A NUCLEAR THREAT: Why the Price-Anderson Act Must Be Amended Following *Cook v. Rockwell*

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I. INTRODUCTION

Disasters such as Fukushima, Three Mile Island, and Chernobyl have raised public awareness of the dangers of nuclear energy. However, despite this risk, nuclear energy supplies twenty percent of the electricity in the United States.[1] Much of this development is due to the Price-Anderson Act ("PAA"). If a nuclear plant exposes a citizen to dangerous radiation that makes the citizen ill or damages his property, the PAA assures that a federal forum will be available to hear the victim's claim,[2] provides government funds to assure the victim's compensation,[3] and gives indemnification to the nuclear operator so that it is not exposed to crushing liability.[4] The PAA only applies to "nuclear incidents": specific types of damages caused by nuclear sources.[5] If any lawsuit alleges that a nuclear incident occurred, it can immediately be removed to federal court.[6] However, the lower courts are split on whether the PAA completely preempts state law actions, including those that do not rise to the level of a nuclear incident under the statute.[7]

The Fifth and Tenth Circuits have each considered whether a victim who has no claim under the PAA has a remedy under state law and split on the outcome.[8] As a result, citizens in the Fifth Circuit have no legal remedy for

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1. "Since 1990, the share of total annual U.S. electricity generation provided by nuclear power has averaged about 20%." *U.S. Nuclear Industry*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=nuclear_use (last visited Oct. 14, 2016).
2. 42 U.S.C. § 2210(n)(2) (2006).
3. *Id.* § 2210(o)(1)(C).
4. *Id.* § 2210(c).
5. *Id.* § 2014(q).
6. *Id.* § 2210(n)(2).
7. *See* Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1103 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.); Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 197 (5th Cir. 2011).
8. *Cook*, 790 F.3d 1103; *Cotroneo*, 639 F.3d at 197.

damages arising from a nuclear source unless it is a "nuclear incident."[9] Meanwhile, nuclear operators in the Tenth Circuit have no protection from state law actions until a nuclear incident is proven.[10] Both outcomes frustrate the purpose of the PAA, which is to ensure that nuclear companies are not exposed to crushing liability while also ensuring that plaintiffs will have access to enough funds to compensate them for their injuries. Accordingly, Congress should amend the PAA to account for this unintended inconsistency.

In *Cook v. Rockwell International Corp.*, the Tenth Circuit held that the PAA did not preempt a state law nuisance claim after the plaintiffs failed to prove that their injury arose from a "nuclear incident" within the meaning of the PAA.[11] This holding was devastating and ironic for the defendants because they ultimately exposed themselves to a larger liability by winning a previous appeal in this case. There, the defendants proved that the plaintiffs' injuries did not constitute a "nuclear incident."[12] Retrospectively, if the defendants had accepted that a nuclear incident occurred, it would have limited their liability by requiring the government to pay any damages not covered by insurance.[13] The plaintiffs took advantage of this misjudgment by abandoning the mechanisms and benefits provided by the PAA and pursuing the background state law nuisance claim instead.[14] In response, the defendants argued that such an action was preempted by the PAA, which the court of appeals ultimately rejected.[15]

The *Cook* court decided that the defendants only raised an express and field preemption argument, and concluded that all other preemption defenses were forfeited since they were not made.[16] The court then stated that the defendants' argument failed for two reasons: (1) the defendants forfeited this

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9. *Cotroneo*, 639 F.3d at 197.
10. *See Cook*, 790 F.3d at 1103; *Cotroneo*, 639 F.3d at 197.
11. 790 F.3d at 1103.
12. *Id.*
13. *Id.* at 1090.
14. *Id.* at 1091.
15. *Id.* at 1099.
16. *Id.* at 1092 (citing Mauldin v. Worldcom, Inc., 263 F.3d 1205, 1211 (10th Cir. 2001) (for the general proposition that unraised preemption defense is forfeited)). Generally, there are two types of preemption: express preemption (Congress explicitly supplants state law) and implied preemption (where the intent to supplant state law is suggested in the statute). *Id.* Implied preemption can be further categorized into field preemption (Congress occupies the field so thoroughly that there is no room for state law), and conflict preemption (the statute displaces state laws that interfere with its application). *Id.* The Supreme Court explained in a footnote that the PAA structure resembles a "complete preemption" statute, where a federal action uses substantive state law rules. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 484 n.6 (1999).

preemption defense when they failed to raise it on the first appeal; and (2) even if the court were to forgive this procedural problem, the PAA is not preemptive without the occurrence of a nuclear incident.[17]

Thus, *Cook* exposed a significant, yet unintended, weakness in federal nuclear law: only suits that involve narrowly defined nuclear incidents are preempted by the PAA, but lesser "nuclear occurrences" can be remedied with state law actions.[18] The Supreme Court last ruled on this issue thirty years ago in *Silkwood v. Kerr-McGee Corp.*,[19] but since then, the PAA has been amended. The *Cook* court observed that its decision represented a split with the Fifth Circuit in *Cotroneo v. Shaw Environment & Infrastructure*.[20] Furthermore, *Cook* appears to be at odds with the reasoning of nearly every other circuit that has heard a similar matter.[21] This Note recognizes that a circuit split exists with the Fifth Circuit, but argues that the *Cook*

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17. *Cook*, 790 F.3d at 1093–94. Regarding the procedural mistake, the court clarified that arguments that were not asserted on appeal may not be asserted on remand. *Id.* at 1093. (citing Dow Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481, 486 n.4 (10th Cir. 1990)). This issue will not be discussed at length because the court continued on to a substantive holding on preemption under the Price-Anderson Act, which the circuit split arises from. *Id.* at 1094.

18. *See id.* at 1104.

19. 464 U.S. 238, 250–51 (1984). In that case, the Court stated "it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Id.* at 256. However, the Price-Anderson Act was amended in 1988, four years after *Silkwood*. While the Court has considered the Price-Anderson Act's interaction with tribal law in El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 476 (1999), the Court has not an opportunity to determine if the 1988 Amendments Act has drastically altered their determination in *Silkwood*.

20. *Cook*, 790 F.3d at 1098–99. *Contra* Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 197 (5th Cir. 2011) ("[R]ecovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions."). The Tenth Circuit completely disagreed with the holding of *Cotroneo*, and instead found support in the reasoning of the dissent in *Cotroneo*: "Had Congress intended to limit recovery to these categories of personal injury claims, it easily could have and probably would have plainly and expressly said so." *Cotroneo*, 639 F.3d at 200 (Dennis, J., concurring in part and dissenting in part).

21. *See, e.g.*, *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2007) ("The PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."); *see also* Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997) ("[W]e hold that the Price-Anderson Act preempts Nieman's state law claims; the state law claims cannot stand as separate causes of action. Nieman can sue under the Price-Anderson Act . . . or not at all."); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1105 (7th Cir. 1993) ("[S]tate regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law."); *In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 854 (3d Cir. 1991) ("After the [most recent amendment to Price-Anderson Act], no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson Act] or *it is not compensable at all*.").

interpretation is compatible with the holdings of the other circuits because these circuits only decided that preemption applies after a nuclear incident occurs.[22]

After *Cook*, a defendant company risks losing the financial protection of the PAA if it attempts to prove that a nuclear incident did not take place. This result creates an incentive for defendants of nuclear tort actions to allow Price-Anderson judgments against them, which is likely preferable to the litigation of a state tort claim. This decision appears to be a windfall for plaintiffs, much to the chagrin of the government: it has effectively provided a disincentive for defendants to litigate on the merits. Now, a defendant company could lose its indemnified status if it challenges the seriousness of the plaintiffs' injuries, as it may inadvertently prove that a nuclear incident did not occur. This may increase the prevalence of nuclear class actions by: (1) offering plaintiffs alternative state law remedies; and (2) encouraging the settlement of Price-Anderson actions.

