<sup>1</sup>

*[T]he relief Entergy is requesting is extraordinary . . . . It is essentially saying that federal law requires Vermont to host a nuclear power plant it doesn’t want.*<sup>2</sup>

### INTRODUCTION

In 2005, the State of Vermont tried to legislatively force the closure of Vermont Yankee, a nuclear power plant owned by the Louisiana-based Entergy Corporation. Since 1972, Vermont Yankee produced approximately one third of the electricity in Vermont.<sup>3</sup> However, in light of a variety of concerns held by Vermont’s citizens,<sup>4</sup> Vermont decided to move away from such a reliance on nuclear energy. On August 14, 2013, following a lengthy battle in court, the Second Circuit affirmed the district court’s holding—the State of Vermont was barred from closing down Entergy’s nuclear plant for the reasons put forth by the State.<sup>5</sup> It seemed that the nuclear business was there to stay, whether the Vermont legislature liked it or not.

The economic winds had not yet subsided for Entergy’s Vermont Yankee, however. Ten days later, in spite of Entergy’s double victory in court, the Company announced that its nuclear plant would

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1. Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010).

2. *Court Denies Preliminary Injunction in Vermont Yankee Case*, VERMONTBIZ (July 19, 2011), <http://www.vermontbiz.com/news/july/court-denies-preliminary-injunction-vermont-yankee-case>, archived at <http://perma.cc/6PZ4-D6RV> (last visited Jan. 27, 2014).

3. See Steven F. Ferrey, *State Wars – The Empire Strikes Back*, 65 BAYLOR L.REV. 1, 7 n.26 (2013). See also *State Nuclear Profiles, Vermont*, ENERGY INFO. ADMIN., [www.eia.gov/nuclear/state/vermont/pdf/vermont.pdf](http://www.eia.gov/nuclear/state/vermont/pdf/vermont.pdf), archived at <http://perma.cc/E84W-GY2S> (last visited Feb. 1, 2015).

4. These concerns were both economic and safety-related and are discussed *infra*.

5. See generally *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 190 (2d Cir. 2013).

nonetheless be eventually shutting down for economic reasons in 2014.<sup>6</sup> *Vermont Yankee v. Shumlin*<sup>7</sup> exemplifies the nuclear industry winning the legal battle but ultimately losing the economic war.

In its ruling, the Second Circuit held that the State of Vermont was federally preempted by the Atomic Energy Act (AEA) from passing state laws touching on radiological safety that had the unilateral effect of shutting down a nuclear power plant. The Second Circuit relied on the Supreme Court's instruction from 30 years ago in *Pacific Gas & Electric v. State Energy Resources Conservation*<sup>8</sup> where the Court noted, in dicta, that "a state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective . . . and would be preempted for that reason."<sup>9</sup> Following the *Pacific Gas* instruction, the Second Circuit found that because the Vermont legislature was improperly motivated by nuclear energy safety concerns when it passed the laws in question, the laws were impliedly preempted by the AEA.<sup>10</sup> However, instruction does not necessarily create a precedent, and in this case, the instruction provided the wrong outcome for *Vermont Yankee*. This comment seeks to explain why *Pacific Gas* dicta provides the wrong outcome in the context of *Vermont Yankee*, and to propose an alternative reasoning that remains true to the AEA's purposes while granting more appropriate autonomy to states.

In *Pacific Gas*, the Supreme Court attempted to explain the state-federal "dual regulation of nuclear-powered electricity generation"<sup>11</sup> that Congress created when it passed the AEA. However, the *Pacific Gas* Court's instruction to focus on legislative intent in determining whether the state law is preempted—to the complete exclusion of the actual effect of a given state law—has created an unclear federal preemption standard for both state legislatures and lower courts to follow in the nuclear energy context. The Court's instruction has made federal preemption in the nuclear energy context all about determining the state legislature's motivation, which requires courts

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6. *Entergy to Close, Decommission Vermont Yankee*, ENTERGY (Aug. 27, 2013), [http://www.entergy.com/news\\_room/newsrelease.aspx?NR\\_ID=2769](http://www.entergy.com/news_room/newsrelease.aspx?NR_ID=2769), archived at <http://perma.cc/72ZA-MUQB>.

7. *See generally Vermont Yankee*, 733 F. 3d 190 (2d Cir. 2013).

8. 461 U.S. 190, 213 (1983).

9. *Vermont Yankee*, 733 F.3d at 422 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 213 (1983)).

10. 42 U.S.C. 2011 (2012).

11. *Pac. Gas*, 461 U.S. at 211–12 (“[T]he 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, ratemaking, and the like.”). *See discussion infra* Part I.B.

“to look for something that does not exist.”<sup>12</sup> Furthermore, an inquiry of this nature creates a perverse rule: If a state legislature can “trick” the court and effectively hide its true motive, then the state law must stand.<sup>13</sup>

This comment critiques the *Pacific Gas* legislative motive test as the method for determining whether federal law preempts a state law. Part I provides background on federal preemption in the nuclear energy context, reviews the Supreme Court jurisprudence on the AEA prior to *Vermont Yankee*, and outlines the *Vermont Yankee* holding. Part I then analyzes the *Vermont Yankee* decision, concluding that the fundamental problem is not that the Second Circuit incorrectly applied *Pacific Gas*, but instead, the problem is that the *Pacific Gas* instruction to rely on legislative intent leads to an ambiguous outcome by putting too much emphasis on the inevitably vague motivations of state legislators with too little attention given to the actual effect of the state law. Part II contrasts the *Pacific Gas* motive-focused preemption test by analogy to federal preemption in the context of immigration law, as well to as the AEA’s preemption interpretation in the lower courts. Finally, Part III proposes a new nuclear energy federal preemption test, which forgoes inquiry into a state legislature’s purpose, emphasizing instead the state law’s effect on the nuclear regulatory scheme.

## I. FEDERAL NUCLEAR ENERGY LAW: CONTEXT FOR *VERMONT YANKEE*

### A. *What Controls—Federal or State Law?*

#### 1. *Supremacy Clause*

The delicate balance of power between the states and the federal government is an issue the United States has grappled with since the nation’s founding.<sup>14</sup> Yet, it still remains a question to this day.<sup>15</sup>

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12. *Edwards v. Aguillard*, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting).

13. *See, e.g., Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992) (quoting *Perez v. Campbell*, 402 U.S. at 651–52(1971)). *See also Ferrey, supra* note 3, at 68 (“whether the stated purpose is merely a cover-up for prohibited state actions” (internal quotes omitted)).

14. *See M’Culloch v. Maryland*, 4 Wheat. 316, 427, 4 L.Ed. 579 (1819) (“It is of the very essence of supremacy, to remove all obstacles to its [Congress’] action within its own sphere, and so to modify every power vested in subordinate governments.”).

15. *See Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. From the existence of two sovereigns follows the possibility that laws can be in conflict or

Federal preemption is grounded in the Supremacy Clause of the United States Constitution: “The laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>16</sup> Thus, the federal government has a distinct advantage<sup>17</sup> because “as long as it is acting within the powers granted to it under the Constitution, Congress may legislate in areas traditionally regulated by the States.”<sup>18</sup> In every case involving federal preemption of state law, the purpose of Congress is the “ultimate touchstone.”<sup>19</sup>

## *2. Presumption against Preemption in Areas within State Police Power*

The “extraordinary power”<sup>20</sup> of the federal government rests on an assumption that Congress does not exercise lightly its power to legislate in areas traditionally regulated by the states.<sup>21</sup> The Supreme Court has enunciated the tenet that states maintain great latitude over their police powers since these powers have traditionally been seen as affecting inherently local matters.<sup>22</sup> This presumption against federal preemption applies when Congress passes a law that touches on state historic police powers, “unless [federal preemption of state law] was the clear and manifest purpose of Congress.”<sup>23</sup> Indeed, when the text

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at cross-purposes. The Supremacy clause provides a clear rule that federal law ‘shall be the supreme Law of the Land. . . .’”

