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## Can You Dig It? A Note on the U.S. Supreme Court's Atomic Energy Act Preemption Decision in *Virginia Uranium, Inc. v. Warren*

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# ONE J

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## CAN YOU DIG IT? A NOTE ON THE U.S. SUPREME COURT'S ATOMIC ENERGY ACT PREEMPTION DECISION IN *VIRGINIA URANIUM, INC. v. WARREN*

JOHN SHELDEN

The sharing of sovereign authority between the Federal government and the several states has been a point of serious contention since the sun rose on the American federalist system. The most recent iteration of this time-honored American dispute concerned a mining regulation and was between the Commonwealth of Virginia (“Commonwealth”) and Virginia Uranium, Inc. (“Virginia Uranium”). The Atomic Energy Act (“AEA”) is a series of laws enacted by Congress that imposes exclusive federal power on the processing, transporting, and usage of radioactive materials.<sup>1</sup> Commonwealth law prohibits the mining of uranium, and so arguably regulates a matter specifically considered and regulated by federal law. Virginia Uranium, a mining company of the eponymous mineral, challenged the state law on the basis that it was preempted by federal law, and thus unconstitutional. In a split-majority decision the U.S. Supreme Court ultimately concluded that the Commonwealth’s ban on mining uranium was not preempted by federal law.<sup>2</sup> The Court’s decision reflects concerns surrounding separating powers between the states and the federal government, as well as the division of authority between the judiciary and the legislature.

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1. 42 U.S.C.A. § 2011–2021, 2022-2286i, 2296-2297h-13 (West 1992).

2. *Virginia Uranium, Inc v. Warren*, 139 S.Ct. 1894 (2019).

As a preliminary matter, background on uranium mining and processing is necessary to understand the content of this note. Uranium is a naturally occurring heavy metal with radioactive properties.<sup>3</sup> Uranium-235 is a variety of the mineral that is commonly used to produce energy.<sup>4</sup> After raw uranium ore is extracted from its place of natural deposit it undergoes a process of milling in which it is ground down to a powder and mixed with water to separate the precious mineral from the dirt and rocks that surround it.<sup>5</sup> At the end of the milling process the separated uranium is processed further to prepare it for enrichment, while the leftover radioactive materials, known as tailings are disposed of in special storage facilities.<sup>6</sup> Disposed tailings are typically stored piles near the milling location.<sup>7</sup> The price of uranium has fluctuated over the last ten years, reaching a peak of \$79.00 per pound in December of 2011, while dipping as low as \$17.00 per pound in November of 2016.<sup>8</sup> Notwithstanding the fluctuations in the commodities market, uranium is still a sought after mineral as the “worldwide consumption of uranium is about 190 million pounds while its global extraction is 140 million.”<sup>9</sup> In 2015 the United States lead global consumption, using nearly 19,000 metric tons of uranium, while France consumed the second most amount at about 9,000 metric tons.<sup>10</sup> The dominant producer of uranium is Kazakhstan, which produced 21,750

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3. *What is Uranium? How Does it Work?*, WORLD NUCLEAR ASS’N (Feb. 2020), <https://www.world-nuclear.org/information-library/nuclear-fuel-cycle/introduction/what-is-uranium-how-does-it-work.aspx#:~:targettext=uranium%20is%20a%20heavy%20metal,be%20recovered%20from%20the%20oceans>.

4. *Id.*

5. *How Uranium ore is made into nuclear fuel*, WORLD NUCLEAR ASS’N, <https://www.world-nuclear.org/nuclear-basics/how-is-uranium-ore-made-into-nuclear-fuel.aspx> (last visited Nov. 9, 2019)

6. *Id.*

7. *Uranium Tailings*, TOXTOWN (Oct. 2019), <https://toxtown.nlm.nih.gov/sources-of-exposure/uranium-tailings#:~:targetText=Uranium%20tailings%20are%20the%20radioactive,located%20close%20to%20uranium%20mills>.

8. *Uranium Commodity Prices*, MKTS. INSIDER, <https://markets.businessinsider.com/commodities/uranium-price> (last visited Dec. 7, 2019).

9. Joyce Chepkemoi, *The Leading Uranium Consuming Countries in the World*, WORLD ATLAS (Apr. 25, 2017), [worldatlas.com/articles/the-leading-uranium-consuming-countries-in-the-world.html](http://worldatlas.com/articles/the-leading-uranium-consuming-countries-in-the-world.html).

10. *Id.*

metric tons in 2018, vastly outpacing the 587 metric tons provided by the United States that same year.<sup>11</sup>

### *I. Analysis of the Relevant Law and Associated Facts*

#### *A. Commonwealth of Virginia*

Coles Hill is a geographic region located largely within Pittsylvania County in southern Virginia. In the early 1980s exploratory holes were drilled in the area by Marline and Union Carbide, which discovered enormous deposits of uranium ore.<sup>12</sup> The Commonwealth's General Assembly then imposed a moratorium on uranium mining to remain effective until a sufficient regime for issuing mining permits is enacted.<sup>13</sup> The moratorium states in part that “[n]otwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute.”<sup>14</sup> The Coal and Energy Commission was requested to evaluate the effects of a uranium mine in Coles Hill prior to the imposition of the moratorium, and it made policy recommendations shortly after the moratorium was put in place that would have contained the effects of uranium mining in the region.<sup>15</sup> With this moratorium and a collapse in the price of uranium, all plans to mine Coles Hill were shelved until 2007 when Virginia Uranium, Inc., drilled new exploratory holes, which is still a practice permitted by the Commonwealth.<sup>16</sup>

After thirty years the Commonwealth's approach to uranium mining has remained unchanged, but not unchallenged. In 2013 Virginia State Senator John Watkins proposed a bill to impose a regulatory regime and a tax scheme on uranium mining.<sup>17</sup> The proposed legislation was greeted by special interests seeking to capitalize on the tons of ore located in Coles

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11. *World Uranium Mining Production*, WORLD NUCLEAR ASS'N (Aug. 2019), <https://www.world-nuclear.org/information-library/nuclear-fuel-cycle/mining-of-uranium/world-uranium-mining-production.aspx> (last visited Dec. 7, 2019).

12. *Coles Hill, Virginia (Uranium)*, VA. ENERGY RESS, <http://www.virginiaenergyresources.com/s/ColesHill.asp> (last visited Oct. 19, 2019).

13. VA. CODE ANN. § 45.1-283 (West, Westlaw through 2019 Reg. Sess.)

14. *Id.*

15. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590 (4th Cir. 2017).

16. VA. ENERGY RES., *supra* note 2. See Va. Code Ann. § 45.1-274.

17. Julian Walker and Scott Harper, *State senator to file bill to lift uranium-mining ban*, THE VIRGINIAN-PILOT (Dec. 4, 2012) [https://www.pilotonline.com/government/virginia/article\\_1b01f355-77ae-59f5-96ad-b308ba44b0fb.html](https://www.pilotonline.com/government/virginia/article_1b01f355-77ae-59f5-96ad-b308ba44b0fb.html).

