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FEDERAL LIMITATIONS ON STATE POWER TO REGULATE RADIOACTIVE WASTE

Rebecca L. Smith

I. INTRODUCTION

In November of 1980 Washington State voters adopted Initiative 383 which enacted the Radioactive Waste Storage and Transportation Act of 1980. By this Act Washington sought to ban the storage within its borders of all non-medical radioactive waste generated outside Washington, and to ban the transportation of this type of waste to any storage site in Washington.¹ The Act did not restrict transportation for storage or storage of radioactive waste generated within Washington. Nor did it seek to ban the transportation of radioactive waste through Washington for use or storage elsewhere. The Act purported to protect the health and safety of Washington citizens.² Several groups filed actions in United States District Court for the Eastern District of Washington challenging the constitutionality of the Act. The court joined these actions in *Washington State Building and Construction v. Spellman*,³ in which the court considered the plaintiffs' motions for summary judgment.

Montana has also enacted a statute that totally prohibits the disposal of byproduct material,⁴ special nuclear material,⁵ or large quantity radioactive material⁶ within Montana.⁷ This statute does not distinguish between waste generated within or without Mon-

1. 1981 WASH. LEGIS. SERV. CHAPTER 1, §§ 3, 4 (West).

2. 1981 WASH. LEGIS. SERV. CHAPTER 1, § 1 (West). This section provides:

Transporting, handling, storing, or otherwise caring for radioactive waste presents a hazard to the health, safety, and welfare of the individual citizens of the State of Washington The burdens and hazards posed by increasing the volume of radioactive wastes transported, handled, stored or otherwise cared for in this state by the importation of such wastes from outside this state is not a hazard the state government may reasonably ask its citizens to bear.

3. 518 F. Supp. 928 (E.D. Wash. 1981).

4. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 75-3-103(1) (1981) defines byproduct materials as any material made radioactive by exposure to the process of producing or utilizing special nuclear material, or tailings produced by extraction of uranium or thorium from source material.

5. MCA § 75-3-103(10) (1981) defines special nuclear material as plutonium, uranium or any other material which the United States Nuclear Regulatory Commission determines to be special nuclear material.

6. MCA § 75-3-103(6) (1981) defines large quantity radioactive material as that quantity of radioactive material defined in 49 CFR 173.389(b).

7. MCA § 75-3-302 (1981). This statute excepts some byproduct material provided that the material was being or had been lawfully disposed of within Montana upon the effective date of the statute.

tana. Another Montana statute prohibits the manufacture, use, production or transportation of any source of radiation unless one obtains a license to do so from the state radiation control agency.⁸ The City of Missoula, Montana, adopted an ordinance in 1980 that restricts the transportation of radioactive material within the city limits.⁹ In light of these laws, Montanans should take special interest in the *Spellman* decision.

In *Spellman* plaintiffs contended that the Washington Act violated the supremacy, commerce, war powers and property clauses of the United States Constitution. Since plaintiffs' attacks focused primarily on the supremacy and commerce clauses, this discussion will summarize the court's analysis of these clauses.

II. SUPREMACY CLAUSE

The supremacy clause provides that the laws of the United States enacted pursuant to constitutional authority are the supreme law of the land.¹⁰ This clause preempts state laws to the extent that they conflict with federal law.¹¹ Although the Supreme Court has rejected any rigid verbal formula as determinative of preemption, the Court has developed a series of tests that courts may use in ascertaining whether state statutes violate the supremacy clause.

A court may find that the supremacy clause preempts a state law when federal regulation of any subject is so detailed and pervasive that a reasonable person may infer that Congress intended to preclude any state from regulating the subject.¹² A court may also find a state law violative of the supremacy clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³ This test has evolved to include a three-pronged inquiry: (1) pervasiveness of a federal regulatory scheme; (2) federal occupation of the field as necessitated by the need for national uniformity; (3) danger of conflict between state laws and the administration of a federal program.¹⁴ A court may not infer that Congress intended a federal statute to supersede the exercise of state power unless Congress has expressed a clear intent

8. MCA § 75-3-404(2) (1981).

9. Missoula, Mont., Ordinance 2104 (Feb. 4, 1980); amend. Ordinance 2181 (Dec. 22, 1980).

10. U.S. CONST. art. VI, cl. 2.

11. *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819).

12. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973).

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

14. *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956).

to preempt state law.¹⁵

Several federal statutes govern the disposal and transportation of radioactive materials. An examination of these statutes will provide a basis for a determination of whether federal regulation preempts a state effort to regulate transportation or disposal of radioactive materials.

A. *Atomic Energy Act of 1954*

The Atomic Energy Act of 1954 authorizes the Nuclear Regulatory Commission (NRC)¹⁶ to regulate byproduct material¹⁷ and special nuclear material.¹⁸ The NRC regulates most radioactive waste since most of this waste consists of byproduct material.¹⁹ Section 274 of the Atomic Energy Act authorizes the NRC to enter into agreements with the governor of any state to transfer regulation of byproduct, source, and special nuclear materials to the state.²⁰ This provision and its legislative history clearly imply that Congress intended to preempt state regulation of radioactive material, except pursuant to a turnover agreement between the NRC and a state.²¹

B. *Energy Reorganization Act of 1974 and Department of Energy Organization Act*

The Energy Reorganization Act of 1974 authorizes the NRC to license and regulate facilities of the Energy Research and Development Administration (ERDA) used for receipt and storage of high-level radioactive wastes generated by ERDA research activities or activities licensed under the Atomic Energy Act.²² The Depart-

15. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942); *accord*, *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973).

16. The Energy Reorganization Act of 1974 abolished the old Atomic Energy Commission and transferred its functions to the Nuclear Regulatory Commission. 42 U.S.C. §§ 5814, 5841 (1976, Supp. II 1978 & Supp. III 1979).

17. 42 U.S.C. §§ 2111-2114 (1976, Supp. II 1978 & Supp. III 1979). The Act defines byproduct material as any material made radioactive by exposure to the process of producing or utilizing special nuclear material, or tailings produced by extraction of uranium or thorium ore from source material. *Id.* § 2014(e).

18. *Id.* §§ 2071-2078. The Act defines special nuclear material as plutonium, uranium or any other material which the Commission determines to be special nuclear material. *Id.* § 2014(aa) (1976).

19. *See Harris C'ty, Tex. v. United States*, 292 F.2d 370 (5th Cir. 1961); *accord*, *City of Britain, Conn. v. AEC*, 308 F.2d 648 (D.C. Cir. 1962).

20. 42 U.S.C. § 2021(b) (1976).

21. S. REP. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 1872-83.

22. 42 U.S.C. §§ 5801-5891 (1976, Supp. II 1978 & Supp. III 1979).

ment of Energy Organization Act gives the Department of Energy (DOE) express authority over management, storage and disposal of all nuclear wastes.²³ This Act also transfers functions previously delegated to ERDA to DOE.²⁴

C. *Transportation Safety Act of 1974*

Title I of the Transportation Safety Act is known as the Hazardous Materials Transportation Act.²⁵ This Act authorizes the Secretary of Transportation to designate materials, including radioactive materials, as hazardous and to issue regulations for the safe transportation in commerce of these hazardous materials.²⁶ This Act also provides that the Secretary of Transportation may determine that a state law governing transportation of hazardous materials is not preempted if it affords an equal or greater level of protection to the public and does not unreasonably burden commerce.²⁷ Therefore, this Act indicates a congressional intent to partially preempt state regulation in this area.

D. *Uranium Mill Tailings Radiation Control Act of 1978*

This Act authorizes the Secretary of Energy to enter into agreements with states to remedy problems associated with sites containing residual uranium mill tailings and other radioactive waste generated by the processing of uranium ore.²⁸ DOE may enter into turnover agreements with states authorizing states to license and regulate uranium mill tailings.²⁹

E. *Low-Level Radioactive Waste Policy of 1980*

This Act places responsibility with each state for providing capacity either within or outside that state for disposal of low-level radioactive waste generated within that state's borders.³⁰ This Act recognizes that low-level radioactive waste can be most safely and effectively managed on a regional basis.³¹ In this Act, Congress au-

23. *Id.* § 7133(a)(8).