16. U.S. CONST. art. VI. cl. 2.

17. See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) (“Because the Supremacy Clause prescribes that federal law trumps conflicting state laws, Congress in effect possesses ‘an extraordinary power in a federalist system’ to displace state regulation.” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))).

18. *Ashcroft*, 501 U.S. at 460 (“This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.”).

19. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

20. *Ashcroft*, 501 U.S. at 460.

21. *Id.*

22. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citing *Hillsborough Cnty. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985) and *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) internal quotation marks omitted).

23. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). (“Clear and manifest,” however, does not have to be explicitly stated by Congress but can instead be implied from the way Congress wrote a given statute.). See *infra* Part I.A.3.

of the preemption clause of a federal statute is ambiguous, the Court ordinarily accepts a reading that disfavors federal preemption.<sup>24</sup>

### 3. Three Types of Federal Preemption

Federal preemption has been described as a judge-made doctrine<sup>25</sup> “rooted in the juxtaposition of the powers reserved to the states and the supremacy of federal law over state law under the United States Constitution.”<sup>26</sup> In a preemption analysis, courts must first define the scope of the preempted field by analyzing the language, structure, and purpose of the federal statute to determine Congressional intent.<sup>27</sup> There are three general situations where federal law may preempt a state law: express preemption, conflict preemption, and implied preemption.<sup>28</sup>

First, express preemption, the most easily identifiable type, occurs “where Congress expressly states that it is preempting state authority.”<sup>29</sup> Second, conflict preemption exists when there is state law that actually conflicts with the federal law, and compliance with both state and federal requirements would be impossible.<sup>30</sup> Third, in implied preemption cases, state law may be preempted if the state law concerns a field that Congress intended to occupy exclusively.<sup>31</sup> In implied preemption cases, implied congressional intent to preempt is found either when a state law “impedes the execution of

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24. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 554 U.S. 431, 449 (2005) (internal quotations omitted)).

25. Hope Babcock, *Can Vermont Put the Nuclear Genie Back in the Bottle? A Test of Congressional Preemption Power*, 39 *ECOLOGY L.Q.* 691, 718 (2012).

26. Laurence H. Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 686 (1979). (The “juxtaposition of the powers reserved to the states” refers to the Tenth Amendment to the United States Constitution: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.).

27. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 218 (D. Vt. 2012) *aff'd in part, rev'd in part*, 733 F.3d 190 (2d Cir. 2013). See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (whether “state action is pre-empted by federal law is one of congressional intent”); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (intent is discerned from statutory language, structure, and purpose).

28. See Laurence H. Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 688 (1979).

29. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). See also *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

30. *English*, 496 U.S. at 79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

31. *English*, 496 U.S. at 79.

the full purposes and objectives of Congress”<sup>32</sup> or where the Act of Congress “touch[es] on a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>33</sup> This third category is also referred to as field preemption.

The Supreme Court has recognized that these three categories are not “rigidly distinct” and that in some cases “field preemption may be understood as a species of conflict preemption.”<sup>34</sup> This matters because it implies that in crafting a new federal preemption test for nuclear energy, one could draw from both conflict preemption cases and field preemption cases. There are a number of federal laws that regulate the use and transmission of nuclear energy<sup>35</sup> that, when taken with permissible state nuclear energy laws, create a dual regulatory scheme for nuclear energy.<sup>36</sup> However, a proposed state law that concerns nuclear energy must take into account whether the state law is preempted by the federal nuclear energy dual regulatory scheme.<sup>37</sup>

### *B. The Nuclear Energy Regulatory Scheme*

Under federal law, the AEA is the centerpiece nuclear energy safety statute. The first iteration of the AEA was enacted in 1946, in the wake of World War II, at a time when Congress thought that nuclear power development should be strictly limited to a federal government monopoly.<sup>38</sup> However, within ten years, Congress reconsidered this federal monopoly, a change that resulted in the Atomic Energy Act of 1954.<sup>39</sup> The 1954 Act came about due to Congress’ belief that “the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing.”<sup>40</sup> The Act implemented Congress’ policy decision

32. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

33. *English*, 469 U.S. at 79. *See also* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947): “[the federal regulatory scheme is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”).

34. *English*, 496 U.S. at 79 n. 5 *accord* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 104 n. 2 (1992).

35. *See infra* Part I.B.

36. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190, 212 (1983).

37. *Id.*

38. *Duke Power Co. v. Carolina Env’tl. Grp., Inc.*, 438 U.S. 59, 63 (1978). *See also* Joseph P. Tomain, *Nuclear Futures*, 15 *DUKE ENVTL. L. & POL’Y F.* 221, 226 (2005).

39. 42 U.S.C. §§2011–2281 (2012).

40. *English v. Gen. Elec. Co.*, 496 U.S. 72, 80–81 (1990).

by providing licensing for private construction, ownership, and operation of commercial nuclear power reactors.<sup>41</sup>

However, in spite of Congress' intent to involve the private sector in nuclear development through the 1954 Act, the private sector did not immediately embrace nuclear energy development due to the disastrous consequences that could arise from a nuclear malfunction.<sup>42</sup> No company was willing to take on such liability.<sup>43</sup> A representative of General Electric expressed this sentiment during congressional hearings when he said that the company would not proceed "with a cloud of bankruptcy hanging over its head."<sup>44</sup> Thus, Congress amended the AEA through the Price-Anderson Act of 1957,<sup>45</sup> which essentially limited the liability that a nuclear operator could be responsible for in the event of a malfunction.<sup>46</sup> Simply put, there was no market to provide insurance for nuclear plant operators given the extent of liability that could arise from nuclear development. The unavailability of insurance was hindering private industry from entering the market and developing nuclear energy technology. The purpose of the Price-Anderson Act was to both provide liability insurance coverage against nuclear hazards and to provide compensation to those claiming damages from nuclear hazards.<sup>47</sup>

Thereafter in 1959, Congress again amended the AEA to "clarify the respective responsibilities of the States and the [Atomic Energy] Commission with respect to the regulation of byproduct, source, and special nuclear materials."<sup>48</sup> The 1959 Amendment authorized the Atomic Energy Commission to turn over some regulatory authority to any state that would adopt an approved regulatory plan. However, the Commission maintained exclusive authority over "the disposal of such . . . byproduct, source, or special nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be disposed of

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41. *Pac. Gas*, 461 U.S. at 207.

42. *See* Tomain, *supra* note 38, at 227.

43. *Id.*

44. *See id.*

45. 42 U.S.C. 2210 (2012). *See* Tomain, *supra* note 38, at 227.

46. *Silkwood v. Kerr-McKee Corp.*, 464 U.S. 238, 251 (1984) (explaining that the 1959 Price-Anderson Act created an indemnification scheme which limited operators of licensed nuclear facilities to a maximum liability of \$60 million. The federal government would thereafter provide \$500 million in indemnification. Licensees were required to purchase the maximum amount of insurance available, and the cap on damages would be \$560 million in liability for any one nuclear accident.)

47. *Id.* at 251 n.12 (quoting S.Rep. No. 296, 85th Cong., 1st Sess., 8 (1957), U.S. Code Cong. & Admin. News 1957, p.1810).

48. 42 U.S.C. 2021(a)(1) (2012).

without a license from the Commission.”<sup>49</sup> Thus, the states were precluded from regulating safety aspects of nuclear power because “the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future.”<sup>50</sup> Congress gave the Atomic Energy Commission, the regulatory body that preceded the present-day Nuclear Regulatory Commission (NRC), “exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states.”<sup>51</sup>

The rationale for prohibiting states from regulating in these areas was “premised on its belief that the [Atomic Energy] Commission was more qualified to determine what type of safety standards should be enacted in this complex area.”<sup>52</sup> Indeed, the 1954 Act specifically stated that “the processing and utilization of . . . nuclear material must be regulated in the national interest” and that national regulation of nuclear materials “is necessary . . . to assure the common defense and security and to protect the health and safety of the public.”<sup>53</sup> However, “[t]here is little doubt that under the [AEA] of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power.”<sup>54</sup>

The AEA has two savings clauses that reserve certain regulatory powers—not related to nuclear safety—to the states.<sup>55</sup> The first savings clause says that the AEA does not restrict state authority in regulating the “generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission.”<sup>56</sup> The second savings clause says that the AEA shall not be “construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.”<sup>57</sup> The two savings clauses read together have been understood to mean that the states may have control over energy generation and transmission, except for when it comes to

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49. 42 U.S.C. 2021 (c)(4).

