
Daryl R. Hague

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Abstract: In Alverado v. Washington Public Power Supply System, the Washington Supreme Court held that nonbinding agency action preempted Washington's constitutional right to privacy in the context of employee drug testing at nuclear power plants. This preemption holding was based on traditional “occupation of the field” standards, which prohibit concurrent state regulation in areas where the federal government exercises plenary power. Because it was based on an “occupation of the field” finding, the court's decision had the practical effect of permitting nonenforceable agency pronouncements to preempt state constitutional guarantees. An exception to traditional “occupation of the field” doctrine is proposed to rectify this summary preemption of state civil rights. The exception would require that courts uphold state constitutional guarantees when the specific federal interest in an occupied field is only expressed by nonbinding agency pronouncements.

In Alverado v. Washington Public Power Supply System, the Washington Supreme Court held that state constitutional guarantees of privacy do not apply to employee drug testing programs at nuclear power plants. The plaintiffs in Alverado, prospective employees at a nuclear plant, challenged the plant's preemployment drug tests as violating article I, section 7 of the Washington constitution, which grants a specific right to privacy. The court held that because Congress has occupied the field of nuclear safety, federal law preempted application of the state constitution to determine the validity of the challenged drug testing program.

In reaching its preemption decision, the Alverado court failed to consider two factors. First, the lawsuit did not involve a federal regulation at all; the plaintiffs merely challenged the nuclear plant's interpretation of nonbinding agency action. Second, the court failed to consider whether, in light of the state constitutional renaissance or “new federalism,” federal occupation of a field should preempt state

2. Id. at 429, 759 P.2d at 430.
3. Id. at 425, 759 P.2d at 428.
4. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7.
5. Alverado, 111 Wash. 2d at 429, 759 P.2d at 430.
6. See infra notes 76–90 and accompanying text (discussing legal and practical effect of proposed agency rules and policy statements).
7. See infra notes 60–70 and accompanying text (discussing the emerging importance of state constitutions in American jurisprudence).
constitutional guarantees. Instead, the court held *sua sponte* that under the traditional "occupation of the field" doctrine,\(^8\) the agency's nonbinding actions preempted the state constitution.\(^9\) This result ignores the emerging importance of state constitutional law, especially in light of the expanding reach of federal agencies and the shrinking scope of federal civil rights.\(^10\) An exception to traditional "occupation of the field" analysis is necessary to preserve state protections in our growing administrative state.\(^11\) Such an exception would require that courts defer to state constitutional guarantees when the specific federal interest in an occupied field is not expressed by binding agency rules.

I. FEDERAL PREEMPTION AND NUCLEAR POWER REGULATION

A. Preemption Generally

Traditional federal preemption doctrine holds that federal law preempts state law under two circumstances.\(^12\) First, Congress may explicitly or implicitly "occupy the field."\(^13\) In this situation, no parallel state regulation is permitted regardless of conflict or harmony with federal law.\(^14\) Second, when federal law has not occupied the field, state law will still be preempted if it actually conflicts with federal law or frustrates a congressional purpose.\(^15\) Because federal

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9. Id. at 429, 759 P.2d at 430.
10. See infra notes 116–19 and accompanying text (discussing the expanding administrative state).
11. For purposes of this Note, "administrative state" refers to congressionally created agencies that establish and enforce national public policy. See FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).
12. Federal preemption of state law is based on the supremacy clause of the federal Constitution. U.S. CONST. art. VI, cl. 2.
13. The United States Supreme Court recently summarized the test for preemption in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). The Court found that state law can be preempted in one of two ways. First, if Congress intends to occupy a field, any state law falling within that field is preempted. Second, if Congress has not entirely displaced state regulation over a matter, state law is still preempted to the extent it actually conflicts with federal law. State law conflicts with federal law when it is impossible to comply with both state and federal law, or where the state law inhibits accomplishing the full purposes and objectives of Congress. *Id.*
agency regulations qualify as federal law, those regulations can preempt conflicting state laws.

Both kinds of preemption, "occupation of the field" and actual conflict with federal law or frustration of congressional purposes, appear throughout federally regulated areas. These general verbal formulae, however, do not provide perfectly articulable standards. Diverse regulatory areas and schemes preclude such simple analysis. Preemption analysis is essentially a matter of statutory construction. Courts determine congressional intent, then base preemption decisions on the specifics of the relationship between the federal and state statutory provisions. Because each regulated area presents unique problems of congressional intent and statutory construction, preemption rationales in one area do not translate easily to another. In nuclear power regulation the preemption rationale typically involves occupation of the field rather than conflict analysis.

