NOTE: THE ROLE OF THE STATES IN ENERGY REGULATION

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In the recent decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*,[1] the Supreme Court indicated that the states would have a large role in the decision to proceed with nuclear power. The *Pacific Gas & Electric* decision, one of the most anticipated[2] and subsequently discussed[3] of the 1982-83 term, not only raises important questions for the nuclear industry, but provides another piece of the puzzle in a growing area of Supreme Court jurisprudence: the role of the states in schemes of federal energy regulation.

Just a few short years ago, proposals for federal action in the energy field envisioned little or no state involvement.[4] Recently, however, the interest and battleground for many energy issues has shifted to the states as ratepayers are more organized and willing to fight issues at the state level.[5] State legislators and governors are more active and sophisticated in energy issues.[6] In fact, groups which previously did battle on these issues at the federal level now often view the states as their primary arena.[7] The power of the states under the Constitution and federal statutes has become the key to the viability or limitation of solutions to national energy problems.

During this term, the Supreme Court has considered several cases in which the states' power to regulate has been challenged on various constitutional grounds, and the Court has upheld state action by large majorities in each case. This note will examine three cases from the 1982-83 term, attempt to distill basic principles from these cases, and illustrate the limits of these principles by examining previous decisions and legislation. These principles and their limitations may serve as a basic guide to understanding what states may or may not do in relationship to the federal government in the field of energy regulation.

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[1]103 S. Ct. 1713 (1983).

[2]The pre-decision law review commentary on this case consisted of over 25 articles, beginning in 1976 and concluding only recently. *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); Tribe, *California Declines the Nuclear Gamble: Is Such a Choice Preempted*, 7 Ecology L. Q. 679 (1978); Preemption Analysis of California's Moratorium on Nuclear Plant Construction: Pacific Legal Foundation v. State Energy Resources & Development Commission, 66 Minn. L. Rev. 1258 (1982).

[3]The decision became the subject of immediate contention in the legal, regulatory, and the regulated community. *See* Wald, *Little Effect Seen From Reactor Ban*, N.Y. Times, April 26, 1983, at A21, col. 1: Ahearne, *The Supreme Court's Nuclear Bomb*, Wash. Post, May 5, 1983 at A27, col. 2.

[4]*See* Proposed Amendment 643 to S. 2506, 93d Cong., 1st Sess., *reprinted in* Williams, Maxwell & Meyers, The Law of Oil & Gas (4th ed. 1979). The amendment was intended to create a Federal Oil & Gas Corporation to explore for natural gas. Section 602(j) stated:

> (1) Except for compliance with Federal statutes which may be administered by the States, the Corporation shall be exempt from State and local statutes or controls which would impede its ability to perform the activities authorized by this title: *Provided*, That the Corporation shall submit a prior report, together with the reasons therefor, to the Commission and the Congress with respect to each incident of noncompliance with any State or local statute or control.

This contrasts with the participation of the states in the most recently enacted natural gas legislation. *See* Natural Gas Policy Act of 1978, 15 U.S.C. § 3413 (Supp. II 1978) (determinations of categories of gas by state regulatory authority).

[5]*See e.g.*, Keppel & Bry, *PUC Feels the Heat as Utility Rate Pleas Rise*, L.A. Times, June 12, 1983 at Sec. 5, p. 1, col. 1.; American Bar Association, 1982 Annual Report on Public Utility Law at 87-88 (1982).

[6]*See* Balz, *New Mexicans Urge Interior to Cancel Scheduled Coal Leasing*, Wash. Post, May 22, 1983, at A3, col. 1. (New Mexico governor attacks Interior Department coal leasing decisions).

[7]Others take the opposite position, that states have or may become the objects of delay or obstruction. *See* Wermeil, *Justices Uphold States in Barring Nuclear Plants*, Wall St. J., April 21, 1983, at 4, col. 1.

I. The Supreme Court's Decisions

In *Energy Reserves Group, Inc. v. Kansas Power & Light*, 103 S. Ct. 697 (1983), the Contract Clause of the Constitution[8] served as the vehicle for challenge to legislation passed by the Kansas legislature[9] pursuant to authority contained in the Natural Gas Policy of 1978 (NGPA).[10] Kansas exercised its authority under NGPA to limit escalations in intrastate natural gas purchase contracts executed before April 20, 1977 but only until December 31, 1984.[11] The Kansas law prevented consideration of either federal ceiling prices or other contractual prices in the application of any indefinite price escalator clause[12] contained in a contract for the sale within the state of gas produced within the state.[13] The Kansas Act did provide that, between March 1, 1979 and December 31, 1984, indefinite escalators could operate to bring the maximum price up to that available under one of the NGPA categories.[14]

Energy Reserves sought a declaratory judgment that it had the contractual right to terminate its contract because of the failure of Kansas Power & Light Company to comply with its request for a price redetermination according to its reading of the contract and NGPA.[15] The state trial court and the state supreme court denied relief to Energy Reserves,[16] whereupon the company appealed to the Supreme Court.

In its consideration of the case, the Supreme Court unanimously upheld the Kansas courts[17] after using a three-part analysis articulated in its recent Contracts Clause cases.[18] The opinion favored state law in every step of its analysis.

Applying the first part of the Contracts Clause test, the Court considered whether the state law was a substantial impairment of a contractual obligation. In

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[8]"No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1.

[9]Kan. Stat. Ann. §§ 55-1401 to 55-1415 (Supp. 1981). Oklahoma has a similar statute. Okla. Stat. Ann. tit. 52 §§ 260.1-.13 ((West) Supp. 1982-83). New Mexico has a related statute. N.M. Stat. Ann. § 62-7-1 to 9.1 (Supp. 1982).