This outcome is undesirable. Nuclear energy accounts for twenty percent of the United States' electrical generation.[23] An unexpected increase in liability may send the industry into disarray and severely affect the cost-benefit analysis of nuclear operators, resulting in the closure of plants.[24] Furthermore, Congress likely intended to provide some stability to the industry by passing the PAA. After a spokesman for the private nuclear sector asserted that companies would be forced to "withdraw from the field if their liability were not limited by appropriate legislation," Congress responded by passing the PAA, creating a ceiling of liability for nuclear operators.[25]

If the *Cook* ruling stands and Congress does not amend the PAA, the nuclear industry will be subject to increased tort liability because it will be vulnerable to any state law action that does not reach the level of a nuclear incident. This lack of predictability would likely interfere with the Congressional intention of the PAA, which was to provide protections from

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22. *See* discussion *infra* Section III.B.

23. *See U.S. Nuclear Industry*, *supra* note 1.

24. *See* Donald A. Jose & Michael A. Garza, *The Complete Federal Preemption of Nuclear Safety Should Prevent Scientifically Irrational Jury Verdicts in Radiation Litigation*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 1, 10 (2007) (arguing that jury awards are effectively regulations that will "perhaps destroy the nuclear industry"); Dara C. Pfeiffer, *An Unstable Cost-Benefit Analysis: How the Federal Courts Have Responded to Damage Claims Related to the Nuclear Power Industry*, 9 VA. ENVTL. L.J. 445, 458 (1990) ("[A]ny court determination which rejects limited liability or imposes further unexpected liability upon the government or contractors will increase the costs of nuclear power and readjust the legislative cost-benefit analysis.").

25. Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 64–65 (1978).

liability in an effort to promote nuclear development.[26] This potential state law liability also discourages nuclear companies from challenging the seriousness of a plaintiff's injuries, as they may risk losing their protection under the PAA.

Alternatively, overturning *Cook* would have undesirable consequences. If all state law actions are found to be preempted, plaintiffs would be left without a remedy for any occurrence that is short of a nuclear incident. This provides a window of negligence in which nuclear companies are now unjustifiably immune.[27] This would create a slew of negative consequences. It will give nuclear companies the ability to operate negligently with impunity, as long as they avoid a "nuclear incident," which, as the *Cook* court says, is a very high bar to reach.[28]

This Note argues that Congress should amend the PAA to completely preempt state law causes of action, but also to clarify that public liability under the PAA should apply to lesser "nuclear occurrences" as well. Such an amendment would close the loophole illustrated in *Cook* and help the PAA better achieve its goals. As of the date of this Note, *Cook* stands as good law because the parties stipulated for dismissal before the case could be heard by the Supreme Court.[29] This Note's argument does not depend on that outcome, because any possible Supreme Court decision affirming or overturning *Cook*

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26. *Id.* at 83 (citation omitted) ("As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident.").

27. For example, the defendant Rockwell Company in *Cook* was operating in a negligent and dangerous fashion. "[P]lant workers had mishandled radioactive waste for years. Some had been poured into the ground and leached into nearby bodies of water. Some had been released into the air and filtered its way into the soil throughout the area. As news of all this emerged, the plant's neighbors saw their property values plummet." Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1090 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.). Such behavior could go unpunished if *Cook* is overturned.

28. *Id.* at 1097 (citation omitted) ("[Defendants'] reading of the law (no recovery absent a full-blown nuclear incident) would have the surprising effect of barring recovery in the event of a future accident exactly like Three Mile Island, because Three Mile Island does not appear to have caused the sort of grave injuries required to establish a nuclear incident under § 2014(q)."). The *Cook* court used this comparison because it observed that Price-Anderson Act was amended to speed the recovery process for victims of the Three Mile Island incident. *Id.* at 1096–97.

29. *See* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.). Importantly, the petition was not denied, but dismissed according to Rule 46.1. *See id.* The docket indicates that the parties stipulated to this dismissal; SUPREME COURT OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-791.htm (last visited Nov. 15, 2016) (noting that a stipulation to dismiss was received by the Court on May 18, 2016).

would result in consequences that betray the purpose of the PAA. Thus, the only remedy for this current impasse is amending the PAA.[30]

In Part II, this Note presents a history of the PAA, while Part III discusses previous Supreme Court and circuit court interpretations of preemption under the PAA. Then, Part IV will explain the *Cook* decision, focusing on why the decision actually exposes a fundamental weakness in the PAA—that it fails to distinguish between incidents and occurrences. Lastly, Part V will argue that the PAA should be amended to better serve its expressed purpose, particularly in light of the *Cook* decision.

II. THE HISTORY OF THE PRICE-ANDERSON ACT

Congress enacted the PAA in 1957, and has amended it several times.[31] The current version of the PAA indemnifies a nuclear operator from any "public liability" that arises from a "nuclear incident" when that liability exceeds the insurance the operator owns.[32] Public liability refers to "any legal liability arising out of or resulting from a nuclear incident."[33] A nuclear incident is "any occurrence" that causes "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties" of nuclear materials.[34] In a public liability action, the substantive rules of decision are derived from the law of the state where the incident occurs.[35]

The following section explains the history of the PAA in detail, with a focus on the Congressional intent for each amendment. Ultimately, this legislative history indicates that Congress wanted to interfere with state law as little as possible, while still providing a consolidated federal forum in the event of a nuclear incident. This intent illustrates why the circuit split frustrates the PAA's purpose.

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30. All further references in this Note to "overturning" or "upholding" *Cook* will refer to future legislative actions or future judicial actions that second handedly reflect on *Cook*.

31. U.S. Nuclear Reg. Comm'n, *Nuclear Insurance and Disaster Relief*, BACKGROUNDER, http://www.nrc.gov/docs/ML0327/ML032730606.pdf (last visited Nov. 15, 2016).

32. 42 U.S.C. § 2210(c) (2012). ("The Commission shall . . . agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee."); *see also id.* § 2210(e).

33. *Id.* § 2014(w).

34. *Id.* § 2014(q).

35. *Id.* § 2014(hh).

A. The Atomic Energy Acts of 1946 and 1954

Congress began to regulate nuclear energy in 1946 with the Atomic Energy Act, which established nuclear energy as a government monopoly.[36] However, this monopoly was destroyed with the Atomic Energy Act of 1954, where Congress "concluded that it would be in the national interest to permit private sector involvement" in the nuclear industry.[37] That statute required all private entities that sought to be involved in the nuclear field to be licensed by the Atomic Energy Commission[38]—the federal commission created in the 1946 Act.[39] Importantly, despite the "potentially devastating liability which might be imposed in the event of a major nuclear accident," the Act of 1954 did nothing to protect the private actors who participated in the nuclear industry.[40] In fact, the Act of 1954 went out of its way to clarify that private corporations would be entirely liable for any damages they caused.[41] The private corporations responded to this by testifying before Congress that they would leave the field if not provided some protection from liability.[42]

B. The Price-Anderson Act of 1957

Congress passed the PAA in 1957 to address the private nuclear companies' concerns.[43] The PAA created a comprehensive, "compensation-oriented system of liability insurance and indemnification for federal nuclear contractors and licensees" that both limited "their possible financial exposure

36. *In re* TMI Litig. Cases Consol. II., 940 F.2d 832, 851–52 (3d Cir. 1991).

37. *Id.* at 852; *see* 42 U.S.C. § 2011 (1992) ("Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.").

38. Ryan Gellert, Merilyn Cook v. Rockwell International Corporation*: Under the Price-Anderson Act, Tort Claimants are not Required to Prove That Nuclear Weapon Manufacturers Violated Federal Regulations*, 24 J. LAND RESOURCES & ENVTL. L. 143, 144 (2004).

39. *See* Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

40. *In re TMI*, 940 F.2d at 852.

41. *See* 42 U.S.C. § 2297h-7(c) (2012).

