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It's a Revolution I Suppose: The Supreme Court's Radioactive Decision in *Virginia Uranium Inc. v. Warren*

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2020]

IT'S A REVOLUTION, I SUPPOSE: THE SUPREME COURT'S
RADIOACTIVE DECISION IN *VIRGINIA URANIUM,*
INC. V. WARREN

“I’m waking up to ash and dust
I wipe my brow and I sweat my rust
I’m breathing in the chemicals.”¹

I. IT’S TIME TO BEGIN: INTRODUCTION

Very little uranium is regulated in the United States.² In fact, according to current estimates, over ninety percent of uranium in the country is imported.³ Uranium mining in the United States was not regulated until the Atomic Energy Act of 1946.⁴ This may be because the only known deposits were in the Four Corners Area.⁵ When other deposits were eventually discovered, uranium regulation only affected eight states, including Arizona, Wyoming, New Mexico, Texas, Utah, and Virginia.⁶ For these states, the Court’s recent decision in *Virginia Uranium, Inc. v. Warren*⁷ raised not only local awareness but also national awareness of uranium regulation.⁸ This case typifies the battle between state and federal government.⁹ Many states, like Virginia, want to maintain the right to control their natural resources to enable protection of the environment; conversely, the federal government has rolled back environmental

1. Imagine Dragons, *Radioactive* (KIDinaKORNER/Interscope Records 2012) (addressing “radioactive” postapocalyptic future of environment if consumer and corporate indifference continues). This Note will incorporate this song and other Imagine Dragons songs as a theme.

2. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1909 (2019) (explaining alternatives to conventional uranium mining on private property).

3. *Id.* (detailing how much is unknown regarding uranium mining).

4. *See generally* 42 U.S.C. § 2011 et. seq. (1946) (providing entire Atomic Energy Act).

5. *Uranium in America*, URANIUM PRODUCERS OF AMERICA, http://www.theupa.org/uranium_in_america/ (last visited Jan. 2, 2020) (recalling history of uranium mining in America). The Four Corners includes the southwest corner of Colorado, southeast corner of Utah, northeast corner of Arizona, and northwestern corner of New Mexico. *Id.* (specifying first discovered uranium deposits in U.S.).

6. *See id.* (enumerating states that contain uranium deposits in U.S. to date).

7. *See generally Va. Uranium, Inc.*, 139 S. Ct. at 1900 (introducing case and illustrating core issues).

8. *See* Andrew Chung, *UPDATE 4-Virginia Ban on Uranium Mining Upheld by U.S. Supreme Court*, REUTERS (June 17, 2019, 10:17 AM), <https://www.reuters.com/article/us-usa-court-uranium/us-supreme-court-upholds-virginia-ban-on-uranium-mining-idUSKCN1T11R6> (characterizing case).

9. *See id.* (exemplifying conflict between state and federal government).

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protections, in turn granting access to uranium for nuclear weapons and power plants.¹⁰

This Note will discuss the implications of the Supremacy Clause on environmental law - specifically the Virginia Uranium Mining Ban - and its effects on both state and local governments' justifications for regulating the mining industry.¹¹ Part II will first explain the uranium mining process and the facts of the case.¹² This Note will then discuss a brief history of the Virginia Uranium Mining Ban and the relevant statutes, constitutional provisions, and case law in Part III.¹³ Part IV will examine the Supreme Court's rationale in the case.¹⁴ Part V will critically analyze the internal inconsistencies between the majority and concurring opinions and demonstrate why the concurrence is the best approach.¹⁵ This Note will conclude in Part VI by discussing the impact of *Virginia Uranium* on the future of environmental cases by examining the dissent and how the majority and concurring opinions may create a circuit split.¹⁶

II. WHATEVER IT TAKES: FACTS OF VIRGINIA URANIUM, INC. v. WARREN

Uranium is a naturally occurring radioactive element - found in rocks, soil, and water - used as a main fuel source for nuclear power.¹⁷ It is refined through three processes.¹⁸ First, raw uranium ore is extracted.¹⁹ Second, it is milled by "grinding the ore into sand-sized grains and . . . exposing it to a chemical solution that

10. *See id.* (summarizing outcome of case).

11. *See Va. Uranium, Inc.*, 139 S. Ct. at 1894 (enforcing preemption precedent); *see also* Cale Jaffe, *What Will the Supreme Court's Decision on Virginia's Uranium Mining Ban Mean for Future Environmental Battles?*, PAC. STANDARD MAGAZINE (June 19, 2019), <https://psmag.com/environment/what-the-virginia-uranium-scotus-decision-means-for-environmentalists> (predicting implications of case).

12. For a discussion of the facts of *Virginia Uranium*, *see infra* notes 17-39 and accompanying text.

13. For a discussion of the history of the uranium mining ban, statutory and constitutional background, and case law, *see infra* notes 40-94 and accompanying text.

14. For a discussion of the Court's rationale, *see infra* notes 95-148 and accompanying text.

15. For a critique of this case, *see infra* notes 153-183 and accompanying text.

16. For a discussion of the impact on the rest of the country, *see infra* notes 184-196 and accompanying text.

17. *Uranium*, VIRGINIA.GOV, <https://www.dmme.virginia.gov/dgmr/uranium.shtml> (last visited Aug. 21, 2019) (specifying scientific characteristics of uranium).

18. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (describing Virginia Uranium's plan to mine for uranium).

19. *See id.* (summarizing extraction process).

leaches out pure uranium.”²⁰ Third, the pure uranium is dried, leaving a “yellowcake” mixture for sale, while leftovers are stored to reduce air and water contamination.²¹

In 1982, Virginia implemented a ban on the uranium extraction process that remains in place today.²² The area in dispute, known as Coles Hill, is located in Virginia and privately owned by Virginia Energy Resources.²³ Its subsidiary, Virginia Uranium, Inc., controls the leasehold development on the property along with the mineral, surface, and operating rights to the area.²⁴ Coles Hill contains the largest known uranium deposit in America.²⁵

Since the ban, a spike in uranium prices caused Virginia Uranium’s renewed interest in the uranium extraction process, which led the company to advocate for deregulation.²⁶ After unsuccessfully petitioning the Virginia legislature to lift the mining ban, Virginia Uranium filed suit against the Commonwealth in federal court.²⁷ Virginia Uranium, Inc., Coles Hill, LLC, Bowen Minerals, LLC, and Virginia Energy Resources, Inc. collectively filed this lawsuit in 2015 in an attempt to gain access to the Coles Hill uranium deposit.²⁸ The plaintiffs asserted that the Atomic Energy Act (AEA) preempted the state mining ban through the Supremacy Clause.²⁹

The Commonwealth of Virginia filed a Rule 12(b)(6) motion to dismiss Virginia Uranium’s complaint.³⁰ In the motion, the Commonwealth argued the AEA did not speak on the issue of uranium deposits on private land and, therefore, did not preempt Virginia law.³¹ Virginia Uranium then cross-filed a motion for

20. *Id.* (elaborating on mining process).