[10]15 U.S.C. § 3301 *et. seq.* (1976 &. Supp. V). Specifically, under 16 U.S.C. § 3432(a):

> Nothing in this chapter shall affect the authority of any state to establish or enforce any maximum lawful price for the first sale of natural gas produced in such state which does not exceed the maximum lawful price, if any, under subchapter I of this chapter.

This clause received further interpretation in a subsequent case involving a Supremacy Clause and a Contract Clause challenge. *See* notes 21 & 94, *infra.*

[11]Kan. Stat. Ann. § 55-1403 & 1411 (1982 Cum. Supp.)

[12]An indefinite price escalator clause allows escalation in contracts without reference to a set percentage of current price. Pierce, *Natural Gas Regulation, Deregulation, and Contracts,* 68 Va. L. Rev. 63, 80-81 (1982). *See* Williams & Meyers, Oil & Gas Law § 726.1 (1981).

[13]Kan. Stat. Ann. § 55-1404.

[14]Kan. Stat. Ann. § 55-1405.

[15]Energy Reserves Group contended that it was entitled to the § 102 NGPA price for newly produced natural gas. The difference in December 1978 was $.44 per mcf.

[16]*See* 230 Kan. 176, 630 P. 2d 1142 (1981).

[17]Six justices joined in the Court's opinion. Three justices concurred.

[18]The Court's Contract Clause analysis is:

> 1) examine whether the state law is a substantial impairment of a contractual obligation, with the level of scrutiny increasing according to the severity of the impairment. Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). State regulation of gains reasonably expected does not per se constitute a substantial impairment, and past regulation in the field by a state will be considered.
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> 2) If there is a substantial impairment, then there must be a significant and legitimate public purpose behind the statute. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The public purpose need not be an emergency, and the elimination of windfall profit is legitimate.
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> 3) After a legitimate purpose is determined, the adjustments made are examined in light of reasonableness and appropriate character. *United States Trust Co.*, 431 U.S. at 22. Courts defer to legislative judgment unless the State itself is a contracting party.

concluding that the law was not a substantial impairment, the Court found that the parties operated in a highly regulated industry, citing a litany of court decisions and laws on price, production, transportation, and other regulation whereby the states exercise extensive powers over the natural gas industry.[19] The Supreme Court further found no impairment because of the parties' expectation that the contract would be subject to relevant present and future state and federal law.[20] The second and third prongs of the Contract Clause analysis involved examination of a legitimate public interest and reasonableness tests. The Court deferred to the judgment of the legislature on the need and means of implementation:

> [T]he Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on fixed incomes. The State also has a legitimate interest in correcting the imbalance between the interstate and intrastate markets by permitting intrastate prices to rise only to the § 109 level. . . . we must consider the entire state and federal gas price regulatory structure. Only natural gas subject to indefinite price escalator clauses poses the danger of rapidly increasing prices in Kansas. Gas under contracts with fixed escalator clauses and interstate gas purchased by the utilities subject to § 109 would not escalate as would intrastate gas subject to indefinite price escalator clauses. The Kansas Act simply brings the latter category into line with old interstate gas prices by limiting the operation of the indefinite price escalator clauses.[21]

The concurrence in the case favored all of the Court's analysis, merely disagreeing with the need to progress to the second and third steps of the Contract Clause analysis given the strong finding on the first element.[22]

The Supremacy Clause of the Constitution[23] provided grounds to challenge the 1976 amendments to California's Warren-Alquist Act,[24] in *Pacific Gas and Electric v. State Energy Resources Conservation and Development Commisison,* 103 S. Ct. 1713 (1983). One of the amendments required a determination by the State Commission 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."[25] before a new nuclear plant can be certified for construction in California.[26] Under Section 271 of the Atomic Energy Act of 1954, ratemaking and other decisions with respect to electricity from nuclear plants were

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[19]103 S. Ct. 697, 706 nn. 16-18.

[20]103 S. Ct. at 707-08. This conclusion is further reinforced by the Court's decision in Exxon Corp. v. Eagerton, 51 U.S.L.W. 4700 (June 3, 1983). In *Eagerton,* gas producers launched a challenge to a state statute which prohibited pass-through of a state severence tax. The Court held that the state could prohibit the pass-through without violating the Contract Clause on an analogy to rate case regulation, which allows regulated rates to displace contractual terms. 51 U.S.L.W. at 4704.

[21]103 S. Ct. at 708, 709.

[22]103 S. Ct. at 710.

[23]"This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land . . . anything in the constitution or laws of any State to the contrary notwithstanding." U.S. Const., Art. VI. cl. 2.

[24]Cal. Pub. Res. Code §§ 25524.1(b), 25524.2 (West 1977).

[25]§ 25524.2, *supra* note 25. At various levels of the litigation, other portions of the 1976 amendments were under challenge. *See infra* note 32.

[26]California, like every other state in the United States, has reserved for itself the right to determine whether to certify a proposed new plant as in the public convenience and necessity. *See* American Bar Association, The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities (1981) (cited by the Court in n. 17 of its opinion). California's decion-making is the subject of one of the two lengthy case studies in the Report. Briefly, California engages in a comprehensive determination of need and siting in an agency entirely separate from the rate regulating body. American Bar Association Report at 25-48.

left to the various types of agencies of the states which dealt with such questions.[27] Subsequent amendments reaffirmed authority of the Atomic Energy Commission, now the Nuclear Regulatory Commission,[28] to regulate nuclear material[29] and tried to prevent direct interference with the activities of the Commission by other agencies of government.[30]

Two California utilities sued in federal district court for a declaratory order that the moratorium on nuclear powerplants was preempted by the Atomic Energy Act of 1954. The utilities were granted relief by the district court,[31] but the court of appeals reversed.[32] On review, the Supreme Court accepted all but the most extreme arguments and rulings which justified the legislation, and rejected all attacks on the state law.

