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## State Sovereignty - Back to the Future: The Supreme Court Reaffirms State Sovereignty in Cooperative Federalism Solutions to Environmental Problems - New York v. United States

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**STATE SOVEREIGNTY—Back to the Future: The Supreme Court Reaffirms State Sovereignty in Cooperative Federalism Solutions to Environmental Problems. *New York v. United States*, 112 S. Ct. 2408 (1992).**

INTRODUCTION

The Low-Level Radioactive Waste Policy Act of 1980<sup>1</sup> (the 1980 Act) and the Amendments Act of 1985 (the 1985 Act)<sup>2</sup> represent congressional efforts to address the difficult problem of disposing of low-level radioactive waste (LLRW)<sup>3</sup> generated by commercial use of nuclear technology.<sup>4</sup> Rather than impose a federal solution, the 1980 Act encouraged states to take responsibility for the disposal of commercial LLRW and offered incentives to states to form regional compacts and work cooperatively to establish disposal sites on a regional basis.<sup>5</sup> The 1985 Act added teeth to the voluntary provisions of the 1980 Act by providing additional monetary incentives,<sup>6</sup> allowing compact states to increase charges and deny access to waste from non-member states,<sup>7</sup> and requiring states which had not joined a compact or established their own disposal sites by 1996 to take title, physical possession, and liability for LLRW generated within their borders.<sup>8</sup>

The State of New York did not join a regional compact, but chose to address the problem by establishing its own disposal sites within the state.<sup>9</sup> New York met strong community opposition to proposed sites, however, and by 1990 had not yet begun construction of its facilities.<sup>10</sup>

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1. Pub. L. No. 96-573, § 2, 94 Stat. 3347 (1980) (codified in scattered sections of 42 U.S.C.).

2. Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified in scattered sections of 42 U.S.C.).

3. Low-level radioactive waste is defined in the Low-level Radioactive Waste Policy Act of 1985 as “not high-level radioactive waste, spent nuclear fuel, or byproduct material [as defined in Atomic Energy Act of 1954].” 42 U.S.C. § 2021b(9) (1988).

4. Brief for Petitioner State of New York at 6, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558, 91-563) [hereinafter Brief of Petitioner New York].

5. *New York v. United States*, 112 S. Ct. 2408, 2415 (1992).

6. See *infra* note 106 and accompanying text.

7. See *infra* note 109 and accompanying text.

8. See *infra* note 115.

9. Brief of Petitioner New York, *supra* note 4, at 7. New York enacted procedures for site selection in 1986, including setting up a commission to select a site. *Id.*

10. Brief for the United States at 21, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558, 91-563) [hereinafter Brief for the United States].

Facing the 1985 Act's deadlines and ominous take-title provision,<sup>11</sup> in February 1990, the State of New York and the counties of Allegheny and Cortland (chosen for potential sites) sued the United States in the United States District Court for the Northern District of New York.<sup>12</sup> Petitioners sought a declaration that, under the provisions of the 1985 Act, the "imposition of broad new affirmative duties upon the States violated the Tenth and Eleventh Amendments, as well as the Due Process and Guarantee Clauses of the United States Constitution."<sup>13</sup> The only three states with established disposal sites—Washington, Nevada, and South Carolina—intervened as defendants.<sup>14</sup>

In December 1990, the district court dismissed the complaint and granted the United States summary judgment.<sup>15</sup> Rejecting petitioners' Tenth Amendment<sup>16</sup> argument, the district court relied on *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>17</sup> noting that "judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to an inquiry of whether the political process has failed."<sup>18</sup> The court concluded that the 1985 Act imposed no restrictions on New York's "ability to operate in the political arena and to challenge the law."<sup>19</sup> The court also rejected petitioners' Eleventh Amendment<sup>20</sup> argument, holding that the Eleventh Amendment is a restriction on judicial power, not congressional power, citing *Pennsylvania v. Union Gas Co.*<sup>21</sup> The court found petitioners' claims under the Guarantee Clause<sup>22</sup>

11. 42 U.S.C. § 2021e(d)(2)(C) (1988). See *infra* note 115 for the text of this provision.

12. *New York v. United States*, 757 F. Supp. 10 (1990).

13. Brief of Petitioner New York, *supra* note 4, at 7.

14. *Id.* at 8. These states intervened by right, Fed. R. Civ. P. 24(a), but numerous utility companies' and medical groups' motions to intervene were denied. These groups were allowed to file brief as amici curiae in support of the intervenors and federal defendants. *New York v. United States*, 942 F.2d 114, 117 (1991).

15. *New York*, 757 F. Supp. at 10 (1990).

16. See *infra* text accompanying notes 52-88.

17. 469 U.S. 528 (1985).

18. *New York*, 757 F. Supp. at 12. The court cited *South Carolina v. Baker*, 485 U.S. 505 (1988), as a source for defining the concept of a "political defect." Relying on *Baker*, the court stated that "the political process rationale for judicial intervention only arises when the legislative/political avenue has been functionally closed." *Id.* at 13.