21. *Id.* (noting drying process).

22. *See Uranium, supra* note 17 (enumerating historical background of ban).

23. *See Coles Hill, Virginia (Uranium)*, VA. ENERGY RES., <http://www.virginiaenergyresources.com/s/ColesHill.asp> (last visited Jan. 3, 2020) (detailing demographics of Coles Hill).

24. *Id.* (describing extent of Virginia Energy’s ownership in Coles Hill).

25. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 593 (4th Cir. 2017) (recounting history of Coles Hill uranium deposit).

26. *Id.* at 593-94 (noting company’s interest in uranium mining).

27. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900-01 (2019) (describing Virginia Uranium’s failures).

28. *Va. Uranium, Inc.*, 848 F.3d at 593-94 (explaining Virginia Uranium’s argument for filing suit).

29. *Va. Uranium, Inc.*, 139 S. Ct. at 1901, 1909 (detailing plaintiffs’ preemption arguments); *see also* Atomic Energy Act of 1954, 42 U.S.C. § 2021 (1954) (regulating nuclear power facilities).

30. *Va. Uranium, Inc.*, 848 F.3d at 594 (affirming district court’s dismissal of Virginia Uranium’s complaint).

31. *See id.* at 594 (concluding Virginia’s ban did not contradict Congress’s objectives behind the AEA).

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summary judgment motion in response.³² The Western District of Virginia ruled in favor of the Commonwealth and, in granting the motion to dismiss, the court found the AEA did not extend to regulation of nonfederal uranium deposits and uranium extraction.³³

The Fourth Circuit affirmed the district court's holding that federal law did not preempt Virginia's ban on uranium mining.³⁴ The court based the majority of its analysis on the Supreme Court's ruling in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*³⁵ and mirrored the decision's reasoning.³⁶ Virginia Uranium subsequently filed a writ of certiorari, which the Supreme Court granted.³⁷ Ultimately, the Commonwealth of Virginia was victorious.³⁸ The Supreme Court affirmed the Fourth Circuit's dismissal of Virginia Uranium's suit, holding that nothing in the AEA explicitly preempted the state's ban on conventional uranium mining.³⁹

III. THE WAY THAT THINGS HAVE BEEN: A BACKGROUND

Uranium mining exploration first began in Virginia in the 1950s and was fruitful until the late 1970s and early 1980s.⁴⁰ The National Uranium Resource Evaluation (NURE) program performed studies and surveys and used samplings of Virginia's rocks and soil to create a mapping distribution of uranium-enriched bedrock.⁴¹ Initially, mining companies also conducted exploration programs, which led them to discover the Swanson Deposit at Coles Hill, Virginia.⁴²

32. *See id.* (relaying case's procedural history).

33. *Id.* (explaining district court's rationale).

34. *Id.* at 593 (holding AEA did not preempt state regulation on uranium mining).

35. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (concluding Commonwealth's statute imposing moratorium on new nuclear plans was not preempted by AEA).

36. *See Va. Uranium, Inc.*, 848 F.3d at 595-99 (utilizing Supreme Court's interpretation of AEA in *Pacific Gas*); *see also Va. Uranium, Inc.*, 139 S. Ct. at 1903-05 (interpreting *Pacific Gas* and applying it to case).

37. *See Va. Uranium, Inc.*, 139 S. Ct. at 1900-01 (emphasizing significance of question presented).

38. *See id.* at 1908-09 (agreeing with Commonwealth's argument that state law is not preempted).

39. *Id.* at 1909 (affirming Fourth Circuit's decision that AEA's purposes and objectives did not contradict Commonwealth's ban).

40. *Uranium*, *supra* note 17 (noting uranium mining's history in Virginia).

41. *See generally id.* (itemizing techniques used to map uranium ore deposits in Virginia).

42. *Id.* (describing explorations in Coles Hill area and giving background of Swanson Deposit).

Following the explorations, the Virginia legislature placed a moratorium on uranium mining in 1982.⁴³ According to the legislature, this was done in order to further investigate the mining process to ensure the health, safety, and welfare of Virginians.⁴⁴ The Commonwealth formed the Uranium Administrative Group (UAG) in 1983 to conduct a cost benefit analysis of uranium mining's effects.⁴⁵ The UAG submitted a recommendation to the Virginia Coal and Energy Commission in January of 1984 to continue oversight and expansion of the cost benefit analysis studies, which the Uranium Task Force (UTF) then conducted.⁴⁶

In its analysis, the UTF considered major monetary and non-monetary costs of the mining, such as the effects on the industry and the environment and increased state and local government subsidies, weighing them against the potential employment earnings and governmental revenue benefits.⁴⁷ The UTF recommended to the legislature that in order to lift the ban, milling and tailing licenses would be required, as well as hazardous waste regulations to ensure public safety from radiation exposure.⁴⁸ By the end of 1984, however, the Coles Hill deposit was no longer practicable because uranium market prices fell globally.⁴⁹ Following the market decline, companies stopped pursuing mineral leases altogether.⁵⁰

In 2005, there was renewed interest in the Coles Hill deposit when uranium prices increased, but the 1982 ban remained in effect.⁵¹ Virginia Uranium filed for an exploration permit in 2007 to continue exploration efforts of the area.⁵² In 2008, the legislature introduced legislation to explore the possibility of lifting the ura-

43. *Id.* (identifying bill introduced to create the uranium mining ban).

44. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 593 (4th Cir. 2017) (recalling historical background of the mining ban).

45. *Uranium*, *supra* note 17 (delving into specifics of regulatory commissions formed).

46. *Id.* (reciting history of cost benefit analysis studies).

47. John L. Knapp et al., *Cost-Benefit Analysis of Mining & Milling Uranium at the Swanson Site in Pittsylvania County, Virginia*, TAYLOE MURPHY INST. xiv (Aug. 1984), <https://www.dmme.virginia.gov/Uranium/pdf/Tayloe%20Murphy%20Institute%20Report%20-%20Cost-Benefit%20Analysis.%20August%201984.pdf> (reporting cost-benefit analysis of uranium mining in Virginia).

48. *Va. Uranium, Inc.*, 848 F.3d at 593 (exploring UTF's role); *see generally Knapp*, *supra* note 47 (detailing results of analysis as well as necessary steps to statutorily take in order to lift ban).

49. *Uranium*, *supra* note 17 (reporting effects of global market in 1984).

50. *Id.* (explaining downfall of uranium mining).