The Supreme Court began its analysis with its restatement of Supremacy Clause limitations related to implied preemption.[33] The Court then classified the arguments of petitioners, the United States, and *amici* as presenting challenges based on dominant federal interests, duplicative purpose, and obstruction of federal goals.[34]

The Court's examination of whether a dominant federal interest was present in the field of atomic energy which ousted states from making decisions began with a review of the broad powers of the states in utility regulation,[35] which was compared to the extensive non-economic authority given to the Nuclear Regulatory Commission by the federal legislation.[36] After finding the preservation of the states'

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[27]Section 271 stated when enacted:

"Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities licensed by the Commission."

For legislative history regarding this section, *see* 100 Cong. Rec. 12015 (1954) (remarks of Sen. Hickenlooper); 100 Cong. Rec. 11689 (1954) (remarks of Reps. Yates and Cole).

[28]42 U.S.C. §§ 5814(a) & 5841 (1976 ed.).

[29]42 U.S.C. § 2021 (1976). For legislative history of this section, *see* S. Rep. No. 870, 86th Cong., 1st Sess. *reprinted in* [1959] U.S. Code Cong. & Ad. News 2872; *see also Federal-State Relationships in the Atomic Energy Field: Hearings on S. 2568 and H.R. 8755 Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. (1959).

[30]*Provided* That this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control or restrict any activities of the commission.

The amendment was intended to reverse a finding by a United States Court of Appeals that allowed a municipality to block transmission lines necessary for a nuclear facility. 103 S. Ct. at 1725-26. *See* H.R. Rep. No. 567 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 2775 (citing Maun v. United States, 347 F. 2d 970 (9th Cir. 1965)).

[31]489 F. Supp. 699 (E.D. Cal. 1980).

[32]659 F. 2d 903 (9th Cir. 1981). The Court of Appeals considered challenges to over a dozen sections of the Warren-Alquist Act because of the consolidation of the *Pacific Legal Foundation* and the *Pacific Gas & Electric* cases. *See* 659 F. 2d at 909-10.

[33]The Court's preemption analysis is essentially:

An implied preemption of state law may occur by total displacement or partial displacement by conflict. Total displacement can occur with

1) A pervasive federal scheme, OR
2) A dominant federal interest, OR
3) A duplicative purpose in the federal and state schemes.

Partiall isplacement by conflict may occur if

1) Simultaneous compliance is impossible, OR
2) When state law serves as an obstacle to the full accomplishment of the purposes of the federal law.

[34]103 S. Ct. at 1722-23.

[35]103 S. Ct. at 1723. The Court's statement is cited in full at text accompanying note 74 *infra*.

[36]"The AEC, however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." 103 S. Ct. at 1724 (citations omitted).

powers in the original Act and subsequent amendments,[37] the Court concluded that:

> Congress has preserved the dual regulation of nuclear-powered electricity regulation: the federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.[38]

The Court recognized that it must find that the California legislation had a non-safety rationale if it were to be sustained, since the Court perceived the "broad" position of the supporters of the legislation[39] as impermissible.[40] Finding a non-safety rationale in the legislative report accompanying the legislation[41] and in the court of appeals interpretation of those reports,[42] *but not in the legislation itself*,[43] the Court summarily rejected a number of arguments suggesting that California's intent was indeed nuclear safety regulation.[44] In conclusion, the Court indicated that its finding of a non-safety rationale was bolstered by its traditional refusal to explore legislative motive[45] and by the ability of California to achieve essentially the same end

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[37] 103 S. Ct. at 1724-26. *See* notes 28-31 & accompanying text *supra*.

[38] 103 S. Ct. at 1726.

[39] Some 30 states supported the California laws before the Court as Amici. *See 2e.g.,* Brief for the States of Illinois and New Hampshire Supporting Affirmance, Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission, 103 S. Ct. 1713 (1983). It must be noted that Amici did not all take the broadest position to defend this legislation. Nonetheless, counsel for the States of Illinois and New Hampshire did argue in counsel for the States of Illinois and New Hampshire did argue in their brief that "From the perspective of federal promotional policy, it matters little whether state interference is on radiological or other environmental grounds, since the result is the same: utilities may be discouraged from building nuclear power plants." Brief of Amici at 19. This seems to have anticipated a major test of the legislation by the Court. *See* nn. 99-102 & accompanying text, *supra*.

[40] The impermissibly broad position was thought to be one which claimed "a state may completely prohibit new construction until its safety concerns are satisfied by the federal government. . . . A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field." 103 S. Ct. at 1726-27.

[41] Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and its Alternatives (1976).

[42] The Court cited the Ninth Circuit's interpretation of the history of § 25524.2 as non-safety related, and stated "Our general practice is to place considerable confidence in the interpretations of *state* law reached by the *federal courts of appeals*." 103 S. Ct. at 1727 (citations ommitted) (emphasis added).

[43] The legislation *itself* contains *no* legislative findings related to economics. *See* Cal. Pub. Res. Code § 25500 *et. seq.* Neither the Court of Appeals nor the Supreme Court considered the statutory language itself without also considering the findings of the accompanying reports. *See* 659 F. 2d at 924 and 103 S. Ct. at 1727-28.