B. Development of Preemption Rationales in Nuclear Power Regulation: The Federally-Occupied Field of Nuclear Safety

Development of preemption rationales in nuclear power regulation begins with the federal Atomic Energy Act of 1954 ("AEA"). The AEA authorized private entities to enter the nuclear power industry

22. Determining congressional intent to preempt is problematic because many state laws exist before Congress attempts to regulate a new area. 1 R. ROTUNDA, supra note 15, at 624.
23. Id. at 629.
24. Id. at 624.
for the first time. In addition, states were allowed to regulate the generation, sale, and transmission of electric power. The federal Atomic Energy Commission, which eventually was replaced by the Nuclear Regulatory Commission ("NRC"), supervised all other facets of nuclear energy development.

Since 1959, the states have been granted a limited role in nuclear safety regulation. First, Congress expressly authorized the states to regulate radioactive effluence and low level waste. Second, despite blanket statements to the contrary, the Supreme Court has allowed the states to regulate some safety matters by characterizing the state interest as an economic one.

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the United States Supreme Court established a dual regulatory system whereby the states regulate the economic aspects of nuclear power and the federal government occupies the field of nuclear safety. In *Pacific Gas*, the Court held that a state...
could stop nuclear power development for economic reasons, even though that action could be motivated by safety concerns. While this decision apparently intrudes on the occupied field of nuclear safety, subsequent cases indicate that it is a limited intrusion.

According to the Court, states have no authority to regulate radiological safety except for those powers expressly granted by Congress. State authority, therefore, is limited to economic regulation. This general proposition is true even after the Court's decision in Silkwood v. Kerr-McGee Corp. In Silkwood, the Court held that Congress did not intend to preempt state punitive damage awards against nuclear power plants. The Court made this decision in spite of the fact that punitive damages regulate safety.

Although some believed that the Court's decisions in Pacific Gas and Silkwood would lead to broad state regulation of nuclear power, lower courts subsequently held that both decisions only establish narrow exceptions to the occupied field of nuclear safety. In two cases addressing local attempts to regulate nuclear energy, federal courts of


36. California passed a moratorium which prohibited construction of new nuclear power plants until the federal government approved technology that could safely dispose of radioactive waste. Pacific Gas, 461 U.S. at 190. The California legislature carefully drafted the moratorium, claiming that the potential costs of nuclear energy—especially disposal costs—were so uncertain that fiscal responsibility required the state to reject new power plants. Id. The Court accepted California's proffered explanation without further questioning whether the legislature acted for safety rather than economic reasons. See id. at 213–14.

37. See infra notes 43–44 and accompanying text (discussing cases where the safety field has been broadly construed to preempt local attempts to regulate nuclear power).

38. See Pacific Gas, 461 U.S. at 212.

39. Id.


41. Id. at 258. In Silkwood, the estate of a nuclear plant's employee sued the plant under state law for plutonium contamination suffered by the employee. The estate was allowed to recover both compensatory and punitive damages. Id. at 245. The plant appealed, claiming that because the federal government has occupied the field of nuclear safety, punitive damage awards and their safety-inducing purpose were precluded. Id. at 249. The Tenth Circuit agreed with the plant and reversed the punitive damage award. Id. at 246. Reversing the Tenth Circuit, a divided Supreme Court found that the AEA did not preempt state punitive damage awards. Id. at 251.


43. Several commentators have stated that the Pacific Gas and Silkwood decisions leave the federal-state allocation of authority in considerable confusion. See, e.g., Chiapetta, supra note 42, at 108; Huber, Electricity and the Environment: In Search of Regulatory Authority, 100 HARV. L. REV. 1002, 1032 (1987). Such criticism is beyond the scope of this Note, which is limited to illustrating the Supreme Court's decision that, with minor exceptions, the federal government has occupied the field of nuclear safety.
appeal have broadly construed the occupied field of nuclear safety and held that the local laws were preempted. Thus, the general rule remains that the federal government exercises plenary power over nuclear safety matters while the states are limited to economic concerns.

C. Alverado v. Washington Public Power Supply System

On August 5, 1982, the NRC published a proposed rule which would have required prospective licensees to ensure that personnel with unescorted access to protected areas were free from the influence of drugs and alcohol. The NRC deferred implementing this rule, however, and agreed to accept programs initiated by the nuclear power industry instead.

Washington Nuclear Plant 2 ("WNP 2"), operated by the defendant Washington Public Power Supply System ("WPPSS"), responded to the NRC's actions by instituting a drug screening program in June, 1986. The program affected both WPPSS employees and contractor employees. Specifically, the program required urinalysis as part of the preemployment medical evaluation for new employees. Current employees could only be tested "for cause."

On August 4, 1986, the NRC withdrew the proposed rule requiring drug tests and instead published a "Statement on Fitness for Duty of Nuclear Power Plant Personnel." This policy statement contained

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44. See Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985) (township's ordinance preventing power company from shipping radioactive waste to a site in the township preempted because township's purpose was to protect public safety), cert. denied, 475 U.S. 1013 (1986); see also County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 60 (2d Cir. 1984) (county's suit against power company alleging company mismanagement and fraud rejected because county's claims regarding design defects constituted indirect efforts to regulate radiological safety).