51. *Id.* (recounting rise in uranium market).

52. *Id.* (stating Virginia Uranium's request for relief at state level).

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anium mining ban in the Commonwealth.⁵³ In January 2013, two Virginia senators sponsored a bill to allow permits for uranium mining, yet for unknown circumstances the bill never came to fruition.⁵⁴ The Virginia Uranium Mining Ban currently remains in effect⁵⁵

A. Statutory Background

In 1982, the Virginia legislature enacted Va. Code Section 45.1-161.292:30, which officially banned uranium mining in Virginia.⁵⁶ Under this section, in order to mine for minerals within Virginia, the person interested in mining must first obtain a license from the Commonwealth.⁵⁷ Yet, the means to obtain a permit were made impossible by Section 45.1-283: “[n]otwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth . . . until a program for permitting uranium mining is established by statute.”⁵⁸ The Commonwealth never statutorily established feasible criteria to permit uranium mining.⁵⁹

Virginia Uranium addresses the state and federal conflict between the Virginia Uranium Mining Ban and the AEA.⁶⁰ The AEA originally created the Atomic Energy Commission (AEC) in order to “promote the ‘utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.’”⁶¹ After countless fatalities in World War II, where the United States utilized two atomic bombs, Congress wanted to promote safe atomic energy

53. *Id.* (showing Commonwealth’s willingness to lift ban).

54. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 593 (4th Cir. 2017) (demonstrating Virginia Uranium’s relentless fight to lift ban).

55. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (evidencing Virginia Uranium’s defeat in litigation).

56. *See generally* VA. CODE ANN. § 45.1-161.292:30 (1982) (implementing strict standards to obtain license for mineral mines operation).

57. *Id.* § 45.1-161.292:20 (explaining procedures to obtain license). The statute is referring to the Department of Mines, Minerals and Energy. VA. CODE ANN. § 45.1-161.292:2 (1982) (defining key terms of Mineral Mine Safety Act).

58. VA. CODE ANN. § 45.1-283 (1982) (deeming uranium mining to have detrimental impact on surface).

59. *See Uranium, supra* note 17 (illustrating timeline of ban).

60. *See Va. Uranium, Inc.*, 139 S. Ct. at 1901 (stating Virginia Uranium’s argument regarding AEA).

61. *Summary of the Atomic Energy Act*, U.S. ENVTL. PROT. AGENCY – LAWS & REGULATIONS, <https://www.epa.gov/laws-regulations/summary-atomic-energy-act> (last visited Aug. 28, 2019) (summarizing AEA’s purpose).

use moving forward.⁶² The AEC has since been abolished, and the Nuclear Regulatory Commission (NRC) and U.S. Department of Energy now have authority under the AEA to fulfill the original purpose of the Act.⁶³ One of the main implications of the AEA is that it gives the Federal Radiation Council under the Environmental Protection Agency (EPA) authority to 1) “develop guidance for federal and state agencies containing recommendations for their use in developing radiation protection requirements” and 2) “to work with states to establish and execute radiation protection programs.”⁶⁴ This portion of the Act delineates cooperation with the states.⁶⁵ 42 U.S.C. § 2021(k) states “nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.”⁶⁶ There is one narrow exception in Section 2097 where the NRC is permitted to regulate uranium mining on federal lands.⁶⁷

B. Constitutional Background

The parties’ dispute rested on their differing views about whether the Commonwealth’s statute or federal law applies.⁶⁸ The Supremacy Clause establishes that federal law is binding on all jurisdictions and preempts state law.⁶⁹ Three different types of preemption doctrines have stemmed from the Supremacy Clause: express,

62. See generally *Atomic Energy Commission*, ATOMIC HERITAGE FOUND. (Nov. 18, 2016), <https://www.atomicheritage.org/history/atomic-energy-commission> (offering background of atomic energy use and why Atomic Energy Act was implemented).

63. See *id.* (recapping history of Atomic Energy Act).

64. *Summary of the Atomic Energy Act*, supra note 61 (describing authority granted through Atomic Energy Act).

65. See generally 42 U.S.C. § 2021 (1954) (outlining how AEA works with state law).

66. *Id.* § 2021(k) (noting certain purposes where AEA may affect state law).

67. *Id.* § 2097 (making exception for uranium mining on federal land). The federal government may regulate uranium mining through eminent domain of private land if it wishes to control uranium ore extraction. *Id.* § 2096.

68. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901-03 (2019) (analyzing Supremacy Clause in regard to facts of this case). Virginia Uranium’s first argument is that the Supremacy Clause allows the AEA to trump Virginia law. *Id.* at 1901 (setting forth Virginia Uranium’s argument).

69. U.S. CONST. art. VI, cl. 2 (setting forth Supremacy Clause of United States). “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . [are] the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.* (articulating that federal law trumps state law).

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field, and conflict preemption.⁷⁰ Express preemption exists when Congress explicitly states in the statute that federal law trumps state law.⁷¹ When Congress is not explicit, field preemption may exist, and federal law preempts state law when the law is within a field Congress deems the federal government has exclusive control over.⁷² Conflict preemption exists when state law conflicts or is inconsistent with federal law.⁷³ *Pacific Gas* specifically established the preemption analysis the Court applies to AEA preemption cases.⁷⁴

C. Case Law

In *Pacific Gas*, the California legislature placed a moratorium on new nuclear plant certification until the State Commission determined that a plant's storage facilities were adequate in size to hold the highly radioactive "spent fuel."⁷⁵ California asserted it had authority to implement this moratorium due to economic concerns of waste disposal.⁷⁶ The central issue in the case was whether the AEA preempted California law.⁷⁷ The Court held while states have the right to create laws for matters such as new power facilities, economic feasibility, and rates and services under the AEA, the federal government is the sole regulator of nuclear safety concerns *only* relating to construction and operation of nuclear plants.⁷⁸ Most notably, the Court found it "inconceivable that Congress would have left

70. *Va. Uranium, Inc.*, 139 S. Ct. at 1901 (discussing preemption doctrines utilized by Court).

71. See Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1257 (1998) (defining express preemption).

72. *Id.* (explaining field preemption).

73. *Id.* (describing conflict preemption).

74. See *Va. Uranium, Inc.*, 139 S. Ct. at 1903-04 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)) (analyzing preemption as it applies to uranium regulation).

75. See *Pac. Gas & Elec. Co.*, 461 U.S. at 195-97 (1983) (giving background of nuclear fuel storage issues). Previously, it was believed that "spent fuel" could be reprocessed; however, the reprocessing never occurred, thus creating a buildup of "spent fuel." *Id.* at 195 (discussing issue with accumulation of "spent fuel"). Further, there was an issue of permanent disposal, which had also never been addressed. *Id.* at 196 (describing issue with permanent disposal). This buildup risked health and environmental concerns and the shutdown of nuclear reactors so the California legislature enacted this moratorium to resolve the issue. *Id.* at 195-96 (explaining rationale for California state law that coincided with federal concerns).