42. Duke Power Co. v. Carolina Envtl. Grp., Inc., 438 U.S. 59, 64 (1978).

43. *Id.*

in the event of a nuclear incident" and created a pool of funds for victims of nuclear incidents.[44]

As observed by the *Cook* court, "the Price-Anderson Act seeks both to promote the private nuclear energy industry and, simultaneously, to ensure relief for those injured by it."[45] Congress explicitly stated in the PAA that the Act served a dual interest: (1) making funds available to protect the public in the event of a nuclear incident, and (2) limiting liability of nuclear developers to provide incentives for development.[46]

To achieve this function, the courts have repeatedly found three main purposes in the PAA: (1) limiting the aggregate liability imposed upon those who used or handled radioactive materials; (2) channeling the public liability of nuclear incidents to the federal government; and (3) assuring that all public liability claims above the amount of required insurance "would be indemnified by the Federal Government, up to the aggregate limit on liability."[47]

C. The Price-Anderson Amendments of 1966

In 1966, Congress amended the PAA, requiring those indemnified under the Act to waive common law defenses (like contributory negligence and assumption of risk) if an action was raised after an "extraordinary nuclear occurrence."[48] Congress was concerned that some aspects of state tort law—such as statutes of limitation that were too short to allow actions following radiation exposure—would frustrate the PAA's purpose of compensating victims of nuclear incidents.[49] Congress believed this approach reflected the approach found in the original PAA: "interfering with State law to the

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44. Gellert, *supra* note 38, at 145.

45. Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1089 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.).

46. 42 U.S.C. § 2012(i) (2012).

47. *See, e.g.*, O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1095 (7th Cir. 1994) (citation omitted); *In re* TMI Litig. Cases Consol. II., 940 F.2d 832, 852 (3d Cir. 1991) (citation omitted). This list of purposes is sourced from the Senate Report issued while amending the Act. *See* S. REP NO. 100-218, at 1477 (1988).

48. *See O'Connor*, 13 F.3d at 1095; *In re TMI*, 940 F.2d at 852. The Act defined an extraordinary nuclear occurrence as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and . . . determines has resulted or will probably result in substantial damages to persons offsite or property offsite." 42 U.S.C. § 2014(j).

49. Gellert, *supra* note 38, at 145–46.

minimum extent necessary."[50] Furthermore, the legislative history for the 1966 amendments stated that "a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides."[51]

D. The Price-Anderson Amendments of 1988

Following the events of Three Mile Island in 1979, Congress amended the PAA again in 1988 to grant United States district courts original and removal jurisdiction over "public liability action[]" which "aris[e] out of or result[] from a nuclear incident."[52] The Act was amended because the Three Mile Island accident could not be consolidated into federal court since it did not reach the level of an "extraordinary nuclear incident."[53] The 1988 Amendments solved this issue by reducing the threshold at which the provisions of the PAA would apply, as a public liability action now included "legal liability arising out of or resulting from a nuclear incident,"[54] instead of an "extraordinary nuclear occurrence." When summarizing the 1988 Amendments, the Third Circuit stated:

> The Amendments Act creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action. By creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity, and efficiency in the disposition of public liability claims.[55]

The history of the PAA reflects congressional concern over the lack of protection for nuclear producers while also ensuring that citizens have a

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50. S. REP. NO. 89-1605, at 3209 (1966).

51. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 254 (1984) (citing S. REP. NO. 89-1605, at 3212 (1966)).

52. 42 U.S.C. § 2210(n)(2) (1992).

53. El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 477 (1999) (citing S. REP. NO. 100-218, at 1488 (1988)).

54. 42 U.S.C. § 2014(w).

55. *In re* TMI Litig. Cases Consol. II., 940 F.2d 832, 856–57 (3d Cir. 1991). The court then clarified the purpose of the removal provisions: "With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds, and assured the preservation of sufficient funds for victims whose injuries may not become manifest until long after the incident." *Id.* at 857.

remedy available when injured by those producers. The 1966 Amendments expressed Congress' intent to interfere with state law as little as possible, while the 1988 Amendments demonstrated the need for a consolidated forum in the event of a nuclear incident. Therefore, prior legislative history suggests that Congress did not intend to preempt all state law actions involving nuclear energy—just those rising to the level of a nuclear incident.

III. THE MODERN JUDICIAL INTERPRETATION OF PREEMPTION UNDER THE PRICE-ANDERSON ACT

To date, the Supreme Court has heard two cases regarding the preemptive effects of the PAA on state law: *Silkwood v. Kerr-McGee Corp.*,[56] discussing the Act's preemption of state torts, and *Pacific Gas and Electric Co. v. State Energy Resource Conservation & Development Commission*,[57] discussing whether the Act precludes a state from preventing the construction of nuclear plants. The Court has not heard a case specifically regarding preemption and the PAA since the 1988 Amendments. However, the Supreme Court has mentioned the preemptive status of the PAA in dicta.[58]

Most federal circuits have decided cases under the PAA since the 1988 Amendments, and decisions prior to *Cook* generally supported the preemptive status of the Act.[59] The *Cook* court asserted that its ruling is only incompatible with *Cotroneo* in the Fifth Circuit and not those of the other circuits.[60] This assertion is likely correct, as most other circuits have held that the Price-Anderson Act only preempts in the event of a nuclear incident, whereas *Cook* adds that occurrences that do not rise to the level of an "incident" are not preempted.[61]

A. Supreme Court Interpretations of the Price-Anderson Act

The Supreme Court has only decided three cases that interpret the PAA. Although each contains an important finding about the PAA, it is the middle

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56. *See generally* 464 U.S. 238 (1984).

57. *See generally* 461 U.S. 190 (1983). While this case does not specifically address the Act's preemption of state tort actions, it does serve as a pre-cursor to the more-important *Silkwood*.

58. *See* El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 474 (1999).

59. *See supra* note 21.

60. Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1098–99 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.).

61. *Id.*

case—*Silkwood*—that speaks most directly to this issue. *Silkwood* ruled that the PAA does not preempt punitive damages arising from state law.[62] While *Silkwood* appears to resolve the issues in *Cook*, it was decided four years before the 1988 Amendments to the PAA were passed. Correspondingly, debate continues regarding the applicability of *Silkwood*'s holding.[63]

1. Pacific Gas

In 1980, the Court addressed whether California could pass a law that required approval by the state energy commission of the construction of nuclear energy plants.[64] The Court noted that the Atomic Energy Act of 1954 and its subsequent amendments (including the PAA) reflected Congress' intention to have the federal government regulate the safety aspects of the construction and operation of nuclear plants, while allowing the states to maintain their traditional powers regarding the need, reliability, and cost of electrical utilities.[65] Because the state commission rejected plants for valid economical purposes, and not safety purposes, the Court upheld the California statute.[66] While the Court did not doubt that the Atomic Energy Act was intended to promote nuclear power, such promotion is "not to be accomplished 'at all costs.'"[67]

62. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258 (1984).

63. *See* Nieman v. NLO, Inc., 108 F.3d 1546, 1552 (6th Cir. 1997) (commenting that the Supreme Court has not had an opportunity to address and analyze how and if the 1988 Amendments change its analysis, and "[a]ccordingly, there is no Supreme Court precedent exactly on point"); O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1105 n.13 (7th Cir. 1994) ("*Silkwood*'s holding regarding damages was overruled by the [1988 Amendments] which specifically bars punitive damages."). Scholars have also criticized the use of *Silkwood* as good law. *See* Jose & Garza, *supra* note 24, at 20 ("*Silkwood* was not a Price-Anderson PLA case and could not possibly be a Supreme Court interpretation of legislation passed four years later. In fact, Justice White's *Silkwood* opinion clearly places great weight on the fact that Congress could have, and had not at that time, created a federal cause of action to provide guidance and limitations for these types of cases. Four years later, that is exactly what Congress did, effectively limiting *Silkwood* to its own facts . . . .").

64. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 194–95 (1983).

65. *Id.* at 205.

66. *Id.* at 216.