Hill, but it was also decried by activists concerned with environmental protection and public exposure to radiation.<sup>18</sup> Several weeks later, Senator Watkins aborted the plan and pulled the bill from the Senate committee's agenda.<sup>19</sup> In this tension between local opposition and industrial interest *Virginia Uranium, Inc. v. Warren* arose.

#### B. United States Federal Government

Even in the twenty-first century, the concept of nuclear energy is inescapably tied to potential danger and devastation. On August 6th and 9th of 1945 the world witnessed the vicious potential of atomic energy. The rapid development and the quick deployment of atomic weapons on the Japanese cities of Hiroshima and Nagasaki brought the carnage of the Pacific theater of World War II to a close, but consequentially opened the door to the uncertainties of the atomic age. In the blink of an eye a single bomb was capable of destroying a city. The danger of the technology was quite clear, but the civic benefits were unexplored. It was a brave new world, and we needed to find a way to live in it.<sup>20</sup> A year later Congress did its best to address these uncertainties by enacting the Atomic Energy Act of 1946.<sup>21</sup> However, the efficacy of the new law was hampered by the fact that many legislators were flying blind when the Act was going through Congress.<sup>22</sup> The intent of the 1946 Act was focused on “protecting technical data and averting nonpeaceful use of fissionable materials.”<sup>23</sup> Pursuant to this purpose, the 1946 AEA created the Atomic Energy Commission (“AEC”), which oversaw the manufacturing and employment of nuclear resources via a licensing regime.<sup>24</sup>

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18. *Id.*

19. Whitney Delbridge, *Sen. John Watkins Withdraws Uranium Bill*, ABC 13 NEWS (Jan. 31, 2013), <https://wset.com/archive/sen-john-watkins-withdraws-uranium-mining-bill>.

20. For more background on the socio-political fallout from the invention of nuclear technology in World War II see Dan Carlin, *The Destroyer of Worlds*, HARDCORE HISTORY (Jan. 24, 2017), <https://dancarlin.com/hardcore-history-59-the-destroyer-of-worlds/>.

21. Pub. L. 79-585, 60 Stat. 768 (1946).

22. Byron S. Miller, *A Law is Passed—The Atomic Energy Act of 1946*, 15 U. CHICAGO L. REV. 4, 799 (Summer 1948) (the combination of a new frontier of technology, emotional responses to the use of atomic weapons in war, politically active scientists, and competing post-war interests presented a unique challenge to legislators).

23. Steven B. Barnett, *Environmental Law – Atomic Energy Act*, 23 NAT. RESOURCES J. 917 (1983).

24. *Id.*

Public interest in exploring the private use of nuclear materials was acknowledged by Congress, which amended the AEA in 1954.<sup>25</sup> Nuclear energy was not just a military asset; it could revolutionize the energy sector. Under this amendment nuclear technology could be patented, government files could be released to the public, and funds could be distributed by the AEC for research.<sup>26</sup> This change in law “stemmed from Congress’ belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing.”<sup>27</sup> In 1959 the AEA was amended again in order to address cooperation with state governments.<sup>28</sup> The changes to the AEA in 1959 split the authority to regulate between the states and the U.S. government.

Three types of state regulatory authority can be extrapolated from existing federal law. First, a state could enter into an agreement with the federal government to assume regulatory authority over source materials for the purpose of public safety.<sup>29</sup> Second, absent an agreement a state could regulate any part of nuclear energy so long as it is not meant to regulate the dangers of radiation.<sup>30</sup> Section 2021(k) states “[n]othing 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*.”<sup>31</sup> Third, a state could regulate activities that take place upstream from federal jurisdiction without an agreement, regardless of the regulation’s purpose.<sup>32</sup> Because the Commonwealth did not have an agreement with the Federal government to devolve regulatory power, this note will address the latter two types.

The AEA explains that states have a legitimate interest in the regulation of nuclear materials, and it supplies a framework for making agreements to transfer certain regulatory authorities from the federal government to the states.<sup>33</sup> When an agreement is made under this body of law, “the State shall have authority to regulate the materials covered by the agreement for the

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25. Pub. L. No. 83-703, 68 Stat. 919 (1954).

26. Barnett, *supra* note 12, at 918.

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

28. Pub. L. No. 86-373, 73 Stat. 688 (1959).

29. 42 U.S.C.A. § 2021(b) (Westlaw through Pub. L. No. 116-138)

30. 42 U.S.C.A. § 2021(k) (Westlaw though Pub. L. No. 116-138)

31. *Id.* (emphasis added).

32. *See* 42 U.S.C.A. § 2092 (Westlaw through Pub. L. No. 116-138)

33. 42 U.S.C.A. § 2021(a) (Westlaw through Pub. L. No. 116-138).

protection of the public health and safety from radiation hazards.”<sup>34</sup> The federal government still has authority to regulate enrichment plants, importing and exporting uranium, and disposal of byproducts and other nuclear materials.<sup>35</sup> Importantly, Congress recognized that states retain regulatory authority over these same practices “for purposes other than protection against radiation hazards.”<sup>36</sup> Preemption issues aside, this provision effectively establishes that every state is able to regulate nuclear materials so long as it is not done in order to contain radiological dangers.

The Nuclear Regulatory Commission retains exclusive control over the regulation of nuclear materials and activities for the purposes related to radiation hazards, but this authority may be shared with states if an agreement is forged between the two governments. Nevertheless, “[e]ven absent such an agreement . . . the state retains the right to regulate non-radiation hazards.”<sup>37</sup> In a lawsuit between Illinois and Kerr-McGee Chemical, the United States Court of Appeals for the Seventh Circuit held that the AEA preempted nuclear regulation for the purpose of protecting the public from radiation, but that it did not preempt state power to regulate the very same materials for any other purpose.<sup>38</sup> The U.S. Supreme Court shared in this opinion when it held that California’s regulation of nuclear power plant construction was not preempted by the AEA, because the state’s purpose was focused on economic regulation, not public safety.<sup>39</sup>

When state regulations address unextracted nuclear material, it can be inferred from legal text that states have *carte blanche* regulatory power over uranium until it has been mined. This circumstance is particularly relevant to the *Virginia Uranium* decision. The Nuclear Regulatory Commission (“NRC”) has licensing power over the possession of uranium, but a person does not incur liability for possession of uranium until “after its removal from its place of deposit in nature.”<sup>40</sup> This restated verbatim in the NRC’s regulatory codes.<sup>41</sup> The NRC is authorized to acquire lands that contain uranium deposits and to use those lands for uranium mining.<sup>42</sup> However,

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34. 42 U.S.C.A. § 2021(b) (Westlaw through Pub. L. No. 116-138).

35. 42 U.S.C.A. § 2021(c)(1–4) (Westlaw through Pub. L. No. 116-138).

