An Analysis of Silkwood v. Kerr-McGee Corp. -- Are Punitive Damage Awards and Exclusive Federal Regulation Consistent?

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AN ANALYSIS OF SIlKWOOD v. KERR-MCGEE CORP.—ARE PUNITIVE DAMAGE AWARDS AND EXCLUSIVE FEDERAL REGULATION CONSISTENT?

The nature of man is intricate; the objects of society are of the greatest possible complexity: and therefore no simple disposition or direction of power can be suitable either to man's nature, or to the quality of his affairs.

Edmund Burke
Reflections on the Revolution in France (1790).

In Silkwood v. Kerr-McGee Corp., a majority of the United States Supreme Court rejected the appellee's contention that a punitive damages award, because of its strictly regulatory purpose, was inconsistent with the exclusive federal nuclear regulatory scheme. Thus, the sovereign role of federal regulators and the ability of Congress to preclude state interference with federal regulation is now in doubt.

Karen Silkwood was employed as a laboratory analyst for Kerr-McGee Nuclear Corporation, a subsidiary and “mere instrumentality” of Kerr-McGee Corporation. Kerr-McGee's Cimmaron plant, where Silkwood worked, fabricated plutonium fuel

2. In this close decision, Justice White wrote for the majority which included Justices Brennan, O'Connor, Rehnquist, and Stevens. Justice Blackmun filed a dissenting opinion in which Justice Marshall joined, and Justice Powell filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined.
3. See infra notes 92-95 and accompanying text.
5. The sovereign role of federal regulators in a preempted area is based on the supremacy clause of the United States Constitution. See infra note 74. This Note will focus on federal regulators in preempted areas. The question of what role regulatory compliance should play in state tort claims for punitive damages, however, is not limited to either federal regulators or preempted areas.
7. Id. at 617 n.1.
rods for use in nuclear power plants. In early November 1974, Silkwood was contaminated with plutonium. Following her unexpected death, Karen Silkwood’s father, Bill Silkwood, brought suit as administrator of her estate. The action was based upon tort, the Civil Rights Act of 1871, and the Constitution. Damages were sought for nine days of “fear and anxi-

8. Id. at 617.
9. Specifically, plutonium contamination on Silkwood’s person was detected on November 5, 6, and 7, 1974. Id. at 618.
10. Silkwood was killed in an automobile accident on November 13, 1974. Id. at 618 (citing the circuit court opinion, 667 F.2d 908, 912 (10th Cir. 1981)). Although the court of appeals affirmatively declared the accident to be “unrelated” to the facts or merits of the case, 667 F.2d at 912, the district court had acknowledged “public speculation... surrounding the facts of the case...” 485 F. Supp. 566, 571 (W.D. Okla. 1979). In fact, Silkwood was on her way to meet a New York Times reporter and a leader of the Oil, Chemical and Atomic Workers Union (OCAW) when her fatal accident occurred. 667 F.2d at 914. Silkwood, as the elected member of the union negotiating team responsible for health and safety matters, “was engaged in collecting information and recording it in notebooks and on tapes” in order to document union allegations of health and safety violations for the Atomic Energy Commission (AEC), predecessor of the Nuclear Regulatory Commission (NRC). 667 F.2d at 913. The public speculation surrounding the case and Silkwood’s role as union investigator served as the focal points of a motion picture based on the Silkwood incident.

11. The plaintiff’s tort theories included negligence in allowing plutonium to escape the defendant’s plant and a claim of strict liability in tort. The jury returned a verdict for the plaintiff based on both theories. 104 S. Ct. at 619 n.7. After an exhaustive review of numerous authorities on the subject, the trial court properly concluded that the common law doctrine of strict liability in tort for abnormally dangerous activities could and should be applied consistently with the federal scheme of nuclear regulation. 485 F. Supp. at 572-77.

The Restatement of Torts contemplates the particular appropriateness of applying strict liability principles to the use of atomic energy. RESTATEMENT (SECOND) OF TORTS § 520 comments g, h (1977). These principles, however, cannot be used against the United States under the Federal Tort Claims Act (FTCA). See 28 U.S.C. § 1346(b)(1982); see, e.g., Laird v. Nelms, 406 U.S. 797 (1972). Thus, strict liability in tort cannot be imposed on the United States for government related nuclear incidents. See, e.g., McKay v. United States, 703 F.2d 464, 472 (10th Cir. 1983)(dismissal of nearby landowner’s strict liability claim for property damage from presence of nuclear weapons plant was proper, but negligence, trespass, and nuisance claims should have been tried under the FTCA. It should be noted that the Tenth Circuit found the plaintiff’s punitive damages claim inappropriate based on its Silkwood analysis).


contamination injuries to Karen Silkwood's person,\textsuperscript{15} and property destruction.\textsuperscript{16} Silkwood sought to avoid the limited remedies of Oklahoma's Workers' Compensation Act\textsuperscript{17} by pleading that all the plutonium exposures originated in Silkwood's apartment, rather than at the Cimmaron plant. Silkwood's theory was that although the plutonium exposures originated in the apartment, Kerr-McGee had intentionally put the plutonium there. In support of this theory, the plaintiff presented evidence that Kerr-McGee or its employees "disliked Silkwood and her evidence-gathering activities and that plutonium could and did

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14. Silkwood's nine days of "fear and anxiety" apparently ran from the date of her first contamination, November 5, 1974, until her death on November 13, 1974. 667 F.2d at 912. See also 485 F. Supp. at 595 (jury instruction no. 2). In Kutz ex rel. L.P.S. v. Lamm, 708 F.2d 537 (10th Cir. 1983), Judge McKay, in dissent, cited the Silkwood jury's verdict of $500,000 in actual damages and $10,000,000 in punitive damages for "seven days [sic]" of anxiety as an example of a large recovery for the vindication of an individual's constitutional rights. Id. at 541 n.* (McKay, J., dissenting).

15. The harmful nature of plutonium was well described by the Tenth Circuit:

Plutonium is an artificially produced radioactive chemical element which has been instrumental in the development of nuclear weapons and nuclear power. It emits alpha particles, beta particles, neutrons, gamma rays, and x-rays. The extent of radiation damage to human cells exposed to plutonium is dependent upon the amount of energy in the radiation. Alpha particles have the largest mass, carry the greatest amount of energy, and are the most hazardous. Damage can occur when alpha particles strike a cell. Damage to an individual cell is not, however, invariably harmful to the human body; a cell is capable of repairing itself and the body normally sheds and replaces millions of cells on a continuous basis. It is acknowledged, however, that plutonium is one of the most carcinogenic and dangerous substances known.

667 F.2d at 903 (emphasis added). An autopsy revealed that the amount of plutonium in Silkwood's body at the time of her death was between 25% and 50% of the AEC's permissible lifetime body burden. Id. at 914. Although Silkwood's plutonium level was within the government's permissible body burden, there was evidence that her exposure for a single year exceeded federal guidelines and regulations. See infra note 128. For a description of the specific injuries pleaded by plaintiff, see 485 F. Supp. at 595 (jury instruction no. 2).