76. *Id.* at 213 (relaying California's intent for implementing ban).

77. *Id.* at 198 (specifying *Pacific Gas*'s argument for filing suit).

78. See *id.* at 207 (interpreting Congress's intent). It should be noted that the AEA was amended in 1976 and changed the scope of the federal government's jurisdiction over nuclear energy. *Id.* at 206-07 (demonstrating legislative changes to AEA).

a regulatory vacuum” within the AEA and, therefore, purposefully left other types of regulation to the states such as economic feasibility.⁷⁹

In *Silkwood v. Kerr-McGee Corp.*,⁸⁰ a laboratory analyst at the defendant’s plant was exposed to plutonium radiation.⁸¹ The exposure resulted in property damage and personal injuries.⁸² The jury found in favor of the plaintiff in the lower court, but the circuit court reversed the award, finding federal law preempted state law.⁸³ The Supreme Court reversed and held the AEA did not preempt state law in this case.⁸⁴ The Court opined Congress intended for state tort remedies to be available to “persons injured by nuclear accidents.”⁸⁵

In *Skull Valley Bank of Goshute Indians v. Nielson*,⁸⁶ plaintiffs contested multiple Utah laws which regulated transportation of nuclear “spent fuel.”⁸⁷ Plaintiffs alleged these laws were preempted by the AEA through the Supremacy Clause.⁸⁸ The Tenth Circuit found the rationale in *Pacific Gas* to be instructive, concluding that the AEA preempted the Utah laws because they regulated radiological safety as opposed to the stated purpose of law enforcement regulation.⁸⁹ This is a rare example of the AEA preempting state law and shows the evolution of the Court’s application of *Pacific Gas*.⁹⁰

79. *Id.* at 208 (examining Congress’ rationale for narrowing extent of AEA).

80. 464 U.S. 238 (1984) (introducing case).

81. *See generally id.* at 241-44 (illustrating facts of case).

82. *Id.* (explaining extent of damages).

83. *Id.* at 245-46 (explicating tenth circuit’s rationale for its reversal). The defendants asserted multiple federal laws, such as the Price-Anderson Act and the Atomic Energy Act, preempted state tort law. *Id.* at 249, 251 (giving detailed background of claims in case). Only the analysis of the Atomic Energy Act, however, is relevant to this case. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (analyzing case as it pertains to Virginia Uranium).

84. *Id.* at 258 (holding AEA does not preempt state law’s award of punitive damages).

85. *Silkwood*, 464 U.S. at 251-52 (exploring Congress’s intent of AEA and state law relationship through examination of its amendment in Price-Anderson Act).

86. 376 F.3d 1223 (10th Cir. 2004) (analyzing preemption doctrine).

87. *Id.* at 1227 (conveying facts of case).

88. *Id.* at 1239 (examining Supremacy Clause claim).

89. *Id.* at 1246 (agreeing with district court’s decision that effects of proposed nuclear fuel storage upon health and general welfare addressed radiological concerns that are covered by federal law). This case delves into more specific analysis of each of the Utah laws, which is not related to the Supremacy Clause analysis. *Id.* at 1223 (analyzing further arguments).

90. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1919 (2019) (Roberts, J., dissenting) (concluding case correctly applied *Pacific Gas* to find preemption).

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In *In the Matter of Hydro Resources, Inc.*,⁹¹ defendants obtained uranium mining licenses at four sites in McKinley County, New Mexico.⁹² Inventors then filed a claim with the NRC to deny the license for one of the four sites due to concerns about radiation contamination of that site.⁹³ The NRC recognized it cannot regulate “conventional” uranium mining – the uranium ore extraction process - because the AEA grants the NRC jurisdiction “at the mill, rather than at the mine.”⁹⁴

IV. YOU CAN’T FIGHT THE FRICTION: THE SUPREME COURT’S ANALYSIS IN *VIRGINIA URANIUM*

On appeal, the key issue in *Virginia Uranium, Inc. v. Warren* was whether the AEA preempted the Virginia Uranium Mining Ban under the Supremacy Clause.⁹⁵ Justice Gorsuch wrote the majority opinion, and Justices Thomas and Kavanaugh joined in the judgment.⁹⁶ The majority organized its opinion around three points made by Virginia Uranium: 1) the AEA mandates that the NRC has the exclusive authority to regulate uranium mining due to public safety concerns; 2) under *Pacific Gas*, the Commonwealth’s ban is barred by field preemption; and 3) under conflict preemption, the AEA must preempt state law.⁹⁷ While the concurrence – written by Justice Ginsburg and joined by Justice Kagan and Justice Sotomayor - similarly analyzes Virginia Uranium’s points, it disagreed with the broad sweeping nature of the majority, finding it unnecessary for the purposes of this case.⁹⁸

A. Majority’s Statutory Interpretation

The Court first assessed Virginia Uranium’s argument that the way the AEA is written grants the NRC sole power to regulate uranium mining due to nuclear safety concerns.⁹⁹ The Court noted

91. 63 N.R.C. 510 (2006) (presenting case).

92. *Id.* at 513 (providing facts of case).

93. *Id.* at 514 (asserting intervenors evidence for radiation contamination of Church Rock Section 17 site).

94. *Id.* at 512 (exploring other regulatory authorities that control conventional mining).

95. *Va. Uranium, Inc.*, 139 S. Ct. at 1901 (explaining Virginia Uranium’s reasoning for filing suit).

96. *Id.* at 1900-09 (concluding preemption does not apply when state law regulates uranium extraction).

97. *Id.* (providing organization of majority opinion); For a discussion of the majority opinion see *infra* notes 95-132 and accompanying text.

98. *Id.* at 1909 (disagreeing with majority’s analysis).