19. *Id.* Although the court noted that *Garcia* left open the possibility of challenging a federal statute when constitutional equality among the states has been jeopardized, it found no evidence that New York was being treated differently from other states. *Id.* at 13. The court relied on *Coyle v. Oklahoma*, 221 U.S. 559 (1911), for the proposition that the federal government cannot force a state to do something no other state is forced to do (Congress had enacted a law conditioning Oklahoma's admission for statehood on the placement of the state capital at a particular location). *Id.* at 12.

20. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

21. *New York*, 757 F. Supp. at 13 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

unfounded as well, since these were “inextricably intertwined” with their claims under the Tenth and Eleventh Amendments.<sup>23</sup>

In August 1991, the United States Court of Appeals for the Second Circuit affirmed the district court’s decision and sustained the 1985 Act, including the take-title provision, as constitutional.<sup>24</sup> Petitioners’ chief argument on appeal was that the 1985 Act, and particularly the take-title provision, violated state sovereignty under the Tenth Amendment.<sup>25</sup> Rejecting petitioners’ claim that the take-title provision resulted from a failure of the political process and a violation of the principles of federalism,<sup>26</sup> the appeals court stated: “Perusing the legislative history of the 1985 Amendments, the conclusion is inescapable that, rather than discovering defects in the political process, both the 1980 Act and its 1985 Amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics.”<sup>27</sup> The appeals court relied on *Garcia*, noting that “[i]n the intervening years, the Supreme Court has emphasized that the judicial role in evaluating Tenth Amendment challenges is narrowly cabined.”<sup>28</sup> The court also found that Congress has a traditional role in the area of nuclear regulation.<sup>29</sup> The appeals court echoed the district court’s reasoning in rejecting the petitioners’ other constitutional challenges.<sup>30</sup>

The State of New York, Allegheny County, and Cortland County filed separate petitions for writs of certiorari to the United States Supreme Court on September 27, October 2, and October 3, 1991, respectively. The petitions were consolidated and certiorari was granted on January 10, 1992.<sup>31</sup>

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22. See *infra* text accompanying notes 89-99.

23. *New York*, 757 F. Supp. at 13.

24. *New York v. United States*, 942 F.2d 114 (1991).

25. *Id.* at 119. The appeals court noted that the petitioners dropped their Due Process challenge on appeal. *Id.* at 118.

26. *Id.* at 120.

27. *Id.* at 119. The court found that “Congress acted only after robust debate and a clearly articulated acceptance of NGA [National Governor’s Association] and other state-based recommendations.” *Id.* at 120.

28. *Id.* at 119.

29. *Id.* at 118. Finding that New York had undertaken “an unusually burdensome task,” in proving a Tenth Amendment violation, the appeals court cited prior holdings rejecting such a challenge and establishing Congressional authority through the Commerce Clause to enact legislation governing the use of nuclear energy (citing *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978)). *Id.*

30. *New York*, 942 F.2d at 120.

31. Brief for Petitioner New York, *supra* note 4, at 9.

In *New York v. United States*,<sup>32</sup> a six-justice majority of the Supreme Court reversed the appellate court in part and affirmed in part, holding that the take-title provision of the 1985 Act violated the Tenth Amendment, but was severable from the Act's remaining provisions, which were constitutional.<sup>33</sup> This casenote discusses the Supreme Court's analysis of the limits of cooperative federalism as applied to a state-negotiated solution to the LLRW problem. It also analyzes the Court's return to an emphasis on the division of powers in the Constitution and the importance of state sovereignty. Finally, this casenote discusses the role of Congress as the enforcer of state-level solutions to environmental problems after *New York v. United States* and whether the decision impacts states' efforts to become players in solving the nation's complex environmental problems. Recent activities in Wyoming help illustrate the active role states are playing in addressing complex issues like radioactive waste disposal.

#### BACKGROUND

As early as 1959, Congress recognized the need to decentralize authority for low-level radioactive waste<sup>34</sup> disposal to the state level.<sup>35</sup> Nevertheless, as with other environmental waste disposal problems, few states rushed to encourage the location of waste disposal sites within their borders.<sup>36</sup> *New York v. United States* exemplifies the problems that typically result when a few states must bear the full burden of a national environmental problem.

Since 1979, only three sites have been available to dispose of all the nation's low-level radioactive waste. These sites are located in

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32. 112 S. Ct. 2408 (1992).

33. *Id.* at 2434-35.

34. See *supra* note 3 and accompanying text for a definition of low-level radioactive waste. The Court noted that "[r]adioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low-level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries." *New York*, 112 S. Ct. at 2414.

35. Under the 1959 Amendments to the Atomic Energy Act, Congress authorized the Atomic Energy Commission (predecessor to the Nuclear Regulatory Commission) to make agreements with governors to transfer authority for nuclear materials and byproducts to the states. 42 U.S.C. § 2021b (1988).

36. See *e.g.*, Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1 (1990), discussing the dearth of commercial hazardous waste treatment and disposal facilities and the associated "Not In My Backyard" (NIMBY) problem. *Id.* at 1-2.