16. After repeated detections of contamination of Silkwood's person, her apartment was monitored and found to be contaminated. 667 F.2d at 914. Silkwood's possessions had to be destroyed. Id. The value of the destroyed property was stipulated at $5,000. Id. at 912.

escape the plant."\(^{18}\)

Kerr-McGee countered with two theories of its own: first, that Silkwood intentionally took plutonium and contaminated herself in an effort to embarrass Kerr-McGee, and second, that Silkwood was contaminated in a job-related accident.\(^ {19}\) The first theory would free Kerr-McGee from any liability; the second theory would limit their liability to that provided for under the Workers' Compensation Act.

The trial court found that the exclusive remedy of workers' compensation did not apply and allowed all of Silkwood's tort claims to go to the jury.\(^ {20}\) The jury expressly found that Silkwood had not intentionally contaminated herself,\(^ {21}\) and the trial court found defense evidence of job-relatedness insufficient either to submit to the jury or to meet the defendant's burden of proof on that issue. The trial court thus allowed the jury's verdict of $500,000 for personal injuries to stand.\(^ {22}\) In addition, the trial court found that punitive damage awards were not preempted by the federal regulatory scheme and charged the jury according to Oklahoma's punitive damages statute.\(^ {23}\)

On appeal, the Court of Appeals for the Tenth Circuit concluded that Silkwood's personal injuries should have been compensated under the Workers' Compensation Act.\(^ {24}\) The Tenth Circuit concluded that while the circumstantial evidence was thin at best, it nevertheless supported a finding of job-related contamination.\(^ {25}\) Thus, the Tenth Circuit reversed the $500,000 verdict for personal injuries. The court, however, approved the application of strict liability principles to Silkwood's property

\(^{18}\) 667 F.2d at 915.

\(^{19}\) See id. at 915-19; 485 F. Supp. at 587-88.

\(^{20}\) The jury was instructed on theories of strict liability in tort and negligence with regard to both personal injuries and property damage. 485 F. Supp. at 597-88 (particularly jury instructions nos. 6, 7, and 9).

\(^{21}\) 667 F.2d at 916; 485 F. Supp. at 588.

\(^{22}\) 485 F. Supp. at 588-89.

\(^{23}\) Id. at 572-77, 583-85. Section 9 of title 23 of the Oklahoma statutes provides: In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant. Okla. Stat. Ann. tit. 23, § 9 (West 1955). The trial court's jury charge was in accordance with the provisions of the statute. See infra note 92.

\(^{24}\) 667 F.2d at 913-20.

\(^{25}\) Id. at 918-19.
damage claim and affirmed the $5,000 verdict for property damage, noting that the Oklahoma Workers' Compensation Act applies only to personal injury.\(^{26}\) In addition, the court of appeals held invalid the trial court's award of punitive damages as inconsistent with the federal regulation of nuclear radiation hazards.\(^{27}\) The sole issue raised by Silkwood on appeal\(^{28}\) to the United States Supreme Court was whether federal regulations preempted the punitive damages award.

I. THE HISTORY AND PURPOSE OF FEDERAL REGULATION

A. Nuclear Energy

The world entered the atomic age in 1945 with the bombing of Hiroshima. Congress officially entered the atomic age with the Atomic Energy Act of 1946.\(^{29}\) Although this initial legislation sought to direct "the development and utilization of atomic energy . . . toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace,"\(^{30}\) it placed strict restrictions on the control and use of nuclear material.\(^{31}\) The primary motive behind the restrictions was to preserve the United State's monopolistic position as a nuclear superpower.\(^{32}\)

By 1954, however, the world had changed. The Soviet Union had the bomb\(^{33}\) and an iron curtain had begun to fall across

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26. Id. at 920-21.
27. Id. at 921-23.
28. Silkwood sought to invoke the appellate jurisdiction of the United States Supreme Court under 28 U.S.C. § 1254(2)(1982)(constitutionality of a state statute) by claiming that the Tenth Circuit's preemption finding necessarily rendered the state punitive damages statute unconstitutional. 104 S. Ct. at 620. The Supreme Court properly rejected this jurisdictional contention. The Court noted that not only did the Tenth Circuit not purport to rule on the constitutionality of the statute, but also the statute's constitutionality was never in issue. Id. at 621. The Supreme Court, however, noted probable jurisdiction, 459 U.S. 1101 (1983), and bent over backwards to reach the merits. Treating Silkwood's jurisdictional statement on appeal as a petition for certiorari, see 28 U.S.C. § 2103 (1982)(authorizing such treatment), the Court granted the petition and addressed the merits. 104 S. Ct. at 621.
33. Id.
eastern Europe.\textsuperscript{34} Moreover, the peacetime use of nuclear power as an energy source had become a reality with the construction of the United States’ first large scale atomic power reactor.\textsuperscript{35} Thus, Congress passed the Atomic Energy Act of 1954,\textsuperscript{36} amending the 1946 Act and removing many of the prior restrictions on private possession and use of nuclear material.\textsuperscript{37} The 1954 Act also made provisions for greater freedom in dealing with European allies.\textsuperscript{38}

In 1957, Congress moved again to further promote the development of nuclear energy with passage of the Price-Anderson Act.\textsuperscript{39} This Act was designed "(1) to assure the public of the availability of funds sufficient to satisfy liability claims arising out of a catastrophic nuclear accident; and (2) to remove the impediment to private sector participation in nuclear energy which existed by reason of potentially enormous liability claims were such an accident to occur."\textsuperscript{40} The basic liability limitation provisions\textsuperscript{41} of the Act were extended in 1965\textsuperscript{42} and 1975\textsuperscript{43} without substantial changes. In 1966, however, the Act was significantly modified by the addition of a waiver requirement for those indemnified under provisions of the Act.\textsuperscript{44} The waiver requirement

\begin{itemize}
\item 34. In response to the fall of the iron curtain, the United States and its allies became engaged in a common endeavor—"to dam the tide of Red military power and prevent it from engulfing free Europe." \textit{Id.} at 3458. Congress felt that nuclear superiority could offset the "numerical superiority of the Communist forces, and serve emphatic notice on the Soviet dictators that any attempt to occupy free Europe, or to push further anywhere into the free world, would be foredoomed to failure." \textit{Id.}
\item 35. \textit{Id.} at 3458-3459 (60,000 kilowatt reactor under construction).
\item 41. See 42 U.S.C. § 2210(e)(1982).
\item 43. Act of December 31, 1975, Pub. L. No. 94-197, 89 Stat. 1111 (codified at 42 U.S.C. § 2210(a)-(f), (h), (i), (k), (l), (n)(i), (n)(ii), (n)(iii), (o)(3), (o)(4), (p) (1982)).
\item 44. 42 U.S.C. § 2210(n)(1982).
\end{itemize}
"make[s] clear that in the event of an ‘extraordinary nuclear occurrence,’ the licensee will be strictly liable for the injuries it causes."45

Finally, the Atomic Energy Act was amended by the Energy Reorganization Act of 1974.46 Under this amendment, the Atomic Energy Commission (AEC), the single regulatory agency responsible for both development and regulation of atomic energy,47 was abolished and its functions split between the Energy Research and Development Administration (development)48 and the Nuclear Regulatory Commission (regulation).49 Despite this separation of functions, the overall federal role has not changed. Today, regulation of the nuclear power industry continues to be pervasive.50 Indeed, it is difficult to imagine an area of activity that is subject to greater federal regulation or that more justifies51 exclusive federal control.