99. *Id.* at 1901 (addressing Virginia Uranium’s first argument).

that according to the AEA, specifically § 2092, the NRC can regulate “only ‘*after* [uranium’s] removal from its place of deposit in nature.’”¹⁰⁰ As a result, the first step in the uranium mining process, extraction, lies outside of the NRC’s authority.¹⁰¹ The majority supported this conclusion by analyzing Congressional “intent” evidenced by a narrow exception in the AEA.¹⁰² The exception granted the NRC power to regulate uranium mining on federal land.¹⁰³ Based on the exception, if the federal government wishes to regulate uranium mining on private land, it may either seize private land through eminent domain or purchase the land to make it federal.¹⁰⁴ By creating this exception, the Court found Congress considered uranium mining on private land and purposely did not grant the NRC regulatory power to this type of uranium mining through the AEA.¹⁰⁵

The Court also focused on Congress’s amendment of subsection (k).¹⁰⁶ It reads “[n]othing in this section [that is, § 2021] shall be construed to affect the authority of any State or local agency to regulate for activities for purposes other than protection against radiation hazards.”¹⁰⁷ Virginia Uranium asked the Court to interpret this subsection to expand the AEA’s preemptive effect thereby giving the NRC authority when any state law pertains to public safety against “radiation hazards.”¹⁰⁸ The majority admonished Virginia Uranium for this interpretation of subsection (k) because of the broad sweeping implications this reading would have.¹⁰⁹ Both state and federal governments would be banned from regulating ura-

100. *Va. Uranium, Inc.*, 139 S. Ct. at 1902 (citing 42 U.S.C. § 2092 (1946)) (emphasis added) (interpreting Atomic Energy Act narrowly).

101. *Id.* (finding agency’s jurisdiction “takes hold only ‘at the mill, rather than at the mine’”) (quoting *In Re Hydro Res. Inc.*, 63 N.R.C. 510, 512 (May 16, 2006)).

102. *Id.* (examining Congressional carve out in the Atomic Energy Act).

103. *Id.* (applying 42 U.S.C. § 2092 (1964)).

104. *Id.* (explaining how federal government can regulate uranium mining on private land).

105. *See id.* (narrowing NRC jurisdiction to exclude uranium mining on private land).

106. *Va. Uranium, Inc.*, 139 S. Ct. at 1902 (focusing on §2021(k) of Atomic Energy Act).

107. *Id.* (reciting statute to analyze its meaning).

108. *Id.* at 1902-03 (reprimanding Virginia Uranium for its interpretation of Atomic Energy Act).

109. *See id.* at 1903 (criticizing Virginia Uranium’s interpretation). The Court explains that in order to read the statute in the way Virginia Uranium requested, the Court would have to take out thirteen words and add two more so that the Statute would state, “any State or local agency may regulate activities only for purposes other than protection against radiation hazards.” *Id.* (refusing to utilize Virginia Uranium’s interpretation).

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mium mining on the basis of radiation hazards due to the NRC's contention that it has no authority over private land uranium mining — Virginia Uranium also never disputed this contention.¹¹⁰

B. *Pacific Gas* Analysis of Field Preemption

The Court next weighed Virginia Uranium's second argument - that field preemption is required by precedent from *Pacific Gas*.¹¹¹ Issues with this argument immediately arose because the AEA in *Pacific Gas* did not preempt the California state law that banned new nuclear power plant construction.¹¹² Virginia Uranium originally asserted this argument to highlight that California state law was upheld solely because its purpose was unrelated to radiation safety hazards, but rather for economic development concerns.¹¹³ The Court, however, reasoned that in order to rule for Virginia Uranium based on this argument, it would have to conclude that any state law enacted for radiation safety hazards would, in turn, be preempted.¹¹⁴

The Court was unwilling to adopt Virginia Uranium's argument and further articulated its reluctance to analyze the state legislative purposes for creating this ban.¹¹⁵ The *Pacific Gas* Court investigated legislative purpose because the AEA addressed construction of nuclear plants that overlapped with the NRC's jurisdiction.¹¹⁶ Here, the Court found the AEA does not cover mining activities, and it was unnecessary to investigate further into an activity with which the federal government could not have involvement.¹¹⁷ According to the Court, this would be "not only a significant federal intrusion into state sovereignty . . . [but] also represent a significant judicial intrusion into Congress's authority to delimit the preemptive effect of its laws."¹¹⁸ Further, the Court insinuated that *Pacific Gas* was decided incorrectly and here, the

110. *Id.* (detailing predicament of state and federal government if statute read in compliance with Virginia Uranium's interpretation).

111. *See generally* *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (rejecting preemption of state law); *see also* *Va. Uranium, Inc.*, 139 S. Ct. at 1903 (analyzing Virginia Uranium's second argument).

112. *Va. Uranium, Inc.*, 139 S. Ct. at 1903-04 (considering *Pacific Gas* case).

113. *Id.* (annihilating Virginia Uranium's argument under *Pacific Gas*).

114. *Id.* (finding apparent flaws in Virginia Uranium's argument).

115. *Id.* at 1904 (scrutinizing Virginia Uranium's argument that Court must look at state legislative purpose).

116. *Id.* (defining scope of NRC's powers).

117. *Va. Uranium, Inc.*, 139 S. Ct. at 1904 (reasoning why the Court refused to extend its inquiry like it did in *Pacific Gas*).

118. *Id.* at 1905 (opposing Virginia Uranium's request).

state law's exclusive objective was an activity left for the states — something that never requires inquiry into legislative motive.¹¹⁹

The Court cited *Silkwood* as evidence that the Court has historically refused to overextend preemption in regard to the AEA.¹²⁰ *Silkwood* was analogized to this case because the Court there did not explore state legislative purpose when deciding whether state tort law was preempted by the AEA.¹²¹ The Court agreed with its conclusion in *Silkwood* that this type of preemption extension fell beyond NRC authority under the AEA.¹²² Ultimately, the majority decided that when addressing field preemption, the standard has been and still should continue to be “*what* the State did, not *why* it did it.”¹²³

C. Conflict Preemption

Lastly, Virginia Uranium argued that the state ban may still be invalidated through conflict preemption.¹²⁴ Under conflict preemption, a state law may be preempted by federal law when it interferes with “the full purposes and objectives of Congress.”¹²⁵ According to Virginia Uranium, Congress intended to balance nuclear power development against safety and environmental costs through the AEA, and the Virginia Uranium Mining Ban upset this balance.¹²⁶ The Court rejected this argument and cited Article VI, Clause 2 of the Constitution along with well-established case law asserting preemption must be written into the statute.¹²⁷

119. *See id.* (explaining how § 2021(k) excludes Virginia's law from legislative motive analysis of preemption).

120. *Id.* (explaining how Court refuses to overextend in this area).

121. *Id.* (deciding whether preemption applied).

122. *Va. Uranium, Inc.*, 139 S. Ct. at 1905-06 (analogizing *Silkwood* to facts of this case). The Court in dicta detailed how dangerous it could be to investigate into state legislative purpose when there is no clear statutory mandate. *Id.* (cautioning future courts). Further, it explained how difficult it can be to prove the purpose for enacting a law due to the number of legislators there are and how it is practically impossible to understand each of their motives for enacting a law. *Id.* at 1906-07 (negating legislative history deference).

123. *Id.* at 1905 (exemplifying case law where this standard was applied).

124. *Id.* at 1907 (analyzing final argument by Virginia Uranium).

125. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (explaining conflict preemption).