Washington, Nevada, and South Carolina.<sup>37</sup> Safety concerns prompted Nevada and Washington to temporarily shut down their sites in 1979.<sup>38</sup> With the prospect of being the nation's only LLRW disposal site, South Carolina's governor threatened to drastically reduce the waste accepted from outside the state.<sup>39</sup> These events got Congress' attention in 1980, and it passed the Low-Level Radioactive Waste Policy Act (the 1980 Act) in response.<sup>40</sup> Although Congress considered constructing LLRW disposal facilities on federal land, pressure from the states resulted in the 1980 Act's state-oriented approach.<sup>41</sup> While encouraging each state to take responsibility for disposal of the LLRW generated within its borders, the 1980 Act authorized states to form regional compacts and select a disposal site within the region.<sup>42</sup> Once approved by Congress, these compacts may restrict the use of the regional disposal site to waste generated within the member states, effective in 1986.<sup>43</sup>

By 1985, only three compacts had formed and these were organized around the existing Washington, Nevada and South Carolina sites.<sup>44</sup> With the prospect that these sites could exclude waste from the thirty-one states that had not yet formed compacts, Congress passed the Low-Level Radioactive Waste Amendments Act of 1985 (the 1985

37. *New York*, 112 S. Ct. at 2414.

38. *Id.* at 2415.

39. *Id.*

40. Pub. L. No. 96-573, § 2, 94 Stat. 3347 (1980) (codified in scattered sections of 42 U.S.C.).

41. *New York*, 112 S. Ct. at 2415. The Court noted that Congress relied heavily on a report submitted by the National Governors' Association (NGA) which suggested the regional approach. The United States' argument relied heavily on the NGA report which was the work of a task force headed by seven governors. The task force:

proposed a 'state solution' to the LLRW disposal problem, which the NGA then presented to Congress with the unanimous support of its members. The NGA recommended that Congress enact legislation assigning to each State primary responsibility for ensuring the availability of adequate disposal capacity for LLRW generated within its borders. It suggested that States be allowed to meet this responsibility either individually (by providing for development of disposal facilities within their own borders), or cooperatively, by joining regional compacts that would provide disposal capacity for LLRW generated within member States. To encourage States to respond to the problem, the NGA recommended that Congress permit compacts with disposal facilities to discriminate against LLRW generated outside the compact. Finally, although the NGA believed that the prospect of exclusion from existing facilities would be sufficient to induce States to act, the NGA stated that 'stronger federal action may be necessary' if the 'states have not responded effectively' within a two-year period. [citations omitted].

Brief for the United States, *supra* note 8, at 12 (citing NATIONAL GOVERNORS' ASSOCIATION, LOW-LEVEL WASTE: A PROGRAM FOR ACTION (Nov. 1980) (Final Report of the NGA Task Force)).

42. *New York*, 112 S. Ct. at 2415.

43. *Id.*

44. *Id.*

Act).<sup>45</sup> Whereas the provisions of the 1980 Act had been voluntary, the 1985 Act offered increased incentives and penalties to encourage states to assume responsibility for disposal of LLRW waste generated within their borders. Congress was again influenced by a National Governor's Association (NGA) proposal, which reflected a compromise worked out between the states with disposal sites (sited states) and those without disposal sites (unsited states).<sup>46</sup> The compromise extended the time that sited states would have to accept waste from other states to seven years, but required unsited states to end their dependence by 1992.<sup>47</sup>

The 1985 Act set forth three types of incentives. Under the first set of incentives, Congress authorized states with disposal sites to impose a surcharge on radioactive waste from other states. A portion of this surcharge would be collected at the federal level by the secretary of state, placed in an escrow account, and paid to states achieving a series of milestones.<sup>48</sup> The second set of incentives authorized states with disposal sites and those in regional compacts to increase the cost of access to the sites, and then to deny access to waste from states not meeting a series federal deadlines.<sup>49</sup> The third set of incentives imposed on states the obligation of taking title to, possession of, and liability for the waste generated in their states as an alternative to regulating in the manner set forth in prior sections of the 1985 Act.<sup>50</sup> These provisions provided the basis for New York's constitutional challenge.<sup>51</sup>

### *The Tenth Amendment Challenge to Federal Statutes Mandating State Action*

The Tenth Amendment to the United States Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>52</sup> The Tenth Amendment is often cited for the legal principle of state sovereignty and the general constitutional limit on national power in the interest of federalism.<sup>53</sup> The federalism debate

45. 42 U.S.C. § 2021b-j (1988).

46. Brief for the United States, *supra* note 10, at 16.

47. *Id.* at 17.

48. *New York*, 112 S. Ct. at 2425.

49. *Id.* at 2427.

50. *Id.* at 2427-28.

51. *Id.* at 2408.