B. Other Areas

Although the area of nuclear energy is perhaps the most regulated in American society, it is by no means the only area subject to strict governmental regulation. Government regulation touches us everyday.52 In fact, the number of regulated activities and corresponding regulatory agencies has multiplied dramatically over the past fifty years.53 Justifications for this explosion include the increasing technical complexity of the

45. Silkwood, 104 S. Ct. at 632 (Blackmun, J., dissenting).
51. The rising threat of world terrorism makes the continuing need for strict federal regulation of nuclear materials particularly clear.
52. See K. Davis, Administrative Law Text § 1.02 (3d ed. 1972).
53. See C. Schultz, The Public Use of Private Interest 7-12 (1977). The growth in federal regulation led one Supreme Court Justice to comment: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts. . . . " Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).
world and the failure of free market regulation.

Areas of federal concern and federal regulation are numerous and varied. These areas include military conscription, space exploration, shipping, employment discrimination, environmental protection, occupational safety, and consumer product safety. Furthermore, the federal government plays an important regulatory role in the development and marketing of new drugs and cosmetics, the design and construction of new automobiles and aircraft, the marketing and packaging of poi-

54. "Under Democratic and Republican Presidents alike, Congress has regularly chosen to rely upon administrative regulation . . . to implement public policies in new and complex areas of federal concern." J. FREEDMAN, CRISIS AND LEGITIMACY, THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 5 (1978)(emphasis added). Similarly, developing technology has led to the discovery of previously unknown product risks and dangers, and this new knowledge has in turn led to more protective regulation. E. BARDACH & R. KAGAN, GOING BY THE BOOK, THE PROBLEM OF REGULATORY UNREASONABLENESS 12 (1982).

55. As one commentator has noted:

The free market model depends ultimately on the assumption that the free market will best satisfy public values through the instrumentality of the invisible hand. Yet the evidence is overwhelming that public values and the goals of firms diverge sharply. . . . [P]rofits and growth are the supreme values for corporations. If firms' discretion were further enlarged through the operation of the free-market principle, we might expect that in some areas their derelictions would expand correspondingly, even if some market distortions attributable to regulation disappeared. Natural gas would flow again, and new drugs would be produced again. But the costs of the free-market approach might very well outweigh the benefits; if nineteenth-century experience is any guide, snake oil and placebos would join new drugs in the marketplace.

A. STONE, ECONOMIC REGULATION AND THE PUBLIC INTEREST 266-68 (1977). Despite Stone's warnings of a return to the evils of the nineteenth century, many modern political ideologues, nevertheless, espouse the virtues of complete deregulation. Deregulation proponents emphasize the philosophical importance of returning substantial decision-making power to the individual, giving the individual "the power to choose . . . free of a government nanny. . . ." INSTEAD OF REGULATION: ALTERNATIVES TO FEDERAL REGULATORY AGENCIES (R. Poole, Jr. ed. 1982). In his introduction, Poole acknowledges that deregulation "tests on an ethical foundation that recognizes the primacy of [informed, conscious,] individual choice . . . and full responsibility for one's actions." Id.

What Poole fails to acknowledge is that informed, conscious decisions are made possible by regulatory disclosure requirements. Furthermore, the costs of litigation, the availability of insurance, and the human errors of both the bench and bar often protect the producer from bearing full responsibility for its actions. As two recent authors noted, "lawsuits are slow, expensive, and chancy; the full deterrent potential of the liability system is thus muted." E. BARDACH & R. KAGAN, supra note 54, at 10. Even Sir Edmund Burke, one of the first and foremost promoters of laissez-faire economic thought, apparently did not envision such a simple disposition of power as Poole suggests. See supra introductory quote to text.

56. J. FREEDMAN, supra note 54, at 5.
sions, pesticides, and other toxic substances, the development and marketing of safe nonflammable fabrics, and numerous other areas.\textsuperscript{57} Typically, the regulatory acts incorporate a constitutionally based purpose such as promoting public safety\textsuperscript{58} or protecting national security.\textsuperscript{59}

C. How Regulatory Decisions Are Made

The proper effect of regulatory decisions is best determined only after consideration of how such decisions are made. For example, the per se negligence doctrine presumes that government safety standards promulgated to protect citizens from a particular hazard represent, \textit{at the least}, a reasonably objective determination of the lowest acceptable level of protection.\textsuperscript{60} This rationale fails if safety standards are determined by flipping a coin. Thus, sound and deliberate administrative determinations are entitled to greater deference than quick and arbitrary determinations.

The role of administrative agencies is to "formulate and carry out comprehensive regulatory programs for particular industries or segments of the economy."\textsuperscript{61} Administrative agencies generally formulate their regulatory schemes under the rulemaking provisions of the Administrative Procedure Act (APA).\textsuperscript{62} APA provisions require publication\textsuperscript{63} of proposed rules\textsuperscript{64} and al-

\begin{itemize}
  \item \textsuperscript{58} See, e.g., 1966 U.S. \textit{Code Cong. & Ad. News} 2709-2713 (legislative history of the National Traffic and Motor Vehicles Safety Act of 1966, indicating that purpose of bill is to promote public safety).
  \item \textsuperscript{59} See, e.g., 1954 U.S. \textit{Code Cong. & Ad. News} 3459-3461 (legislative history of the Atomic Energy Act of 1954, indicating that purpose of bill is to promote national security and the development of atomic energy).
  \item \textsuperscript{60} See infra note 105 and sources cited therein.
  \item \textsuperscript{61} W. Cary, \textit{Politics and the Regulatory Agencies} 133 (1967).
  \item \textsuperscript{63} 5 U.S.C. § 553(b)(1982).
  \item \textsuperscript{64} A rule under the act is defined as:
  \begin{itemize}
    \item the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an
  \end{itemize}
\end{itemize}
low for comment from interested parties before the proposals become effective. The degree of participation and comment allowed will depend on the nature and significance of the proposed rule. Some rules are so significant that Congress has statutorily required formal determinations. Because this procedure promotes fairness and efficiency, it should result in sound administrative determinations.