[44] The arguments dismissed by the Court were:

1) The statute evinces no concern with economics.
2) The statute does not ban California utilities from building nucllar power plants outside the state.
3) The California Public Utility Commission is already authorized to make these decisions on economic grounds.
4) The enactments were closely related to Proposition 15, a rejected nuclear initiative, which would have banned nuclear power as "a threat to California."

The Court termed these arguments in turn as overly myopic, carrying little force, not foreclosed, and not part of the enacting statute. 103 S. Ct. at 1727-28.

[45] *Id.* citing United States v. O'Brien, 391 US 367, 383 (1967). For another recent discussion of legislative motive, see Minneapolis Statr & Tribune Co. v. Minnesota Comm. of Revenue, 103 S. Ct. 1365 (1983).

by different and legitimate means.[46]

The Court also rejected duplicative purpose as a reason to invalidate the California law. Petitioners attempted to read the Nuclear Regulatory Commission's continued licensing of reactors[47] and the passage by Congress of the Nuclear Waste Policy Act[48] as establishing a scheme of waste disposal regulation. The Court rejected this interpretation, finding: "As there is no attempt on California's part to enter this field, one which is occupied by the federal government, we do not find § 25524.2 preempted any more by the NRC's obligations in the waste disposal field than by its licensing power over the plants themselves."[49] The Court similarly dismissed a preemptive effect from the recent nuclear waste legislation, finding that Congress did not intend "to make [a] decision for the states through this legislation."[50] The Court further noted that Congress had rejected a preemptive effect for the legislation on this very matter.[51] It concluded: "[I]t is certainly possible to interpret the Act as directed at solving the nuclear waste disposal problem for existing reactors without necessarily encouraging or requiring that future plant construction be undertaken."[52]

Applying the final test for preemption, the Court considered and rejected Petitioners' argument that the California legislation frustrated the purposes of the Atomic Energy Act. The Court took pains to reject the extreme position taken by the court of appeals that subsequent federal legislative developments abandoned the encouragement of nuclear power[53] and cited statutes which suggested that nuclear

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[46]The Court said:

> [S]tates have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic ggounds to issue certificates of public convenience in individual proceedings. In these circumstances, it should be up to the Congress to determine whether a sttte has misused the autbority left in its bands.

103 S. Ct. at 1728. In essence, the Court sanctioned the achievement of even *illegitimate* ends by legitimate means which have not been preempted by the federal enactment.

[47]The courts have affirmed the licensing decisions of the Nuclear Regulatory Commission in these matters. *See* Minnesota v. NRC, 602 F. 2d 912 (D.C. Cir. 1979); Illinois v. NRC, 591 F. 2d 12 (7th Cir. 1979); NRDC v. NRC, 582 F. 2d 166 (2d Cir. 1978). *See also* Baltimore Gas & Electric v. Nat. Res. Def. Council, 51 U.S.L.W. 4678 (June 6, 1983), *reversing* Nat. Res. Def. Council v. NRC, 685 F. 2d 459 (1982) ("Vermont Yankee II").

[48]The Nuclear Waste Policy Act of 1982, Pub. L. 97-425 (1982). The legislative history of the Act is somewhat confusing, since there was no conference or Conference Report to resolve differences. Instead, the Senate and House passed each others bills with amendments. *See* Davis, The Development and Legislative History of the Nuclear Waste Policy Act of 1982, Institute of Nuclear Materials Management Seminar on the Nuclear Waste Policy Act of 1982 (May 4, 1983). Therefore, floor remarks may provide key legislative history for many of the most controversial decisions made in the waning hours of the 97th Congress.

[49]103 S. Ct. at 1730.

[50]103 S. Ct. at 1730.

[51]A floor amendment was offered without objection which would have provided that the enactment of the Nuclear Waste Policy Act would satisfy all requirements of demonstrated technology or assurances on high-level waste disposal. *See* 128 Cong. Rec. S4310 (April 29, 1982). As the Court noted, the House omitted such a provision, with the floor manager claiming this action would specifically prevent a legislative finding of preemption in the *Pacific Gas & Electric* case. 128 Cong. Rec. H8797 (daily ed. Dec. 2, 1982) (remarks of Rep. Ottinger). The Senate accepted this omission, but Senator McClure has since disputed the claim that this has the significance of an affirmative rejection of preemption. McNeil-Lehrer Report, The New Cloud Over Nuclear Power (April 20, 1983).

[52]103 S. Ct. at 1730.

[53]103 S. Ct. at 1731. The Court was referring to the court of appeals discussion at 659 F. 2d at 926-27. The court of appeals had noted the division of Atomic Energy Commission's promotional and safety responsibilities in 1974, but the Supreme Court noted that this division "was carefully drafted, in fact, to avoid any anti-nuclear sentiment." 103 S. Ct. at 1731.

power was still being promoted.[54] Moreover, the Court reiterated that California had been left the authority to slow or even stop nuclear power "for economic reasons,"[55] and that Congress should redraw the division of authority if national objectives were being frustrated.[56]

Finally, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 103 S. Ct. 1905 (1983), the Commerce Clause of the Constitution[57] provided the basis for the challenge to the assertion of jurisdiction by the Arkansas Public Service Commission over a wholesale electric power cooperative which markets solely within the state.[58] The Arkansas Commission decided that any effects which its regulation might have upon interstate commerce would be only incidental.[59] The state trial court set aside the Commission's finding but the Arkansas Supreme Court reversed.[60] The Cooperative appealed to the United States Supreme Court.