52. U.S. CONST. amend. X.

53. In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court stated that "[w]e use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to

has typically been a tug-of-war between Congress' assertion of power under the Commerce Clause and the States' assertion of Tenth Amendment limits on that power. However, in 1937, the Supreme Court began a policy of broad deference to Congress' authority under the Commerce Clause<sup>54</sup> which remained virtually impervious to Tenth Amendment challenges for four decades.<sup>55</sup>

In *National League of Cities v. Usery*,<sup>56</sup> the Court reaffirmed the principle of state sovereignty. At issue was a Tenth Amendment challenge to 1974 amendments to the Fair Labor Standards Act (FLSA)<sup>57</sup> which extended maximum hour and minimum wage provisions to employees of states and municipalities.<sup>58</sup> Although recognizing that FLSA was well within Congress' authority under the Commerce Clause, the Court found the 1974 amendments unconstitutional because they were directed to the "States as States."<sup>59</sup> Writing for the Court, Justice Rehnquist stated:

We have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce . . . Congress may not exercise that power so as

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regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *Id.* at 511 n.5.

54. This "modern trend" in Supreme Court Commerce Clause analysis began in 1937 with the Court's decision in *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court held that the National Labor Relations Act of 1935 applied to a Pennsylvania manufacturing plant which sent seventy-five percent of its products out-of-state, because a work stoppage at the plant would have a substantial effect on interstate commerce. *See also* *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), holding that racial restrictions at an Atlanta motel could be constitutionally reached by the 1964 Civil Rights Act, through the Commerce Clause. Prior to 1937, the Court limited Congress' power to pass national legislation under the guise of the Commerce Clause by applying a narrow construction to that authority. In striking down numerous national pieces of legislation, the Court drew a narrow definition of "commerce," distinguishing it from mining and manufacturing. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 305-10 (2d ed. 1988).

55. *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941), rejecting a Tenth Amendment challenge to applying the Fair Labor Standards Act of 1938's minimum wage and maximum hours to employees engaged in production of goods for interstate commerce; *Maryland v. Wirtz*, 392 U.S. 183 (1968), holding that minimum wage and overtime pay requirements of the Fair Labor Standards Act could be applied to public schools and hospitals; and *Fry v. United States*, 421 U.S. 542 (1975) sustaining application of the Economic Stabilization Act to limit wage increases of public employees. During this period, assertion of individual rights under the Bill of Rights and internal political restraints remained the primary check on Congress' commerce power. TRIBE, *supra* note 54, § 5-20, at 378-85.

56. 426 U.S. 833 (1976).

57. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 56 (current version at 29 U.S.C. §§ 201-219 (1988 & Supp. III 1991)).

58. *National League of Cities*, 426 U.S. at 836.

59. *Id.* at 845.



to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.<sup>60</sup>

Although *National League of Cities* seemed to reestablish the states' Tenth Amendment shield, the five-to-four decision reflected some members' reluctance to scrutinize Congress' Commerce Clause authority.<sup>61</sup>

In *Hodel v. Virginia Mining & Reclamation Ass'n*,<sup>62</sup> the Court articulated the *National League of Cities*' three-part test. Under this test a Tenth Amendment challenge to the constitutionality of Congress' actions under the Commerce Clause must show that the federal statute: 1) "regulates the states as states," 2) "address[es] matters that are indisputably attribute[s] of state sovereignty," and 3) "directly impair[s] [states'] ability to structure integral operations in areas of traditional governmental functions."<sup>63</sup> Applying this test, the *Hodel* Court upheld the Surface Mining Control and Reclamation Act of 1977<sup>64</sup> because the challenged provisions "govern only the activities of . . . private individuals and businesses" and "states are not compelled to enforce the steep-slope standards, to expend any funds, or to participate in the federal regulatory program in any manner whatsoever."<sup>65</sup> The Court stated that "there can be no suggestion that the Act commandeers the legislative processes of the States . . . ."<sup>66</sup>

In subsequent cases, the *National League of Cities* test proved more difficult to apply. The task of defining traditional government functions proved to be the test's undoing.<sup>67</sup> The majority in *Federal*

60. *Id.* at 854-55.

61. *Id.* at 856. Justice Blackmun concurred, but expressed reservations about possible implications of the decision. *Id.* (Blackmun, J., concurring). Justices Brennan, White and Marshall dissented, with Brennan arguing that "the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and . . . the States are fully able to protect their own interests . . . ." *Id.* at 876 (Brennan, J., dissenting).

62. 452 U.S. 264 (1981).

63. *Id.* at 287-88 (quoting *National League of Cities*, 426 U.S. at 854, 845, and 852). The Court added a caveat that even if these three factors were present, there might be "situations in which the nature of the federal interest advanced may be such that justifies state submission." *Id.* at 288 n.29.

64. 30 U.S.C. §§ 1201-1328 (1988 & Supp. III 1991)

65. *Hodel*, 452 U.S. at 288.

66. *Id.* *Hodel* has been described as a preemption case. TRIBE, *supra* note 54, § 5-22, at 390. However, the Court stated that "the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel*, 452 U.S. at 289.