36. 42 U.S.C.A. § 2021(k) (Westlaw through Pub. L. No. 116-138) (emphasis added).

37. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 581 (7th Cir. 1982).

38. *Id.*

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

40. 42 U.S.C.A. § 2092 (Westlaw through Pub. L. No. 116-138).

41. 10 C.F.R. § 40.3 (West, Westlaw through 85 FR 21305).

42. 42 U.S.C.A. §§ 2096–2097 (West, Westlaw through Pub. L. 116-138).

there is no federal law particularizing the use of land that is not owned by the United States.

## *II. Analysis of the Case*

### *A. Lower Court Decisions*

This matter began in U.S. District Court by Petitioners on August 5, 2015, seeking “declaratory and injunctive relief against Virginia’s Governor, Secretary of Commerce and Trade, Secretary of Natural resources, and various officials affiliated with the Department of Environmental Quality (“DEQ”) or the Department of Mines, Minerals and Energy.”<sup>43</sup> Petitioners moved the court to declare that the AEA preempted Virginia’s uranium mining ban, and to enjoin the Commonwealth from enforcing it.<sup>44</sup> Respondent moved to dismiss the complaint asserting that the moratorium was not preempted and that certain named defendants were immune under the Eleventh Amendment of the United States.<sup>45</sup>

The trial court explained that the Governor, Cabinet Secretaries, and the DEQ officials were immune from the lawsuit.<sup>46</sup> In holding that the moratorium was not unconstitutional on the basis of field preemption, the trial court explained that although the AEA established various regulatory regimes for Federal authority it “institutes no permitting regime respecting nonfederal uranium deposits’ conventional mining and does not otherwise regulate nonfederal uranium deposits or their conventional mining.”<sup>47</sup> The trial court further found that the moratorium did not intrude on existing Federal regulations, because the moratorium had no regulatory effect on milling and storing tailings.<sup>48</sup> Because the trial court granted Respondent’s motion to dismiss, it further denied Virginia Uranium’s motion for summary judgment on the basis of mootness.<sup>49</sup>

In 2017 the U.S. Court of Appeals for the Fourth Circuit affirmed the trial court’s decision to dismiss.<sup>50</sup> The appellate court provided more background information on the matter, explaining that the suit was filed after the interested parties had failed to persuade the legislature to lift the

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43. *Va. Uranium, Inc. v. McAuliffe*, 147 F. Supp. 3d 462, 466 (W.D. Va. 2015).

44. *Id.*

45. *Id.*

46. *Id.* at 468.

47. *Id.* at 471.

48. *Id.* at 477.

49. *Id.* at 478.

50. *Virginia Uranium, Inc. v. Warren*, 848 F.3d 590 at 593 (4th Cir. 2017).



moratorium.<sup>51</sup> Virginia Uranium raised three arguments on appeal: first, that § 2021(k) considers uranium mining to be an “activity” that cannot be regulated by a state absent an agreement; second, that if mining is not an “activity” then the moratorium was intended to regulate milling and tailing storage for safety purposes; and third, that the moratorium was “an obstacle to the full implementation of the [AEA]’s objectives.”<sup>52</sup>

The appellate court rejected Virginia Uranium’s arguments. In particular, the court’s dismissal of the second argument is material. In that argument Virginia Uranium requested a purpose inquiry, asking the appellate court look past the plain text of the moratorium, and to rule based on the motivations of the General Assembly.<sup>53</sup> The appellate court refused to indulge in that analysis, and held that the moratorium regulated activity that was not within the scope of the AEA.<sup>54</sup> Following the appellate court’s decision, Virginia Uranium petitioned for writ certiorari, which was granted on May 21, 2018.<sup>55</sup>

#### *B. Parties’ Positions and Legal Arguments*

##### *1. Petitioners, Virginia Uranium, Inc., et al.*

The first argument Virginia Uranium advanced framed that the prohibition was imposed for the purpose of responding to concerns of radioactive risks associated with uranium processing. In the absence of an agreement with the NRC, regulatory authority over radioactive hazards is something that the federal government already has authority over.<sup>56</sup> Virginia Uranium asserted that the lower courts erred in ignoring the motivation for imposing the moratorium, and advocated for the Court to consider legislative intent.<sup>57</sup> Virginia Uranium’s second argument was that the moratorium was unconstitutional on the basis of conflict preemption, in that it was “an obstacle to the accomplishments of the AEA’s purposes and objectives.”<sup>58</sup> Petitioners asserted that by prohibiting uranium mining for

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51. *Id.* at 594.

52. *Id.* at 594–95.

53. *Id.* at 597.

54. *Id.* at 599.

55. *Va. Uranium, Inc. v. Warren*, 138 S.Ct. 2023 (Mem), 201 L.Ed.2d 277 (2018).

56. Brief for Petitioners at 26–28, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275), 2018 WL 3546327, at \*26–\*28.

57. *Id.*

58. *Id.*

the alleged purpose of public safety in the absence of an agreement, the Commonwealth frustrated federal objectives.<sup>59</sup>

In its first proposition, Virginia Uranium submitted that the text of the “AEA establish limits on state authority that are drawn based on the purposes the States may pursue through regulation, not just the activities they may continue to regulate.”<sup>60</sup> It posited that the structure of the 1959 amendment to the AEA grants states the power to regulate for purposes of safety when there is an agreement and that § 2021(k) defines the limits of state authority in the absence of an agreement.<sup>61</sup> It followed this explanation by arguing that if states were permitted to regulate for safety purposes absent an agreement, then § 2021 would be redundant.<sup>62</sup> Virginia Uranium supported its “purpose & activity” framework with the *PG&E* decision.<sup>63</sup> Petitioners articulated that in the 1983 decision upholding California’s moratorium on nuclear power plants, the Court stressed the purpose for the ban, which was addressing an economic concern.<sup>64</sup> In its brief, Petitioners emphasized the Court’s rejection of California’s safety purpose, which explained “the federal government has occupied an entire field of nuclear safety concerns, except the limited powers ceded to the states . . . . A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field.”<sup>65</sup>

Virginia Uranium applied this legal position by first raising the fact that “[r]espondent have conceded for purposes of their motion to dismiss [that the ban] was motivated by the purpose of protecting against the radiological hazards of uranium milling and the storage of uranium tailings.”<sup>66</sup> Petitioners attempted to make it emphatically clear that the Commonwealth’s moratorium was imposed for a purpose that is expressly forbidden by § 2021(k), and recounted the holdings of the lower courts which refused to consider Virginia’s intent.<sup>67</sup> In this argument Virginia Uranium asserted that Congress wanted the courts to assess a state’s

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59. *Id.*

60. *Id.* at 31 (emphasis omitted).

61. *Id.* at 32.

62. *Id.* at 34.

63. *Id.* at 35.

64. *Id.* at 36.

65. *Id.* at 37 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 at 212–13 (1983)).