Finding no sufficient grounds for preemption by either the Federal Power Act[61] or the Rural Electrification Act,[62] the Supreme Court examined the Commerce Clause challenge to the Arkansas Commission's assertion of jurisdiction.[63] While acknowledging that its prior decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*[64] limited state electric utility regulation under the Commerce Clause and drew a bright line between wholesale and retail

[54]The Court noted the extension of the Price-Anderson Act in Pub. L. No. 94-197, 89 Stat. 1111, and the passage of the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301 *et. seq.*, as evidence that nuclear power was still the subject of promotional interest by Congress. 103 S. Ct. at 1731.

[55]103 S. Ct. at 1732. *See* text accompanying note 101 *infra* for full quotation.

[56]The Court concluded with a footnote reference to First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), but distinguished nuclear energy from hydroelectric energy because the Atomic Energy Act does not mandate a comprehensive planning responsibility like Title I of the Federal Power Act, 16 U.S.C. §§ 791a-823 (1976). 103 S. Ct. at 1732. In its final footnote, the Court also stated "state regulations which affected the construction and operation of federally approved nuclear power plants would pose a different case." 103 S. Ct. at 1732. Theoretically, this leaves open the question of both operating nuclear power plants and any planned plant for which Nuclear Regulatory Commission approval was obtained before state approval. The operating reactor question is an open one, but the question of a plant first certified by that Commission but not certified by a state is discussed in the legislative history of the Atomic Energy Act. Remarks of Reps. Yates and Cole, *supra* note 28.

[57]"The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. *See* Tanzman, *Commerce Clause Limitations on State Regulation and Taxation of the Energy Industry*, 13 Loy. U. Chi. L.J. 277 (1982).

[58]The Court in the Arkansas Electric case also considered the preemption of the Arkansas Public Service Commission's jurisdiction by the Federal Power Act and the Rural Electrification Act. 103 S. Ct. at 1912 and rejected a claim of preemption. 103 S. Ct. at 1913, 1915. These developments have not been discussed in the previous section due to the lengthy considerations of preemption in the *Pacific Gas & Electric* case.

[59]*See* 273 Ark. 170, 618 S.W. 2d 151 (1981) and discussion of the Court at 103 S. Ct. at 1911.

[60]273 Ark. 170, 618 S.W. 2d 151 (1981).

[61]16 U.S.C. § 824 *et. seq.* (1976 ed.)

[62]7 U.S.C. § 901 *et. seq.* (1976 ed., and Supp. V).

[63]The Court reached the Commerce Clause issue following its rejection of preemption arguments. The Court has indicated that the main focus has moved from constitutional issues to statutory interpretation in a number of energy areas. 103 S. Ct. at 1909-10.

[64]Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927).

rate regulation, the Supreme Court passed by[65] the mechanical tests in *Attleboro* and other cases[66] in favor of "modern" Commerce Clause analysis.[67]

Under "modern" analysis, whether State regulation will be upheld becomes a balancing between the burdens imposed upon interstate commerce and the benefits sought to be gained by the State, provide that other conditions are satisfied.[68] The Supreme Court examined each condition in turn, and concluded that the assertion of jurisdiction was "well within the scope of 'legitimate local public interests,' " and that economic protectionism by the State was not implicated.[69] The Court then concluded that any incidental effects on interstate commerce from the existence of an interstate power grid were not outweighted by the purported local benefits of State regulation:

> Part of the power AECC sells is received from out-of-State. But the same is true of most *retail* utilities, and the national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States. Similarly, it is true that regulation of the prices that AECC charges to its members may have some effect on the price structure of the interstate grid of which AECC is a part. But, again, we find it difficult to distinguish AECC in this respect from most relatively large utilities which sell power directly to the public and to other utilities.[70]

The dissent did not reach the Commerce Clause question.[71]

II. Principles to Guide the States in the Energy Field

Although each of the decisions discussed above have limitations presented by previous cases and by the opinions themselves, certain broad guidelines can be deduced to guide states in their attempts to exercise power where federal energy regulation exists.

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[65] The Court stated:

> We are faced, then, in this case, with precisely the question left open in *Illinois Gas:* Do we follow the mechanical test set out in *Attleboro,* or the balance-of-interests test applied in our Commerce Clause cases for roughly the past 45 years? Of course, the principle of *stare decisis* counsels us, here as elsewhere, not likely to set aside specific guidance of the sort we find in *Attleboro.* Nevertheless, the same respect for the rule of law that requires us to seek consistency over time also requires us to seek consistency in the interpretation of an area of law at any given time. Thus, in recent years, this Court has explicitly abandoned a series of formalistic distinctions — akin to the one in *Attleboro* — which once both defined and controlled various corners of Commerce Clause doctrine.

103 S. Ct. at 1916.

[66] Missouri v. Kansas Gas Co., 265 U.S. 298 (1924); Public Utilities Comm. v. Landon, 249 U.S. 236 (1919).

[67] 103 S. Ct. at 1915.

[68] The "modern analysis" states:

> If 1) a statute regulates evenhandedly,
> 2) to effectuate a legitimate local interest,
> Then, 3) the statute will be upheld if the burden on commerce is not excessive in relation to the purported local benefits.
> Further, 4) upon a finding of legitimate purpose, the nature of the interest and the possibility of whether it could be promoted with lesser impact on interstate commerce are considered.

See Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

[69] 103 S. Ct. at 1917.

[70] 103 S. Ct. at 1918.

[71] 103 S. Ct. at 1921.