67. *See e.g.*, *United Transportation Union v. Long Island R.R.Co.*, 455 U.S. 678 (1982), up-

*Energy Regulatory Commission v. Mississippi*<sup>68</sup> virtually ignored the test and relied, instead, on Congress' expansive powers under the Commerce Clause.<sup>69</sup> Mississippi brought a Tenth Amendment challenge to provisions of the Public Utility Regulatory Policies Act of 1978<sup>70</sup> (PURPA), which required states to consider Federal Energy Regulatory Committee (FERC) rate structures and described how the states would "consider" these in great detail.<sup>71</sup> The Court upheld the statute as valid because it found "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program."<sup>72</sup> The Court reached a similar conclusion in *Equal Employment Opportunity Commission v. Wyoming*,<sup>73</sup> upholding application of the Age Discrimination in Employment Act<sup>74</sup> to state and local government employees.<sup>75</sup> The Court reasoned that Wyoming, like Mississippi, was free to set its own goals as long as it applied the federal regulations in the process.<sup>76</sup> However, it was precisely this approach—allowing a state to determine employees pay as long as it meets federal minimum wage laws—that *National League of Cities* found invalid.<sup>77</sup>

Finally, in 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>78</sup> upholding as constitutional the application of FLSA overtime and minimum wage requirements to the San Antonio Metropolitan Transit Authority. The Court concluded that, although municipal ownership and operation of a mass-transit system was a "traditional governmental function," the

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holding federal law as applicable to a state-owned railroad and its unions because of the federal government's historical role in regulating railroads. Use of the "traditional government function" test in this case was criticized as allowing Commerce Clause regulation of all but the most fundamental state functions and discouraging states from entering new areas. TRIBE, *supra* note 54, § 5-22, at 390.

68. 456 U.S. 742 (1982).

69. *Id.* at 758. The majority opinion mentioned the test in a footnote. *Id.* at 763 n.28. The case was marked by a strong dissent from four justices, including Justice O'Connor who supported Congress' authority to enact PURPA under the Commerce Clause, but found the challenged provisions invalid because they "conscript[ed] state utility commissions into the national bureaucratic army," a result "contrary to the principles of *National League of Cities* . . . antithetical to the values of federalism, and inconsistent with our constitutional history." *Id.* at 775 (O'Connor, J., concurring and dissenting).

70. 16 U.S.C. §§ 2611-2645 (1988).

71. *FERC*, 456 U.S. at 759.

72. *Id.* at 765 (quoting *Hodel*, 452 U.S. at 288).

73. 460 U.S. 226 (1983).

74. 29 U.S.C. §§ 621-634 (1988 & Supp. III 1991).

75. *EEOC*, 460 U.S. at 243.

76. *Id.* at 240.

77. See *supra* text accompanying note 59.

78. 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

function standard was “unsound in principle and unworkable in practice . . . .”<sup>79</sup> The Court thus returned to its pre-*National League of Cities* stance,<sup>80</sup> taking a broad view of federal power and concluding that “[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”<sup>81</sup> Nevertheless, four justices dissented, warning that the majority decision “effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”<sup>82</sup>

Following *Garcia*, the Court continued its retreat from the Tenth Amendment as a limit on Congress’ Commerce Clause power, emphasizing that such limits are “structural, not substantive—i.e., . . . States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”<sup>83</sup> Nevertheless, Justice O’Connor resurrected the federalism debate in *Gregory v. Ashcroft*.<sup>84</sup> In *Gregory*, state judges challenged Missouri’s mandatory retirement laws as violating the federal Age Discrimination in Employment Act of 1967 (ADEA).<sup>85</sup>

79. *Id.* at 546.

80. *Id.* at 557. Justice Blackmun, who reluctantly concurred in *National League of Cities*, wrote the majority opinion in *Garcia*. He was joined by the four dissenters from *National League of Cities*. See *supra* note 61 and accompanying text.

81. *Id.* at 552. The Court noted the states’ role in the “selection of both the Executive and the Legislative Branches of the Federal Government,” and in particular their equal representation in the Senate. *Id.* at 551. The Court also stated:

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’

*Id.* at 554.

82. *Id.* at 560 (Powell, J., dissenting). Chief Justice Burger and Justices Rehnquist, O’Connor, and Powell dissented. Justices Rehnquist and O’Connor predicted in their dissents that the Court would return to *National League of Cities*. *Id.* at 589 (O’Connor, J., dissenting), 579-80 (Rehnquist, J., dissenting).

83. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). In *Baker*, the court upheld the Tax Equity and Fiscal Responsibility Act of 1982, which removed federal tax exemptions from state- and locally-issued unregistered bonds, against a Tenth Amendment challenge under *Garcia*. *Id.* at 513. The Court concluded that “[a]lthough *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid . . . [w]here, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated.” *Id.* at 512-13 [Court’s emphasis]. Justice O’Connor dissented, warning that, “[i]f Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state and local government activities.” *Id.* at 532 (O’Connor, J., dissenting).

84. 111 S. Ct. 2395 (1991).