Administrative procedures for setting standards and adopting rules are not, however, free from criticism. The notice and comment procedure laid out in the APA has been criticized as inadequate to deal effectively with "the greatly increased importance of the substantive areas that rulemaking now addresses." The evaluation of "hybrid" rulemaking procedures which incorporate some of the due process safeguards of more formal administrative procedures may be a response to this problem. Additionally, regulations are frequently criticized as inefficient because they lack accountability to policies of the President and coordination with other regulatory agencies. Regulators are also criticized as subject to the control and influence of the industries they regulate. Therefore, the history and development

agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4).
65. Id. § 553(c).
68. Id. at 1016-17. For discussions of "hybrid" rulemaking procedures, see Fuchs, Development and Diversification in Administrative Rule Making, 72 Nw. U.L. Rev. 83, 104-08 (1977); Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Calif. L. Rev. 1276, 1319-26 (1972).
of each individual regulatory determination should be considered before evidentiary weight is assigned to regulatory compliance. Although this process may be an indirect means of assessing liability, a lay jury seems more capable of evaluating the objectivity of the procedure used by the Nuclear Regulatory Commission in promulgating a radiation standard than of evaluating whether the Commission's standard is in reckless disregard of the public's safety.

II. EXCLUSIVITY OF FEDERAL REGULATION

A. The Doctrine of Preemption

The doctrine of preemption grants the federal government the sole authority to regulate a particular area or activity; state regulatory authority is preempted. Preemption promotes national uniformity in areas where federal direction is particularly appropriate.

Federal preemption is generally based on two elements: congressional intent and constitutional supremacy. Although


71. Black’s Law Dictionary defines preemption as follows: “Doctrine adopted by U.S. Supreme Court holding that certain matters are of such a national . . . character that federal laws pre-empt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.” Black’s Law Dictionary 1060 (5th ed. 1979). For a more detailed discussion of preemption in the field of nuclear regulation, see Jaksetic, Constitutional Dimensions of State Efforts to Regulate Nuclear Waste, 32 S.C.L. Rev. 789, 801-10 (1981). For a more detailed discussion of preemption in general, see Note, A Framework for Preemption Analysis, 88 Yale L.J. 363 (1978).


73. As the Eighth Circuit noted,

Once it is ascertained that the federal government possesses the power to regulate in a given area, the question is whether Congress has exercised its power of legislation in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter. . . . [A]bsent inevitable collision be-
preemption may be dictated by an express provision in the federal legislation,76 preemptive intent is more frequently implied by courts.76 The Eighth Circuit found that Congress had intended that "the processing and utilization of source, by-product and special nuclear material must be regulated by the United States in the national interest because of their effect upon interstate and foreign commerce and in order to provide for the common defense and security and to protect the health and safety of the public."77 Twelve years later, the United States Supreme Court also concluded that the federal government had exclusive authority over the safety aspects of nuclear energy. The Court stated that "the federal government has occupied the entire field of nuclear safety concerns. . . ."78 The Court found that Congress had given the AEC "exclusive jurisdiction to li-

between the two schemes of regulation it must be determined whether Congress manifested an intent to displace coincident state regulation in a given area. Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146 (8th Cir. 1971)(emphasis added), aff'd, 405 U.S. 1035 (1972).

74. U.S. Const. art. VI.


76. Preemptive intent may be implied from:
(1) the aim and intent of Congress as revealed by the statute itself and its legislative history. . ..; (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency. . .; (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests". . .; and ultimately (4) "whether, under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Northern States Power Co. v. Minnesota, 447 F.2d at 1146-47.

77. Id. at 1153 (emphasis in original).

license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials."[79] Seemingly, this finding left no role for the states.

B. The Remaining Role of the States

In the wake of federal preemption, the regulatory role of state governments is limited. Although state agencies may be enlisted to implement and apply federal standards,[80] they are prohibited from applying state regulations or standards that are inconsistent with or conflict with federal standards.[81] Thus, in preempted areas, state agencies often serve as mere extensions or branch offices of federal regulators.[82] Generally, state government may continue to act in a preempted area as long as the purpose of the state action is not to regulate within the preempted area.[83]

In the field of nuclear energy, the Atomic Energy Act preempted only the regulation of the radiological hazards.[84] States may regulate nonradiological hazards of nuclear energy, presumably because the states have more experience and greater expertise in these areas. Nonradiological hazards involve such concerns as plant siting and nuisances from the fogging, icing and steam of the power plant's cooling pond.[85]

79. Id. at 207 (emphasis added)(citations omitted).

80. See, e.g., 7 U.S.C. §§ 136u, 136v(c), 136w-1 (1982)(provisions of the Federal Insecticide, Fungicide and Rodenticide Act allowing states to develop and administer programs consistent with federal standards, allowing states to register local pesticides in compliance with federal standards, and giving states primary enforcement responsibility as long as state plans and standards have federal approval).

81. See, e.g., id. § 136v.

82. In South Carolina, for example, the Director of the Division of Regulatory and Public Service Programs, College of Agricultural Science, Clemson University, oversees the certification and use of pesticides in the state pursuant to federal guidelines and standards. See S.C. CODE ANN. §§ 46-13-20(K), 46-13-20 (Supp. 1984).

83. See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. at 216 ("[W]e accept California’s avowed economic purpose as the rationale for enacting [the statute]. Accordingly, the statute lies outside the occupied field of nuclear safety regulation.").

84. Id. at 210-12; Northern States Power Co. v. Minnesota, 447 F.2d at 1147-54.

III. DAMAGES IN STATE TORT ACTIONS

A. Actual Damages

Damages in state law tort actions are generally divided into two categories: actual and punitive.\(^8\) Actual damages seek to compensate the plaintiff for his actual injuries or losses.\(^7\) Hence, they are also known as compensatory damages. In tort law, the measure of actual damages is the amount necessary to restore the plaintiff to his pre-injury condition.\(^8\)

Actual damages may include both tangible and intangible components. The tangible component may include items such as medical expenses, lost wages and property damage.\(^8\) These items can be objectively determined with reasonable accuracy. The intangible component includes awards for subjective injuries such as "fear and anxiety"\(^9\) or pain and suffering.\(^9\) Although not capable of objective determination, these damages are nevertheless theoretically actual.

B. Punitive Damages

Punitive damages in tort seek to punish the defendant for wrongful conduct.\(^9\) Punitive damages, like fines levied by regu-
PUNITIVE DAMAGE AWARDS

PUNITIVE DAMAGES are designed to deter wrongful conduct in the future and thus compel compliance with a higher standard of conduct. Punitive damages serve an important function when other forms of punishment and deterrence are unavailable or inadequate. One of the problems with punitive damage awards is that the higher standard of conduct sought to be imposed by the awarding jury may not be clear. Thus, the defendant is given little guidance on how to improve his conduct in the future.

Incidental to their regulatory purpose, punitive damages result in a "windfall" to the tort victim who generally must receive full compensation by actual damages as a prerequisite to recovery of punitive damages. In practice, punitive damages may actually help the plaintiff pay for his legal fees. This practice and the historical unavailability of compensatory damages for certain intangible injuries has led many commentators to characterize punitive damages as compensatory—at least in part.