50. H.R.Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959). *See also Silkwood*, 464 U.S. at 250 (1984).

51. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (internal citations omitted).

52. *Silkwood*, 464 U.S. at 250.

53. 42 U.S.C. 2012(c–e) (2012).

54. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 550 (1978).

55. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 410 (2d Cir. 2013).

56. 42 U.S.C. 2018.

57. 42 U.S.C. 2021(k).

protecting its citizens against radiation hazards—that power falls within the exclusive jurisdiction of the federal government.<sup>58</sup>

*C. Supreme Court on the AEA: States, (Sometimes) Stay Away from Safety!*

The Supreme Court interpreted Congress' intent behind the AEA in three key cases during the past three decades. *Pacific Gas* concerned whether the AEA preempted California from passing laws that conditioned the construction of a new nuclear plant on the development of a nuclear waste disposal program;<sup>59</sup> *Silkwood v. Kerr-McGee* addressed whether a state tort award of \$10.5 million in punitive damages against a nuclear power facility was preempted by the AEA;<sup>60</sup> and *English v. General Electric* addressed whether a nuclear power plant employee's emotional distress tort claim against her nuclear power plant employer was preempted by the AEA.<sup>61</sup> It is worth noting that the three Supreme Court AEA cases came to the opposite conclusion from the Second Circuit's decision in *Vermont Yankee*. None of the three leading Supreme Court cases on federal preemption in the nuclear context found that the state law at issue was preempted by the AEA. While the conduct in the three Supreme Court cases was distinguishable from that in *Vermont Yankee*, this pattern nonetheless contrasts directly with the holding in *Vermont Yankee*, where the Second Circuit determined that Vermont's laws were preempted by the AEA and accordingly struck them down.

*1. Pacific Gas and Electric*

In *Pacific Gas*, the State of California passed two laws that conditioned the construction of nuclear power plants on the availability of storage facilities and an adequate means of disposing of the nuclear waste that would be produced by the nuclear plants.<sup>62</sup> Section 25524.1(b) of the Warren-Alquist Act required that the California Energy Commission determine whether there would be sufficient capacity to store the used nuclear fuel rods, essentially addressing the issue of short-term storage of spent nuclear rods.<sup>63</sup>

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58. See Babcock, *supra* note 25, at 704. See also *Vermont Yankee*, 733 F.3d 393, 410 (2d Cir. 2013).

59. See 461 U.S. 190, 194 (1983).

60. See 464 U.S. 238, 245–46 (1984).

61. See 496 U.S. 72, 77–78 (1990).

62. See 461 U.S. 190, 197–98 (1983).

63. *Id.* at 195. It should likewise be noted that no permanent disposal method existed at the time these laws were passed and even today, no permanent nuclear waste disposal mechanism has been developed.

Section 25524.2 addressed the long-term barriers to permanently storing nuclear waste and imposed a moratorium on construction of new nuclear power plants until the Atomic Energy Commission developed a plan for permanently disposing of the nuclear waste.<sup>64</sup>

The California Energy Commission found that the federal government had not yet developed an adequate system for permanently storing nuclear waste.<sup>65</sup> Therefore, even though the nuclear power company had obtained the federal licensing permits as required by the AEA, state laws nonetheless blocked the power company from constructing a nuclear power plant in California.

In spite of these two laws that seemed to directly address concerns regarding the manner in which nuclear waste would be permanently disposed of—a concern that clearly touches on worries about nuclear safety—the Supreme Court effectively read an “avowedly economic purpose”<sup>66</sup> into the statutes. The Supreme Court held that in light of California’s economic purpose behind the two laws—the effect of which was to block a private company from constructing a nuclear plant in California—the laws were permitted to stand. No preemption by the AEA regulatory scheme was found in spite of documentation in the legislative history which stated that California was concerned with the construction of a nuclear power plant due to concern about radiation safety hazards.

The Court stated that it would not become “embroiled in attempting to ascertain California’s true motive.”<sup>67</sup> The Court then explained that such inquiries are often fruitless since “[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it” and because states have clearly been allowed to regulate regarding their initial need for nuclear power.<sup>68</sup> The Court found an economic purpose in the California statutes, and the statutes were upheld regardless of points made in the nuclear company’s Brief.<sup>69</sup>

In its Brief, the Pacific Gas Company pointed out that California was very much concerned with nuclear safety when it passed these two laws.<sup>70</sup> And, because safety concerns were relegated to the federal government, these California laws, which effectively halted the nuclear company’s construction of a new

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64. *Id.* at 195.

65. *Id.* at 197.

66. *Id.* at 216. *See* Babcock, *supra* note 25, at 709–10.

67. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Com’n*, 461 U.S. 190, 216 (1983).

68. *Id.* at 216.

69. Brief for Petitioner, *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190 (1983) (No. 81-1945), 1982 WL 957209, at \*7.

70. *Id.*

plant, should have been preempted by the AEA. Pacific Gas Company's Brief noted that

[t]he Reassessment dealt at length with the radiological hazards created by nuclear power plants and their waste and includes the following passage:

The [State Energy] commission does not have clear and explicit authority to condition its approval on demonstrations of waste disposal safety or reactor safety, *but the same problems could be addressed indirectly through reviews of the economics and reliability of the plant and through specific siting criteria* (minimum distance from populated areas, minimum distance from active faults).<sup>71</sup>

The preamble of the California statutes had no reference to passing these laws on the basis of economic need. The Supreme Court read in an economic intent on their own and notably glossed over references to California's enunciated nuclear safety worries. This holding has been interpreted as expanding the authority of states within the nuclear energy dual regulatory scheme.<sup>72</sup>

In accepting California's economic purpose as the rationale for enacting its state laws, the Supreme Court also gave its impression on the importance given to the California legislature's underlying motive in passing the two statutes. The result of the *Pacific Gas* decision was that states had the power to decide on economic grounds whether they wanted nuclear power in their jurisdiction. If there was a non-safety rationale for a given state law, the state law could avoid AEA preemption, as long as the law was enacted in light of the state's economic need for nuclear power.<sup>73</sup>

Justices Blackmun and Stevens concurred in the holding. Though they agreed in result, the concurrence did not sign on to portion of the majority opinion which held that a state must not be motivated by safety when it is determining whether to allow the construction of a nuclear power plant within the state's jurisdiction.<sup>74</sup> Justice Blackmun did not believe that the federal government through the AEA "has occupied the broader field of nuclear safety concerns, but instead only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards."<sup>75</sup> Justice Blackmun found that "[t]here is, in short, no evidence that Congress had a 'clear

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71. *Id.* at \*7 (emphasis added).

72. Babcock, *supra* note 25, at 709–10.

73. *Pac. Gas*, 461 U.S. 190, 213 (1983).

74. *Id.* at 223.

75. *Id.* at 224.

and manifest purpose' to force States to be blind to whatever special dangers are posed by nuclear power plants."<sup>76</sup> Based on this reasoning, if Justice Blackmun had been on the Second Circuit when it decided *Vermont Yankee v. Shumlin*, he would have likely found two of the three Vermont laws permissible under the AEA.