66. *Id.* at 40.

67. *Id.* at 41–42.

motivation and that such an analysis is “central to the import of Section 2021.”<sup>68</sup>

In its second proposition, Virginia Uranium argued that the decisions of the lower courts frustrate the AEA’s objectives because it “would enable state and local governments to second-guess the NRC’s judgments across the entire universe of these issues, effectively declaring open season on the Nation’s atomic energy industry.”<sup>69</sup> Virginia Uranium then advised the Court of lower court decisions that had struck down state and local laws that stifled the AEA’s objectives, such as a Utah city’s municipal ordinance that excluded a nuclear fuel storage facility from city services and required a nuclear fuel company to get permission from the state governor before it could use a highway.<sup>70</sup> Even though Utah was well within its police powers to tailor provisions of fire services and sewer access, Petitioners argued, the efforts were condemned by the Tenth Circuit because the “regulation of those activities was motivated by radiological safety concerns related to materials within the NRC’s regulatory jurisdiction.”<sup>71</sup> Virginia Uranium submitted that the Fourth Circuit’s holding “provide[d] what amounts to a road map showing state and local governments how to thwart the AEA’s purpose of promoting nuclear energy.”<sup>72</sup> This “road map” Petitioners assert is simply that a state could get away with frustrating federal objectives in nuclear energy by regulating the source extraction of nuclear fuels.<sup>73</sup>

Petitioners further argued that the Commonwealth’s moratorium is also unconstitutional because it “directly conflicts with federal law.”<sup>74</sup> Virginia Uranium explained that “[s]tate law is in conflict with federal law if . . . it ‘stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.’”<sup>75</sup> Virginia Uranium’s logic naturally leads to the conclusion that, by preventing the mining of uranium, Virginia had simply stopped the Federal government’s interest in promoting the safe use of nuclear fuels. Petitioners characterize the mining moratorium as an

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68. *Id.*

69. *Id.* at 47.

70. *Id.* at 47–48 (discussing *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004)).

71. *Id.* at 48–49.

72. *Id.* at 53.

73. *Id.*

74. *Id.* at 55.

75. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

“outright de facto ban of milling and tailings [that] circumvents [] congressionally prescribed procedures.”<sup>76</sup>

2. *Respondents, John Warren, Director of the Virginia Department of Mines, Minerals and Energy, et al.*

The Commonwealth approached the issue of this case as whether the AEA regulates uranium mining, and tailored its first argument to assert that it does not.<sup>77</sup> Respondent argued that § 2021(k) does not preempt the moratorium, and that the Federal provision actually “cautions courts against drawing any preemptive inference from provisions of the 1959 Act that gave States a new mechanism for obtaining regulatory authority over certain matters that previously had been the exclusive province of the Federal Government.”<sup>78</sup> Respondent cautioned the Court against indulging in an analysis of legislative intent for preemption issues as it “is an enterprise destined to produce confusion worse confounded.”<sup>79</sup> In its second argument, the Commonwealth asserted that the moratorium is not invalidated by conflict preemption because the law is focused only on mining and “Congress has never sought to reduce or limit a State’s inherent power to regulate uranium mining within its borders.”<sup>80</sup> The Commonwealth argued that the AEA has always striven to protect state power over uranium mining, and the scope of state participation in furthering nuclear interests has been expanded by the Act.<sup>81</sup>

In the Commonwealth’s first argument it is asserted that there is no preemption issue present in the case. Respondent commenced this argument with an examination of the Supremacy doctrine, asserting that a “preemption analysis ‘start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>82</sup> Thus, there is no express preemption. The Commonwealth further articulated that this is not a field preemption case because the AEA is silent on an intent to prevent

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76. *Id.* at 58.

77. Brief for Respondent at 16–17, *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894 (2019) (No. 16-1275), 2018 WL 4105540 (emphasis omitted).

78. *Id.* (emphasis omitted).

79. *Id.* (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010)) (internal quotation marks omitted).

80. *Id.*

81. *Id.*

82. *Id.* at 19 (quoting *Wyeth v. Leving*, 555 U.S. 555, 565 (2009)) (alteration in original).

states from regulating activities that are not under the NRC's power.<sup>83</sup> Then it asserted that there is no conflict preemption because the AEA did not mean to curtail the power to regulate uranium mining held by the states.<sup>84</sup> The Commonwealth heavily stressed that in order to overcome the presumption against preemption requires more than the fact that § 2021 general applies to state authority.<sup>85</sup> Respondent then countered Petitioner's argument that § 2021(k) preempts the moratorium by arguing that the provision actually "preserves state authority by directing courts not to draw preemptive inferences from the rest of Section 2021."<sup>86</sup> Where Petitioners called to this provision as a sword, Respondent deployed it as a shield.

Respondent proceeded to challenge the Petitioner's argument that the Court should consider the purpose of the moratorium and not just its activity.<sup>87</sup> Virginia Uranium wanted the Court to approach this analysis as a matter of historical fact, however, the Commonwealth argued that Petitioners failed to adequately support this assertion.<sup>88</sup> Respondent acknowledged that the judiciary will treat legislative purpose as historical fact, but it has only done so in "claims of racial discrimination under the Equal Protection Clause."<sup>89</sup> Virginia then drew the Court's attention to AEA cases in which the Court has analyzed legislative intent, but did not investigate the motivations of lawmakers.<sup>90</sup> In this argument, Respondent cautioned the Court to avoid an inquiry into "subjective intentions of the state legislature."<sup>91</sup>

Respondent countered Virginia Uranium's assertion that the moratorium presents a conflict preemption issue by relying on the rule that "conflict preemption exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>92</sup> The Commonwealth asserted that obedience to the moratorium

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83. *Id.*

84. *Id.* at 19–20.

85. *Id.* at 21.

86. *Id.* at 23.

87. *Id.* at 33.

88. *Id.* at 34.

89. *Id.*

90. *Id.* at 35–36 (discussing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 214 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); and *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990)).

91. *Id.* 38 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404(2010)).

92. *Id.* at 49 (quoting *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1595 (2015)).

does not require Virginia Uranium to violate Federal law.<sup>93</sup> It was further argued that if the Court held that the moratorium presents an obstacle to the AEA, then it would render the AEA unconstitutional under the doctrine of anti-commandeering, because it would in effect be Congress requiring states to implement regulatory regimes on uranium mining due to the fact that Congress lacks its own authority to regulate mining.<sup>94</sup> The Commonwealth closed its argument by stating that it is congressional prerogative to modify the regulatory authority shared by the Commonwealth and the NRC “when it comes to uranium mining . . . [b]ut, absent such [legislative] action, the correct instruction to draw from the text, structure, and history of the [AEA] is that Congress did not intend to preempt state regulation of conventional uranium mining.”<sup>95</sup>

### *C. Analysis of the Court’s Decision*

The decision to affirm the judgment of the lower court was made up by an overall majority of six Associate Justices, split in half by reasoning. The leading opinion was written by Justice Gorsuch, joined by Justices Thomas and Kavanaugh; while Justice Ginsburg, joined by Justices Sotomayor and Kagan filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion, in which he was joined by Justices Breyer and Alito.