45. 47 Fed. Reg. 33,980 (1982). The proposed rule made no specific demands. Instead, the rule merely stated that licensees should establish and implement "adequate written procedures" to ensure that personnel with unescorted access to protected areas were free of the influence of drugs or alcohol. Id. Earlier, in February 1982, the NRC published six safety goals, but these goals did not address personnel fitness for duty. Rather, the goals augmented the general proposition that societal risks from nuclear accidents should be comparable to the risks of generating electricity by viable competing technologies. See NRC OFFICE OF POLICY EVALUATION, SAFETY GOALS FOR NUCLEAR POWER PLANTS: A DISCUSSION PAPER (NUREG-0880, Feb. 1982), quoted in Huber, supra note 43, at 1017 nn.55–57.


47. Id. at 427, 759 P.2d at 429.

48. Id.

49. Id.

several “expectations” for maintaining a drug-free environment.\textsuperscript{51} One of the expectations stated that licensees should implement “[e]ffective monitoring and testing procedures” to ensure that employees were fit for duty.\textsuperscript{52}

The plaintiffs in \textit{Alverado} were prospective employees for WNP 2 and WPPSS contractors. On December 3, 1986, the plaintiffs filed a motion to enjoin WPPSS and a WPPSS contractor, Bechtel Construction, from requiring preemployment drug tests.\textsuperscript{53} The state trial court, holding that state law did not prohibit the tests, denied the motion.\textsuperscript{54} The Washington Supreme Court granted direct review. On review, the plaintiffs claimed that the preemployment drug tests violated their rights to privacy under article I, section 7 of the Washington constitution.\textsuperscript{55} Both plaintiffs and defendants restricted their briefs to this issue.\textsuperscript{56} The court held \textit{sua sponte} that the drug testing program fell under the occupied field of nuclear safety.\textsuperscript{57} Therefore, the court concluded, the plaintiffs were barred from pressing a state claim.\textsuperscript{58} After denying the state claim, the court found that the WPPSS preemployment drug tests satisfied the administrative search exception to the fourth amendment.\textsuperscript{59}

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\textsuperscript{51} \textit{Id.} at 27,922; \textit{see infra} note 92 (containing full text of NRC policy statement).
\textsuperscript{52} 51 Fed. Reg. 27,922 (1986). An employee free from the influence of drugs and alcohol is considered “fit for duty.” \textit{Id.} at 27,921.
\textsuperscript{54} \textit{Id.} at 430, 759 P.2d at 430.
\textsuperscript{55} \textit{Id.} at 429, 759 P.2d at 430. The Washington constitution grants a specific right to privacy. \textit{See infra} notes 71–75 and accompanying text (discussing development of Washington’s constitutional right to privacy).
\textsuperscript{56} \textit{Alverado}, 111 Wash. 2d at 429–30, 759 P.2d at 430.
\textsuperscript{57} The court found that safety concerns in nuclear power plants present a “classic example of congressional intent to ‘occupy the field’ and preempt any state action.” \textit{Id.} at 432, 759 P.2d at 431. The court then found that drug testing was instituted to promote safety, and therefore fell within the federally occupied field. \textit{Id.} at 433, 759 P.2d at 431.
\textsuperscript{58} \textit{Id.} at 429, 759 P.2d at 430.
\textsuperscript{59} \textit{Id.} at 441, 759 P.2d at 436. The fourth amendment proscribes unreasonable searches and seizures. U.S. CONST. amend. IV. Because drug testing is a warrantless search, it must satisfy an exception to the fourth amendment’s general requirement that searches be conducted pursuant to a valid warrant based on probable cause that a violation of law has occurred. \textit{See Mincey v. Arizona}, 437 U.S. 385, 390 (1978). Warrantless administrative searches are constitutionally reasonable if the regulated body is a pervasively regulated industry. \textit{United States v. Biswell}, 406 U.S. 311 (1972) (firearms and munitions dealers). The rationale for this exception is that because routine inspections are necessary to enforce government regulations, such inspections do not require probable cause. \textit{Alverado}, 111 Wash. 2d at 435, 759 P.2d at 433.

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II. NEW FEDERALISM: THE EMERGING ROLE OF STATE CONSTITUTIONS IN AMERICAN JURISPRUDENCE

"New federalism," a label attached to the actions of many state courts that have recently "rediscovered" their state constitutions in adjudicating civil rights claims, may affect traditional preemption analysis. Scholars agree that much of this rediscovery owes its impetus to the Supreme Court's curtailment of civil rights developed by the Warren Court. The state courts, in an effort to maintain civil rights, have looked to federal constitutional law as establishing minimum standards only. Since 1970, state courts have published over 450 opinions holding that their state constitutions provide greater individual protections than does the federal Constitution. These opinions have focused on state bills of rights and the so-called fundamental rights described therein.