126. *Id.* (detailing Virginia Uranium's argument for conflict preemption).

127. *Va. Uranium, Inc.*, 139 S. Ct. at 1907 (citing Constitution and case law to determine how to establish conflict preemption). “Only federal laws ‘made in pursuance of’ the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect.” *Id.* (citing U.S. CONS. art. VII, cl. 2) (citation omitted) (explaining importance of legislature in creating federal laws). Further, “any ‘[e]vidence of pre-emptive purpose,’ whether express or implied, must therefore be ‘sought in the text and structure of the statute at issue.’”

Similar to how challenging it would be to find each legislator's motive behind field preemption, the same can be said for conflict preemption.¹²⁸ The Court reasoned that analyzing these motives would be a classic example of "piling inference upon inference;" by reading into each Congressperson's intent, the law may be applied in a way it was not actually intended.¹²⁹ The Court found that interpreting the law this way would take away from the negotiation and compromising tactics it actually takes to get a law passed.¹³⁰ Ultimately, the Court declined to speculate about this matter and decided to focus on what the text of the AEA actually states.¹³¹ For this reason, the Court found conflict preemption did not apply in this case.¹³²

D. Concurrence

Justice Ginsburg began her concurrence by addressing her contentions with the majority.¹³³ The concurrence stated that the majority's analysis of legislative motive went beyond the scope of this case.¹³⁴ Further, Justice Ginsburg found the majority's opinion inappropriate because it focused more on Justice Gorsuch's personal preferences rather than the opinion of the majority as a whole.¹³⁵

1. Concurrence's Statutory Interpretation

The concurrence used a slightly different method than the majority when analyzing the statutory interpretation of the AEA § 2021(k).¹³⁶ Instead of the formal, text-centered approach used by the majority, the concurrence looked at the context and history

Id. (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)) (defining when preemption may be utilized).

128. *Id.* at 1907-08 (detailing level of speculation associated with discerning Congressional intent when enacting new laws).

129. *Id.* at 1908 (refusing to disregard legislative process by overemphasizing Congressional intent).

130. *Id.* (explaining democratic process behind how Congresspersons enact laws).

131. *See id.* (speculating what Congress might have meant to refute Virginia Uranium's argument).

132. *Va. Uranium, Inc.*, 139 S. Ct. at 1909 (affirming judgment of Fourth Circuit).

133. *Id.* (Ginsburg, J., concurring) (discussing majority's overbroad holding).

134. *Id.* at 1909 (restricting analysis to parameters of case).

135. *See id.* (giving thorough explanation of how Justice Ginsburg would resolve case).

136. *See id.* at 1913 (deciding Virginia Uranium's argument is unsupported).

of the AEA.¹³⁷ Even before the enactment of the AEA, the federal government regulated public health and safety while state governments regulated the economic and non-radiological purposes of nuclear fuel.¹³⁸ When the AEA was enacted, it was designed to give states an elevated responsibility exempting low-risk, nuclear power concerns from federal regulation under § 2021(k).¹³⁹ Further, the concurrence looked to House and Senate reports to confirm the AEA was written so that states could retain authority over nuclear fuel regulation authority.¹⁴⁰

2. Concurrence's Analysis of Field Preemption

The concurrence next analyzed Virginia Uranium's argument that the AEA should preempt Virginia law because the *Pacific Gas* Court stated, "the Federal Government has occupied the entire field of nuclear safety concerns."¹⁴¹ The state law in *Pacific Gas* and *Silkwood* were not preempted by the AEA.¹⁴² The concurrence declined to analyze the purpose behind the ban, noting such inquiry may be appropriate in some circumstances, as in *Pacific Gas*, but is not required here.¹⁴³ In *Pacific Gas*, the purpose of the state law related to nuclear powerplant construction which is related to economic development - not safety hazards - and, therefore, was appropriately considered in the context of preemption.¹⁴⁴

3. Conflict Preemption

The concurrence laid out Virginia Uranium's four arguments for conflict preemption, only two of which are relevant to this Note.¹⁴⁵ The concurrence first addressed the "delicate balance" be-

137. *Va. Uranium, Inc.*, 139 S. Ct. at 1913 (explaining federal and state responsibilities before AEA).

138. *Id.* (examining history to explain future application of AEA).

139. *Id.* (reiterating §2021(k)'s purpose when enacted).

140. *Id.* (quoting House and Senate reports to support conclusion that § 2021(k) left lower risk nuclear fuel activities to states). "Nothing suggests that Congress 'intended to cut back on pre-existing state authority outside the NRC's jurisdiction.'" *Id.* (quoting *Pac. Gas & Elec. Co. v. State Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209-10) (analyzing similar case law that declined preemption).

141. *Id.* (citing *Pac. Gas & Elec. Co.*, 461 U.S. at 212) (contending this was Virginia Uranium's "strongest argument" for preemption).

142. *Va. Uranium, Inc.*, 139 S. Ct. at 1913 (stating holding of *Silkwood* and *Pacific Gas*).

143. *See id.* (contrasting *Virginia Uranium* to *Pacific Gas*).

144. *Id.* (explaining difference in state law in *Pacific Gas*).

145. *Id.* at 1912 (rebutting Virginia Uranium's arguments). Justice Ginsburg explains conflict preemption may not be used in this case as "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives

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tween nuclear power and public welfare and rejected the majority's analysis; instead, the concurrence highlighted the complete lack of balance in this area of the law because conventional uranium mining on private land is statutorily left to the states.¹⁴⁶ Next, the concurrence focused on Virginia Uranium's argument that Congress has the "primary purpose" to sponsor nuclear power, and Virginia's law stops Congress from achieving this purpose.¹⁴⁷ In the very case Virginia Uranium cited, however, this policy argument was dismissed because of the lack of federal regulation to suggest this is Congress's "primary purpose."¹⁴⁸

E. Dissent

According to the dissent, the state of Virginia successfully regulated the milling and drying steps of uranium mining, that are preempted by the AEA, by claiming the ban regulates "mining safety" of the extraction process, a step not preempted by the AEA.¹⁴⁹ Instead of trusting the mining safety argument, the dissent finds the true purpose of the ban is actually to regulate the more harmful steps of milling and drying.¹⁵⁰ The dissent demonstrates that in *Pacific Gas*, the state was able to give a "nonsafety rationale" to the milling and drying steps, which is the only reason the state law was not preempted.¹⁵¹ Here, however, the dissent opines Virginia never gave a non-safety reason for implementing this ban.¹⁵²

V. IS IT JUST SMOKE AND MIRRORS? A CRITICAL ANALYSIS

It is quite ironic that the concurrence found it unfitting for the majority to write an opinion speaking for the entire Court, that "sweeps well beyond the confines of this case[,] instead of writing as individuals."¹⁵³ The irony in this statement comes from the ma-

of Congress." *Id.* at 1915 (citing *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009)) (finding no conflict between state law and Congressional purpose).