24. *Id.* § 7151.

25. 49 U.S.C. §§ 1801-1812 (1976, Supp. II 1978 & Supp. III 1979).

26. *Id.* §§ 1803-1804.

27. *Id.* § 1811.

28. 42 U.S.C. §§ 7913-7923 (Supp. II 1978 & Supp. III 1979).

29. *Id.* § 2021(o).

30. 42 U.S.C. § 2021d(a)(1)(A) (Supp. IV 1980). The Act defines low-level radioactive waste as radioactive waste, trans-uranic waste, spent nuclear fuel or byproduct material. *Id.* § 2021b(2).

31. *Id.* § 2021d(a)(1)(B).

thorizes the states to enter into interstate compacts to provide for establishment and operation of regional disposal facilities for low-level radioactive waste.³² After January 1, 1986, any compact approved by Congress may restrict the use of regional disposal facilities to low-level waste generated within the region.³³

These provisions indicate a congressional intent to place responsibility for low-level radioactive waste disposal with each state. If any state does not provide for disposal of low-level radioactive waste generated within its borders by January 1, 1986, that state could be denied access to other regions' disposal sites.³⁴ Most radioactive waste, however, consists of byproduct material,³⁵ which is specifically exempted from this Act.³⁶ Under the Atomic Energy Act and the Department of Energy Organization Act, the NRC and DOE maintain primary authority to regulate disposal of radioactive waste.³⁷

This web of federal law indicates a congressional intent to preclude state regulation of either radioactive waste disposal or transportation except when Congress has expressly ceded regulatory authority to the states.

III. COMMERCE CLAUSE

The Constitution grants to Congress the power to regulate interstate commerce.³⁸ Under the supremacy clause, if Congress has enacted legislation pursuant to the commerce clause, a state is precluded from enacting any conflicting legislation.³⁹ In the absence of federal legislation, the commerce clause precludes any state from obstructing the free flow of interstate commerce unless a state law serves a legitimate state interest and is applied in a nondiscriminatory manner.⁴⁰ In determining whether a state law serves a legitimate state interest, the Supreme Court will balance the need for uniform national regulation against the putative state interest.⁴¹

32. *Id.* § 2021d(a)(2)(A).

33. *Id.* § 2021d(a)(2)(B).

34. *Id.*

35. *See supra* note 18.

36. 42 U.S.C. § 2021b(2) (Supp. IV 1980).

37. *See supra* notes 14, 15, 21 and 22.

38. U.S. CONST. art. I, § 8, cl. 3.

39. U.S. CONST. art. VI, cl. 2. *See also* *Cooley v. Board of Wardens*, 53 U.S. 299 (1851); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

40. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978).

41. *Southern Pacific v. Arizona*, 325 U.S. 761, 775-76 (1945); *accord*, *Bibb v. Navajo Freight Line*, 359 U.S. 520, 529 (1959); *Raymond Motor Transp., Inc.*, 434 U.S. 429, 440 (1978).

The Supreme Court established standards for balancing these interests in *Pike v. Bruce Church, Inc.*⁴² Under the *Pike* standards the court determines: (1) as a threshold issue, whether the state law regulates evenhandedly; (2) whether the state law effectuates a legitimate local public purpose; and (3) whether the state law has only an incidental effect on interstate commerce.⁴³ If the court answers each issue affirmatively, the court will uphold the state law unless the burden that it imposes on commerce is clearly excessive in relation to the putative local benefits.⁴⁴

A state law discriminates on its face against interstate commerce if it overtly blocks the flow of commerce at its borders based on the origin of transported substances.⁴⁵ A court may invalidate a state statute based on this facial discrimination.⁴⁶ Even if a court does not invalidate a statute based solely on facial discrimination, this discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.⁴⁷

IV. THE SPELLMAN HOLDING

In *Spellman* the court invalidated the Washington Act as violative of the supremacy and commerce clauses of the United States Constitution, and granted plaintiffs' motions for summary judgment.⁴⁸

The court held that, under the supremacy clause, federal law preempted the Washington Act because the pervasive federal statutory schemes for regulation of radioactive waste demonstrated a congressional intent that the "transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except when jurisdiction was expressly ceded to the states."⁴⁹

After finding that radioactive waste fits the definition of "commerce" for constitutional purposes⁵⁰ and that the Washington Act was clearly a regulatory measure,⁵¹ the court held the Act violative

42. 397 U.S. 137, 142 (1970).