This characterization can be misleading, however, since under the "American Rule" attorney's fees are not considered

93. The NRC, for example, has the power to impose fines on any person who violates the license requirements of the Atomic Energy Act. See 42 U.S.C. § 2282(a)(1982).
95. As one author has noted, "punitive damages [attempt] to achieve, through civil litigation, results otherwise associated with the criminal law." Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1158-59 (1966). The author concludes that, "punitive damages [are] a useful substitute for criminal law in areas where criminal punishment is inappropriate." Id. at 1184. See also Silkwood, 104 S. Ct. at 628 (Blackmun, J., dissenting)(characterizing "punitive damages as 'private fines levied by civil juries' ")(quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).
96. See, e.g., Aubertin v. Bd. of County Comm'rs of Woodson County, Kansas, 588 F.2d 781, 786 (10th Cir. 1978). Punitive damages are also a "windfall" to the tort victim when there are no actual damages but nominal damages are awarded. See RESTATEMENT (SECOND) OF TORTS § 908 comment c (1979) ("an award of nominal damages (see [id.] § 907) is enough to support a further award of punitive damages").
98. See id. (wounded feelings as an element of damage not legally compensable). See also Ghiardi, The Case Against Punitive Damages, 8 FORUM 411, 412-13 (1972)(historical unavailability of compensatory damages as a justification for punitive damages no longer exists because of the expanding scope of compensatory damages).
part of the plaintiff’s actual damages. An award of attorney’s fees, or punitive damages earmarked for attorneys, does not compensate the tort victim for an injury proximately caused by the tort; it simply reimburses the victim for a voluntary expense incurred after the tort.

C. Regulatory Effect

All civil liability has potential regulatory impact; even the mere obligation to compensate tort victims could promote safer conduct in the future. That is not, however, why compensatory damages are awarded. Compensatory damages are awarded for the sole purpose of restoring the tort victim to his pretort condition; the regulatory effect of compensatory damages is merely incidental. In contrast, the sole purpose of punitive damages is to regulate conduct, not to incidentally compensate the plaintiff.

The use of punitive damage awards to reimburse the tort victim’s legal fees generally will not change their exclusive regulatory purpose except perhaps in those jurisdictions where punitive damages are measured by reference to the plaintiff’s attorney’s fees instead of the defendant’s conduct and wealth. Of course, even in jurisdictions in which punitive damages are intended to compensate litigation expenses, punitive damages will have the same incidental regulatory effect as do all damage awards.

IV. PUNITIVE DAMAGES IN REGULATED AREAS

Failure to comply with statutory and regulatory safety standards constitutes negligence per se. Statutory or regulatory

100. See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975) (reaffirming the “American Rule” that each litigant bear its own attorney’s fees absent statutory authorization to the contrary). See also Restatement (Second) of Torts § 914 (1977).

101. See supra notes 87-88 and accompanying text.

102. See supra notes 92-95 and accompanying text.


104. See Restatement (Second) of Torts § 908 comment e (1977).

105. The negligence per se rule is limited, however, to those statutory or regulatory
compliance, on the other hand, has generally only been considered mere evidence of due care. Thus, governmental standards

safety standards whose purpose is:
(a) to protect a class of persons which includes the one whose interest is invaded, and
(b) to protect the particular interest which is invaded, and
(c) to protect that interest against the kind of harm which has resulted, and
(d) to protect that interest against the particular hazard from which the results result.

Restatement (Second) of Torts § 286 (1965). Once the requisite protective purpose is found, violation of the standard is "negligence in itself." Id. § 288B(1). See, e.g., Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979); Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) (absence of lights on vehicle, required by statute for the protection and guidance of others, is negligence in itself). See generally Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 455 (1932); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914); Note, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932).

106. Chief Judge Theis of the District of Kansas, sitting as a judge of the Western District of Oklahoma in Silkwood, instructed the jury:

You are instructed that [government standards for radiation exposure] may be considered by you as evidence of expert scientific and medical opinions on what levels of exposures may result in actual physical injuries, of whatever severity, to persons who work in such facilities. You may consider this evidence as any other expert opinion, and you should give it such weight and credit to which you deem it entitled, when viewed in connection with all other facts and circumstances.

You are instructed, however, that you are not bound by these standards. Compliance with such standards does not necessarily mean injury cannot occur for which liability may be imposed.

are treated as the minimum level of conduct necessary to avoid the presumption of per se negligence. The reasonable man standard, used in the determination of civil liability, is therefore presumably higher than or equal to the standards promulgated by regulatory agencies; but how much higher?

Because the reasonable man standard is based on "an external and objective [judgment], rather than the individual judgment, good or bad, of the particular actor. . . ."107 this standard is theoretically always the same.108 Thus, the difference between the objective standard of liability in tort law and the minimum safety standard set by government regulators will depend on the character of the government regulation.109 Similarly, the difference, if any, between the punitive liability standard,110 which is also theoretically constant, and the governmental safety standard will depend on the regulation. For example, minimal compliance with an automobile headlight regulation promulgated by a state highway department in 1930 might nevertheless constitute "reckless disregard" for the safety of others when the state of the art111 over fifty years later indicates that much greater

THE DAME LAW. 1 (1965). It is interesting to note that punitive damages were not awarded in any of the cases listed above.

107. W. PROSSER & W.P. KEETON, supra note 97, § 32 at 173-74 (footnotes omitted)(citing, in part, Seavy, Negligence—Subjective or Objective, 41 Hary. L. Rev. 1 (1927)).

108. Id.

109. As Justice Linde of the Supreme Court of Oregon noted, "The role of [regulatory] compliance should logically depend on whether the goal to be achieved by the particular government standards, the balance struck between safety and its costs, has been set higher or lower than that set by the rules governing . . . civil liability." Wilson v. Piper Aircraft Corp., 282 Or. 61, 81, 577 P.2d 1322, 1333 (1978)(Linde, J., concurring)(airplane compliance with FAA standards). Of course, it has already been noted that courts generally find government standards lower than civil liability standards, see supra note 106 and accompanying text, but, as Judge Linde points out, how much lower, if at all, should depend on the particular regulation and the nature of the safety-costs balance found in that regulation. Superficially, at least, the district court in Silkwood considered the nature of nuclear regulations. See infra note 112. The Model Uniform Products Liability Act and several state statutes provide for defenses based on regulatory statutory compliance. Model Unif. Prod. Liat. Act § 108; Colo. Rev. Stat. § 13-21-403 (Supp. 1978); N.D. Cent. Code § 28-01.1-05 (Supp. 1984); Utah Code Ann. § 78-15-6 (1977). These statutes are overbroad to the extent they fail to fully consider the numerous factors suggested by the present author. See infra text accompanying notes 112-16.

110. The standard used to determine liability for punitive damages is "oppression, fraud or malice" or "reckless disregard." See supra note 92.

111. Generally, state of the art refers to the technological or economic capacity to know of and/or reduce the dangers associated with product use. Phillips, The Standard
illumination is possible. Thus, one obvious important characteristic of the regulation is its timeliness. Other relevant factors

for Determining Defectiveness in Products Liability, 46 U. Cin. L. Rev. 101, 103-18 (1977). State of the art may, however, only be considered in technological terms without regard to the economic feasibility of acquiring the knowledge and/or reducing the danger. See 1 L. Frumer & M. Friedman, Products Liability § 6.05[15] at 104.38 (1978).