1. *Justify actions as within the traditional police power and exercise that power to its limit.*

All three recent cases recognize the traditional police powers of the states regarding "public utilities." In the *Energy Reserves* case, the Supreme Court wrote:

> Significant here is the fact that the parties are operating in a heavily regulated industry. State authority to regulate natural gas prices is well established. At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive.[72]

The same sentiment was evident in the *Pacific Gas & Electric* case:

> Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States. Justice Brandeis once observed that the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." The nature of government regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Thus, Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that ws the clear and manifest purpose of Congress.[73]

In the *Arkansas* case, the Supreme Court emphatically stated:

> [T]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States.[74]

The police power originated under the Commerce Clause as powers retained by the states[75] to regulate purely local activities.[76] Since then, the police power has developed into a factor of *balance* in a number of constitutional inquiries: legitimate purpose versus reasonableness and appropriateness in a Contract Clause analysis,[77] presumption of the saving a state's police power versus clear intent to preempt on the part of Congress in a Supremacy Clause analysis,[78] and regulation of a legitimate, local public interest versus burden upon interstate commerce in a Commerce Clause analysis.[79] Given the recognized extent of the police power and the origins of that power with regard to utilities,[80] it is hardly surprising that the police power won in the balancing carried out by the Court in the three recent cases.

Nonetheless, the police powers of a state are not without limits. One limit which would serve as a useful test to states contemplating action where a federal energy regulation scheme exists might be *think twice before doing anything that would not*

[72] *Energy Reserves*, 103 S. Ct. at 706 (Citations omitted).

[73] *Pacific Gas & Electric*, 103 S. Ct. at 1723. (citations omitted).

[74] *Arkansas Electric Cooperative Corp.*, 103 S. Ct. at 1908.

[75] Gibbons v. Ogden, 22 US (9 Wheat) 1 (1824). A modern statement of the theory is:

> [U]nless some federal or state constitutional provision exists with which the state action conflicts, a state statute, or action taken pursuant to it, is valid simply because if *any* government is competent to make the regulation in question, the state can do it because the states are the general repository of governmental power.

Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 Hou. L. Rev. 1201, 1202 (1978).

[76] Cooley v. Board of Wardens, 53 US (12 How.) 299 (1851). *See* Nowak, Rotunda & Young, Handbook on Constitutional Law Ch. 4 (1979).

[77] *See Energy Reserves*, 103 S. Ct. at 704-05.

[78] *See Pacific Gas & Electric*, 103 S. Ct. at 1723.

[79] *See Arkansas Electric Cooperative Corp.*, 103 S. Ct. at 1915.

[80] *See* Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 511-14 (1979). The interests suggested are prevention of environmental damage, protection of eminent domain, and retention of community services.

disadvantage local interests as much or more than "interstate" interests. State laws seeking to favor local businesses over interstate businesses have often been struck down as undue burdens upon interstate commerce,[81] while those that disadvantage both equally may receive more favored treatment.[82] The Arkansas cooperative and the California utilities were limited in their economic decision-making by being made subject to regulation, but there is no clear indication that the decisions of the States in these cases were protectionist in nature.[83] Although Kansas' decision to control gas prices seems protectionist,[84] a grant of federal authority allowed the action.[85]

A clear example of state action which was protectionist and in excess of a state's police power was before the Supreme Court in *New England Power Co. v. New Hampshire.*[86] In *New England Power,* a state attempted to exercise the right to prohibit or limit exportation of relatively inexpensive hydroelectric power.[87] The Court noted that the action by New Hampshire to benefit from the inexpensive hydroelectric power was the very type of action suspect under the Commerce Clause,[88] and, therefore, the Court had little difficulty rejecting the thin legislative history[89] which the state claimed as the defense to its previously unneercised power.[90]

Similarly, state legislation has been invalidated under the Contract Clause when narrow interests were dealt with by previously unexercised "police" powers.[91] In a Supremacy Clause action, the Court has invalidated energy tax legislation which by its analysis conflicts with federal authority to regulate the sale and transportation of natural gas in interstate commerce.[92] Thus, a state's police powers are limited, and states must be aware of those limits in their actions. A state might do well to consider *whether its legislation would pass muster under a hypothetical clause which allowed the state to*

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[81] L. Tribe, American Constitutional Law § 6-12 (1978).

[82] South Carolina Highway Dept. v. Barnwell Bros., 303 US 177 (1938).

[83] At first glance both might seem to be, perhaps upon a theory that they could favor the movement of business into states with lower utility rates. *See* Tribe at § 6-9, n. 82 *supra.* One can hypothesize a situation of conflict, but the Court has indicated that it will not consider hypothetical conflicts. 103 S. Ct. at 1915 & 1918, *citing* Exxon Corp. v. Governor of Maryland, 437 US 117 (1978).

[84] Tribe § 6-9, note 82 *supra.*

[85] This grant of federal authority, while not sufficient to give authority for the states to impair contracts in violation of the Constitution, might have given the legislation a considerable boost in establishing a legitimate state purpose for Contract Clause analysis.

[86] 455 U.S. 331 (1982).

[87] Appeal of New England Power Co., 120 N.H. 866, 424 A. 2d 807 (1980). The statute is N.Y. Rev. Stat. Ann. § 374.35.

[88] 455 U.S. at 339.

[89] 455 U.S. at 341-43. New Hampshire relied "on a single statement made on the floor of the House of Representatives," which noted that five states had laws enabling them to prohibit hydropower export. The Court found these types of laws not saved by § 824(b) of the Federal Power Act since the Congress had failed to allow these states to regulated free of Commerce Clause limitations. *See* 455 US at 343 & *infra* note 112.