#### *1. The Leading Opinion*

At the introduction of the opinion, Justice Gorsuch wrote that it is the Court’s responsibility “to respect not only what Congress wrote but, as importantly, what it *didn’t* write.”<sup>96</sup> Virginia Uranium asserted that the moratorium was preempted because under the AEA the NRC has exclusive regulatory power in the field of nuclear energy, and that due to the lack of NRC guidance on mining, it was able to dig up uranium anywhere in the United States, including in Coles Hill.<sup>97</sup> Preemption doctrine is derived from the Supremacy Clause, which is that the “Constitution, and the laws of the United States . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>98</sup> A state law may be preempted by federal law in three different ways: express, field, or

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93. *Id.*

94. *Id.* at 51–52.

95. *Id.* at 52–53.

96. *Va, Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1900 (emphasis added).

97. *Id.* at 1901.

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

conflict.<sup>99</sup> Virginia Uranium claimed that the Commonwealth's mining ban was preempted by the AEA on the bases of field and conflict.<sup>100</sup>

The leading opinion addressed field preemption first and rejected Virginia Uranium's position. Justice Gorsuch noted that field preemption takes place when "Congress evidences an intent to occupy a given field, [then] any state law falling within that field is preempted."<sup>101</sup> He explained that although it is clear that federal law regulates processing and distribution of uranium, the law states "that the NRC's regulatory powers arise only 'after [uranium's] removal from its places of natural deposit."<sup>102</sup> Then Justice Gorsuch addressed the fact that the NRC already has a narrow authority to regulate mining itself, however noting that power exists only over federal lands, and that the only thing the NRC may do with private land is purchase it from the owner.<sup>103</sup> Therefore, "Congress . . . has spoken directly to the question of uranium mining on private land, and every bit of what it's said indicates that state authority remains untouched."<sup>104</sup>

Virginia Uranium also argued that 42 U.S.C. § 2021(k) preempts Virginia's law because the statute displaces state laws that regulate any component of nuclear energy "if that law was enacted for the purpose of protecting the public against 'radiation hazards.'"<sup>105</sup> Integral to this argument was the company's assertion that the mining ban was implemented for the impermissible purpose of public safety. The lead opinion rejected this argument. Section 2021(k) is part of a series of statutes establishing a procedure for the NRC to devolve some of its regulatory authority to state governments pursuant to an agreement; however, this provision is clearly intended to establish that absent an agreement states may regulate nuclear energy so long as it is not furthering an interest in public safety.<sup>106</sup> In fact, Virginia Uranium's proposed reading of § 2021(k) is the exact opposite of what a plain reading would yield.<sup>107</sup>

The leading opinion then addressed Virginia Uranium's request to explore the Commonwealth's intent in implementing the ban. The three

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99. *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901 (2019).

100. *Id.*

101. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

102. *Va. Uranium*, 139 S. Ct. at 1902 (quoting 42 U.S.C. § 2092) (emphasis added).

103. *Id.* (citing 42 U.S.C. §§ 2096 and 2097).

104. *Id.*

105. *Id.* at 1903 (internal quotation marks omitted).

106. *Id.*

107. *Id.* ("In our view, [Virginia Uranium's] reading nearly turns the provision on its head.").

Justices rejected this invitation, explaining that doing so was not only uncalled for because regulation of mining was not within the NRC's authority, but also because doing so would be inconsistent with how the Court has resolved claims of field preemption in the past.<sup>108</sup> Justice Gorsuch wrote that "[t]he natural tendency of regular federal judicial inquiries into state legislative intentions would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge."<sup>109</sup> Because legislative intent is such an ambiguous concept, obtaining the relevant information would require "depositions of state legislators and governors, and perhaps [having to] hale them into court for cross-examination at trial about their subjective motivations in passing a mining statute."<sup>110</sup> Virginia Uranium argued that an inquiry into the legislative intent would be simple as Respondent had conceded to the factual allegations; however, the Commonwealth contended that it merely accepted the claims as true for the purpose of the motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>111</sup> The Commonwealth explained that if the case were to progress further "a more searching judicial inquiry into the law's motivation would be inevitable."<sup>112</sup> Thus, as a matter of separation of powers, the lead opinion refused to accept Virginia Uranium's argument, explaining that to do so "would require serious intrusions into state legislative processes in future cases."<sup>113</sup>

Next, the lead opinion tackled Virginia Uranium's conflict preemption claim. This type of preemption occurs "when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."<sup>114</sup> Virginia Uranium asserted that the mining ban "st[ood] as an impermissible 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"<sup>115</sup> The company asserted Congress's objectives in the AEA of fostering nuclear power at low safety and environmental risks have been frustrated by the mining ban because it

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108. *Id.* at 1904–05

109. *Id.* at 1906.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 248, 248 (1984) (internal citations omitted).

115. *Va. Uranium*, 139 S.Ct. at 1907 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).



subverts the NRC's regulatory authority of activities occurring after the minerals has been extracted.<sup>116</sup>

The lead opinion dismissed this argument. Justice Gorsuch explained that “any ‘evidence of preemptive purpose,’ whether express or implied, must therefore be ‘sought in the text and structure of the statute at issue.’”<sup>117</sup> Contrary to Virginia Uranium's position, the AEA does not include such an expressed purpose. Justice Gorsuch explained why he disagreed with Virginia Uranium's approach to analyzing legislative purpose:

Trying to discern what motivates legislators individually and collectively *invites speculation* and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product . . . In disregarding these legislative compromises, we may only wind up displacing perfectly legitimate state laws on the strength of “purposes” that only we can see, that may seem perfectly logical to us, but that lack the *democratic provenance* the Constitution demands before a federal law may be declared supreme.<sup>118</sup>

Justice Gorsuch emphasized that when purpose is not explicitly stated the dynamics and complexities of legislating law forecloses the possibility of synthesizing an accurate purpose based solely upon inference. Due to the complications and dynamics of legislating national law in a democratic format the interpretation is confined to the four-corners of the statute, because “[t]he only thing a court can be sure of is what can be found in the law itself.”<sup>119</sup> The leading opinion explained that the moratorium was not preempted under this doctrine because “every indication in the law before us suggests that Congress elected to leave mining regulation on private land to the States and grant the NRC regulatory authority only *after* uranium is removed from the earth.”<sup>120</sup>

Although Virginia Uranium did not raise the argument before the Court, Justice Gorsuch addressed the “purposes-and-objectives branch of conflict

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116. *Id.*

117. *Id.* (quoting *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)) (internal brackets omitted).

118. *Id.* 1907–08 (emphasis added).