## 2. Silkwood

In the following term, the Supreme Court decided *Silkwood v. Kerr-McGee Corporation*,<sup>77</sup> another case where a state law was allowed to stand in the face of AEA federal preemption. In *Silkwood*, a woman who worked at the Kerr-McGee nuclear plant discovered that she had been contaminated by plutonium while at work, finding plutonium on her body, as well as at her apartment and on her roommate. During the investigation of the plutonium leak, the NRC determined that the nuclear plant had complied with practically all of the federally mandated NRC safety procedures.<sup>78</sup> At trial, however, the court instructed the jury that the purpose of punitive damages was to punish the nuclear corporation and deter it from engaging in dangerous conduct in the future. With this instruction in mind, the jury returned a verdict for the plaintiff in the amount of \$505,000 for actual damages and \$10,000,000 for punitive damages, even though the NRC determined that the nuclear plant had essentially complied with the only standards it was required to follow—federal safety standards.<sup>79</sup>

The Supreme Court held, in spite of the state tort law which in this case allowed for a significantly large \$10 million punitive damages jury verdict against the nuclear power plant, that Congress nonetheless had not intended for the AEA to preclude state law punitive tort actions against nuclear corporations.<sup>80</sup> This large damages award was decided by a state court jury that had had been instructed by the state court judge to return a dollar figure that would punish the nuclear power company, even though the nuclear plant had followed practically all the federal rules.<sup>81</sup> Even though allowing such a huge award by a state court due to a nuclear safety leak effectively created an additional means of regulating the nuclear power plant, the majority nonetheless held that the AEA

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76. *Id.* at 225 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

77. 464 U.S. 238 (1984).

78. *Id.* at 244.

79. *Id.* at 245.

80. *Id.* at 258.

81. *Id.* at 284.

did not preempt this state law cause of action. The nuclear power plant was therefore forced to pay the award.<sup>82</sup>

Justices Blackmun, Powell, and Chief Justice Burger dissented.<sup>83</sup> In his 15 page dissent, Justice Blackmun pointed out the incongruity between the *Pacific Gas* holding that said that “the Federal Government has occupied the entire field of safety concerns”<sup>84</sup> and the *Silkwood* majority, which said that a state-authorized \$10 million punitive damages award against a nuclear corporation based on safety concerns was allowed to punish the corporation even though the corporation had been largely in compliance with the NRC rules and any shortcomings were not found to have caused the plutonium contamination at issue.<sup>85</sup> Justice Powell dissented separately with 11 pages of written reasons, concluding that “this case is a disquieting example of how the jury system can function as an unauthorized regulatory medium.”<sup>86</sup> He found that the majority’s decision ignored *Pacific Gas*’s holding that “Congress has occupied the entire field of nuclear safety concerns.”<sup>87</sup>

The *Silkwood* holding is important to the *Vermont Yankee* case because it shows an instance where, in spite of the Court previously saying that “Congress has occupied the entire field of nuclear safety concerns,” this is, in fact, not entirely accurate. The cause of the plaintiff’s injury and damages in *Silkwood*—plutonium contamination of person and property—was directly related to nuclear safety concerns. Oddly, however, these damages were found to be outside of the federally preempted “entire field of nuclear concerns.” Such a holding demonstrates the elasticity of the *Pacific Gas* standard<sup>88</sup>—an elasticity that was not, but should have been, taken into account by the Second Circuit in *Vermont Yankee*.

### 3. English v. General Electric

In *English v. General Electric*, Justice Blackmun wrote for a unanimous Court, finding that a nuclear power plant employee’s state law intentional infliction of emotional distress state law claim was not preempted by the federal nuclear regulatory scheme.<sup>89</sup> The employee’s claim was based on her emotional distress after having

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82. *Id.*

83. *Silkwood*, 464 U.S. at 258.

84. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190, 212 (1983).

85. 464 U.S. 238, 274 and 277 (1984).

86. *Id.* at 283.

87. *Id.* at 286.

88. See Babcock, *supra* note 25, at 709–710 (2012).

89. 496 U.S. 72, 90 (1990).

been ostracized, and ultimately terminated, by management at work, after she pointed out a safety violation at the plant. In spite of the employee being terminated for complaining to management about safety issues at the power plant, the Court found that the intentional infliction of emotional distress state law claim “did not have some *direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels.”<sup>90</sup> The Court instead found that this state law claim really only concerned retaliation against whistleblowers in general.<sup>91</sup> For this reason, the state law fell outside of the federally preempted field of radiological safety concerns. Especially in light of its prior decision in *Silkwood*, the Court found:

[I]t would be odd, if not irrational to conclude that Congress intended to include tort actions stemming from retaliation against whistleblowers in the preempted field but intended not to include tort actions stemming from radiation damage suffered as a result of actual safety violation.<sup>92</sup>

*English* makes several relevant points concerning the *Vermont Yankee* decision. One is the Court’s “direct and substantial effect” language that could be used to determine the outer bounds of a more fitting nuclear preemption test in the wake of *Vermont Yankee*.<sup>93</sup> Another noteworthy point from *English* is that this is one case in the nuclear energy preemption context where all the Justices agree. This whistleblower cause of action was not preempted by the AEA; thus it serves as a guidepost for what all the Justices have agreed is outside the currently unclear “entire field of nuclear safety concerns.”<sup>94</sup>

#### *D. Vermont Yankee Interpretation of Supreme Court Jurisprudence*

In *Vermont Yankee v. Shumlin*,<sup>95</sup> the Second Circuit was tasked with interpreting the above Supreme Court jurisprudence in light of a circumstance that had effectively been described by Justice Blackmun in his concurrence in *Pacific Gas*<sup>96</sup>—whether a state

90. *Id.* at 85 (emphasis added).

91. *Id.*

92. *Id.* at 86.

93. *See infra* Part III.

94. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 212 (1983).

95. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

96. *Pac. Gas*, 461 U.S. at 224.

could pass laws that would have the effect of requiring a nuclear power plant to terminate its operations. In 2005, the State of Vermont decided that it no longer wanted nuclear power to be generated within its jurisdiction.<sup>97</sup> This decision was documented by the Vermont Legislature's passage of three laws that would require Vermont Yankee Nuclear Power Plant to close down in 2014.

First, Act 74 was state legislation that concerned an increase of nuclear waste storage by Vermont Yankee. This Act came in response to Entergy's request to increase Vermont Yankee's power output by 20%, which would have resulted in a concomitant increase in nuclear waste.<sup>98</sup> Entergy had already received NRC approval to build additional temporary nuclear waste storage facilities, but under Vermont law, constructing new nuclear waste storage was prohibited unless specifically authorized by the state legislature.<sup>99</sup>

The law contained an exemption for Vermont Yankee Nuclear Power Corporation (VYPC). However, the Vermont Attorney General interpreted this exemption as only applying to the previous owner of the plant, VYPC, but not the new plant owner, Entergy.<sup>100</sup> Act 74 had the effect of requiring the Vermont Legislature to affirmatively vote on whether new nuclear storage facilities could be built in Vermont.<sup>101</sup> This decision-making power was previously vested in the Vermont Public Service Board, whose decision could be appealed to the Vermont Supreme Court.<sup>102</sup> Entergy, however, had no mechanism to appeal a decision by the Vermont Legislature, which eventually decided not to allow the construction of new nuclear storage facilities. Without such an affirmative go-ahead, Vermont Yankee would be forced to close.<sup>103</sup>

Second, Act 160 was state legislation requiring state legislative approval to operate Vermont Yankee after 2012.<sup>104</sup> The law required that "a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly."<sup>105</sup> Act 160 stated that the Vermont Legislature should consider "the state's

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97. See, e.g., Brief of Appellants at 6, *Entergy Nuclear Vt. Yankee LLC v. Shumlin*, 773 F.3d 393 (2d Cir. 2012), 2012 WL 2064593, which details Vermont's long-term plan to "move from nonrenewable sources of energy, such as oil, gas, and nuclear, toward energy efficiency and renewable energy sources, such as solar, wind and biomass."

98. *Vermont Yankee*, 733 F.3d at 398.

99. *Id.*

100. *Id.*

101. *Id.* at 423.

102. *See id.*

103. *See id.*

104. *Vermont Yankee*, 733 F.3d at 414.