67. *Id.* at 221–22.

2. Silkwood

Next, the Court reviewed whether punitive damages awarded through state law were preempted by the PAA as a regulation of "nuclear safety."[68] The injured party in *Silkwood* was an employee at a plant that produced plutonium fuel pins for use in nuclear reactors.[69] During a three-day period, the employee was contaminated repeatedly with plutonium, before dying in an unrelated car crash.[70] The employee's father brought a common law action to recover for his daughter's contamination injuries.[71] At trial, the evidence "tended to show that [defendant] did not always comply with NRC regulations," although it did comply with most regulations.[72] The trial court then submitted alternative claims to the jury on theories of strict liability and negligence.[73]

The jury returned a verdict in favor of the plaintiff, awarding actual damages of $505,000 and punitive damages of $10 million.[74] The defendant moved for a judgment notwithstanding the verdict, contending that punitive damages were precluded since the defendant had complied with federal regulations.[75] The trial court rejected this motion, stating that the defendant failed to comply with all federal standards, and that allowing punitive damages was not inconsistent with congressional design when the damages are caused by grossly negligent or reckless behavior.[76]

On review, the Tenth Circuit overruled the trial court's award of punitive damages using a "broad pre-emption analysis."[77] The court of appeals reasoned that "any state action that competes substantially with the [NRC] in its regulation of radiation hazards . . . was impermissible."[78] In the court's view, federal law preempted such awards because "exemplary damages under

68. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 241 (1984).
69. *Id.*
70. *Id.* at 241–42.
71. *Id.* at 243.
72. *Id.* at 243–44. Although an NRC official testified that Kerr-McGee was making efforts to reduce radiation exposures to levels "as low as reasonably achievable," Kerr-McGee also introduced a report from the NRC that stated that the only violation of regulations during the Silkwood incident was Kerr-McGee's failure to maintain a record of dates on urine samples submitted by the plaintiff. *Id.*
73. *Id.* at 244.
74. *Id.* at 245.
75. *Id.*
76. *Id.*
77. *Id.* at 246.
78. *Id.* (internal quotations omitted).

state law as punishment for bad practices" interferes with federal nuclear regulation at least as much as direct legislation by the state.[79]

The Supreme Court reversed the Tenth Circuit, holding that punitive damages were not preempted in this case.[80] The Court found that there was "ample evidence that Congress had no intention of forbidding the States to provide such remedies."[81] It found no language in the Atomic Energy Act suggesting that Congress considered precluding state actions, and asserted that "[t]his silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[82]

The Court held that the PAA did not apply in this situation because the Act does not address plutonium processing plants.[83] However, the Court still found that the legislative history behind the PAA indicated that persons injured by "nuclear accidents" could still seek state law remedies.[84] The Court cited a Joint Committee Report, which stated: "[T]here is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of indemnity."[85]

The Court also found evidence that Congress contemplated punitive damages being awarded by state law.[86] The Court concluded: "[I]t is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents."[87] Although the Court was aware that this created a tension between the direct regulation of nuclear safety through federal law and the indirect regulation of nuclear safety through state tort law, the Court reasoned that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less."[88] The

79. *Id.*
80. *Id.* at 258.
81. *Id.* at 251.
82. *Id.* (internal citation omitted).
83. *Id.* at 251–52 n.12.
84. *Id.* at 252.
85. *Id.* (citing S. REP. NO. 85-296, at 9 (1957)).
86. *Id.* at 255. The Court cited a form published following the 1966 Amendments. The form expressed that the waivers to nuclear licensees do not apply to punitive or exemplary damages. *Id.* at 255 n.17.
87. *Id.* at 256. This statement does not ring true for the current PAA. Now, all harms arising from a "nuclear incident" are preempted by the PAA and removable to federal court. This change arose from the 1988 Amendments.
88. *Id.*

Court emphasized that preemption should not be based on the federal occupation of the field of nuclear safety, but rather on if the awarding of state damages frustrated federal objectives.[89] Here, it found no such conflict, and reasoned that it was not "physically impossible" to pay both federal fines and state law punitive damages.[90]

3. El Paso

The Supreme Court has heard only one PAA case following the 1988 Amendments. *El Paso Natural Gas Co. v. Neztsosie*[91] involved the issue of tribal-court exhaustion, and mostly did not speak to the issues discussed in *Silkwood* or later in *Cook*.[92] However, in dicta, the Court did discuss the "unusual preemption provision[s]" of the PAA generally.[93] The Court specifically cited to 42 U.S.C. § 2014(hh), which defines a "public liability action."[94] That section provides that the "substantive rules for decision in such an action shall be derived from the law of the State in which the nuclear incident involved occurs."[95]

The Court then explained in a footnote that this preemptive structure, where a public liability action becomes a federal action decided under substantive state law rules, resembles what the Court calls "complete pre-emption doctrine."[96] The Court stated that this doctrine applies when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'"[97] Thus, the Court has expressed that substantive state law rules should apply to PAA actions.

B. Circuit Court Interpretations of the Act

The Court decided *Silkwood* four years before the 1988 Amendments to the PAA. Although *El Paso* did shed some light on the nature of the

89. *Id.* The Court did not indicate what types of preemption this statement applied to.

90. *Id.* at 257. The court then cites *Pacific Gas* to reiterate that "the promotion of nuclear energy is not to be accomplished at all costs." *Id.* (internal quotation marks omitted).

91. 526 U.S. 473 (1999).

92. *Id.* at 476.

93. *Id.* at 484 n.6.

94. *Id.* This federal action was created in the 1988 Amendments.

95. 42 U.S.C. § 2014(hh) (2012).

96. *El Paso Nat. Gas Co.*, 526 U.S. at 484 n.6.

97. *Id.* (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987)).

preemption provisions, circuit courts have been the primary battleground for Price-Anderson arguments following the 1988 Amendments.[98]

These circuit cases can be separated into four categories: (1) early cases that upheld the constitutionality of the 1988 Amendments under Article III and discussed preemption tangentially;[99] (2) cases that determined that federal regulations were to be used as the standard of care in a public liability action arising from a nuclear incident;[100] (3) cases that determined that, if a nuclear incident occurs, the PAA serves as the only means of recovery;[101] and (4) cases that decided whether injured parties can recover according to state common law if a nuclear incident did not occur.[102]

The *Cook* case may be an outlier, but only as to the last category. While the cases in Categories 1–3 discuss the preemptive provisions of the PAA, they do not expressly disagree with *Cook*. These courts ruled on different issues—such as a constitutional challenge to the PAA—and did not decide if damages arising from non-incidents can be remedied by state law (as the

98. *See supra* note 63 (discussing the persuasiveness of *Silkwood* following the 1988 Amendments).

99. O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1094 (7th Cir. 1993) ("[Plaintiff] argued that the Amendments Act unconstitutionally conferred jurisdiction on the federal courts."); *In re* TMI Cases Consol. II, 940 F.2d 832, 835 (3d Cir. 1991) ("Our focus here is on the constitutionality of the Price-Anderson Amendments Act of 1988 . . . .").

100. *See* Roberts v. Fla. Power & Light Co., 146 F.3d 1305, 1308 (11th Cir. 1998) (holding that "federal safety regulations conclusively establish the duty of care owed in a public liability action."); *see also O'Connor*, 13 F.3d at 1103, 1105 (discussing the plaintiff's argument that a state law standard of care should be used, and rejecting that argument by announcing "we conclude that Illinois would use the federal safety regulations as the applicable standard of care in public liability actions").