The state constitutional renaissance or "new federalism" provides several advantages for American jurisprudence. First, the states are able to develop civil rights frameworks reflecting the particularities of their locales. Second, because the Supreme Court cannot review...
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state-law decisions unless those decisions contravene federal law,\textsuperscript{67} reliance on state constitutions assures greater finality for state court judgments.\textsuperscript{68} Third, by determining state-law questions before federal ones, state courts can avoid creating new federal law unnecessarily.\textsuperscript{69} In other words, if a state statute or constitutional provision answers a question dispositively, there is no need to address the federal question. Thus, new federalism allows states to reassert the priority of state law.\textsuperscript{70}

The Washington Supreme Court has adopted new federalism in the area of privacy rights and searches.\textsuperscript{71} Article I, section 7 of the Washington constitution contains specific language granting a right to privacy.\textsuperscript{72} The Washington court has long described this right as providing greater protection to the individual than federal rights.\textsuperscript{73} For example, the court has used article I, section 7 to create a warrant preference rule that only allows warrantless searches when their neces-

\begin{itemize}
  \item 67. Collins, \textit{supra} note 60, at 9.
  \item 68. This is the doctrine of "independent and adequate state grounds," a jurisdictional doctrine which states that when a state court's judgment rests on two grounds, one federal and one state, the Supreme Court has no jurisdiction if the state ground is independent of the federal ground and is adequate to support the judgment. \textit{See} Greenhalgh, \textit{Independent and Adequate State Grounds: The Long and the Short of it}, in \textit{DEVELOPMENTS IN STATE CONSTITUTIONAL LAW} 211, 211-12 (B. McGraw ed. 1985). The Supreme Court recently modified this doctrine in \textit{Michigan v. Long}, 463 U.S. 1032 (1983) (Supreme Court will presume jurisdiction if independent and adequate state grounds are not clearly stated and it appears that the state court has relied on federal doctrines).
  \item 69. If a state court sustains a claim under federal law, it will be forced to write two opinions—one federal and one state—if it hopes to develop state constitutional law. Collins, \textit{supra} note 60, at 8. By addressing state claims first, the burden of writing two opinions is lifted. \textit{Id.} Furthermore, those state courts deciding state claims first will not have to rehear cases as they would if the Supreme Court reversed and remanded a federal question. \textit{Id.}
  \item 70. \textit{Id.} at 3.
  \item 72. \textit{See supra} note 4.
  \item 73. Since State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978), Washington courts have repeatedly held that in the criminal context, article I, section 7 provides greater individual protections than the fourth amendment's search-and-seizure language. Nock, \textit{supra} note 71, at 333. In the civil context, however, the courts have not relied on article I, section 7; rather, they have limited their inquiry to fourth amendment doctrines. \textit{See}, e.g., Kuehn v. Renton School Dist. Number 403, 103 Wash. 2d 594, 694 P.2d 1078 (1985) (inspection of student's baggage without reasonable belief that violation occurred was unconstitutional under fourth amendment; article I, section 7 violation asserted by plaintiff but not analyzed by court); King County v. Primeau, 98 Wash. 2d 321, 654 P.2d 1199 (1982) (building inspector's failure to request permission to enter home made subsequent search unconstitutional; article I, section 7 issues raised only in Justice Utter's partial concurrence).
\end{itemize}
sity is clearly demonstrated under the facts of each case. The plaintiffs in Alverado relied on this commitment to individual privacy—a commitment induced by new federalism—when they brought suit. Section IV of this Note examines the merits of the plaintiffs’ claim.

III. PROPOSED RULES AND POLICY STATEMENTS: NONBINDING AGENCY ACTION IN ALVERADO

The Washington Supreme Court in Alverado neglected two factors that could have allowed it to apply state law to protect the plaintiffs’ privacy rights. First, the court did not analyze the legal effect of the NRC’s policy statement. Because policy statements are nonbinding and do not constitute federal law, the statement could not have preempted the state constitution under conflict-type analysis. Second, the policy statement contained such vague expectations that licensees had discretion to choose the drug programs they deemed appropriate. Thus, the court’s strict application of occupation of the field analysis permitted a licensee’s interpretation of nonbinding agency action to preempt state constitutional guarantees.

A. The Plaintiffs Challenged WPPSS’ Interpretation of Nonbinding Agency Action

In concluding that drug tests fall within the exclusive purview of the federal government, the Alverado court failed to evaluate the legal effect of the NRC’s proposed rule, the decision to accept industry-initiated programs in lieu of the proposed rule, and the legal effect of the 1986 policy statement. Because the NRC formally withdrew the proposed rule, the only published standards for antidrug programs available to the Alverado court were those in the 1986 policy statement. Thus, in spite of the fact that the policy statement was issued two months after WPPSS instituted its antidrug program, analysis of that statement is appropriate to evaluate the impact of the court’s decision.