Arguably, consideration of the state of the art is only appropriate with liability determinations based upon fault. See Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 204, 447 A.2d 539, 546 (1982) (a products liability case in which the court noted, "Essentially, state-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable. . . . But in strict liability cases, culpability is irrelevant."). But see Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (effectively overruling Beshada although expressly only restricting it to its circumstances). The Beshada conclusion that state of the art is irrelevant to strict liability determinations is based on the Wade/Keeton notion that all knowledge of product danger "as it is proved to be at the time of trial" is imputed to the defendant manufacturer at the time it sold or marketed the product. Keeton, Product Liability and the Meaning of Defect, 58 N.Y.U. L.J. 30, 38 (1973); Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 834-35 (1973). But see Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. Rev. 734, 761-64 (1983) (Dean Wade, like the New Jersey Supreme Court, has apparently changed his mind although he states that differences between his position and Dean Keeton's position were always present); Keeton, The Meaning of Defect in Product Liability Law—A Review of Basic Principles, 45 Mo. L. Rev. 579, 595 (1980) (Dean Keeton now indicates that state of the art "at the time the product was designed" is a relevant factor in assessing liability).

Liability for punitive damages is a fault-based determination. See text accompanying notes 92-95. Thus, even if consideration of the state of the art is inappropriate for determining strict liability in tort on compensatory claims, it is a proper factor in considering punitive damages. Thus, the careful plaintiff may want to shun a claim for punitive damages in order to avoid introduction of state of the art evidence. In Silkwood, the defendant, Kerr-McGee, was held negligent and strictly liable for an abnormally dangerous activity. See supra note 11. Consideration of the state of the art in plutonium control and regulation would have been particularly appropriate in Silkwood's negligence cause of action and her claim for punitive damages.

112. In fact, the timeliness of federal nuclear regulations was considered by the district court in Silkwood. The court gave particular emphasis to the time element because the AEC was inexperienced in nuclear regulation when the atomic industry was beginning, 485 F. Supp. at 579 (quoting Trowbridge, Licensing and Regulation of Private Atomic Energy Activities, 34 Tex. L. Rev. 842, 843-51 (1956)), and because the evolution of nuclear knowledge and regulation was continuing, 485 F. Supp. at 580 (citing authority published more contemporaneous with Silkwood's exposure). The district court stated that the evolutionary nature of the state of the art in the nuclear industry and the related evolution of government regulation "support[ed] the proposition that the general
rule [that regulatory compliance or noncompliance be treated only as inconclusive evidence of care] should be no different for the atomic industry. . . . [T]oo many variables exist in any given situation for an absolute standard to apply." 485 F. Supp. at 580. Although the district court properly introduced the time element, perhaps it incorrectly assumed that, because nuclear regulation was evolving, the applicable regulations at any given time must necessarily be so far behind that they deserve little deference. This, of course, is not necessarily the case.

In fact, the nuclear industry has historically been more closely regulated than other industrial areas. Unlike most areas in which federal regulation was imposed after development of the industry, federal regulation of the nuclear industry developed as a matter of national security before the private industry had really begun. See supra notes 29-51 and accompanying text. This distinction supports the proposition that perhaps the general rule should not apply. Although the trial court acknowledged that "the maximum permissible exposure ceiling has been frequently rendered more stringent over the years," 485 F. Supp. at 581 (citing Rogers, The Development and Use of Regulatory Standards, 14 ATOM. ENERGY L.J. 173, 178 (1972); Goodman, Radiation Injuries, 5 ATOM. ENERGY L.J. 20, 23 (1963)), and that several writers suggest that "greater deference be given governmental exposure limits," 485 F. Supp. at 582, 581-83 (citing Keyes & Howarth, Approaches to Liability for Remote Causes: The Low Level Radiation Example, 56 IOWA L. REV. 531, 557-69 (1971); E. STASON, S. ESTEP & W. PIERCE, ATOMS AND THE LAW 127-28 (1959)), the court nevertheless adhered to the general rule on regulatory compliance.

The trial court repeatedly emphasized that exposures within governmental standards may still be injurious. 485 F. Supp. at 580-81 (citing various law review articles discussing the permissible exposure regulations promulgated by the AEC). While this may demonstrate the need for victim compensation despite regulatory compliance, see Silkwood, 485 F. Supp. at 583 (citing Hamilton & Krebs, Radiation Protection Regulation: An Opportunity for Cooperative Federalism, 12 VAND. L. REV. 395, 407-08 (1959))(basic problem of radiation protection is ascertaining how much exposure may be permitted; separate problem is determining what special measures are required to provide compensation to those injured by such exposure), it does not demonstrate that the cost-benefit balance represented by government regulations, see Silkwood, 485 F. Supp. at 581 (government standards represent cost-benefit balance)(citing law review articles discussing the cost-benefit balance), shows such little regard for human safety that a defendant in compliance can nevertheless be considered in reckless disregard of human safety and subjected to punitive damages. To reach such a conclusion, one would have to consider federal nuclear regulators in breach of their statutory duty to "protect health [and] minimize danger to life or property." 42 U.S.C. § 2201(b)(1982)(describing the NRC's duties in connection with establishing rules, regulations and standards governing the use and possession of nuclear material).

The trial court compared its conclusion that conduct justifying punitive damages is not inconsistent with regulatory compliance to Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432 (S.D.N.Y. 1968), aff'd, 411 F.2d 48 (2d Cir. 1969), and Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1965). Silkwood, 485 F. Supp. at 584. The relevancy of these cases is not at all clear. In Tinnerholm, there were no applicable government regulations. See 285 F. Supp. at 448 n.12. Although punitive damages were indeed awarded in Gillham for the defendant's reckless failure to redesign its product or warn against the dangers of product use, 523 F.2d at 109, government regulations were not even considered in the case.

The district court in Silkwood charged the jury that the defendant's good faith compliance with regulatory standards would be evidence of conduct inconsistent with the
include the purpose of the regulation,\(^{113}\) the procedure employed by the agency in its development,\(^{114}\) the creditability and accountability of the regulators,\(^{115}\) and the general nature of the safety-costs balance found in the regulation.\(^{116}\)

Of course, an evaluation of the nature and characteristics of a governmental regulation to determine its logical role in tort actions is only necessary if that role is not specified in the legislation or regulation itself. Rarely does a legislative enactment or government regulation specify that it is the sole standard to be used in assessing civil liability.\(^ {117}\) Legislative enactments and governmental regulations do, however, frequently specify\(^ {118}\) or imply\(^ {119}\) that they are the exclusive regulatory standards.

Because punitive damages are only regulatory in nature,\(^ {120}\) those legislative enactments and regulations which specify or imply that they are the exclusive regulatory standards should preempt the award of punitive damages whether the standards are complied with or not.\(^ {121}\) Furthermore, if government regulatory

\(^ {113}\) See infra text accompanying notes 134-49.