85. *Id.* at 2398. Age Discrimination and Employment Act of 1967, 29 U.S.C. §§ 621-634

The Court held that ADEA did not apply to state judges, and thus avoided a *Garcia* analysis.<sup>86</sup> Writing for the majority, Justice O'Connor also argued that "Congressional interference with this decision of the people of Missouri . . . would upset the usual constitutional balance of federal and state powers."<sup>87</sup> Justice O'Connor's approach to questions of federalism in *Gregory* foreshadowed the opinion in *New York*.<sup>88</sup>

### *The Guarantee Clause*

The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican form of Government."<sup>89</sup> Whereas the Tenth Amendment provides an indirect assertion of state sovereignty, the Guarantee Clause is a "specific textual provision that safeguards state integrity."<sup>90</sup> The Guarantee Clause's lack of influence in the federalism debate<sup>91</sup> is due largely to an 1849 case, *Luther v. Borden*,<sup>92</sup> concerning which of two rival governments constituted the legitimate government of Rhode Island. In *Luther*, the Court held that "it rests with congress to decide what government is the established one in a State."<sup>93</sup> Justice O'Connor noted that, "[o]ver

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(1988 & Supp. III 1991).

86. *Id.* at 2404. The Court found that the ADEA contained no "plain statement" that Congress intended to protect state judges and, in fact, the ADEA excluded "policy makers" from the Act's protection. *Id.*

87. *Id.* at 2401. Justice O'Connor used language reminiscent of *National League of Cities* to describe state laws setting the qualifications for judges, stating that "beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id.* at 2400.

88. *Id.* at 2400. Justice O'Connor recognized that under *Garcia* "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." *Id.* at 2403. She, nevertheless, discussed the value of the separation of powers in the Constitution and explained: "In the tension between federal and state power lies the promise of liberty," and "[t]he Federal Government holds a decided advantage in this delicate balance." *Id.* at 2400 (citing the Supremacy Clause, U.S. CONST. art. VI.).

89. U.S. CONST. art. IV, § 4. The Clause reflects the framers' emphasis on "assur[ing] that state governments, like the national government, would be controlled by the popular will, principally through majoritarian processes." *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 163, 180 (1992) (citations omitted).

90. *Id.* at 179.

91. *New York*, 112 S. Ct. at 2433 (O'Connor, J., discussing the history of Guarantee Clause case law). Despite its potential use by states arguing against congressional infringement on state autonomy, the Guarantee Clause has been used infrequently in judicial history because, "[i]n most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *Id.* 2432. For cases applying the Guarantee Clause, see *infra* notes 98-99.

92. 48 U.S. (7 How.) 1 (1849).

93. *Id.* at 10.

the following century, [Luther's] limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts."<sup>94</sup> More recently, commentators have tried to vitalize the Guarantee Clause as a potential source of "judicially enforceable states rights,"<sup>95</sup> urging that "nonjusticiability should no longer serve as an obstacle to employing the Guarantee Clause as a tool for protecting state autonomy."<sup>96</sup> Justice O'Connor gave credence to linking state sovereignty to the Guarantee Clause in *FERC v. Mississippi*, remarking that "federalism enhances the opportunity of all citizens to participate in representative government."<sup>97</sup> The Court has affirmed the use of the Guarantee Clause in state challenges to the Voting Rights Act<sup>98</sup> and apportionment of state legislative districts.<sup>99</sup>

#### PRINCIPAL CASE

Dissenting in *Garcia*, Justice O'Connor avowed that "[t]he court today surveys the battle scene of federalism and sounds a retreat . . . I would prefer to hold the field and, at the very least, render a little aid to the wounded."<sup>100</sup> O'Connor returned to the battlefield in *New York v. United States* in considering whether Congress was constitutionally empowered to direct the states to act under three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the 1985 Act).<sup>101</sup>

Writing for the six-justice majority in *New York*, Justice O'Connor began her analysis with an overview of the constitutional division of authority between the federal and state governments. She explained: "If a power is delegated to Congress in the Constitution, the Tenth Amendment

94. *New York*, 112 S. Ct. at 2433 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

95. *TRIBE*, *supra* note 54, § 3-13, at 99 n.21. Tribe states that "[i]f the courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guarant[ee] clause might well provide the most felicitous textual home for that enterprise." *Id.* at 398. Tribe also proposes that the Guarantee Clause "is an express provision that might plausibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly 'to every State in this Union' rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in their own governance." *Id.*

96. *The Supreme Court—Leading Cases*, 106 HARV. L. REV. 163, 182 (1992).

97. *FERC*, 456 U.S. at 789 (O'Connor, J., concurring and dissenting).

98. *City of Rome v. United States*, 446 U.S. 156 (1980).

99. *Baker v. Carr*, 369 U.S. 186 (1962).

100. *Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting).