43. *Id.*

44. *Id.*

45. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

46. *Id.*

47. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

48. *Spellman*, 518 F. Supp. at 935.

49. *Id.* at 931.

50. *Id.* at 933.

51. *Id.*

of the commerce clause.⁵²

In its commerce clause analysis the court first held that since Congress has established a pervasive scheme to regulate this area of commerce, the supremacy clause preempted the Washington Act.⁵³ The court further held that even in the absence of this pervasive federal regulatory scheme, the Act still violated the commerce clause since it did not meet any of the standards established in *Pike*.⁵⁴ Reviewing the *Pike* standards the court held that: (1) the Act discriminated on its face since it overtly blocked the flow of interstate commerce at Washington's borders on the basis of origin;⁵⁵ (2) the Act did not effectuate a legitimate local purpose since the defendants "failed to present evidence that non-medical radioactive waste, transported and stored in compliance with federal regulations, is dangerous to the health and safety of the citizens of the State of Washington";⁵⁶ and (3) the Act would "clearly" have more than an incidental effect on interstate commerce since the Act would aggravate the national problem of reduction in radioactive waste disposal sites.⁵⁷

V. CONCLUSION

The *Spellman* court had little trouble in holding the Washington Act unconstitutional, primarily because of the Act's rather blatant violations of the supremacy and commerce clauses. The significance of the *Spellman* decision lies in its utility as a basic guide to the constitutionality of other enactments in the area of radioactive waste regulation. For example, although Montana's statutes in this area differ significantly from the Washington Act, *Spellman* reveals that Montana's enactments are open to similar constitutional attacks. Montana law totally prohibits disposal of byproduct material, special nuclear material and large quantity radioactive material within Montana.⁵⁸ In addition, Montana law prohibits the manufacture, use, production or transportation of nuclear material within Montana without a license to do so from the state radiation control agency.⁵⁹ Montana has not entered into any turnover agreements with the NRC under section 274 of the Atomic Energy Act

52. *Id.*

53. *Id.*

54. *Id.* at 934.

55. *Id.*

56. *Id.* at 935.

57. *Id.*

58. *See supra* note 7.

59. *See supra* note 8.

or any other federal law transferring regulation of radioactive material to state government.⁶⁰

Courts will uphold state regulations in this area under the supremacy clause only if a state proves that it regulates pursuant to a turnover agreement with the NRC under the Atomic Energy Act or pursuant to some other express authority ceded to it by Congress. In addition, state regulations in this area will withstand commerce clause attacks only if a state proves that the local benefits of its nondiscriminatory regulations outweigh the need for uniform national regulation.

Since the federal government has not ceded any of its regulatory authority to Montana, Montana's law governing disposal of radioactive materials probably violates the supremacy clause. But since the Hazardous Materials Transportation Act permits the Secretary of Transportation to determine that federal law does not preempt a state law regulating transportation of radioactive material,⁶¹ Montana's statute governing transportation of radioactive materials could possibly withstand scrutiny under the supremacy clause.

Although Montana's laws do not discriminate on the basis of the origin of radioactive materials, courts could find them violative of the commerce clause unless Montana can show that the purported health and safety benefits outweigh the need for uniform national regulation in this area.

60. Although Montana has not entered into any turnover agreements for the regulation of byproduct materials, special nuclear materials or other high-level radioactive materials, Montana has taken responsibility for low-level radioactive waste disposal. On November 24, 1981, Governor Schwinden signed Executive Order 29-81 which designated Montana as a party to the Northwest Interstate Compact on Low-Level Radioactive Waste pursuant to the Low-Level Radioactive Waste Policy Act of 1980.

61. See *supra* note 27.