\(^ {114}\) See infra text accompanying notes 60-70.

\(^ {115}\) See supra notes 69-70 and accompanying text.

\(^ {116}\) See supra note 109 and accompanying text.

\(^ {117}\) In fact, legislative enactments frequently specify that compliance is not to be considered a defense to liability. Consider, for example, the following provision from the Traffic and Motor Vehicle Safety Act of 1966: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Pub. L. No. 89-563, § 108(c), 80 Stat. 718, 723 (codified as amended at 15 U.S.C. § 1397(c)(1982))(emphasis added).

\(^ {118}\) See supra note 75.

\(^ {119}\) See supra note 76.

\(^ {120}\) See supra notes 92-95 and accompanying text.

\(^ {121}\) The Tenth Circuit noted in Silkwood:

"Arguably there should be a strong presumption against preemption of state laws affecting such vital interests of its citizens . . . However, the nuclear industry was initially developed by the Federal government, is closely linked with national security, and is extensively regulated by a Federal agency. This apparently is the basis upon which Northern States was decided. . . . A judicial award of exemplary damages under state law . . . is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case.

It does not matter whether Kerr-McGee violated AEC regulations in the conduct of its plant operations. The AEC (NRC) has comprehensive powers to
standards are set high enough, compliance should preclude a punitive damages award even absent regulatory preemption. In fact, the continuing value of regulatory agencies that set safety standards so low that they fail to preclude findings of "reckless disregard" for safety is doubtful. This, of course, is the implication made by the Supreme Court in Silkwood.122

The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, were saddled with a statutory duty to establish rules, regulations and standards to "promote the common defense and security [and] to protect health or to minimize danger to life or property."123 Assuming Kerr-McGee substantially complied with all applicable federal regulations,124 the Silkwood jury’s punitive damages verdict indicates that Commission standards and regulations were in "reckless disregard" of public health and safety. Although the federal government is always immune from liability for punitive damages,125 the government may be subjected to compensatory damages for

punish and prohibit practices it regards as improper . . . and [to] seek civil and criminal penalties.

667 F.2d at 923 (citations omitted)(emphasis added). The procedural safeguards of criminal law have not been extended, however, to punitive damage awards. Boyd v. United States, 116 U.S. 616 (1886).

122. There was evidence presented at the Silkwood trial indicating that nuclear safety standards were in "reckless disregard" of public safety. As the court noted: [F]ederal regulation and regulatory guidelines would permit .5 grams of plutonium to escape their facility without detection, even assuming complete compliance with federal regulations and perfect operation of all detection equipment. Thus, a single worker who left the facility building twice per day could remove without detection 1 gram of plutonium per day, or 1 pound of plutonium over approximately 19 months. Two workers could achieve the same result in less than a year. Regulations controlling inventory difference would permit this facility to have approximately nine or ten pounds of plutonium unaccounted for, so loss of this one pound could easily go unnoticed. A Kerr-McGee witness characterized the implications of this 1 pound of plutonium in the public domain as "sheer havoc and death." Even the potentially very grave dangers of one half gram of plutonium in the public domain were agreed upon by virtually all witnesses.

485 F. Supp. at 576. In contrast, Justice Powell’s dissent to the Supreme Court’s opinion gives credit for the safe development of nuclear energy to the regulation and oversight of the AEC and NRC. Silkwood, 104 S. Ct. at 638 n.10 (Powell, J., dissenting).


124. For a discussion of the evidence of Kerr-McGee’s regulatory compliance, see infra note 128.

negligence under the Federal Tort Claims Act.\textsuperscript{126} Because the Commission’s rule-making, standard-setting duty is discretionary, however, the government could probably escape liability through the “discretionary function” exception to the Act.\textsuperscript{127}

V. PROBLEMS WITH THE \textit{Silkwood} HOLDING

In \textit{Silkwood}, the United States Supreme Court allowed a jury’s imposition of punitive damages despite the defendant’s compliance\textsuperscript{128} with the exclusive federal regulatory scheme.\textsuperscript{129}


\textsuperscript{127} 28 U.S.C. § 2680 provides in part:

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(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
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\textsuperscript{128} Actually, it is questionable whether Kerr-McGee complied with the applicable federal regulations. Although the NRC’s report on their investigation of the Silkwood incident indicated that Kerr-McGee’s only regulatory violation throughout the incident was its failure to maintain a record of the dates of two samples of Silkwood’s urine, 104 S. Ct. at 619; 104 S. Ct. at 629 n.4 (Blackmun, J., dissenting); 104 S. Ct. at 636 (Powell, J., dissenting)(citing AEC Regulatory Operations Investigatory Report No. 74-09, December 16, 1974, at 5), the trial court noted that “[t]here was evidence of regulatory noncompliance.” 485 F. Supp. at 586. Specifically,

\textsuperscript{[a]} Kerr-McGee witness . . . conceded that the defendants’ inventory difference, or the amount of plutonium unaccounted for by the defendants at their facility, slightly exceeded that permitted by regulation. An NRC official called by defendants testified that he did not feel that Kerr-McGee was conforming its conduct to the “as low as is reasonably achievable” [see 10 C.F.R. § 20.1(c)(1984)] standard. Dr. Karl Morgon, a plaintiff’s witness, testified that Silkwood’s exposure did not conform to ICRP [International Commission on Radiological Protection] guidelines and part 20 of the federal regulations for an exposure received within a single year, even though Silkwood’s burden was within the regulation limits for a lifetime exposure. [\textit{See supra} note 15.]

Other regulations control defendant’s conduct in the instant situation. They forbid a licensee from possessing, using or transferring plutonium in such a manner that radiation levels in unrestricted areas could exceed prescribed
Thus, the Court cast doubt not only on the vitality of the Nuclear Regulatory Commission but also on governmental regulation in general. In addition, the decision threatens to undermine the delicate balance of federalism established under the doctrine of preemption.

In *Silkwood*, the Court acknowledged that "Congress' decision to prohibit the states from regulating the safety aspects of nuclear development was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area." The Court then proceeded to ignore both this sound premise and its previous declaration of complete preemption. The Court found that "the preempted field does not extend as far as Kerr-McGee would have it." But how much farther can preemption extend beyond the "entire field"? In a blind effort to preserve state law remedies for irradiated plaintiffs, the Court allowed lay jurors to impose punitive damages in one of the most technologically complex areas known to man. As Justice Powell noted in his dissent, "The Court . . . is willing to allow a jury, untrained in even the most rudimentary aspects of nuclear technology, to impose heavy penalties on the basis of its own perceptions or prejudices." Even in the year 1790, Sir Edmund Burke knew better than to support such a simple disposition of regulatory affairs.

The *Silkwood* majority seems to have a nuclear blind spot; "its entire analysis proceeds as if pre-emption of punitive damages would require pre-emption of compensatory damages as well." Of course, that is not the case. Punitive damages are readily distinguished from compensatory damages by their di-

levels. 10 C.F.R. §§ 20.105(b), 20.106(a)(1974)[current regulation materially the same]. Although the parties disagree, the record contains some evidence that the level of plutonium in Silkwood's apartment may potentially have exceeded that permitted in an unrestricted area, such as a residence.