105. *Id.* at 403.

need for power, the economic and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives.”<sup>106</sup>

Third, Act 189 was state legislation requiring state inspection of Vermont Yankee.<sup>107</sup> This Act required Department inspections of Vermont Yankee’s operations “such as its electrical, emergency, and mechanical systems.”<sup>108</sup> The Act created an oversight panel of nuclear power experts that were appointed by the Vermont governor and legislature.<sup>109</sup>

In determining that Acts 74 and 160 were preempted by federal law (and Act 189 not ripe for judicial review) the district court and the Second Circuit relied on explicit language from *Pacific Gas*.<sup>110</sup> There, the Supreme Court stated, in dicta that “a state prohibition on nuclear construction *for safety reasons* would also be in the teeth of the Atomic Energy Act’s objective to insure that nuclear technology be safe enough for widespread development and use — and would be preempted for that reason.”<sup>111</sup> The Second Circuit considered the legislative record that was replete with references to closing down Vermont Yankee on the basis of safety concerns and held that under *Pacific Gas*, “the one avenue Vermont may not pursue is to pass a ‘state moratorium’ on nuclear energy ‘grounded in safety concerns.’”<sup>112</sup> Under this rationale, therefore, the Second Circuit held Acts 74 and 160 were preempted by the AEA.

## II. SHORTCOMINGS OF *PACIFIC GAS*, REVEALED IN *VERMONT YANKEE*

### A. Analytic Weaknesses of *Pacific Gas*

A panel of three judges on the Second Circuit found federal preemption of the Vermont laws in *Vermont Yankee*, but Judge Susan Carney only “reluctantly” concurred<sup>113</sup> in the decision. Judge Carney’s concurrence provides a solid outline for the analytic weaknesses in the *Pacific Gas* holding. Judge Carney stated that she

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106. *Id.*

107. For more detailed information on the factual history and the exact requirements of each state law, see *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183 (Dist. 2012) and *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

108. *Vermont Yankee*, 733 F.3d at 404.

109. *See id.*

110. *See id.* at 407.

111. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 213 (1983) (emphasis added).

112. *Vermont Yankee*, 733 F.3d at 434 (Carney, J., concurring).

113. *Id.* at 434 (emphasis omitted). *See Pac. Gas*, 461 U.S. 190, 213 (1983).

was concerned, not with the majority's reasoning under *Pacific Gas*, but that "Congress, in enacting the AEA, did not intend the result we reach."<sup>114</sup> She opined that the Second Circuit was led to its conclusion "principally by an expansive gloss on the preemptive scope of the AEA first set forth in PG&E."<sup>115</sup> She explained that "it is principally the judicial phrase 'grounded in safety concerns' and not the Court's holdings or the text of the Atomic Energy Act, that compels us to strike down Vermont's statutes."<sup>116</sup> Judge Carney's concurrence deconstructs the *Pacific Gas* decision and in doing so reveals the problems with *Pacific Gas* that the Second Circuit was nonetheless bound to follow.

First, Judge Carney acknowledged that under the explicit holding of *Pacific Gas*, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field."<sup>117</sup> Thus, under this Supreme Court instruction, the Vermont statutes would be preempted. Carney pointed out that given this Supreme Court instruction, it is ironic that in *Pacific Gas* the Court *upheld* a state law whose purpose was implicitly based on California's safety concerns regarding the storage of excess nuclear waste.<sup>118</sup> However, Carney recognized that this same language from *Pacific Gas* was reiterated in both *Silkwood* and *English*. She thus took the use and re-use of this same language in two subsequent cases at face value, accepting that a state moratorium on construction of a nuclear plant grounded in safety concerns would "be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use—and would be preempted for that reason."<sup>119</sup>

The fact that this "state moratorium on nuclear construction grounded in safety concerns"<sup>120</sup> language was dicta in all three of the key AEA preemption cases<sup>121</sup> (since the Court said none of the cases, including *Pacific Gas*, fell into this category) has not seemed to matter all that much; lower courts have nonetheless relied upon it in deciding AEA federal preemption in other contexts.<sup>122</sup> However,

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114. *Vermont Yankee*, 733 F. 3d at 434.

115. *Id.* (emphasis omitted) (quoting *Pac. Gas*, 461 U.S. at 213).

116. *Pac. Gas*, 461 U.S. 190, 213 (1983).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 213.

121. Since the "state moratorium based on safety concerns" did not apply in *Pacific Gas*, *Silkwood*, or *English*.

122. See e.g., *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004); *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001). See discussion *infra* Part II.B.2.

at least one scholar has noted that outside of the AEA context, the portion of the *Pacific Gas* holding that relies heavily on an analysis of the state legislature's motive when passing a given state law has not been heavily relied upon in other areas of the law at all.<sup>123</sup>

Judge Carney pointed out other analytic weaknesses of applying of *Pacific Gas* instruction to the Vermont Yankee dispute. She particularly noted that, in light of the two savings clauses that clarified the states' role in nuclear energy regulation and allowed for increased federal-state cooperation,<sup>124</sup> it was odd that the Vermont legislature's concern about safety alone would be enough to invalidate a state law on the matter.<sup>125</sup> She acknowledged that applying an overly close reading of the *Pacific Gas* dicta to *Vermont Yankee* undermines the general principle that absent "the clear and manifest purpose of Congress"<sup>126</sup> there is a presumption against preemption in areas where the federal statute intrudes into state traditional roles.

Moreover, Judge Carney gave credence to the presumption against preemption principle, stating, "as a practical matter, it seems impossible to divorce safety concerns from any State legislature's consideration whether to allow, or continue to allow, the generation of nuclear power within its borders."<sup>127</sup> Clearly, state legislators will be tempted to consider radiological safety concerns when deciding whether to allow nuclear energy production in their state—this alone, however, should not doom the statute. The language of the AEA itself does not say that "a state moratorium on nuclear energy for safety concerns would be in the teeth of the preempted field"<sup>128</sup>—this is the Supreme Court's interpretation which itself has been subject to dispute.<sup>129</sup> There is a distinct disjuncture here

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123. See Ferrey, *supra* note 3, at 67–68 (discussing how the *Pacific Gas* holding examines the importance of examining legislative purpose in the AEA context and has only been cited in approximately 5% of the instances where *Pacific Gas* has been relied on). According to Ferrey, "Very few opinions appear to have followed the holding from *Pacific Gas* that to the effect that the language in a piece of legislation is the final authority as to the actual purpose of that legislation." *Id.* at 68.

124. See 42 U.S.C. §§ 2018, 2021(k) (2012).

125. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F. 3d 393, 435 (2d Cir. 2013).

126. *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). See also *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947) (explaining this presumption).

127. *Vermont Yankee*, 733 F.3d at 437 (Carney, J., concurring).

128. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983).

129. See Justice Blackmun's concurrence in *Pac. Gas*, 461 U.S. at 223–29 (1983) (Blackmun, J., concurring), and his dissent in *Silkwood v Kerr-Mcgee Corp.*, 464 U.S. 238, 258–73 (1984).

between what the AEA actually states and what the Supreme Court says that the AEA states. The former is the law itself, and the latter is judicial gloss on that law. The AEA explicitly leaves available to the states the opportunity to decide for themselves what kind of energy makeup they will have within their jurisdiction.<sup>130</sup> Indeed, the *Pacific Gas* court itself acknowledged this distinct role for the states by recognizing the “dual regulation of nuclear-powered electricity.”<sup>131</sup>

Finally, Judge Carney noted that one can glean a great deal from what Congress omitted from the AEA.<sup>132</sup> Even though the purpose of the AEA was to promote the private development of nuclear energy for peaceful purposes,<sup>133</sup> the AEA does not require a state to host a nuclear energy plant or be forced to permit construction or continuous operation of a nuclear plant.<sup>134</sup> Even more telling is the majority’s acknowledgment in *Pacific Gas* of this same general principle that, in spite of the AEA’s policy in favor of promoting the development of nuclear energy, the technology is not to be developed at all costs. Judge Carney ends by pointing out the glaring omission from the AEA that should give states authority to decide whether to host nuclear within their borders: “The legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power *to be slowed or even stopped* for economic reasons.”<sup>135</sup>

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130. See 42 U.S.C. § 2018 (2012) (“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 [NRC]”). *Id.* at §2021(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”).