Policy statements are nonlegislative rules that indicate agency goals and outline how the agency may exercise discretionary powers in the

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future. Modern agencies commonly publish policy statements in lieu of legislative rules, otherwise known as formal rules or regulations. While policy statements must be published in the Federal Register, such statements are not legally enforceable; they do not bind the public, as do legislative rules. This nonbinding character attaches to general policy statements because they do not require the public notice and comment necessary to legislative rules. Because policy statements are not legislative rules they do not qualify as federal law, and therefore do not preempt state law.

While the theoretical legal effect of legislative rules and policy statements is clear, distinguishing one from the other has proved difficult. This difficulty results from the practical effects of both actions. Generally, licensees follow policy statements as if they were valid administrative rules. Therefore, actual public reaction to legislative rules and policy statements is often identical.

In distinguishing policy statements from legislative rules, courts traditionally look to several factors. First, the agency's label for an action usually carries great weight, although that label is not dispositive. Additionally, agency guidelines will be characterized as policy statements if the guidelines fail to establish mandatory standards, the orders use tentative language and appear temporary in duration, the

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77. Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 DUKE L.J. 381, 386 (1985). Professor Asimow suggests that policy statements indicate how an agency will pursue its goals when conducting investigations, prosecutions, legislative rulemaking, and formal or informal adjudications. Id. at 383.

78. Id. at 386-87.

79. Id. at 383.


81. Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (general policy statements are not law because they do not establish binding norms or make final determinations of the issues and rights they address).


83. 5 U.S.C. § 552a (1982). Valid legislative rules, of course, are legally enforceable. They amount to administrative statutes that have the force of federal law. See Pacific Gas, 506 F.2d at 38; Asimow, supra note 77, at 383.

84. Asimow, supra note 77, at 383-84. The Second Circuit has stated that the distinction between legislative rules and policy statements is "enshrouded in considerable smog." Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975), cert. denied, 423 U.S. 824 (1976).

85. Asimow, supra note 77, at 383-84.

86. Id. at 384.

87. Id.


89. Asimow, supra note 77, at 389-90.
orders are directed to agency staff, and if aggrieved persons can try to
persuade decisionmakers to withhold the rules in particular cases. 90

Applying these criteria to the NRC's 1986 policy statement at issue
in Alverado, that statement was exactly what it claimed to be. First,
the NRC characterized its action as a policy statement describing
the means it would use to ensure public health and safety. 91 Second, the
statement did not contain mandatory standards for drug testing.
Rather, the NRC's "expectation" was that licensees would institute
"effective" monitoring and testing procedures to ensure employee fit-
ness for duty. 92 The word "effective" does not describe a specific
mandatory standard. Third, the policy statement solicited public
comment, 93 and noted that the NRC would refrain from new rulemak-
ing for at least eighteen months. 94 The eighteen-month period reflects
both the temporary and tentative nature of the policy statement; the
NRC's request for public comment indicates this as well. Fourth,
although the NRC's "expectations" were directed to the public, 95 the
entire statement emphasizes that staff will exercise discretion through
regular agency channels. 96 Essentially, the policy statement was

90. See Asimow, Public Participation in the Adoption of Interpretive Rules and Policy
Federal Power Comm'n, 506 F.2d 33 (D.C. Cir. 1974)).
91. 51 Fed. Reg. 27,921 (1986). NRC Commissioner Asselstine criticized the agency's
decision to issue a nonenforceable policy statement instead of a rule. Id. at 27,922. The NRC
disagreed with the Commissioner's concern, stating that the AEA granted broad authority to
sanction any licensee that did not operate safely. Id. at 27,923.
92. The essential sections of the policy statement read as follows:
By way of further guidance to licensees, Commission expectations of licensee programs for
fitness for duty of nuclear power plant personnel may be summarized as follows: It is
Commission policy that the sale, use, or possession of alcoholic beverages or illegal drugs
within protected areas at nuclear plant sites is unacceptable. It is Commission policy that
persons within protected areas at nuclear power plant sites shall not be under the influence
of any substance, legal or illegal, which adversely affects their ability to perform their duties
in any way related to safety. An acceptable fitness for duty program should at a minimum
include the following essential elements: (1) A provision that the sale, use, or possession
of illegal drugs within the protected area will result in immediate revocation of access to vital
areas and discharge from nuclear power plant activities. The use of alcohol or abuse of legal
drugs within the protected area will result in immediate revocation of access to vital
areas and possible discharge from nuclear power plant activities. (2) A provision that any other
sale, possession, or use of illegal drugs will result in immediate revocation of access to vital
areas, mandatory rehabilitation prior to reinstatement of access, and possible discharge from
nuclear power plant activities. (3) Effective monitoring and testing procedures to provide
reasonable assurance that nuclear power plant personnel with access to vital areas are fit for
duty.
Id. at 27,921.
93. Id.
94. Id.
95. Id. at 27,922.
96. Id. at 27,921–23.
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directed to both staff and the public. The fifth factor—procedures for aggrieved persons—does not specifically appear in the 1986 statement. The NRC's request for public comment, however, would certainly invite input from aggrieved individuals.