101. *New York*, 112 S. Ct. at 2414.

expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."<sup>102</sup> Thus, delegated powers under the Commerce, Spending, and Supremacy clauses authorize Congress to regulate the interstate market in waste disposal, condition federal funds on state compliance with federal regulations, or pre-empt state radioactive waste regulation.<sup>103</sup> The question remained whether the Tenth Amendment limits Congress' power to regulate in the way it had chosen in the area of low-level radioactive waste disposal.<sup>104</sup> With the groundrules of federalism set, the Court analyzed the 1985 Act as "three sets of 'incentives' for the States to provide for the disposal of [LLRW] generated within their borders."<sup>105</sup>

Under the first set of incentives, the three states with existing disposal sites could impose surcharges on radioactive waste from other states, but the latter could receive rebates if they achieved a series of milestones.<sup>106</sup> The Court viewed these provisions as constitutional under the Commerce Clause, and "an unexceptional exercise of Congress' power to authorize the States to burden interstate commerce."<sup>107</sup> The Court also rejected petitioners' Spending Clause challenge alleging that disbursements through the escrow account gave the states too much con-

102. *Id.* at 2417 (citations omitted).

103. *Id.* at 2418-19. Justice O'Connor noted that the Court has upheld as constitutional "withhold[ing] federal highway funds from States failing to adopt Congress' choice of a minimum drinking age." *Id.* at 2423. The Court has "recognized Congress' power to offer States the choice of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation" in "cooperative federalism" programs. *Id.* at 2424 (citing the Clean Water Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988), as amended by Act of Oct. 6, 1992, 42 U.S.C.S. §§ 6901-6992k (Law. Co-op. Supp. 1993); and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3126 (1988)).

104. *Id.* at 2420.

105. *Id.* at 2425.

106. The 1985 Act states in part:

(1) Surcharges

The disposal of any low-level radioactive waste under this section . . . may be charged a surcharge by the State in which the applicable regional disposal facility is located . . . .

(2) Milestone Incentives

(A) Escrow Account

Twenty-five per centum of all surcharge fees received by a State . . . shall be transferred . . . to an escrow account held by the Secretary [of Energy].

(B) Payments

The twenty-five per centum . . . shall be paid by the Secretary . . . if the milestone described . . . is met by the State in which such waste originated.

42 U.S.C. § 2021e(d)(1), (2)(A)(B)(i) (1988).

107. *New York*, 112 S. Ct. at 2425.

trol over these funds. The Court concluded that "the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power."<sup>108</sup>

Under the second set of incentives,<sup>109</sup> if a state fails to meet a July 1986 deadline for either joining a regional compact or developing plans to build its own disposal site, its waste generators may be charged double the ordinary surcharge by the states with disposal sites up until January 1987, after which they may be denied access to disposal sites altogether. If a state fails to meet a January 1988 deadline requiring more specific actions for regional or in-state disposal, its waste generators face increased surcharges and could ultimately be denied access.<sup>110</sup> The Court also viewed these incentives as "a conditional exercise of Congress' commerce power" and constitutional because they did "not intrude on the sovereignty reserved to the States by the Tenth Amendment."<sup>111</sup> The Court reasoned that "affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign."<sup>112</sup>

The Court also addressed petitioners' challenge under the Guarantee Clause. Applying the Guarantee Clause to the 1985 Act's two provisions which withstood Tenth Amendment scrutiny, the Court concluded that "neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government."<sup>113</sup>

108. *Id.* at 2427.

109. These provisions stated, in part:

(e) Requirements for access to regional disposal facilities

Each non-sited compact region, or State that is not a member of a compact region that does not have an operating disposal facility, shall comply with the following requirements:

(A) By July 1, 1986, each such non-member State shall ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State.

(B) By January 1, 1988 each non-sited compact region shall identify the State in which its low-level radioactive waste disposal facility is to be located, . . . develop a siting plan . . . include a description of the optimum way to attain operation . . . within the time period specified . . . .

42 U.S.C. § 2021e(e)(1)(A)(B)(i)-(iii) (1988).

110. 42 U.S.C. § 2021e(e)(2)(A)-(D) (1988).

111. *New York*, 112 S. Ct. at 2427.

112. *Id.*

113. *Id.* at 2433.

Finding the first two sets of incentives non-controversial,<sup>114</sup> the Court turned its focus to the third set of incentives, which it characterized as “an alternative to regulating pursuant to Congress’ direction, the option of taking title to and possession of the low-level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States’ failure to do so promptly.”<sup>115</sup> Finding that “Congress has crossed the line distinguishing encouragement from coercion,”<sup>116</sup> the Court concluded that the take-title provision was unconstitutional “whether one views [it] as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment.”<sup>117</sup> The Court rejected arguments that a sufficient federal interest could overcome Tenth Amendment limits, stating that, “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”<sup>118</sup>

Justice White, joined by Justices Blackmun and Stevens, wrote a concurring and dissenting opinion.<sup>119</sup> Justice White concurred in uphold-

114. *Id.* at 2434. Having affirmed the constitutionality of two of the challenged provisions, the Court determined that the take-title provision could be severed from the rest of the 1985 Act which “is still operative and . . . still serves Congress’ objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste.” *Id.*

115. *Id.* The Act provides:

(C) Failure to meet January 1, 1993 deadline

If, by January 1, 1993, a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region—

(i) each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment . . . .

42 U.S.C. § 2021e(d)(2)(C) (1988).

116. *New York*, 112 S. Ct. at 2428.