101. *See In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2007) ("The [Price-Anderson Act] is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."); Nieman v. NLO, Inc., 108 F.3d 1546, 1549–54 (6th Cir. 1997). In *Nieman*, the plaintiff claimed that a uranium leak at nuclear power plant was a nuclear incident, but also contended that his state law action for continuing trespass was not preempted by the Price-Anderson Act. *Id.* at 1549–50. The court held that the plaintiff could not have two separate causes of action, stating: "Nieman can sue under the Price-Anderson Act, as amended, or not at all." *Id.* at 1553. However, this did not extinguish plaintiff's trespass claim, as the court then continued onto a thorough analysis of the plaintiff's continuing trespass claim, using Ohio state law. *Id.* at 1554–59. Thus, the plaintiff's state claim was absorbed into the federal claim, and then the federal claim was decided according to state law. *Id.* at 1553 (citing 42 U.S.C. § 2014(hh) (2012)).

102. *See* Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1104 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.); Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 197 (5th Cir. 2011); *supra* note 20 (discussing the contrary findings of the *Cook* and *Cotroneo* cases).

Cook court decided).[103] In fact, the cases in Categories 1–3 all assume that a nuclear incident has occurred—making them completely unlike *Cook*—and compatible with the *Cook* holding.[104] *In re TMI*[105] and *In re Hanford*,[106] discussed in detail below, are two examples of this point. After discussing these cases, this section demonstrates that *Cotroneo*[107] is the only case incompatible with the *Cook* holding.

1. *In re TMI* (Third Circuit)

In re TMI is the first of the Category 1 cases that upheld the constitutionality of the 1988 Amendments. While many courts recognize it as a watershed case in support of the preemptive argument, the *TMI* court did not expressly rule on the issue of preemption and only articulated a preemptive argument as part of an extensive Article III analysis.[108] This case arose out of the Three Mile Island incident in 1979, wherein defendants were attempting to remove the case to federal jurisdiction and the plaintiffs were challenging that jurisdiction in an effort to remain in the state court system.[109] The district court determined that 1988 Amendments were unconstitutional because the creation of a federal forum for public liability actions exceeded Congress' authority under Article III, Section 2 of the Constitution.[110] The Third Circuit reversed this finding, holding that the 1988 Amendments were constitutional.[111]

To decide the constitutionality of the PAA, the *TMI* court looked for "the federal components necessary to survive the constitutional challenge

103. *Compare Cook*, 790 F.3d at 1092 (responding to the defendant's argument that "the Act also preempts and precludes any state law recovery where (as here) a nuclear incident is asserted but ultimately unproven."), *with In re TMI*, 940 F.2d at 835 ("Our focus here is on the constitutionality of the Price-Anderson Amendments Act of 1988 . . . .").

104. *See supra* notes 99–101.

105. *In re TMI*, 940 F.2d 832.

106. 534 F.3d 986 (9th Cir. 2007).

107. Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186 (5th Cir. 2011).

108. *In re TMI*, 940 F.2d at 835–36. Thus, the *TMI* court only made these statements to support the constitutionality of the 1988 Amendments.

109. *Id.* at 835.

110. *Id.* The district court reasoned that, because the rules of decision in Price-Anderson suits were to be determined by state law, Congress had "failed to rule substantively," thereby exceeding the boundaries of Article III. *Id.* at 855. While the finer points of Article III jurisdiction are discussed exhaustively in the opinion, this Note is only concerned with the dicta that the Third Circuit utilizes to determine "that Congress intended to—and did—create a federal cause of action which will implicate substantive aspects of federal law." *Id.* at 854.

111. *Id.* at 836.

mounted here."[112] When listing the federal elements, the court made several observations regarding the preemptive nature of the PAA. The court determined that the act created a federal cause of action that utilized aspects of state law, remarking: "After the [1988 Amendments], no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the [1988 Amendments] or it is not compensable at all."[113] Therefore, the court was very clear in establishing that preemption only applies in the event of a nuclear incident.[114] In fact, the court even acknowledged that state tort law may operate in a state action that does not rise to the level of an incident.[115] Thus, the *TMI* court predicted the outcome of *Cook*, decided twenty-three years later.[116]

Interestingly, many later cases would come to rely upon the strong preemptive language utilized in *In re TMI*,[117] but since the *TMI* court was not expressly deciding on the issue of state law preemption, these later cases are largely citing dicta.

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112. *Id.* at 857.

113. *Id.* at 854. It is important to note that the court is expressly referring to a "nuclear incident" in this statement. The *Cook* ruling complies with this finding, as it agreed that actions following nuclear incidents were preempted, but lesser "nuclear occurrences" were not. Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1096–97 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.).

114. *In re TMI*, 940 F.2d at 857 ("With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress ensured that all claims resulting from a given *nuclear incident* would be governed by the same law . . . . Thus, Congress clearly intended to supplant all possible state causes of action when *the factual prerequisite of the statute* are met.") (emphasis added).

115. *See id.* at 854–55 ("Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be one based on 'any legal liability' of 'any person who may be liable on account of a nuclear incident.' It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme.").

116. *See id.* The *TMI* court asserts that a new "species of tort" which "state courts might recognize" might be born when a "claim could not qualify as a public liability action." In *Cook*, the claim did not qualify as a public liability action, and, therefore, a new species of tort was born (an *occurrence*), which the *Cook* court found to be recognizable under state law. *Cook*, 790 F.3d at 1104 (reasoning that the statute provides "special rules like liability caps for a subset of those claims involving nuclear incidents—while permitting claims involving lesser occurrences to proceed to decision under preexisting state law principles"). Therefore, *TMI* correctly predicted this outcome.

117. *See, e.g.*, Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir. 1997) (agreeing with the preemption analysis in *TMI*); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1105 (7th Cir. 1994) (agreeing with *TMI* that "[state] negligence actions [are] preempted by federal law").

2. *Hanford* (Ninth Circuit)

In *Hanford*, certain plaintiffs in a class sought medical monitoring[118] after claiming injuries arising from a nuclear incident.[119] However, the Ninth Circuit had already ruled in a previous case that "claims for medical monitoring are not compensable under the PAA, because they do not constitute claims of 'bodily injury, sickness, disease, or death . . . .'"[120] As a result, the plaintiffs requested that the district court remand their medical monitoring claims to state court.[121]

The district court denied the plaintiffs' request, and the Ninth Circuit upheld that decision.[122] The court of appeals asserted that the district court still had subject matter jurisdiction over the issue, but it could not grant relief because the plaintiffs did not suffer any physical injury.[123] Furthermore, the court of appeals declared that "[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."[124] Since a nuclear incident was alleged, the district court properly had jurisdiction, but the claim could not be remanded to state court because the medical monitoring claims were not compensable under the PAA.[125]

3. *Cotroneo* (Fifth Circuit)

In *Cotroneo*, the Fifth Circuit held that injured parties cannot recover under state common law even if a nuclear incident did not occur.[126] Plaintiffs brought a public liability suit under the PAA, and as part of the suit alleged an "offensive contact" claim that was derived from Texas state law.[127] The plaintiffs alleged that they had suffered injuries and illnesses due to nuclear exposure, which qualifies as a public liability action.[128] However, in trial

118. *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 999 (9th Cir. 2008).

119. *Id.* at 997.

120. *Id.* at 1009 (quoting *In re* Berg Litig., 293 F.3d 1127, 1132 (9th Cir. 2002)). The *Berg* court was quoting the language from 42 U.S.C. § 2014(q) (2012), which defines a nuclear incident as "any occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property" which originates from nuclear source materials or byproducts.

121. *In re Hanford*, 534 F.3d at 1009.

122. *Id.* at 1010.

123. *Id.* at 1009.

124. *Id.* (citing *In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 854 (3d Cir. 1991)).

125. *Id.* at 1010.

126. Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 197 (5th Cir. 2011).

127. *Id.* at 189–90.