146. *Id.* at 1915 (analyzing and disclaiming "delicate balance" argument by showing lack of federal regulation in uranium mining).

147. *Va. Uranium, Inc.*, 139 S. Ct. at 1915 (disproving plaintiff's argument through case quoted by plaintiff).

148. *Id.* (showing Virginia Uranium lacks proof of this contention).

149. *Id.* at 1919 (detailing Virginia Uranium's theory).

150. *Id.* (exemplifying how states may not indirectly regulate preempted fields through *Pacific Gas*).

151. *Id.* (analogizing facts of *Pacific Gas* to *Virginia Uranium*).

152. *Va. Uranium, Inc.*, 139 S. Ct. at 1915 (distinguishing *Virginia Uranium* from *Pacific Gas* for lack of non-safety rationale).

153. *Id.* at 1909 (discussing inappropriateness of majority's field preemption analysis).

jority and the concurrence having fundamentally differing views on the preemption doctrines, and the concurrence is therefore also giving an individualized opinion that could have spoken for the Court had it rendered more support.¹⁵⁴ The majority disfavored preemption due to strong federalist beliefs that judges should only consider what is written in the statute, while the concurrence put faith in Congress and its intentions when it comes to preemptive purpose.¹⁵⁵ The way the Justices divided in this case were along philosophical theories of statutory interpretation.¹⁵⁶ The more liberal Justices, Ginsburg, Sotomayor, and Kagan, all concurred, while the conservative Justices, Thomas and Kavanaugh, joined Gorsuch.¹⁵⁷

As expected, given the ideological leanings of the Justices, the majority took a textualist approach to preemption.¹⁵⁸ The predominant textualist belief is that congressional intent can be found directly in the statutory text and there is no reason to inquire into intent.¹⁵⁹ Contrary to the majority, the concurrence seems to support a purposivism approach, although the concurrence ultimately did not use a per se purposivism analysis – which would have required an inquiry into legislative intent.¹⁶⁰ In cases where the text of the statute is in conflict with its purpose, purposivism allows judges to look past what is written in the text of the statute in order to carry out the “spirit of the law.”¹⁶¹

By choosing to look at “*what* the state did, not *why* it did it,” the majority created a new standard that has the potential to cause con-

154. See Gordon D. Todd, *The Sound of Silence*, THE REGULATORY REVIEW (July 12, 2019), <https://www.theregreview.org/2019/07/12/todd-preemption-virginia-uranium/> (analyzing disagreement between majority and concurrence).

155. See *id.* (contrasting majority and concurring Justices’ judicial beliefs).

156. See *id.* (discussing how Justices’ ideologies affect cases).

157. Meghan Keneally, *Their Pay, Age, Political Leanings and More: 6 Supreme Court Questions Answered*, ABC NEWS (Oct. 1, 2018, 4:43 PM), <https://abcnews.go.com/US/pay-age-political-leanings-supreme-court-questions-answered/story?id=58204713> (explaining key questions about Supreme Court including political leanings).

158. See *Va. Uranium, Inc.*, 139 S. Ct. at 1900-09 (interpreting preemption from textualist view).

159. See Jordan, *supra* note 71, at 1211 (explaining textualist philosophy); see also *Va. Uranium, Inc.*, 139 S. Ct. at 1900-09 (demonstrating majority’s preemption philosophy).

160. See *Va. Uranium, Inc.*, 139 S. Ct. at 1909-16 (defining preemption from purposivism view).

161. Jordan, *supra* note 71, at 1205 (analyzing development of purposivism as well as its approach).

fusion for field and conflict preemption analyses.¹⁶² Historically, the Court has looked to legislative motive when deciding whether field or conflict preemption are present in the case at issue, except in cases where states have traditionally been given deference.¹⁶³ In cases of state deference, the Court in the past rejected field and conflict preemption unless there was “clear and manifest evidence” that Congress intended preemption.¹⁶⁴ Here, the majority doubted that field and conflict preemption doctrines may ever be invoked, even in instances of state deference.¹⁶⁵ This is a deviation from established Court holdings within the preemption sphere, which can be grounds for misunderstanding in lower courts in the future.¹⁶⁶

Conversely, the concurrence is not without fault.¹⁶⁷ The structure of the concurrence does not follow the logical structure of Virginia Uranium’s arguments.¹⁶⁸ In this instance, the concurrence did not find it necessary to investigate legislative intent; however, reprimanding the majority for its legislative intent analysis is contrary to purposivism.¹⁶⁹ For further clarification, the concurrence should have specified when an inquiry into legislative intent is necessary in order to find field and conflict preemption.¹⁷⁰

This case also raises even bigger issues when speculating as to why the Supreme Court granted certiorari in the first place.¹⁷¹ Virginia Uranium essentially asked the Court to uproot a well-established doctrine of law.¹⁷² Before the decision, some thought that this case may be the one to change the course of the law in this

162. *See Va. Uranium, Inc.*, 139 S. Ct. at 1905 (analyzing case from holistic standpoint).

163. Jordan, *supra* note 71, at 1205 (describing how Court traditionally invoked implied preemption doctrines).

164. *Id.* at 1214 (noting Court’s traditional analysis when deciding whether field or conflict preemption is present).

165. Todd, *supra* note 154 (explaining majority’s beliefs on preemption).

166. Jordan, *supra* note 71, at 1151-52 (detailing precedent in context of preemption).

167. *See generally Va. Uranium, Inc.*, 139 S. Ct. at 1909-16 (concurring in judgment).

168. *Id.* at 1909-16 (agreeing with majority but for different reasons).

169. *Id.* at 1909 (disagreeing with majority’s analysis into legislative intent); *see also* Jordan, *supra* note 71 (explaining purposivism as applied to preemption doctrine).

170. *See* Todd, *supra* note 154 (discussing concurrence’s reasoning).

171. *See* Tom McLaughlin, *Opinion – Nervously Waiting*, S. BOSTON NEWS & RECORD (May 16, 2019), http://www.sovanow.com/index.php?/opinion/article/nervously_waiting/ (speculating as to why Court heard this case).