131. *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 426 (2d Cir. 2013).

132. *Id.*

133. See AEA Congressional Declaration of Policy, 42 U.S.C. § 2011 (2012) (stating: “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 direct so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in the private enterprise.”). See also *Pac. Gas*, 461 U.S. at 207.

134. *Vermont Yankee*, 733 F.3d at 426.

135. *Id.* at 436 (citing *Pac. Gas*, 190 U.S. at 223) (emphasis added).

*B. Fundamental Problem: Legislative Motive Preemption Test is Untenable*

Judge Carney addresses the heart of the problem with *Pacific Gas*, as made manifest through its application in *Vermont Yankee*. She states that “[p]lacing decisive emphasis on motivation to the exclusion of impact . . . creates an irresistible incentive for States to do their best to mask their concerns about safety.”<sup>136</sup> She points out what would seem to be the obvious—that safety and economic concerns necessarily relate to one another. Thus, it would be quite difficult, if not impossible, for a state legislature to divorce the two concerns from one another: “To rule that concern for safety is fatal to a State’s legislative initiatives is to disable the States from legislating within their borders to respond to the legitimate economic concerns of their citizens.”<sup>137</sup>

This reasoning acknowledges that a state’s legitimate right to make use of the AEA’s dual regulatory scheme and legislate according to that state’s economic needs could be usurped by an individual state legislator’s inappropriate, or in some cases inadvertent, reference to safety concerns. Indeed, in the *Vermont Yankee* context, the legislators of Vermont were not concerned solely with the safety of the plant. This is clearly the case given that the plant had been in operation in the same place in Vernon, Vermont for 40 years, and the plant had not created any significant hazards in the recent past.<sup>138</sup> Additionally, *Vermont Yankee* had created economic benefits for the community, such as employment opportunities and the supply of clean, low-cost energy.<sup>139</sup> The citizens of Vermont were interested in moving towards the development of their wind, solar, and biomass renewable energy sector,<sup>140</sup> which was categorized by the State of Vermont in its Reply Brief as an economic question of a

136. *Id.* at 437.

137. *Id.*

138. There was documentation of one nuclear leak in 2004 that the plant cleaned up. The NRC conducted an investigation and determined that no hazard came from the leak. *See* *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 838 F. Supp. 2d 183, 214–15 (D. Vt. 2012).

139. In 2013, the plant had 630 employees. *See Nuclear Sites, Vermont Yankee Nuclear Power Plant*, ENTERGY [http://www.entergy-nuclear.com/plant\\_information/vermont\\_yankee.aspx](http://www.entergy-nuclear.com/plant_information/vermont_yankee.aspx), archived at <http://perma.cc/G2K3-GSJZ> (last visited Feb. 2, 2015).

140. *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 426 (2d Cir. 2013) (discussing how the Vermont Public Service Board had held a number of public meetings where many individuals stated they opposed allowing a new nuclear waste storage facility and were concerned about the potential for “natural or manmade disasters, the nuclear waste storage technology, and the potential for environmental harm”).

state's power scheme.<sup>141</sup> However, the broad language of *Pacific Gas* nullifies and sweeps such economic concerns under the rug in the face of documented safety concerns. Such a result does not reflect the “dual regulatory authority” intended by the AEA. Nonetheless, *Pacific Gas* requires reliance upon state legislative motive to determine whether federal law preempts the state law, and in *Vermont Yankee*, the Second Circuit complied with this reasoning.

The problem with relying wholly on state legislative motive and looking beyond the expressly stated purposes of a given statute is two-fold. First, such overreliance on motive incentivizes state legislatures to hide their true motives if they want to legislate on nuclear safety. *Pacific Gas* and *Vermont Yankee* provide a clear blueprint for how a state legislature can regulate a nuclear power plant out of existence. All that is needed is for the state legislature to hide any true, safety-related reasons and provide plausible economic reasons instead, and the state law should stand. In *Vermont Yankee*, if the legislators had done a better job of covering their tracks and hiding their true motives in the legislative history then, under *Pacific Gas*, their laws would have likely been upheld. From a basic public policy standpoint, one cannot logically infer that when Congress passed the AEA, it intended that state legislatures should be able to prevail with their state nuclear safety-related laws by deceiving the judiciary regarding their true, safety-focused motives. However, under a strict legislative-motive federal preemption test, such deceit is incentivized.

Secondly, and perhaps more importantly, such a motive-focused inquiry provides unclear guidance to other states that may want to legislate on nuclear energy issues.<sup>142</sup> The Second Circuit majority in *Vermont Yankee* acknowledged that, as the law currently stands, no one knows how great a role the legislative history should play in the preemption test.<sup>143</sup> This will necessarily be the case with a motive-based preemption test due to the subjective nature of the motive-focused inquiry. Even if the Supreme Court were to take this matter up in the future and spell out exactly how closely a court must analyze a given legislature's motive, with a subjective test such as this based on the intent of legislators—which will necessarily be

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141. See Reply Brief for Plaintiffs-Appellees-Cross-Appellants at 6–7, *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 426 (2d Cir. 2013) (No. 12-707-cv(L)).

142. See *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 426 (2d Cir. 2013). See also *id.* at 419 n.27 (conceding that “*Pacific Gas* does not explain with precision the role legislative history plays in the analysis of an Atomic Energy Act preemption claim. . . . It is not clear how heavily legislative purpose is to be weighed in determining preemption”) (internal citations omitted).

143. *Id.*

ambiguous, the test as it is cannot provide clear guidance regarding permissible laws under the AEA.

Support for this ambiguity is seen in the opposite outcomes that arose in *Pacific Gas* as compared to *Vermont Yankee*. In the former, legislative intent was not delved into very much,<sup>144</sup> and in the latter, it was scrutinized quite closely. Because such level of scrutiny is necessarily subjective, a *Pacific Gas*-style legislative motive-focused test will always be unreliable and provide unclear guidance to states regarding the areas within the nuclear field that they may legislate without the fear of federal preemption. The Supreme Court has long acknowledged this fundamental problem with legislative motive-based tests:

We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some *purpose* in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [A]ny state legislation which frustrates the full *effectiveness* of federal law is rendered invalid by the Supremacy Clause.<sup>145</sup>

The Supreme Court's mention of the "frustration of the full effectiveness of federal law"<sup>146</sup> implies that the inquiry should be into what *effect* the state law has on the federal scheme, without concern for the state legislature's purpose in passing the law. Indeed, the Court acknowledges this tenet<sup>147</sup> in both *Pacific Gas* and *English*. However,

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144. The *Pacific Gas* majority said that it did not even need to address this question because there is a permissible, economic rationale for the law as it currently stands. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 222.

145. *Perez v. Campbell*, 402 U.S. 637, 651–52 (1971) (emphasis added). See also *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 105–06 (1992).

146. See *Gade*, 505 U.S. at 105–06.

147. "[Although] part of the pre-empted field is defined by reference to the purpose of the state law in question . . . another part of the field is defined by the state law's actual effect." *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990) (referencing *Pac. Gas*, 416 U.S. at 212, "[T]he statute does not seek to regulate the construction of operation of a nuclear power plant. It would clearly be impermissible for California to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless [infringe upon] the NRC's exclusive authority.>").

the Court then switches its position by crafting a broad test under which any reference to safety concerns will preempt a state law.<sup>148</sup> Given that this is not the way that federal preemption works in other contexts, as well as for the reasons discussed above, the legislative motive test should be struck in favor of a more tailored AEA preemption test. A look at federal preemption in the context of immigration law, as well as in the application of the *Pacific Gas* test in a number of federal circuit courts, provides guidance for formulating an alternative AEA preemption test.