119. *Id.*

120. *Id.* (emphasis original).

preemption.”<sup>121</sup> This route of pursuing conflict preemption rests on the practice that the Court “can sometimes infer a congressional intent to displace a state law that makes compliance with a federal statute impossible.”<sup>122</sup> Virginia Uranium did not submit this argument because “[n]ot only *can* Virginia Uranium comply with both state and federal laws; it is also unclear whether laws like Virginia’s might have a meaningful impact on the development of nuclear power in this country.”<sup>123</sup> Justice Gorsuch then explained that the moratorium did not appear to impair federal objectives because the majority of uranium consumed in the United States is imported and most uranium mines are under federal authority, far from state powers.<sup>124</sup> Furthermore, if the moratorium was contrary to federal objectives, the NRC could obtain Coles Hill by purchase or seizure by using authority granted to it by § 2096.<sup>125</sup> Lastly, he wrote, Congress could amend the AEA to compensate for whatever problems are created by the moratorium, a course of action “which this Court should never be tempted into pursuing on its own.”

## 2. *The Concurring Opinion*

Justices Kagan and Sotomayor joined Justice Ginsburg in agreeing with the leading opinion’s conclusion that the AEA did not preempt the Commonwealth’s moratorium.<sup>126</sup> However Justice Ginsburg wrote separately because the leading opinion’s “discussion of the perils of inquiring into legislative motive . . . sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court.”<sup>127</sup> She explained that through the AEA the federal government monitors many aspects of uranium use and disposal, but that it “does not regulate conventional uranium mining on private land, having long taken the position that its authority begins ‘at the mill, rather than at the mine.’”<sup>128</sup>

The concurrence proceeded to discuss the relevant laws of Virginia and the United States. Justice Ginsburg explained that after discovering the deposit in Coles Hill “the General Assembly authorized uranium

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121. *Id.*

122. *Id.* (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

123. *Id.* at 1908–09 (emphasis in original).

124. *Id.* at 1909.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 1910 (quoting *In re Hydro Resources, Inc.*, 63 N.R.C. 510, 512–13 (2006)).

exploration but imposed a one-year moratorium on uranium mining.”<sup>129</sup> The reasoning behind this policy decision “was ‘to encourage and promote the safe and efficient exploration for uranium resources within the Commonwealth, and to assure . . . that uranium mining and milling will be subject to statutes and regulations which protect the environment and the health and safety of the public.’”<sup>130</sup> The concurrence then notes that a year later the Virginia General Assembly prolonged the moratorium, and “has not established a permitting program, so the ban remains in force.”<sup>131</sup>

Justice Ginsburg addressed Virginia Uranium’s field preemption argument first.<sup>132</sup> She explained that “[§] 2021(k) presupposes federal preemption of at least some state laws enacted to guard ‘against radiation hazards.’”<sup>133</sup> The concurrence then states that the Commonwealth’s contention that federal preemption applies only to the activities controlled by the NRC is a “better reading of the statute,” than what is taken by Virginia Uranium and the dissent, who argue that every activity intended to regulate the hazards of radiation is preempted by federal law.<sup>134</sup> Justice Ginsburg’s reasoning was that since the AEA is silent on conventional mining on private land, and the Commonwealth’s moratorium only applies to conventional mining, “it is hard to see how or why a state law on the subject would be preempted, *whatever the reason for the law’s enactment.*”<sup>135</sup> This reasoning is not contradicted by the language of § 2021(k), because in the broader context of § 2021 the term “activities” is most logically interpreted to “mean[] activities *regulated by the NRC.*”<sup>136</sup> As such, any activity not regulated by the NRC may be regulated by the states in the absence of an agreement, regardless of the state’s purpose.

The concurrence corroborated this point with legislative history behind § 2021(k). Justice Ginsburg wrote that the adoption of “§ 2021(k) is most sensibly read to clarify that the door newly opened for state regulation left in place preexisting state authority.”<sup>137</sup> This is because “House and Senate reports are explicit on this point: Section 2021(k) was ‘intended to make clear that the bill does not impair the State[s]’ authority to regulate

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129. *Id.* at 1911 (citing 1982 Va. Acts ch. 269).

130. *Id.* (quoting 1982 Va. Acts ch. 269).

131. *Id.*

132. *Id.* at 1912.

133. *Id.* (quoting 42 U.S.C. § 2021(k) (2018)).

134. *Id.* (alterations in original).

135. *Id.* (emphasis added).

136. *Id.* at 1913 (emphasis in original).

137. *Id.*

activities of [federal] licensees for the manifold of health, safety, and economic purposes other than radiation protection.”<sup>138</sup>

Justice Ginsburg then rejected the Solicitor General’s argument that the moratorium “is preempted because it is a pretext for regulating the radiological safety hazards of milling and tailings storage.”<sup>139</sup> In its argument, the Solicitor General analogized the instant case to *National Meat Association v. Harris*, which struck down a series of California laws regulating the slaughtering of non-ambulatory pigs since “the sale ban fell within the scope of the [Federal Meat Inspector] Act’s express preemption clause because it was intended to work together with other California provisions to impose additional requirements on slaughterhouse operations.”<sup>140</sup> This argument submitted by the Solicitor General is essentially that the mining moratorium is preempted because it effectively regulates activities that are regulated by the NRC. However, Justice Ginsburg noted that there was no expressed preemption present in the dispute, and that the Commonwealth’s moratorium is silent on milling and tailings storage.<sup>141</sup> In dismissing this creative argument, she concluded that “[a] state law regulating an upstream activity within the State’s authority is not preempted simply because a downstream activity falls within a federally occupied field.”<sup>142</sup>

The concurrence then turned the conflict preemption claims raised by Virginia Uranium and the U.S. Solicitor General, addressing each of the four arguments individually. First, the argument that the moratorium upset a balance in federal interests of energy innovation and public safety was rejected because the United States “does not regulate the radiological safety of conventional uranium mining on private land, so federal law struck *no* balance in this area.”<sup>143</sup> Second, the contention that the Commonwealth was obstructing federal interest in promoting nuclear power was dismissed because “[g]iven the absence of federal regulation in point, it is improbable that the Federal Government has a purpose or objective of promoting conventional uranium mining on private land.”<sup>144</sup> Third, Virginia

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138. *Id.* (quoting S. Rep. No. 870, 86th Cong., 1st Sess. At 12) (bracketing original).

139. *Id.* at 1914. For more information on the Solicitor General’s arguments see Brief for the United States as Amicus Curiae Supporting Petitioners, *Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894 (2019) (No. 16-1275), 2018 WL 3599466.

140. *Id.* at 1914 (quoting *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 463–64 (2012)).

141. *Id.*

142. *Id.* at 1915.