172. *Id.* (explaining what favorable outcome for Virginia Uranium would require Court to do).

area, while others were questioning how this case made it to the Supreme Court in the first place.¹⁷³

Moreover, it is clear this was not a “Republicans versus Democrats” issue, but instead an issue of “respective understanding[s] of what it means to be a judge.”¹⁷⁴ This is because, traditionally, Republicans embrace states’ rights while Democrats favor federal regulation.¹⁷⁵ Here, however, the Justices followed their statutory interpretation philosophies rather than their partisan beliefs.¹⁷⁶

In a case that hinges on differing interpretation philosophies, it is difficult to determine which opinion is “correct,” but purposivism seems like the best approach for addressing these issues.¹⁷⁷ The ultimate goals of preemption are to ensure the judicial branch finds the correct balance between state and federal government without legislating from the bench.¹⁷⁸ With these goals in mind, purposivism better addresses preemption issues in a way that textualism would limit because of the nature of the doctrine.¹⁷⁹ Textualism strictly focuses on the text and structure of statutes, leaving only one way for the judicial branch to interpret preemption.¹⁸⁰ Purposivism instead allows the judicial branch to examine Congress’s intent through interpretation that places checks and balances on the legislature, like the system of government in the U.S. was created to do.¹⁸¹ Through a purposivism approach, the judicial branch is not restricted to the confines of the statute itself and may place themselves in the position of a “reasonable legislature.”¹⁸² Purposivism presents additional options for the judiciary because it

173. See Halle Parker, *Supreme Decision: In Multi-Faceted Case that Defies Political Stereotypes, Highest Court in Land to Hear Arguments on Uranium Mining Moratorium*, GODANRIVER.COM (Nov. 3, 2018), https://www.godanriver.com/news/pittsylvania_county/in-multi-faceted-case-that-defies-political-stereotypes-highest-court/article_f630b634-dfb0-11e8-8e74-ebc58661f835.html (explaining background, key arguments, as well as Court vantage points); see also McLaughlin, *supra* note 171 (speculating as to how Supreme Court heard this case).

174. See Parker, *supra* note 173 (differentiating this case from others on partisan lines); see also Todd, *supra* note 154 (detailing differences in Justices’ philosophies).

175. See Parker, *supra* note 173 (noting traditional values of Republicans).

176. See generally *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (examplifying Justices’ opinions through their judicial ideologies).

177. See Todd, *supra* note 154 (explaining how differing judicial philosophies may impact cases).

178. Jordan, *supra* note 71, at 1215 (noting goals of preemption doctrines).

179. *Id.* at 1218 (demonstrating how narrowly statutes may be interpreted through textualism).

180. *Id.* at 1217-18 (explaining textualism).

181. *Id.* at 1219 (describing how purposivism fulfills purposes of checks and balances of Constitution).

182. *Id.* (applying purposivism to judiciary).

is permitted to assess the underlying rationale of the statute and examine the context in which it was created.¹⁸³

VI. WELCOME TO THE NEW AGE: THE FUTURE OF ENVIRONMENTAL PREEMPTION CASES

Although this case reaffirmed Supreme Court preemption precedent, the effects of the ruling may change preemption as applied to the environment throughout the country.¹⁸⁴ The dissent illustrates the far-reaching impact this decision will have stating, “so long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free reign . . .” to implement state laws similar to Virginia’s without a non-safety justification to the milling and drying steps to do so.¹⁸⁵ In essence, states now have the ability to regulate radiation hazards, forbidden by the AEA, through other AEA authorities because the majority’s opinion refuses to inquire into legislative purpose.¹⁸⁶ Chief Justice Roberts recommended that states, all of which already possess extensive police powers, can effectuate the same desired result through police powers rather than “subvert[ing] Congress’s judgment on nuclear safety.”¹⁸⁷

This six-three ruling in favor of Virginia, with three Justices in the majority and three in the concurrence, may potentially create a circuit split causing some circuits to follow the majority and others follow the concurrence.¹⁸⁸ While the outcome was the same in this particular case, the Justices philosophically differ in the rationale doctrines each invoked.¹⁸⁹ Because purposivism typically focuses on legislative intent, the concurrence’s rationale could endorse a more expansive outcome that favors an environmentalist agenda

183. Jordan, *supra* note 71, at 1219-20 (elaborating on purposivism in judiciary context).

184. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1909 (2019) (holding AEA does not preempt Virginia’s mining ban); *see also* Chung, *supra* note 8 (explaining potential effects of case).

185. *Id.* (presuming decision grants states authority beyond their reach).

186. *Id.* at 1919 (showing how states can get around preemption). As explained in the background, the AEA grants states the authority to “regulate activities for purposes *other than* protecting against radiation hazards.” 42 U.S.C. § 2021(k) (emphasis added).

187. *Id.* (demonstrating examples where states have used police powers to block in-state nuclear development).

188. *See id.* at 1900 (differing on fundamental judicial theories).

189. *See* Todd, *supra* note 154 (explaining key differences in concurrence and majority rationales).

than the majority's textualist approach.¹⁹⁰ In contrast, the majority's approach could limit future environmental preemption cases in instances where Congress is silent by refusing to investigate legislative intent altogether.¹⁹¹

Indiana, Washington, Hawaii, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Rhode Island, and Texas all advocated on behalf of the Commonwealth during the course of the Supreme Court litigation.¹⁹² These states warned the Court of potential implications of preemption on state environmental law, including the state hazardous waste statutes, to demonstrate their support of states' rights to regulation in the environmental sphere.¹⁹³ The outcome of this case, however, wavered state concerns and was a significant win for their environmental rights.¹⁹⁴ This case may in fact provide another way for states, already fighting against the current administration's cuts on federal environmental protections, to continue pushing for stricter environmental regulation.¹⁹⁵ By implementing laws that do not overlap with federal authority, states may be able to more definitively avoid preemption and place stricter environmental safeguards for their citizens.¹⁹⁶

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190. See Jordan, *supra* note 71, at 1219 (demonstrating differences that may result from Justices' differing preemption philosophies). For a discussion on purposivism see *infra* notes 160-183 and accompanying text.

191. See Todd, *supra* note 154 (expounding on majority's view that Congressional silence on common issue should be treated as conscious choice not to regulate).

192. Brief for Indiana et al. as Amici Curiae Supporting Respondents at 1, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275) (presenting arguments in Commonwealth's favor).

193. *Id.* at 2 (asserting arguments regarding detrimental effect to states if preemption applied).

194. Jaffe, *supra* note 11 (analyzing problems with petitioner's argument).

195. See *id.* (speculating future of environmental cases).

196. See *id.* (inquiring into *Virginia Uranium's* impact on environment's future).

* J.D. Candidate May 2021, Villanova University Charles Widger School of Law. I want to thank my friends here at the law school who have helped me throughout my law school career — especially to those on the journal who helped make this Note what it is. I also want to thank my husband, Dallas, for supporting me day in and day out and encouraging me to pursue my dreams. I truly would not be where I am today without you. I'm dedicating this Note to my parents, Michael and Rosario Pankey, who have made it possible for me to pursue my legal education and given me the world. I love you both and can never thank you enough for all that you have done and continue to do.