### *1. Federal Preemption in the Context of Immigration Law*

In 2012, the Supreme Court addressed federal preemption law in the context of immigration law in *Arizona v. United States*.<sup>149</sup> The United States challenged four provisions of Arizona's state law under the doctrine of federal preemption. The Court found that the pervasive regulatory scheme that the federal government maintains over immigration matters, the need for uniformity of immigration laws as they relate to foreign relations, as well as the Constitution's dictate that the national government have the power to "establish a uniform Rule of Nationalization,"<sup>150</sup> all provided evidence for federal field preemption of state laws in the context of United States immigration policy.<sup>151</sup> Specifically with regard to Arizona's law on alien registration, the Court looked to precedent that had previously established federal field preemption.<sup>152</sup>

One of Arizona's four proposed laws was Section 3 of S.B. 170 which created a new state misdemeanor, forbidding "willful failure to complete or carry an alien registration document . . . in violation of 8 U.S.C. §1304(e) or §1306(a)." Section 3 effectively created steeper state law penalties for violating federal law. In determining

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148. *Pac. Gas*, 416 U.S. at 212–13.

"[T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states . . . A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC . . . A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use-and would be preempted for that reason."

Id.

149. 132 S.Ct. 2492 (2012).

150. U.S. CONST. art. I, sec. 8, cl. 4.

151. *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012).

152. *Id.* at 2498–99 (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 (1940)).

that the state law was preempted, the Court looked to the *presumed effect of the law* and analyzed how the enactment of the law would affect the federal government's regulatory scheme:

If §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, diminish[ing] the [Federal Government]'s control over enforcement and detract[ing] from the integrated scheme of regulation created by Congress.<sup>153</sup>

Nowhere in its discussion of Section 3 or the other challenged Arizona provisions does the Supreme Court give weight to the state's legislative motive in its preemption analysis. Instead, the Court focused on how the state laws, if enacted, would affect the federal regulatory scheme in order to determine preemption.

## *2. Lower Courts' Interpretation of AEA Supreme Court Jurisprudence*

### *a. U.S. v. Kentucky*

In *U.S. v. Kentucky* the Sixth Circuit addressed federal preemption of state-issued permits that contained conditions relating to the disposal of certain radioactive waste in a federal Department of Energy-operated landfill.<sup>154</sup> The Sixth Circuit used the blunt "does it fall within the entire field of nuclear concerns" preemption test from *Pacific Gas* reasoning that "the AEA preempts any state attempt to regulate materials covered by the Act for safety purposes."<sup>155</sup> Under this analysis, and similar to the reasoning in *Vermont Yankee*, the Sixth Circuit succinctly ruled that the state-issued permit conditions fell within the AEA-preempted field, and thus the Kentucky state requirements were struck down.

### *b. U.S. v. Manning*

Not all circuits, however, have used such a blunt, purpose-based preemption approach. In *United States v. Manning*, the Ninth Circuit addressed the AEA preemption question regarding a Washington law called the Cleanup Priority Act ("CPA").<sup>156</sup> The CPA was to add new provisions concerning mixed radioactive waste "requiring

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153. *Id.* at 2502 (citing Wisconsin Dept. of Industry v. Gould, Inc. 475 U.S. 282, 288–89 (1986)).

154. *See* 252 F.3d 816, 820 (6th Cir. 2001).

155. *Id.* at 823.

156. *See* 527 F.3d 828, 831 (9th Cir. 2008).

cleanup of contamination before additional waste is added, prioritizing cleanup, [and] providing for public participation and enforcement through citizen lawsuits.”<sup>157</sup>

The Ninth Circuit deviated from the blunt *Pacific Gas* test and interpreted the AEA preemption inquiry through the lens of *English*, saying that the AEA would preempt the CPA if: (1) the purpose of the CPA was to regulate against radiation hazards *or* (2) if the CPA directly affected decisions concerning radiological safety. Even though the Ninth Circuit found the state law to be preempted on both grounds,<sup>158</sup> it was nonetheless noteworthy that the Ninth Circuit used this more all-encompassing test, instead of just relying on the purpose of the state statute at issue as basis for striking the law.

c. Skull Valley Band of Goshute Indians v. Nielson

In *Skull Valley Band of Goshute Indians*,<sup>159</sup> an Indian tribe and a private company that planned to build a storage facility for spent nuclear waste brought suit against the State of Utah after the state legislature passed laws regulating the storage and transportation of nuclear waste.<sup>160</sup> The Tenth Circuit held that federal law preempted the Utah statutes. However, instead of looking solely to the *Pacific Gas* instruction that relied so heavily on a state legislature’s intent, the Tenth Circuit also included analysis from the Court’s unanimous holding in *English* which said that both the purpose and the effect of a given law should be analyzed to determine whether the AEA preempted the state laws.

The Tenth Circuit addressed both the purpose and the effect of the state laws in question but ultimately struck all three. The Tenth Circuit addressed whether the Utah laws had an impermissible “direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety

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157. *Id.* at 833.

158. *Id.* at 836.

159. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004).

160. The statutes at issue fell into three general categories: (1) [establishment of] state licensing requirements for the storage of [spent nuclear fuel] (SNF), and which revoke common law grants of limited liability to stockholders in companies engaged in storing SNF; (2) [provisions] which require county governments to impose regulations and restrictions on SNF storage; (3) [road provisions] which vest power to the Governor to regulate road construction around the proposed site. *Id.* at 1228.

levels.”<sup>161</sup> Such an inquiry was mentioned but notably not relied upon by the Second Circuit in *Vermont Yankee*.

### III. PROPOSAL: EFFECTS TEST FOR NUCLEAR ENERGY FEDERAL PREEMPTION

#### *A. Analysis Based on a State Law’s Effect on Safety Regulation*

By looking at how the Supreme Court has recently employed federal preemption of state law in the immigration context, as well as three lower courts’ varied approaches to AEA preemption, one can glean overall guiding principles of federal preemption law. These principles are as follows: presumption against preemption when dealing with historic state police powers,<sup>162</sup> congressional intent as the touchstone inquiry,<sup>163</sup> and the Supreme Court’s teachings that a state law’s effect should be given full attention in preemption analysis.<sup>164</sup> When one holds these principles up to how the *Pacific Gas* instructions unfolded in *Vermont Yankee*, the overreliance on legislative intent becomes clear. In light of the need for uniformity so that both state legislatures and lower courts have a predictable standard to follow, the federal preemption legislative motive test should be reformulated so inquiry into the state legislature’s motive would not be required at all.

Such a reformulation would allow for total bypass of the problem that was enunciated in *Vermont Yankee* at the district court where, in response to Entergy’s lawyer, a state witness noted, “The fact that you have this cacophony of ostensibly preempted inputs and unpreempted output, doesn’t mean that somebody’s dealing in pretexts or trickery, it means, the product worked, and the prohibited beginning became an accessible end. That’s not trickery, that’s legislation.”<sup>165</sup> Or, to quote an oft-mentioned reference to lawmaking, “[t]o retain respect

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161. *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

162. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

163. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

164. *See Gade v. Nat’l Solid Waste Mgmt Ass’n*, 505 U.S. 88, 105–06 (1992) (citing *Perez v. Campbell*, 402 U.S. 637, 651–52 (1971), “[W]e can no longer adhere to the aberrational doctrine. . . that state law may frustrate the operation of federal law as long as the state legislature . . . had some purpose in mind other than one of frustration. . . Any State legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.” *See also Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (noting that “when considering the purpose of a challenged statute, this Court is not bound by the name, description or characterization given it by the legislature or the courts of the state, but will determine for itself the practical *impact* of the law.” (emphasis added))).

165. *See Ferrey*, *supra* note 3, at 20.

for sausages and laws, one must not watch them in the making.”<sup>166</sup> Omitting reliance on legislative intent altogether would align with the longstanding principles of federal preemption generally and would allow for a more predictable—and more honest—test.