128. *Id.* at 194.

court, the plaintiffs failed to demonstrate that their physical injuries had been caused by exposure to radiation, and accordingly, the court granted summary judgment in favor of the defendants on those issues.[129] However, the offensive battery charge did not require any of the plaintiffs to prove any physical injury.[130] Therefore, the district court remanded the offensive battery claim to the state court, reasoning that:

> [F]ederal causes of action under the PAA are available only for suits asserting liability arising out of 'nuclear incident[s],' which are defined as occurrences causing 'bodily injury, sickness, disease, or death,' and that because the 'offensive contact' claims did not arise out of a "nuclear incident," they fell outside the PAA's scope.[131]

The Fifth Circuit, in a split decision, reversed this holding, and remanded to the district court to dismiss the offensive battery claims with prejudice.[132] The court of appeals found that the causes of action could not be severed; once the plaintiffs brought a public liability action, the entire suit, and not just particular claims, arose under federal law.[133] Correspondingly, because the offensive contact claim does not arise from a nuclear incident (causing bodily injury, sickness, etc.), it does not create "public liability."[134] Thus, the plaintiffs could not recover on a public liability action.[135]

The court reasoned that "[allowing] recovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions, which is clearly inconsistent with [the PAA]."[136] The court clarified that the offensive contact claim can be consistent with the PAA if the plaintiff shows "a minimum threshold of injury" to satisfy the nuclear incident requirement.[137] However, because that threshold was not met, the offensive contact was not sufficient to be considered a nuclear incident.[138] Without an incident, allowing recovery on such a claim "would permit an end-run around the entire [Price-Anderson] scheme."[139]

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129. *Id.* at 191.
130. *Id.* at 195.
131. *Id.* at 191 (alteration in original) (citation omitted) (quoting 42 U.S.C. § 2014(q) (2012), which defines a nuclear incident).
132. *Id.* at 200.
133. *Id.* at 194.
134. *Id.* at 195–96.
135. *Id.*
136. *Id.* at 197.
137. *Id.* at 198–99.
138. *Id.* at 199.
139. *Id.* at 196.

IV. *COOK V. ROCKWELL*

The defendants in *Cook* operated a nuclear weapons production facility under contracts with the federal government.[140] In 1989, the FBI raided the plant and revealed that the defendants had been committing environmental crimes by mishandling radioactive waste.[141] The plant operators had poured radioactive waste on the ground, allowing it to leach into nearby bodies of water, and had also released waste into the air, polluting the soil.[142] The real estate value of surrounding homes plummeted, and following the government's criminal case, the landowners filed suit against the defendants, seeking relief through the PAA and state nuisance law.[143] The case took fifteen years to reach a jury, with much of the delay due to exhaustive pretrial discovery.[144] The jury found for the plaintiffs and awarded $177 million in compensatory damages and $200 million in punitive damages, as well as $549 million in prejudgment interest.[145]

Making "a curious tactical decision," the defendants on appeal argued that the district court's jury instructions regarding what constitutes a "nuclear incident" under the PAA were too permissive.[146] The defendants argued that the plaintiffs must show "loss of or damage to property, or loss of use of property" to qualify as an incident under the Act.[147] The defendants then asserted that the loss of real estate value resulting from nuclear contamination was not sufficient to be considered a nuclear incident, and that the plaintiffs failed to show physical damage or the loss of use of property.[148] The court of appeals agreed, vacating the lower court's judgment and remanding the case back to the district court.[149]

The court of appeals called the defendants' argument "curious" because, if a nuclear incident is proven at trial, "special rules" arising from the PAA would have come into effect to protect the defendants from liability.[150] Specifically, the government would have been required to pay any damages

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140. Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1090 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* (quoting 42 U.S.C. § 2014(q) (2012)).
148. *Id.*
149. *Id.* at 1090–91.
150. *Id.* at 1090 (citing 42 U.S.C. § 2210(c)–(e) (2012)).

that exceeded the insurance coverage of the defendants.[151] The court remarked: "Unsurprisingly given these generous financial protections, defendants often have as much incentive as plaintiffs to accept that any harm they caused stemmed from a nuclear incident."[152] Thus, the defendants' victory on appeal overturned the district court's decision in the short term, but in the long term, it restricted the defendants' access to the PAA's benefits.[153]

On remand, the plaintiffs "sought to turn the defendants' victory against them" and completely abandoned their argument that a nuclear incident had occurred.[154] Accepting that they could not prove a nuclear incident, the plaintiffs chose to forego the PAA and the benefits it afforded both sides.[155] The plaintiffs argued that the PAA only served to limit the indemnification protections of the defendant, and that state tort law could now function normally, away from the PAA.[156] Moreover, the plaintiffs had already done enough to secure a judgment on the state law nuisance claim, as the jury had already returned a state law nuisance verdict in accordance with the district court's instructions.[157]

No error was argued or revealed on the first appeal regarding the nuisance claim, and the plaintiffs concluded that the judgment on that claim should issue immediately.[158] The court of appeals summarized this argument by saying:

> Perhaps the defendants' push in the first appeal for a narrow definition of what qualifies as a nuclear incident won them the battle, but it lost them the war—failing to eliminate the plaintiffs' state law claim and serving only to narrow now and in the future both sides' ability to secure the benefits of the Price-Anderson Act.[159]

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1091.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*

The defendants responded that the PAA preempts any state law recovery when a nuclear incident is alleged but not proven.[160] The district court agreed with the defendants, and the plaintiffs appealed that finding.[161]

In regard to the substantive preemption issue, the court of appeals "start[ed] with the assumption that the historic police powers of the States were not to be superseded" without clear intent from Congress.[162] Therefore, the court has a "duty to accept the reading that disfavors pre-emption."[163] Thus, in order for the defendants to succeed on appeal, the preemptive argument must be strong enough to overcome the presumption against it.[164] The court then turned to the statute itself to look for evidence of express preemption.[165]

The court found no language indicating that Congress expressly preempted state law torts that plead but do not prove nuclear incidents.[166] The defendants argued that § 2014(hh), which provides a federal forum when a nuclear incident is asserted, is proof of Congress' express preemption.[167] However, the court reaffirmed that the section did not address when a plaintiff alleges a nuclear incident and does not prove it.[168] Furthermore, the court reasoned that the statutory definition of a nuclear incident also alludes to the possibility of lesser nuclear events, since an incident is an "occurrence" that leads to bodily harm or damage to property.[169] Accordingly, there could be occurrences that are not nuclear incidents.[170] Otherwise, this would lead to the odd result of Congress granting full recovery to those injured by a nuclear incident, but granting nothing to those injured by a lesser occurrence, without expressing any intent of this result in the statute.[171]

The court then turned to the larger statutory structure to confirm that state law torts for lesser occurrences could coexist with the current Price-Anderson

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160. *Id.* at 1092. The court further summarized the defendants' argument by saying, "[i]n this way, the defendants suggested, the Act embodies a sort of go-big-or-go-home rule of liability. If you allege and successfully prove a full-blown nuclear incident your recovery may be assured by the full faith and credit of the federal government. But if you allege and then fail to prove a nuclear incident you are barred from recovery of any kind . . . ." *Id.*

161. *Id.*

162. *Id.* at 1094 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

163. *Id.* (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)).

164. *See id.*

165. *Id.* at 1094–95.

166. *Id.* at 1095.

167. *Id.*

168. *Id.*

169. *Id.* (citing 42 U.S.C. § 2014(q) (2012)).