143. *Id.*

144. *Id.*

Uranium's argument that the moratorium is preempted as it is regulation that circumvents § 2021 by indirectly regulating milling and tailing storage was rejected on the basis that the moratorium "has not regulated the radiological safety of tailings storage; it has prohibited only the an antecedent activity subject to exclusive state authority."<sup>145</sup> Fourth and final, the concurrence rejected the argument posed by the United States that the moratorium frustrated the federal government's interests because "federal regulation of certain activities does not mean that States must authorize activities antecedent to those federally regulated."<sup>146</sup>

### *3. The Dissenting Opinion*

Justices Breyer and Alito joined Chief Justice Roberts in a unified dissenting opinion. Chief Justice Roberts commenced the opinion by raising his objection to the leading opinion, asserting that the Justices had "sets out to defeat an argument that no one made, reaching a conclusion with which no one disagrees."<sup>147</sup> The dissent stressed that the leading opinion missed the mark by focusing on uranium mining under the AEA, while the true issue of the case was "whether a State can purport to regulate a field that is *not* preempted (uranium mining safety) as an indirect means of regulating other fields that *are* preempted (safety concerns about uranium milling and tailings storage)."<sup>148</sup> The Chief Justice submitted that the answer is easy, because "our precedent is clear: The AEA prohibits state laws that have the purpose and effect of regulating preempted fields."<sup>149</sup>

The Chief Justice commenced his preemption analysis by raising the legal principle that "a state law is preempted not only when it 'conflicts with federal law,' but also when its *purpose* is to regulate within a preempted field."<sup>150</sup> He explained that in *PG&E California's* ban on the construction of all new nuclear power plants was permissible for the purpose of economic regulation; however, if the state had been regulating the construction of plants itself (e.g., design specifications) or had banned all construction for a purpose related to radiation safety, the laws would have been preempted by the AEA.<sup>151</sup> Facially the law was valid because the

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145. *Id.* at 1916.

146. *Id.*

147. *Id.*

148. *Id.* (emphasis in original).

149. *Id.*

150. *Id.* at 1917 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983)) (emphasis in original).

151. *Id.* at 1918.

manner was not preempted, but the true issue in that case was the purpose; when the Court accepted the “non-safety rationale” submitted by California, the laws were upheld as constitutional.<sup>152</sup> The Chief Justice argued that *PG&E*’s authority should have directed Justice Gorsuch’s decision: although the Commonwealth’s moratorium was facially valid, its failure to demonstrate a purpose independent from radiation safety rendered the law preempted by the AEA.<sup>153</sup> He continued with explaining that the purpose of *PG&E*’s intent prong was to prevent state circumvention of the AEA by an attempt “to regulate one activity by exercising their authority over another.”<sup>154</sup>

The dissent argued that the leading and the concurring opinions departed from this precedent by not seriously considering of the Commonwealth’s purpose. Chief Justice Roberts attacked the split majority, asserting that its rule has established that “so long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free rein to subvert Congress’s judgment on nuclear safety.”<sup>155</sup> Under this rule, he complained, “[a] State could . . . restrict the ability of a county to provide a nuclear facility with municipal services . . . [or] eliminate limited liability for the stockholders of companies that operate nuclear facilities.”<sup>156</sup> The Chief Justice applauded the Tenth Circuit’s decision in *Skull Valley*, which “concluded that the ‘state cannot use its authority to regulate law enforcement and other similar matters as a means of regulating radiological hazards.’”<sup>157</sup>

The Chief Justice then turned his attention to the applicability of the *National Meat* decision.<sup>158</sup> In that case there was a federal law that regulated the intake process for slaughterhouses, while California law prohibited commercial sales of meat not slaughtered in accordance with state regulations.<sup>159</sup> That decision was relevant to this matter, because “[a]lthough the federal statute’s preemption clause did ‘not usually foreclose state regulation of the commercial sales activities of slaughterhouses,’ we unanimously held that California’s sales regulation

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152. *Id.*

153. *Id.*

154. *Id.* at 1919.

155. *Id.*

156. *Id.* (referring to *Skull Valley Band of Goshute v. Nielson*, 376 F.3d 1223, 1247–48, 1250–52).

157. *Id.* (quoting *Skull Valley*, 376 F.3d at 1248).

158. *Id.* at 1919–20. See *Nat’l Meat Ass’n. v. Harris*, 565 U.S.425, 455 (2012).

159. *Id.* at 1920

was preempted because it was a transparent attempt to circumvent federal law.”<sup>160</sup> Chief Justice Roberts was unpersuaded by the concurrence’s approach to this precedent, which distinguished it based on where the state regulations took place in the stream, stating that the difference was immaterial because “[r]egardless whether the state regulation is downstream like *National Meat*, upstream like here and *Pacific Gas*, or entirely out of the stream like *Skull Valley*, States may not legislate with the purpose and effect of regulating a federally preempted field.”<sup>161</sup>

That is the dissent’s conclusion, that although the manner and method of state regulation is material to a preemption issue, the state’s purpose in the regulation is equally important to consider. The Chief Justice called out the leading opinion’s avoidance of this inquiry, explaining that there isn’t a choice because “statute and precedent plainly require such an approach here . . . and the difficulty of the task does not permit us to choose an easier way.”<sup>162</sup> Assessing legislative purpose is always difficult, but the Chief Justice concluded that it is a necessary component to a field preemption analysis. The Commonwealth’s purpose of imposing the uranium mining moratorium is what caused it to be preempted by federal law, and the majority’s refusal to undergo a purpose inquiry rendered its decision something that the Chief Justice could not join.

### *III. Argument in Support of the Concurring Opinion*

This decision presents a complicated landscape for future precedent. There are three differing opinions, each supported by three judges. The concurring opinion submitted by Justice Ginsburg and joined by Justices Sotomayor and Kagan is the most logically sound, and it is the shortest departure from existing precedent; therefore, its authority ought to provide the guiding light for lower courts in future AEA preemption cases. The only thing that fundamentally distinguishes the leading and concurring opinions is Justice Gorsuch’s position on the purpose inquiry, otherwise the two opinions are exceedingly similar in their reasoning and naturally identical in their judgments.

Justice Gorsuch explained that the Court ought not take part in a purpose analysis for what appears to be his personal adherence to judicial restraint and separation of powers. He explained that a consequence of a judicial inquiry into legislative intent “would be to stifle deliberation in the state

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160. *Id.* (quoting *Nat’l Meat*, 565 U.S. at 463).