Regarding how to formulate a more predictable AEA federal preemption test, one can find guidance in the Supreme Court’s analysis of Arizona’s alien registration law. In that case, the Court determined that the Arizona alien registration law was preempted by focusing on the anticipated *effect* of the law if it were enacted, and how that effect would impact the federal regulatory immigration scheme. Use of the effect-focused inquiry such as that in *Arizona v. U.S.* would go a step further than the Tenth Circuit in *U.S. v. Manning*, which construed AEA Supreme Court jurisprudence as requiring preemption either when a statute has an impermissible purpose *or* an impermissible effect.<sup>167</sup> Employing a test similar to the immigration effects test would also go a step further than in *Skull Valley* where the Ninth Circuit acknowledged that Supreme Court AEA jurisprudence dictated an analysis of both the purpose *and* the effect of the law.<sup>168</sup> The analogy to *Arizona* is useful because it provides a means of moving away from AEA preemption ambiguity in favor of a clearer standard. Additionally, *Arizona* provides a helpful analogy because in both the *Arizona* analysis of Section 3 and in the *Pacific Gas* decision, the Court acknowledged that federal field preemption was in effect in both cases—in *Pacific Gas* the field was “radiological safety aspects”<sup>169</sup> and in *Arizona* the field was “alien registration laws.”<sup>170</sup>

Similar to the Court’s discussion in *English* and its holding in *Arizona*, the first step of a more tailored test might be to ask: What is the “direct and substantial effect”<sup>171</sup> of the state nuclear law? Once the anticipated effect of the law is determined, the second step would then be to ask: Does the direct and substantial effect of the state nuclear law substantially impact the NRC’s safety regulation function?<sup>172</sup> If the answer to step two is “yes,” then the state law would be preempted by the federal nuclear regulatory scheme.

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166. Ferrey, *supra* note 3, at 20 (citing Chancellor Otto von Bismark, In re Graham, 104 So. 2d 16, 18 (Fla. 1958)).

167. See *United States v. Manning*, 527 F.3d 828, 836–38 (9th Cir. 2008).

168. See *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1248 (10th Cir. 2004).

169. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983).

170. *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012).

171. *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

172. The inquiry laid out in *English* was whether the law had some direct and substantial effect on the decisions made by those who build or operate nuclear

Of importance to this test is the use of the phrase “safety regulation function” as opposed to the phrase “safety concerns” used by the Supreme Court in *Pacific Gas*. This change should be made for a number of reasons. First, the AEA’s explicit proviso states “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.”<sup>173</sup> The use of the word “regulation” thus better aligns with the wording of the AEA’s proviso itself. In that same vein, the use of the word “safety concerns”<sup>174</sup> opens up the federally preempted field too much, making it more likely that state laws implicating both safety and economic concerns would be struck down, even if their effect was ultimately permissible. As noted by Judge Carney in *Vermont Yankee*, under the AEA Vermont has the right to decide to completely halt production of nuclear energy within its jurisdiction.<sup>175</sup> The reasons for which a legislature bases its decision should not be given such weight as to strike the law if the effect of the law itself was permissible under the federal scheme. A narrower test such as the “effect on safety regulation” test would bring the jurisprudence into line with the text of the AEA.

*B. Application of Effect on Safety Regulation Test to Previously Decided Cases*

The strength of the effect on safety regulation of the two-part test is demonstrated when the new test is applied to fact patterns from previous cases. For example, if the effect on safety regulation test was applied to *Pacific Gas*, the outcome would likely be the same. However, the reasoning would rely, not on California’s avowed economic purpose, but would instead look to the actual effect of the law. In *Pacific Gas*, the effect of the nuclear waste disposal means requirement was to halt construction of nuclear plants until the NRC had finished its disposal means plan. Halting construction of a nuclear power plant is perfectly within the bounds of the AEA’s proviso. Thus, the test would allow for the same outcome in the *Pacific Gas* context.

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facilities concerning radiological safety levels. *Id.* at 85. In *English*, the Court unanimously determined that the whistleblower anti-retaliation tort action did not have such an effect and was thus not preempted by the AEA. *Id.* at 90.

173. 42 U.S.C. 2021(k) (2012) (emphasis added).

174. *Pac. Gas*, 461 U.S. at 212.

175. See *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 436–38 (2d Cir. 2013) (Carney, J., concurring).

The effect on safety regulation test, however, would render the opposite result in *Silkwood*. The first step would be to ask: What is the direct and substantial effect of the state law tort claim in *Silkwood*? The response would be that the state law tort claim allowed for a \$10 million punitive damages award against a nuclear plant based on the jury's thoughts about nuclear safety, aimed at punishing the nuclear power plant into modifying its safety procedures. The second step would be to ask whether this effect—the \$10 million punitive damages award against a nuclear power company—would have a substantial impact on the NRC's safety regulation function. It certainly could because, at least in *Silkwood*, the NRC investigatory team found no violation of safety procedures connected to the plutonium contamination, but the jury nonetheless returned a \$10 million punitive damages award as a means of prompting the nuclear company to improve its safety procedures (when under federal law, their procedures were perfectly fine).<sup>176</sup>

As applied to *English*, the effect on safety regulation test would likely produce the same outcome since, in that case, the anti-retaliation issue that was presented did not directly implicate safety regulations but instead concerned plaintiff's status as a whistleblower and her corresponding intentional infliction of emotional distress claim.

Finally, if the effect on safety regulation test were applied to *Vermont Yankee*, the outcome would be that Vermont's Acts 74 and 160, two laws that were preempted under the current analysis, would stand under the proposed effects test. In response to the first question—What is the direct and substantial effect of the two laws?—the anticipated effect was to force the closure of the plant.<sup>177</sup>

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176. 464 U.S. 238, 245 (1984).

177. The Second Circuit in *Vermont Yankee* addressed the noteworthy fact that the electricity generation regulatory landscape is quite different now from in the 1980s and 1990s, which was closer in time to when the Supreme Court issued its 1983 *Pacific Gas* decision. See *Vermont Yankee*, 733 F.3d at 411. It is relevant to point out that in the 1980s, all states were vertically-integrated entities that sold the power they generated directly to their in-state retail customers. Then, state regulatory agencies would focus on what retail rates were sold to the public. Essentially, this framework meant that in 1982, California's argument that if a local utility's operating costs rose, those increases would be directly passed on to the public. Nowadays, however, the regulatory framework is different and accommodates "merchant generators" who sell the power they generate wholesale across state lines. While this market change is good to keep in mind, it should not impact the outcome of preemption analysis. If Congress wants to amend the AEA to bring it up to date with the new electricity regulatory scheme, it is wholly empowered to do that. The court, through use of a preemption test, should not be concerned with this though. For more information, see generally *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013).

Then, the question would be whether this effect impacts the NRC's safety regulation function. The answer would have to be no, because even though the NRC would be involved in ensuring the safety of the plant as long as it was operational and during decommissioning that would not implicate the NRC's function itself. The NRC procedure for shutting down would remain the same whether the Vermont Yankee plant closed or not. However, with regard to Act 189, which the Second Circuit found not ripe for review, that law directly required state-sponsored nuclear technical inspections, which would fall squarely within the NRC's purview. Thus, a law such as Act 189 would be preempted under this new formula.

#### CONCLUSION

In light of the varied interpretations of *Pacific Gas* in recent years, as well as the Second Circuit's own acknowledgment that it remains unclear how much weight legislative intent should receive in the nuclear energy context, the Supreme Court should consider a reformulation of the nuclear energy federal preemption test. Applying the proposed "effect on safety regulation" test seems to produce an outcome that is more in line with the actual language and structure of the AEA—allowing states to make the decision regarding their desired local energy mix but leaving the technical safety regulation questions to the experts at the NRC. Such a result indicates that this test would be preferable to the current guideline. The Supreme Court should take heed and seek to clarify its guideline when this issue arises in the future.

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