The NRC's 1986 policy statement did not constitute federal law. The statement fit traditional standards delineating policy statements, and was not preceded by the procedures required for legislative rules. Because the policy statement did not constitute federal law, it could not have preempted Washington’s constitution under conflict analysis. The Alverado court's application of traditional occupation of the field standards, however, had the practical effect of allowing the policy statement to preempt the state constitution.

B. The NRC's Policy Statement Gave Licensees Discretion To Determine “Effective” Testing

The standards in the 1986 policy statement should not have received the deference accorded by the Alverado court. The court found that the NRC intended to retain authority over nuclear plant personnel and supervise the implementation of antidrug programs.97 While this analysis of the NRC's intent may be correct,98 that intent does not justify the preemption holding in this case. The plaintiffs did not challenge federal regulations. They did not even challenge the NRC's policy statement. Rather, they claimed that WPPSS' interpretation of the NRC's nonbinding actions violated state constitutional protections.

The discretion accorded licensees was greater than the Alverado court claimed. Both the NRC's 1982 proposed rule and 1986 policy statement describe fitness-for-duty concerns generally.99 The proposed rule would have required “adequate written procedures,”100

98. “Nothing in this Policy Statement shall limit the authority of the NRC to conduct inspections as deemed necessary or to take appropriate enforcement action when regulatory requirements are not met.” 51 Fed. Reg. 27,922 (1986).
100. The essential sections of the proposed rule read as follows:
   § 50.54 Conditions of licenses.
   (x)(1) Each licensee . . . shall establish, document, and implement adequate written procedures designed to ensure that, while on duty, the licensee's and its contractors' personnel with unescorted access to protected areas are not—(i) Under the influence of alcohol; (ii) Using any drugs that affect their faculties in any way contrary to safety; or (iii) Otherwise unfit for duty because of mental or temporary physical impairments that could affect their performance in any way contrary to safety.
while the policy statement suggested "effective monitoring and testing." These vague standards provided only limited guidance for licensees seeking to implement drug programs. Essentially, licensees could decide which procedures and testing would be most "effective" for them. In the policy statement, for example, the NRC commented favorably on fitness-for-duty guidelines produced by the Edison Electric Institute ("EEI"). Yet as NRC Commissioner Asselstine pointed out, the EEI guidelines were optional, not mandatory, and the utilities could select from among various elements in formulating their programs. The introduction to the EEI guidelines confirms the Commissioner's characterization, for the introduction notes that the EEI's information is not prescriptive and that other methods of ensuring fitness for duty may be equally effective.

WPPSS instituted preemployment testing as part of its antidrug program, yet the NRC did not require preemployment testing. This conclusion is borne out by the 1982 proposed rule, which would have specifically required licensees to develop their own programs, the 1986 policy statement, the EEI guidelines, and by the fact that not all nuclear plants adopted preemployment testing. While the NRC has recently published a proposed rule requiring preemployment testing, that fact does not alter licensee discretion under the NRC's

The agency purposely used broad language so that each licensee could develop procedures that not only considered fairness to and due process for its employees, but also any conditions or circumstances unique to the licensee's facility. 47 Fed. Reg. 33,980 (1982).


102. NRC Commissioner Asselstine criticized the policy statement as "too amorphous." In addition, the Commissioner noted that the statement did not indicate what the Commission considered an adequate fitness-for-duty program to be. 51 Fed. Reg. 27,922 (1986).

103. Id. at 27,921.

104. Id. at 27,922-23. Commissioner Asselstine further noted that the EEI guidelines were general in nature and could be interpreted in diverse ways. Id.

105. EDISON ELECTRIC INSTITUTE HUMAN RESOURCE MANAGEMENT DIVISION, EEI GUIDE TO EFFECTIVE DRUG AND ALCOHOL/FITNESS FOR DUTY POLICY DEVELOPMENT 1 (rev. 1985).

106. Id.

107. See supra note 100.

108. In the commentary on a proposed rule promulgated September 22, 1988, discussed at infra note 109, the NRC stated that large industrial companies use preemployment testing more than any other type, and that "virtually every" nuclear power company employs it as well. 53 Fed. Reg. 36,806 (1988).

109. On September 22, 1988, the NRC published a proposed rule on fitness for duty. 53 Fed. Reg. 36,795-830 (1988). This new rule requires random urinalysis for all employees. The random tests, which are the rule's main focus, are supplemented by "testing immediately before the initial granting of unescorted access to protected areas." Id. at 36,825. Thus, the new program combines preemployment and random testing. The rule also requires for-cause testing under particular circumstances. Id.