161. *Id.*

162. *Id.*

legislatures and encourage resort to secrecy and subterfuge.”<sup>163</sup> I agree with Justice Ginsburg that there is no need to engage in a purpose inquiry, because the federal law is absent in conventional mining on private lands.<sup>164</sup> She addressed the applicability of *PG&E* head on in the case, concluding that the reason why the Court engaged in an inquiry analysis in that decision was because California’s law affecting the construction of nuclear power plants was closely related to the federal government’s regulation of nuclear power.<sup>165</sup> However, in this case, it was undisputed that the AEA lacked authority over conventional uranium mining on private land, and that the moratorium “target[ed] an exclusively state-regulated activity.”<sup>166</sup>

I further agree with the concurrence’s approach to the U.S. Solicitor General’s pretext argument. The Commonwealth’s moratorium on uranium mining interferes with millings and tailings storage by the natural fact that it is impossible to mill uranium without first extracting it. Unlike California’s regulation of slaughtering non-ambulatory animals, the Commonwealth’s mining ban has no engagement with federal regulations. In *National Meat*, the Court described the relevant federal law to contain a “preemption clause [that] sweeps widely”<sup>167</sup> and that “California’s statute substitutes a new regulatory scheme for the [federal] one.”<sup>168</sup> Unlike that case, there is no federal law that regulates conventional mining on private lands, so there is nothing for the moratorium to be preempted by.

Justice Ginsburg draws attention to the fact that there isn’t a provision that expressly preempts the Commonwealth’s authority to ban uranium mining. The arguments submitted by Virginia Uranium and the Solicitor General are flawed because they unreasonably rely on § 2021(k), which is textually unrelated to uranium mining; and the *PG&E* decision, which pertained to a law regulating an activity controlled by the NRC. If the Commonwealth was attempting to regulate activities like millings or transportation of uranium, then the Court would need to conduct a purpose inquiry because the Commonwealth would be regulating an “activity” within the bailiwick of the AEA and NRC. But since the moratorium did not touch federal authority, a purpose inquiry was unnecessary.

Regarding the purpose inquiry and pretext regulation issues, I also side with the concurrence over the dissent. For the most part I agree with the

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163. *Id.* at 1906.

164. *Id.* at 1913–14.

165. *Id.* at 1913.

166. *Id.* at 1914.

167. *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 459 (2012).

168. *Id.* at 460.



dissent's reasoning, but it is misplaced. It undertook a purpose and pretext inquiry just for the sake of doing one. The dissent treated this matter as if it was identical to *National Meat* and *PG&E*, in which the Commonwealth was regulating something already covered by federal law. However, the dissent missed the mark, because the AEA doesn't apply to the activity affected by the mining ban. In a footnote, the dissent argued that there isn't a distinction in *National Meat* and this case, because California's commercial regulation of meat sales is just as much within its police powers as Virginia's authority of mining.<sup>169</sup> I am unpersuaded by this comparison. What Chief Justice Roberts omits in this argument is the fact that the California law at issue in *National Meat* was an omnibus prohibition applying to the shipment, holding, slaughtering, processing, and sale of non-ambulatory animals and the meat from those animals.<sup>170</sup> California's regulatory regime effectively sandwiched the federal government's regulation of slaughterhouses, which already provided specific provisions for approving meat from non-ambulatory animals as a matter of interstate commerce. California had control over the non-ambulatory animals from farm to table, which is significantly different from the Commonwealth's mining ban.

The Commonwealth's moratorium on uranium mining is simply a ban on uranium mining. A license is required to mine minerals in Virginia,<sup>171</sup> and the law prohibits the issuance of a license for uranium mining until an adequate licensing regime can be implemented.<sup>172</sup> Processing and transporting uranium within the Commonwealth is unaffected by this code; under it, any person could buy, sell, or possess uranium in Virginia without running afoul of the law. Naturally, not being able to extract uranium from its place of natural deposit makes it difficult to engage those types of activities, but the code is silent on such matters. The dissent's argument on the purpose inquiry is really only viable if federal law could preempt the challenged state law. Preemption in the manner of regulation is as necessary as preemption in a law's purpose for that analysis,<sup>173</sup> so the dissent presupposed that the AEA applied to conventional mining on private land

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169. *Va. Uranium*, 139 S.Ct. at 1920, n.4.

170. CAL. PENAL CODE § 599f (West 2019).

171. VA. CODE ANN. § 45.1-161.292:30(A) (West 2019).

172. See VA. CODE ANN. § 45.1-283 (West 2019).

173. *Virginia Uranium*, 139 S.Ct. at 197 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13(1983) (“Under our precedents, a state law is preempted not only when it ‘conflicts with federal law,’ but also when its *purpose* is to regulate within a preempted field.”)).

based on the idea that all safety concerns related to nuclear power have been preempted by the federal government.<sup>174</sup> However, this is inconsistent with the text of § 2021(k), which states that it applies to activities already under federal purview for the purpose of controlling nuclear dangers.<sup>175</sup> Thus, preemption under § 2021(k) should only be applicable if the state law relates to a preexisting federal regulation; and in consideration of other federal nuclear laws, it is apparent that conventional mining on private lands is not something the federal government has authority over. This presupposition that simply because the activity of mining is related to nuclear power it is under the purview of the NRC ignores the text of the AEA. Although, the dissent's analysis is correct in its form, it doesn't fit the context of this case.

The leading opinion should not be authoritative over the concurrence because its adoption would undermine the application of the purpose-inquiry established in *PG&E*. Although I disagree with the dissent's use of the purpose inquiry in this case, the leading opinion launches a sharp departure from Court precedent. It is one thing to do as the concurrence, not conducting a purpose inquiry because it would be inappropriate, but it is another thing to refuse a purpose inquiry and explain that doing so would be unfeasible. Justice Gorsuch's musings on judicial inquiry of legislative intent could have ripple effects in the future. By stating that "[t]he only thing a court can be sure of is what can be found in the law itself,"<sup>176</sup> the leading opinion degrades the applicability of legislative intent when interpreting a statute. Although Justice Gorsuch does not crush the *PG&E* purpose inquiry, his opinion does narrow its application to only those words expressing purpose in the legislation. This narrow inquiry would be difficult to perform in states that do not elaborate on legislative purpose, and it would give state legislatures a shield to hide behind if there is a constitutional challenge of a law in federal court.<sup>177</sup> Justice Gorsuch's interest in not stifling the prerogative of the legislature may well end up stifling the power of the judiciary.

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174. *Id.* (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983)).

175. 42 U.S.C.A. § 2021(k) (Westlaw through Pub. L. No. 116-138).

176. *Virginia Uranium*, 139 S.Ct. at 1908.

177. *See id.* at 1918 (“[S]o long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free rein to subvert Congress’s judgment on nuclear safety.”).

#### *IV. Conclusion*

The consequences of the *Virginia Uranium* decision are subtle, but strong. As a result of this decision, it is now conclusive that the NRC does not have authority over conventional mining on private lands, and the soil of Coles Hill will remain undisturbed. Because the dissenting opinion's arguments are misplaced, and the leading opinion's reasoning runs amuck, the concurring opinion should be adopted as the authoritative precedent among the lower courts and in future preemption cases before the Court. It adheres closely with existing precedent, while arriving at a logical conclusion based on the relevant facts and laws. The regulation of nuclear energy is just as necessary today as it was eighty years ago, so it is important for the state and federal governments to cooperate in controlling the hazards of the technology while fostering the development of its potential benefits. This decision substantiates the power of the states in the paradigm of protection, while providing a definition of federal powers.