485 F. Supp. at 586 (footnote omitted).

129. Compliance is, of course, irrelevant. All regulatory state action is preempted. See supra note 121 and accompanying text.

130. 104 S. Ct. at 622 (emphasis added).

131. Id. at 622.

132. The Supreme Court declared the "entire field" of nuclear safety preempted in 1983. See supra note 78 and accompanying text.

133. 104 S. Ct. at 640 n.15 (Powell, J., dissenting).

134. Id. at 631 (Blackmun, J., dissenting).
rect regulatory purpose. In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, the Court concluded that only state action with a direct regulatory purpose was preempted by federal regulation and thus upheld a state statute which had an economic purpose but an indirect regulatory effect.

In a recent court of appeals decision, a defendant pesticide manufacturer sought, like Kerr-McGee, to use preemption as a defense. In Ferebee v. Chevron Chemical Co., the defendant’s herbicide, Paraquat, complied with the extensive labeling regulations of the Environmental Protection Agency (EPA). The defendant further argued that an amendment to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted state regulation of labeling and packaging of substances subject to that Act. The court of appeals, nevertheless, affirmed the trial court’s judgment of $60,000 in compensatory damages for the survival and wrongful death actions.

Although the court addressed the issues of preemption and the weight to be afforded regulatory compliance in the wrong order, it reached the correct result on each issue. The court first considered the proper weight to be given to compliance with federal labeling regulations and correctly concluded that, “The fact that EPA has determined that Chevron’s label is adequate for purposes of FIFRA does not compel a jury to find that the label is also adequate for purposes of state tort law as well. The purposes of FIFRA and those of state tort law may be quite distinct.” The court next concluded that state damage actions were not precluded by FIFRA’s preemptive provision because compensatory damage verdicts do not directly regulate pesticide

136. See supra note 83 and accompanying text.
137. 736 F.2d 1529 (D.C. Cir. 1984).
138. Id. at 1532, 1539-40.
139. “Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required pursuant to this Act.” Pub. L. No. 92-516, § 24(b), 86 Stat. 973, 997 (1972)(codified at 7 U.S.C. § 136v(b)(1982)).
140. Because a finding of federal preemption would render an evaluation of the nature and characteristics of the federal regulations unnecessary, the possibility of preemption should be analyzed first.
141. 736 F.2d at 1540 (emphasis in original).
Although the circuit court in *Ferebee* cites the Supreme Court's *Silkwood* opinion twice in its analysis, it does not address the *Silkwood* issue of punitive damages preemption. The court's emphasis in *Ferebee* on the compensatory nature of the plaintiff's verdict would imply, however, that regulatory damages were not considered consistent with exclusive federal regulation. In *Silkwood*, the Court glossed over the distinctions between compensatory and punitive damages by broadly focusing on the congressional intent that state tort law remedies remain available to the victims of nuclear accidents.

Relying on the legislative history of the Price-Anderson Act and its amendments, the Court concluded that, "Congress assumed that state-law remedies . . . were available to those injured by nuclear incidents." Because "[p]unitive damages have long been a part of traditional state tort law," the Court further concluded that punitive damages are not preempted. The Court ignored, however, those portions of the legislative history which make it clear that the purpose of the Price-Anderson Act was to provide a strict liability, indemnification system as an alternative to compensatory state tort law in cases of "extraordinary nuclear occurrence."

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142. The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label.

143. 736 F.2d at 1542-43.
144. 104 S. Ct. at 623-26.
145. Id.
146. Id. at 625.
147. Id.
148. Id. at 625-26.
149. See id. at 633 n.12 (Blackmun, J., dissenting) ("[T]he legislative history of the Act . . . when read in context, makes clear that its objective is to provide compensation to persons that suffer injuries. See, e.g., S. Rep. No. 296, 85th Cong., 1st Sess. 8, reprinted in 1957 U.S. CODE CONG. & AD. NEWS 1803, 1810 (Price-Anderson offers 'a practical approach to the necessity of providing adequate protection against liability arising from atomic hazards as well as a sound basis for compensating the public for any possible injury or damage arising from such hazards')(emphasis supplied).")
The Court in *Silkwood* sought to justify its decision further by emphasizing that it was Kerr-McGee's burden to show preemption and by noting Kerr-McGee's failure "to point to anything in the legislative history or in the regulations that indicate[d] that punitive damages were not to be allowed." The Court failed, however, to realize that its prior decisions on punitive damages and nuclear regulation indicate that punitive damages should not be allowed. The Court also failed to show anything in the legislative history that expressly indicates that punitive damages are to be allowed in nuclear accident claims. The Court only pointed to a waiver form developed by the Atomic Energy Commission following the 1966 amendment to the Price-Anderson Act. The waiver specifically provides that it does "not apply to . . . [a]ny claim for punitive or exemplary damages. . . ." Although this provision indicates that the Commission contemplated the possibility of a punitive damages award, the United States Supreme Court should not be swayed from its prior case law by the mere contemplation of a regulatory commission; the tail should not be allowed to wag the dog.

Under the American constitutional concept of federalism, the original states delegated most of their sovereign power to the central government. The range of powers given up by the states and specifically granted to the federal government is quite broad. The doctrine of preemption effectively preserves this constitutional division of power and prevents state interference with broad, constitutionally designated areas of federal concern. The Court's failure in *Silkwood* to recognize the preemption of punitive damages raises doubts about the continued ability of Congress to preclude state interference absent an express preemption clause which specifically mentions punitive damages. State governments can now impose direct regulation despite

150. 104 S. Ct. at 625 (citing IBEW v. Foust, 442 U.S. 42, 53 (1979)(Blackmun, J., concurring)).
151. 104 S. Ct. at 625.
154. 104 S. Ct. at 625 n.17.
156. See The Federalist No. 9 (A. Hamilton); The Federalist No. 39 (J. Madison).
157. See U.S. Const. art. I, § 8 (legislative powers); see also U.S. Const. art. II, § 2 (executive powers); U.S. Const. art. III, § 2 (judicial powers).
VI. CONCLUSION

The Supreme Court's opinion in *Silkwood* effectively limits Congress' ability to preclude state interference with federal regulators and casts doubt on the continuing vitality and statutory fulfillment of the Nuclear Regulatory Commission. Congress may now want to amend once again the Atomic Energy Act by adding an express preemption provision.

In the future, the Court should follow a thorough two-step analysis of punitive damage claims in heavily regulated areas. First, the Court should employ its traditional preemption analysis to determine the existence and extent of any possible regulatory preemption. Second, in the absence of complete preemption or preemption of punitive damages, the Court should thoroughly evaluate the development and nature of the applicable regulatory scheme to determine if compliance should preclude a punitive damages award. The Court's analysis of the nuclear regulatory scheme in *Silkwood* is disappointing and unnecessary.

*J. René Josey*