170. *Id.*

171. *Id.* at 1095–96.

framework. Large nuclear incidents could bankrupt nuclear power licensees and leave victims undercompensated, but lesser nuclear occurrences do not raise the same concerns.[172] To support this assertion, the court pointed out that the liability cap for nuclear licensees following nuclear incidents under the PAA ($12.7 billion) dwarfs the scale of damages owed in *Cook* ($926 million, after prejudgment interest).[173] Furthermore, the legislative history of both the 1966 and 1988 Amendments indicate that Congress only wanted to interfere with state law in large-scale incidents.[174] To find otherwise would be equivalent to "foreclosing small claims while guaranteeing larger ones," which raises due process concerns regarding the elimination of "longstanding common law rights."[175]

The defendants rested most of their argument upon the Supreme Court's statements in *El Paso*, where it said the PAA resembled a "complete preemption" structure.[176] The *Cook* court found nothing in that case to be at odds with its view of the statute.[177] While the Supreme Court said that the PAA "resembled" a complete preemption doctrine, it also said that it was "unusual" because the Act incorporates the state law rules of decision.[178] Furthermore, a few years after *El Paso*, the Supreme Court claimed that it had only encountered three complete preemption statutes, and did not list Price-Anderson among them.[179]

Defendants then turned to *Pacific Gas* and *Silkwood* to support the proposition that the federal government has completely occupied the field of nuclear safety.[180] However, the *Cook* court stated that the defendants "overread" these decisions, and asserted that these cases only support the notion that Congress gave the federal government power to regulate nuclear safety regulations, but did not "forbid states from indirectly regulating nuclear safety through the operation of traditional after-the-fact tort law remedies."[181] The court then quoted *Silkwood*, saying that the legislative

172. *Id.* at 1096.

173. *Id.* Since this was only 7.29% of the cap, the court reasoned that "[t]he claims here thus simply do not appear to be of the sort that implicate the Act and its textually manifest concerns related to liability limitation and indemnification." *Id.*

174. *Id.* at 1096–97 (quoting S. REP. NO. 89-1605, at 3206 (1966)).

175. *Id.* at 1099, 1099 n.3.

176. *Id.* at 1097 (discussing El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 476 (1999)). See *supra* Section III.A.3. for further discussion of this case.

177. *Id.*

178. *Id.* (quoting *El Paso*, 526 U.S. at 484).

179. *Id.* (citing Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8–9 (2003)).

180. *Id.*

181. *Id.* at 1098.

history "indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies."[182] The court reasoned that this system is similar to the federal approach to motor vehicle safety and medical devices.[183]

Lastly, the defendants relied on cases from other circuits, including *Hanford* and *Cotroneo*, to support their central premise.[184] The *Cook* court distinguished *Hanford* because it did not address the issue before the *Cook* court since *Hanford* held that "[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."[185] *Cook* is different because it is debating not what happens after a nuclear incident, but what happens after a lesser occurrence.[186]

The *Cook* opinion explicitly observed that this decision represented a split with the Fifth Circuit in *Cotroneo*.[187] The defendants cited *Cotroneo* to assert that allowing recovery "under state law for lesser occurrences would 'circumvent the entire scheme governing public liability actions.'"[188] The *Cook* court did not think its view "circumvent[ed] anything."[189] Allowing state law claims for lesser occurrences can be consistent with a system that provides federal jurisdiction to assure uniform processing and liability protections in the event of nuclear incidents.[190] Instead, the *Cook* court found support in the reasoning of the *Cotroneo* dissent, which remarked, "[h]ad Congress intended to limit recovery to these categories of personal injury claims, it easily could have and probably would have plainly and expressly said so."[191]

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182. *Id.* (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251–52 (1984)).

183. *Id.*

184. *Id.* at 1098–99 (discussing *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2007) ("The [Price-Anderson Act] is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."); Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 197 (5th Cir. 2011) ("[R]ecovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions . . . .")).

185. *Id.* at 1098 (quoting *In re Hanford*, 534 F.3d at 1009).

186. *Id.*

187. *Id.* at 1098–99. *Contra Cotroneo*, 639 F.3d at 197 (5th Cir. 2011) ("[R]ecovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions . . . .").

188. *Cook*, 790 F.3d at 1098 (quoting *Cotroneo*, 639 F.3d at 197).

189. *Id.*

190. *Id.* at 1099.

191. *Cotroneo*, 639 F.3d at 200 (Dennis, J., concurring in part and dissenting in part).

V. ANALYSIS

Congress should amend the PAA to completely preempt state law causes of action, and also to clarify that public liability under the Act is incurred for lesser "nuclear occurrences." Although the parties of *Cook* stipulated to dismiss the case before the Supreme Court,[192] this Note's argument does not rely on that outcome. Any possible Supreme Court decision affirming or overturning *Cook* would result in consequences that betray the purpose of the PAA. Therefore, *Cook*, and its disagreement with *Cotroneo*, indicate that the PAA needs to be amended in order to prevent two alternative outcomes: (1) an increase in the liability of nuclear operators in state courts (when the PAA was designed to protect operators from uncertainty regarding liability); or (2) the removal of a legal remedy for citizens injured by negligent operator behavior (when the PAA was designed to assure recovery for citizens injured by such behavior). To support this argument, this Note briefly discusses the preemptive status of the PAA. Then, this Note explores why the PAA should be amended, and what form those amendments should take.

A. The Preemption Argument

The *Cook* court's finding of the lack of express and field preemption in the PAA is likely correct, while the *Cotroneo* court's finding of implied preemption in the PAA is likely incorrect. If state tort law is preempted, previous federal cases indicate Congressional intent to preempt must be clear.[193] Supreme Court jurisprudence makes clear that a court should "start 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."[194] Moreover, state tort law has traditionally been given the same deference as state police power.[195] The Supreme Court stressed the need for explicit preemption in *United Mine Workers v. Gibbs*,[196] where the Court said: "State jurisdiction has prevailed in [tort] situations because the compelling state interest, in the scheme of our federalism, in the maintenance

192. *See* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.); *supra* text accompanying note 23.

193. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

194. *Rice*, 331 U.S. at 230.

195. *E.g.*, Modeste v. Local 1199, 850 F. Supp. 1156, 1161 (S.D.N.Y. 1994).

196. *United Mine Workers*, 383 U.S. at 721.

of domestic peace is not overridden in the absence of clearly expressed congressional direction."[197]

Therefore, previous case law tends to indicate that the preemption of state tort law should be through explicit congressional intent, and not by implication. Other scholars have come to a similar conclusion, with one stating "[w]hen Congress has manifested no express intent to preempt, courts should reject private tort remedies only when compliance with the obligations imposed by both state tort law and federal law is impossible."[198]

However, the "presumption against preemption" in *Rice* has been criticized by some as being too weak for courts to actually implement,[199] while others assert that the Supreme Court has been inconsistent in its application of preemption to state tort law.[200] In the absence of an express preemption clause, judges largely rely on congressional intent when deciding such issues, and have "enormous" discretion when determining if federal law should displace state law.[201]

If congressional intent is the lynchpin for this issue, then *Cook* has the superior argument. *Silkwood* decided that the legislative intent of the PAA expressed no intent to displace state law.[202] The PAA was subsequently amended, but the 1988 Amendments were intended to ensure uniformity and efficiency in legal actions following a nuclear incident.[203] There is no evidence that Congress intended to change the PAA so drastically in the 1988 Amendments as to guarantee damages from nuclear incidents but foreclose all lesser claims.

This preference for express preemption in tort actions indicates that *Cotroneo*'s holding of implied preemption was incorrect. The *Cotroneo* majority asserts that state law actions could disrupt the entire PAA scheme,[204] but it does not specify why that is the case. This assertion is only true if the

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197. *Id.* (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

198. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565 (1997) (alteration in original).

199. Christina E. Wells et al., *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793, 800 (2011) (citing Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 742 (2008)).

200. Grey, *supra* note 198, at 560 ("The Court has vacillated in its approach in the area, shifting from presumptions for to presumptions against preemption, most recently changing its course within the span of a few decisions.").

201. Wells et al., *supra* note 199, at 799 (citing Donald P. Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. MIAMI L. REV. 829, 843–44 (1984)).

202. *See supra* notes 86–90 and accompanying text.

203. *See supra* note 55 and accompanying text.

204. Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 196 (5th Cir. 2011).

PAA scheme is to ensure that big cases grant compensation while smaller cases are foreclosed from recovery. Given the background of the PAA discussed in Part II(A)–(D), nothing in the legislative intent supports this finding. Furthermore, *Silkwood* is still the leading case on this issue, and expressed that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[205] When Congress created a federal cause of action with the 1988 Amendments, it did so to "avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation."[206] Nothing in the Amendments implies that Congress intended to foreclose all claims that stemmed from an event considered less than a nuclear incident.