[90] *See* 455 U.S. at 341 n. 7. The Court was careful to note in its recitation of the facts of the case that the New Hampshire Commission had routinely approved the sales for 54 years, which included the time before and after the passage of the Federal Power Act. 455 US at 335.

[91] Allied Structural Steel v. Spannaus, 438 US 234 (1978).

[92] *Eagerton, supra* note 20, at 4702 (state statute preventing producers from passing on costs of severance tax in interstate commerce impinged on federal authority to determine ability to pass on expenses). *See* Maryland v. Louisiana, 451 US 725(1981), *citing* Northern Natural Gas Co. v. Kansas Corp. Corp. 372 US 84 (1962) (state regulatory agency cannot force interstate purchaser of gas to take pro-rata from producers). The Supremacy Clause issue presented by *Northern Natural* has recently become prominent again in the issue of the effectiveness of state ratable take orders during this time of a current natural gas surplus. Transcontinental Gas Pipe Line Corp. v. Oil & Gas Board of Mississippi, Civil Action No. J82-0531(R) (S.D. Miss.).

engage in its own stricter regulation.[93]

2. *Where interference is not authorized by federal law, look for a regulatory gap.*

The Kansas pricing act in *Energy Reserves* was specifically authorized by law, so it had a boost in surviving challenge.[94] This is the best of all possible worlds for there is no regulatory gap into which a state can step. States contemplating regulation without a specific grant of authority should look for a gap, *the subject of which is not further denied by an affirmative federal silence.*

In the other prominent decision besides *Energy Reserves* from this term, the Court in the *Pacific Gas & Electric* case said:

> It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the states to continue to make these judgments.[95]

The same analysis pervaded the *Arkansas* case:

> [T]he FPC simply held that, purely as a jurisdictional matter, the relevant statutes gave the REA exclusive authority among federal agencies to regulate rural power cooperatives. It did not determine that, as a matter of policy, rural power cooperatives that are engaged in sales for resale should be left unregulated.[96]

Accordingly, if Congress left areas open for States to step into, they can choose to do so.[97] States might do well to examine carefully federal energy schemes and determine the weak spot where powers exercised could be in the realm of legitimate police powers.

A new theory of regulatory gap might be available as a result of the *Pacific Gas & Electric* decision. This theory would derive from the "federal swat" suggested by the Court's analysis of dominant federal purpose and frustration of federal objectives.[98] The Court noted that California could accomplish essentially the same ends through entirely legitimate means.[99] Most clearly, the Court stated:

> [W]hile the argument of petitioners and the United States has considerable force, 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. Given

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[93]*See e.g.* Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (1976 ed. Supp. III) (allowing state regulation of radiation emissions to be stricter than federal regulation). *See* also White & Barry, Energy Development in the West: Conflict & Coordination of GOvernmental Decision-Making, 52 N.D.L.Rev. 451, 513-17 (1976) (examples of degrees of state participation in regulatory schemes).

Recently, the Supreme Court considered yet another test useful to the states: try rationalizing an action by using the policies underlying a general savings clause. In *Eagerton, supra* note 20, the Court reasoned that a prohibition of the pass-through of a severance tax on gas sold intrastate was permissible because the state could achieve essentially the same limitation by a straight price control instead of a tax. 51 U.S.L.W. at 4703, *citing* 16 U.S.C. § 3432(a), *supra* note 10. This provides further indication of the ability of states to regulate local business more strictly than interstate commerce.

[94]*See* note 85, *supra.*

[95]*Pacific Gas & Electric,* 103 S. Ct. at 1724.

[96]*Arkansas Electric Power Cooperative,* 103 S. Ct. at 1912.

[97]Nonetheless, states must not intrude upon those areas in which Congress has, through silence, been deemed to have spoken in the subject area of the regulation. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." 103 S. Ct. at 1912, *citing* NLRB v. Nash-Finch Co., 404 US 138 (1971).

[98]*See supra* notes 35-46, 53-56 & accompanying text.

[99]*See supra* notes 46 & 56.

> this statutory scheme, it is for the Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective.[100]

The combination of this requirement for Congress to take an action to "swat down" illegitimate actions by the states, combined with the reluctance of the Court to strike down state legislation which it views as presenting a hypothetical conflict with federal legislation[101] or hypothetical commerce problem[102] may give the states wide latitude in finding a regulatory gap. A state's police power is no longer simply those powers which the state retains; it has become *any powers a state attempts to exercise within a federal scheme which Congress cannot or chooses not to contravene.*[103]

3. *Get an explicit savings clause in federal legislation*

The solution to a state's problem of potential invalidation of state law is most obvious in the case of new legislation. An example is provided in the case of coal-slurry pipeline legislation now moving through the 98th Congress.