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previous actions.\textsuperscript{110} In light of the discretion accorded licensees in formulating their antidrug programs, the \textit{Alverado} court's decision had the practical effect of conferring preemptive status on WPPSS' discretionary choice.\textsuperscript{111}

IV. NEW FEDERALISM AND AGENCY PREEMPTION

The Washington Supreme Court's focus on traditional occupation of the field analysis prevented it from reaching the most important issue in this case: the evolving role of state constitutions in the administrative state. By assessing that role in light of the recent state constitutional revival or "new federalism,"\textsuperscript{112} the court could have seen the need to create an exception to traditional "occupation of the field" doctrine that preserves state guarantees. Such an exception would apply state constitutional protections when the specific federal interest in an occupied field is not expressed by congressional enactments or agency regulations.

A. New Federalism as a Check on the Expanding Administrative State

The decision in \textit{Alverado} illustrates the Washington Supreme Court's reluctance to check administrative intrusion on an important state constitutional guarantee. Because it employed traditional occupation of the field analysis, the court did not evaluate the legal effect and vagaries of the NRC's pronouncements. The court's approach allowed both nonbinding agency action and licensee interpretation of that action to preempt state constitutional guarantees without discussion. The state constitutional revival or "new federalism" justifies a change in the traditional occupation of the field doctrine. Under gen-

\textsuperscript{110} At most, the proposed rule indicates the NRC's current understanding of effective monitoring and testing procedures. See \textit{supra} notes 99--106 and accompanying text (discussing the policy statement's expectations of "effective" procedures).  

\textsuperscript{111} Whether preemployment drug testing is "effective" is beyond the scope of this paper. Such an inquiry should at least consider two questions: the accuracy of drug testing and the ability of preemployment testing to identify and deter drug abusers. Many commentators have assessed the accuracy of drug testing in general. \textit{See, e.g.}, \textit{Testing For Drug Use in the American Workplace: A Symposium}, 11 NOVA L. REV. 291 (1987); \textit{Symposium: Drug Testing}, 36 U. KAN. L. REV. 641 (1988). The NRC has acknowledged that the ability of preemployment testing to detect substance abuse is limited. 53 Fed. Reg. 36,806 (1988). This limitation results from public notice of the tests. \textit{Id.} According to the NRC, the only advantage to preemployment urinalysis is identifying the chemically dependent. \textit{Id.} In its newly proposed rule, the NRC deemed this advantage important enough to make preemployment testing a "necessary" part of adequate fitness-for-duty programs. \textit{Id.}  

\textsuperscript{112} \textit{See supra} notes 60--70 and accompanying text (discussing "new federalism" and reliance on state constitutional law).
eral preemption doctrine, federal administrative regulations preempt state legislation. The United States Supreme Court, however, has never addressed the question whether nonbinding agency action in an occupied field must preempt state constitutional provisions. The traditional response to this question would be that the preemption doctrine does not require special deference to a state constitution. Because state law includes both constitutional provisions and legislation, federal preemption may apply to both with equal force. In other words, the fact that the state constitution is the supreme law of a state should not affect preemption analysis. The Ninth Circuit has already taken this stance.

While the Ninth Circuit's position likely reflects traditional preemption analysis, it ignores new problems of federal encroachment on sensitive areas of state law posed by an expanding administrative state. Agencies, the so-called "fourth branch of government," are not directly subject to the electorate as are the legislative bodies that create them. Yet federal agency regulations or rules, properly issued, constitute federal law. These laws can preempt state law just as congressional enactments do. As the administrative state expands, the probability for agency intrusion on state constitutions will naturally increase. While such an intrusion would likely have gone unnoticed thirty years ago, this is not the case today.

115. See Utility Workers of Am. v. Southern Cal. Edison, 852 F.2d 1083 (9th Cir. 1988), cert. denied, 109 S. Ct. 1530 (1989). In Utility Workers, a union challenged a nuclear plant's unilaterally imposed urinalysis program as violating California's constitutional right to privacy. The court found that § 301 of the Labor Management Relations Act, which grants federal jurisdiction to collective bargaining matters, preempted the state law claim. In making this conclusion, the court stated that the supremacy clause asserts the power of federal law over state constitutional provisions as well as over state common and statutory law. Id. at 1087.
116. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (creation of government agencies, a "fourth branch" of the government, is the most important modern legal trend and has skewed tripartite theories of government).
117. See supra notes 12–17 and accompanying text.
118. Id.
119. Twentieth-century state courts have only recently begun to rely on their own constitutions in adjudicating civil rights. See infra notes 60–70 and accompanying text (discussing new emphasis on state constitutional law).
B. Nonbinding Agency Action Within Occupied Fields Should Not Preempt State Constitutional Law

Addressing new federalism's future role in preserving civil rights, Professor Collins predicted that future state courts would assert state constitutional law in ways never before imagined.\textsuperscript{120} \textit{Alverado} presented just such an opportunity for the Washington court in the context of agency action and federally-occupied regulatory fields.