Lastly, the cases in Categories 1–3, discussed in Part III(B), should not be relied upon to support a preemptive argument. As noted in that section, these cases did not directly rule on the issue discussed in *Cook*.

B. Why the Price-Anderson Act Needs to Be Amended

Assuming *Cook* interpreted the PAA correctly, the case also illustrates that the Act itself is flawed because even under that interpretation, the PAA frustrates its own intended purpose. Recall that the dual purpose of the PAA is to (1) make funds available so the public is protected in the event of a nuclear incident, and (2) limit liability of nuclear developers in order to provide incentive for development.[207] Under the *Cook* interpretation, the second goal of the PAA is not served. Nuclear companies in the Tenth Circuit are now liable for any state law action that does not reach the level of a nuclear incident.

The unpredictability of this increased risk will likely serve as a disincentive for nuclear development.[208] While the safety of citizens is paramount, the government has demonstrated its intent to encourage the development of nuclear power through the PAA.[209] If these protections are weakened, nuclear companies "may well revert to the position they took prior

205. Silkwood v. Kerr-McGee, 464 U.S. 238, 251(alteration in original) (citation omitted).

206. S. REP. NO. 100-218, at 13 (1987).

207. 42 U.S.C. § 2012(i) (2012).

208. Pfeiffer, *supra* note 24, and accompanying text.

209. *Id.*; *see also* 42 U.S.C. § 2012(i) (noting the government's intent to limit the liability of nuclear developers in order to promote development).

to the passage of the Price-Anderson Act: no nuclear power plants."[210] In a worst-case scenario, this could result in the withdrawal of twenty percent of the nation's electrical generation.[211]

Cook has another negative consequence: it creates a perverse incentive for defendant companies to settle under the PAA, which the *Cook* court readily concedes.[212] A nuclear operator can admit to a nuclear incident under the PAA, preempting any state law recovery and granting special protections to the operator. Nuclear companies can likely save money on legal fees and damages by accepting the nuclear incident classification, which is equivalent to accepting a plaintiff's damages as stated. This would put the government "on the hook" without the merits of the case being debated. While the government intended to protect the public from damages caused by nuclear development, it likely did not intend to severely weaken the defendant's ability to respond to accusations of damages.

However, overturning *Cook* would frustrate the first goal of the PAA. The adoption of the complete preemption holding in *Cotroneo* would indicate that nuclear companies have the ability to operate negligently with impunity, as long as they avoid a "nuclear incident." This window of immunity is unjustifiable and drastically weakens the deterrence value of tort liability. For example, the defendant in *Cook* was operating in a negligent and dangerous fashion. The facts in *Cook* illustrated that:

> [P]lant workers had mishandled radioactive waste for years. Some had been poured into the ground and leached into nearby bodies of water. Some had been released into the air and filtered its way into the soil throughout the area. As news of all this emerged, the plant's neighbors saw their property values plummet.[213]

If *Cook* is overruled and the PAA is found to preempt all state law causes of action, victims of any negligent nuclear operation that mirrors the dangerous behavior in *Cook* would have no remedy at law. This appears to invite negligent behavior in a field where none should be permitted.

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210. Jose & Garza, *supra* note 24, at 19; *see also* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 64 (1978) (noting that nuclear companies testified before Congress that they would leave the industry without some protection from liability).

211. *See* Jose & Garza, *supra* note 24 (arguing that jury awards are effectively regulations that will "perhaps destroy[] the nuclear industry"); *see also* Pfeiffer, *supra* note 24, and accompanying text.

212. Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1090 (10th Cir. 2015), *cert. dismissed sub nom.* Dow Chem. Co. v. Cook, 136 S. Ct. 2055 (2016) (mem.) ("Unsurprisingly given these generous financial protections, defendants often have as much incentive as plaintiffs to accept that any harm they caused stemmed from a nuclear incident.").

213. *Id.* (alteration in original).

In conclusion, if Congress does not amend the PAA and the *Cook* decision is upheld, then there will likely be an increase in Price-Anderson settlements, as the legal strategy indicates that companies would now prefer to accept liability under the PAA instead of risk a state nuisance action. Alternatively, if Congress does not amend the PAA and the *Cook* decision is eventually overturned, nuclear operators across the country will have a government-sanctioned window of immunity from negligence. Thus, the PAA should be amended to avoid either of these outcomes.

C. Possible Amendments to the Price-Anderson Act

Congress should amend the PAA to completely preempt state law causes of action, but also include coverage for "nuclear occurrences" in the federal indemnification scheme. This will leave citizens with a remedy while also providing predictable outcomes and possible protections to nuclear companies. This resolution will ensure that the PAA meets its two goals of protecting and promoting nuclear development, and allowing citizens to recover if they suffer an injury due to such development. This new system could provide a sliding scale of protection to nuclear operators. In large-scale "incidents," the operator can enjoy the protection of the current PAA indemnification, whereas in small scale "occurrences," the operator only receives partial indemnification. Such a system could assure operators that their company will not be crushed by large liabilities, while still providing financial incentives for them to operate non-negligently. Furthermore, it would assure that all nuclear torts are litigated in federal court, granting some predictability and stability to the system.

These changes would nullify the perverse incentives that would exist for both parties if the PAA were left in its current state. If these changes are implemented, a nuclear company will have the freedom to challenge a plaintiff's damages without the fear of losing all of its federal protection. This improves the adversarial process, and makes it less likely that nuclear companies will "default" to nuclear incidents in order to assure their own financial protection. Plaintiffs will also benefit, as they will receive compensation for their injuries and nuclear companies will remain liable for their negligence, even if such negligence does not meet the level of a nuclear incident. Thus, the system closes the "immunity window" that would exist if the *Cook* ruling is reversed.

Alternatively, Congress could respond by amending the PAA to expressly preempt all state law remedies, while leaving the rest of the PAA intact, thereby leaving all citizens without any remedy for nuclear damages up until

a nuclear incident. While this position would provide clarity, it would still endanger citizens by creating a window of negligence where nuclear operators are immune from liability and victims do not receive compensation for their injuries.

Another option is for Congress to amend the PAA to expressly not preempt state law actions that do not rise to the level of a nuclear incident. This would effectively create a system where the PAA protections only apply when a large-scale incident occurs. The nuclear operator would be liable in state court, without any government protection, if any lesser event occurs. However, this solution fails to adequately consolidate cases into a single forum, frustrating the purpose of the 1988 Amendments.[214] This lack of uniformity creates uncertainty and may leave potential nuclear operators unsure of their potential liability. *Cook*'s sizable damages[215] are likely enough to change the cost-benefit analysis for many nuclear operators. Thus, neither of these alternative solutions should be adopted.

VI. CONCLUSION

Congress should amend the PAA to completely preempt state law causes of action, and also to clarify that public liability under the Act is incurred for lesser "nuclear occurrences." This amendment would close the loophole illustrated in *Cook* and help the PAA better achieve its goals. This will give clarity to the courts, provide a remedy to citizens, and grant predictable outcomes and protection to nuclear companies. Furthermore, this will have the result of consolidating all nuclear tort actions into federal court, which provides uniformity and allows nuclear operators to better estimate their risks and benefits. Admittedly, uniformity will suffer because each federal court will apply the substantive law of the state in which the damage occurred.[216] However, this system best preserves the purpose of the PAA, and promotes the stability of nuclear electrical generation while simultaneously ensuring that citizens have a remedy available when harmed by nuclear operations.

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214. *See generally* S. REP. NO. 100-218, at 13 (1987) (discussing the advantages of being able to consolidate such claims in federal court).

215. *See supra* note 173 and accompanying text (discussing the $926 million judgment).

216. *See* 42 U.S.C. § 2014(hh) (2012) ("substantive rules for decision in such an action shall be derived from the law of the State in which the nuclear incident involved occurs . . . .").