Last term, the Supreme Court held that groundwater is an article of commerce, and that certain prohibitions on its export from a staae were impermissible burdens on interstate commerce.[104] As a result of this decision, legislation currently in Congress to grant federal eminent domain powers to coal slurry pipelines contains language designed to insure state decisionmaking over water which would be used in the coal slurry process.[105] For example, the House bill contains the following provision:

> SEC. 5. (b) In full recognition of its powers under Article I, section 8, of the United States Constitution, Congress expressly delegates to the States the power to regulate the use or export of water in interstate coal pipeline distribution systems, through State water laws, notwithstanding any adverse impact such delegation may have on interstate commerce or on any interstate coal pipeline distribution system.[106]

Similarly, the Senate bill provides:

> "SEC. 207 Notwithstanding any other provision of this title or any other federal law:
> "(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress hereby expressly delegates to the states the power to establish and exercise in State law, whether now in existence or hereafter enacted, terms or conditions (including terms or conditions denying or terminating use) for the reservation, appropriation, use, export, or diversion of or other claim to, or exercise of any right in, water for a coal pipeline, notwithstanding any otherwise impermissible burden which may thereby be imposed on interstate commerce.[107]

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[100] 103 S. Ct. at 1732. Conversely, the presence of a questionable means may be saved by the presence of a legitimate end. *See Eagerton,* 51 U.S.L.W. at 4703 & note 93 *supra.*

[101] *Exxon Corp.,* 437 US at 130-31.

[102] *Arkansas Electric Cooperative Corp.,* 103 S. Ct. at 1918.

[103] This is not an inconsequential power, if one considers the difficulty in passing federal legislation. One need only recall the nuclear waste legislation of last year to realize how slowly a statute nullifying state's action proceeds through the institutional roadblocks in Congress.

[104] Sporhase v. Nebraska, 458 US 273 (1982).

[105] The coal slurry process requires water to move powdered coal from the pulverization plant to coal-burning generating plants hundreds or even thousands of miles from the mining areas. *See* Office of Technology Assessment, A Techology Assessment of Coal Slurry Pipelines (1978).

[106] S. Rep. No. 61, 98th Cong., 1st Sess. 5 (1983).

[107] H.R. Rep. No. 64 Pt. 1, 98th Cong., 1st Sess. 4 (1983) (emphasis added). The Committee on Public Works and Transportation considered the bill concurrently with the Interior and Insular Affairs Committee, which published Part 1 of the Report.

Portions of the accompanying Committee Reports underscore in no uncertain terms Congressional intent. "[T]he Committee has explicitly provided that no commerce clause challenge of any kind may be raised against any state controls imposed on water for coal slurry pipelines."[108] "[T]hose new subsections perfect and clarify the intent of the measure in establishing the primacy of State water as a superior national interest above the interest in constructing *any* interstate coal pipeline distribution system, even those which do not seek the eminent domain authority available under the measure."[109]

The importance of these savings clauses is best illustrated by recalling the *New England Power* case.[110] In that case, the Supreme Court noted that Congress evinced no intent "to alter limits of state power *otherwise* imposed by the Commerce Clause."[111] In other words, Congress must cede its commerce power to the States. The coal slurry proposal seems designed to cede powers in such a manner.[112]

A Supremacy Clause challenge to State legislation may be foreclosed by Congress. One of the House versions[113] of the coal slurry bill provides: "SEC.212. Nothing in this title shall be construed to diminish, preempt or modify the ratemaking authority of any State utility regulatory agency."[114] Since preemption is not favored unless the regulated subject matter permits no other conclusion,[115] a reference invoking traditional and identifiable state regulatory structures[116] and types of decisions may go a long way toward preserving state decision-making.[117]

Conclusion

The above discussion of the recent cases and their limitations is not aimed at analytical exhaustion. It is merely designed to call to the attention of those involved in the state regulatory process that there are principles, indices and warning flags to consider while contemplating the enactment of laws. These principles originate from different constitutional doctrines, but many of the same threads run through the doctrines as recently espoused by the Court: deference to police powers and a premium on true conflicts. In this regard, states should aim for nondiscriminatory legislation which is not aimed at protecting its own citizens. Preferably, such legislation should look to a specific savings clause in a federal statute or some form of regulatory gap in the federal scheme.

State powers have been reaffirmed as the result of several Supreme Court decisions this term. Since the battleground for many energy related issues has shifted, the way states exercise their police powers within the context of a federal regulatory scheme may greatly influence national policy on energy in unpre-

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[108] H.R. Rep. No. 64 at 20.

[109] S. Rep. No. 61 at 17.

[110] *See* note 86 *supra*. *New England Power* was cited by the Committees at pp. 20-22 of the Senate Report and p. 20 of Part I of the House Report.

[111] 455 US at 341, *citing* United States v. Public Utilities Commission, 345 U.S. 295 (1953).

[112] *See supra* note 106-07.

[113] *See* text accompanying note 107, *supra*.

[114] H.R. Rep. No. 64 Pt. 1 at 6.

[115] Commonwealth Edison, Inc. v. Montana, 453 U.S. 609 (1981).

[116] These structures may not even need to be limited to those in existence at the time of the passage of the legislation. *See* text at note 107, *supra*.

[117] As stated above at note 85, the federal government cannot grant a State the ability to violate the Contracts Clause, but theoretically the federal government could cede whatever police powers it has and thereby have such an action enter into the calculus of "legitimate public purpose." *See* note 18, *supra*.

cedented ways.[118] State governments must be careful to examine their police powers in light of federal enactments, exercise those powers based on careful reasoning and potential infirmities within the federal structure, and pursue a role when new energy legislation is proposed. Only through actively and intelligently examining their options will state lawmakers succeed in standing as an equal to the federal government in the development of energy policy.

[118]Perhaps States should also consider a greater exercise of the police powers absent federal statutes. Recent decisions in Federal Energy Regulatory Commission v. Mississippi, 456 US 742 (1982) and Hodel v. Virginia Surface Mining Assn., 452 US 264 (1981), indicate that states must act positively to avoid having their police powers constitutionally and lawfully snatched from beneath them or from being forced by Congress to make decisions. The Supreme Court in *Mississippi* & *Hodel* both make clear that such action is permissible within limits.