The facts in \textit{Alverado} offer compelling reasons to apply state constitutional protections. First, \textit{Alverado} concerned an agency's nonbinding pronouncements. There was technically no federal regulation at all.\textsuperscript{121} Second, the vagaries of the NRC's pronouncements gave WPPSS discretion to determine "effective" drug control procedures.\textsuperscript{122} Giving preemptive power to licensee discretion does not bode well for the state constitution, especially as the administrative state continues to grow and agencies make regular use of policy statements.\textsuperscript{123}

Because it prohibits parallel state regulation of any kind,\textsuperscript{124} traditional doctrine concerning occupation of a field allows nonbinding agency action to preempt state law.\textsuperscript{125} Thus, when the \textit{Alverado} court decided that drug testing fell within the occupied field of nuclear safety, that decision gave preemptive power to a licensee's interpretation of nonenforceable agency pronouncements. This result illustrates the need for an exception to traditional occupation of the field doctrine that asserts the viability of state constitutional guarantees while recognizing the supremacy of federal law.

Courts should uphold state constitutional provisions when a specific federal interest in an occupied field is expressed by nonbinding agency action. This exception to occupation of the field analysis recognizes the increasingly important role of state constitutional law in our federal system, especially in light of the expanding reach of federal agencies and the retrenchment of federal civil rights.

\textsuperscript{120} Collins, \textit{supra} note 60, at 20.
\textsuperscript{121} See \textit{supra} notes 77–90 and accompanying text (discussing differences between policy statements and legislative rules).
\textsuperscript{122} See \textit{supra} notes 97–111 and accompanying text (discussing practical effect of the court's holding).
\textsuperscript{123} See \textit{supra} notes 78–79 and accompanying text (discussing common use of policy statements).
\textsuperscript{124} See \textit{supra} notes 13–14 and accompanying text (occupation of the field doctrine does not permit parallel state regulation).
\textsuperscript{125} See \textit{supra} notes 76–96 and accompanying text (illustrating that the practical effect of occupation of the field analysis is to allow nonbinding agency action to preempt state law).
C. *Impact of Upholding State Constitutional Law in Occupied Fields*

Courts would serve several ends by upholding state constitutional rights over nonbinding agency action within federally-occupied fields. First, state constitutional law would be developed in greater detail, providing clearer constitutional guidelines for state citizens.126 Second, by requiring licensees to accommodate state law when interpreting agency policy statements or proposed rules, courts can ensure that state protections are enforced. Third, federal agencies would be notified of state challenges and could incorporate those challenges into official rulemaking.

The traditional view could argue against this new assertion of state rights by noting that federal agencies can still promulgate formal rules with full preemptive power within occupied fields. Hence, the new state role merely delays the inevitable. This traditional view, however, ignores the inherent values of rulemaking. The rulemaking process requires input from the governed, input that can lead to rules that recognize the peculiarities of individual groups.127 Policy statements do not require such input.128 Asserting state rights in occupied fields simply allows the general public to challenge licensees’ reactions to nonbinding agency action, an opportunity the public might not otherwise receive. Thus, while the traditional view may be correct in asserting that the new state role merely delays an inevitable preemptive agency rule, that view ignores the fact that the inevitable may become more palatable when issued through formal procedures.

If the *Alverado* court had applied article I, section 7 to WPPSS’ preemployment drug screening procedure, that application would not have impinged upon the NRC’s authority in a significant way. At most, article I, section 7 would have limited WPPSS’ choice of effective programs. Additionally, the NRC would have been notified of the state constitutional requirement and could have considered that requirement when promulgating a legislative rule.

**V. CONCLUSION**

In *Alverado v. Washington Public Power Supply System*, the Washington Supreme Court failed to define the relationship between federal agency actions and state constitutional law. This failure is particularly

127. *See supra* notes 80–83 and accompanying text (describing distinct procedures for formal rules and policy statements).
128. *Id.*
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troublesome in light of the expanding reach of federal agencies and the shrinking scope of federal civil rights. By applying traditional occupation of the field standards, the court allowed nonbinding agency pronouncements to preempt fundamental state privacy guarantees. Such guarantees should not fall so easily before agency action.

Courts should uphold state constitutional protections when nonbinding agency pronouncements, such as proposed rules and policy statements, are announced in federally-occupied regulatory fields. This new assertion of state rights will allow states to develop their constitutional law while encouraging agencies to make rules, thus restoring the priority of state law in our federal system.

In the future, perhaps no agency action—whether formal legislative rule or nonbinding pronouncement—should be allowed to preempt state constitutional guarantees. Such a rule could employ a balancing test that weighs the federal interest in uniformity against the state interest in preserving a particular civil right. As the administrative state continues to expand, this suggested rule may become reality. A decision to apply state privacy guarantees in Alverado, however, would not have required such a radical change in preemption doctrine. By acknowledging the practical effect of preempting the state constitution in Alverado, the court could have upheld the civil rights on which the plaintiffs relied.

_Daryl R. Hague_