117. *Id.* at 2429. The Court reasoned that:

an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two . . . . Either way, “the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

*Id.* at 2428 (citing *Hodel*, 452 U.S. at 288).

118. *Id.* at 2429. The Court also rejected examples of “congressional regulation of individuals” and courts ordering “state officials to comply with federal law” as relevant precedent. The Court concluded that, while these were valid exercises under the Supremacy Clause, they were not comparable to Congress “command[ing] state legislatures to legislate.” *Id.* at 2430.

119. *Id.* at 2435 (White, J., concurring and dissenting). Justice Stevens, writing separately,



ing the constitutionality of the two provisions which the majority left intact and dissented from finding that the take-title provision violated principles of federalism. Thus, White argued, the take-title provision withstands the constitutional tests set forth under the Court's prior decisions where "[i]t certainly does not threaten New York's independent existence nor impair its ability to function effectively in the system."<sup>120</sup> White noted that "in its formalistically rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems."<sup>121</sup>

### ANALYSIS

The irony of the Court's decision in *New York v. United States* is that the states had gone to great lengths to avoid federal pre-emption and to maintain state control in the area of LLRW policy.<sup>122</sup> In rejecting the take-title provision, the Court refused to expand Congress' power and directed it to use its traditional tools of outright pre-emption or financial and regulatory incentives.<sup>123</sup> The result is that states will likely see an increased federal role in low-level radioactive waste management—the scenario states were trying to avoid in the compromise reached under the 1985 Act.<sup>124</sup> Nevertheless, *New York* was a victory for states because the Court reasserted the important balance between federal and state power established in the Constitution. While the Court limited Congress' enforcement role in the LLRW area, this decision will have little practical impact on states' efforts to expand their role in solving the nation's environmental problems.<sup>125</sup>

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argued that because the "Federal Government directs state governments in many realms[.]" he saw "no reason why Congress may not also command the States to enforce federal water and air quantity standards or federal standards for the disposition of low-level radioactive wastes." *Id.* at 2446-47 (Stevens, J., concurring and dissenting).

120. *Id.* at 2443 (White, J., concurring and dissenting).

121. *Id.* at 2446.

122. Brief of Respondents, States of Washington, Nevada and South Carolina at 10, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543; 91-558; 91-563 Consolidated) [hereinafter Brief of Respondents, States of Washington, Nevada and South Carolina]. These Respondents argued:

Under principles of federalism embodied in the Constitution, the states are entitled to enter into agreements among themselves which can then be ratified and enacted by Congress. The 1980 Act and its 1985 Amendments are paragons of federalism—Congress deferring to a consensus of all of the states to take responsibility for solving the problem of low-level radioactive waste management.

*Id.*

123. *New York*, 112 S. Ct. at 2435.

124. See *supra* text accompanying notes 118, 121.

125. See *infra* note 151.

*Returning to the Constitutional Division of Powers*

In *New York*, Justice O'Connor resumed the federalism debate she embarked on in *Gregory* by focusing on the "constitutional balance of federal and state powers."<sup>126</sup> Justice O'Connor neither relied on *Garcia*'s assertion that the political process alone protects state sovereignty, nor returned to the antiquated "traditional governmental functions" test of *National League of Cities*.<sup>127</sup> Instead, she defined federalism by the traditional separation of powers set forth in the Constitution<sup>128</sup> and concluded that the take-title provision represented a "type of federal action . . . inconsistent with the Constitution's division of authority between federal and state governments."<sup>129</sup> The Court avoided overruling *Garcia* and previous Tenth Amendment cases by focusing on the uniqueness of the take-title provision.<sup>130</sup> The Court correctly distinguished *New York* as involving federal legislation aimed only at states and not the "generally applicable laws" at issue in *Garcia*, *National League of Cities*, and other prior cases.<sup>131</sup> For guidance, the Court turned to principles discussed in *FERC* and *Hodel* because it found that the take-title provision "concerns the circumstances under which Congress may use the States as implements of regulation . . . ."<sup>132</sup> Thus, the Court's admonitions in *Hodel* and *FERC*, that Congress may not "commandeer" state legislative processes for federal purposes or "compel" states to enact federal programs,<sup>133</sup> proved decisive in finding the take-title provision unconstitutional in *New York*.<sup>134</sup>

The dissenters in *New York* rejected the majority's reliance on *FERC* and *Hodel*<sup>135</sup> and the distinction which precluded using *Garcia*.<sup>136</sup> Yet,

126. *Gregory*, 111 S. Ct. at 2401.

127. See *supra* text accompanying note 60.

128. *New York*, 112 S. Ct. at 2417.

129. *Id.* at 2428.

130. The Court said: "The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 2429.

131. *Id.* at 2420. The court also distinguished *Maryland v. Wirtz*, *EEOC v. Wyoming*, *South Carolina v. Baker*, and *Gregory v. Ashcroft* on similar grounds. *Id.*

132. *Id.* at 2420.

133. See *supra* text accompanying notes 66 and 72 (the cited language is found in *Hodel*, 452 U.S. at 288; and *FERC*, 456 U.S. at 765).

134. *Id.* at 2420-22, 2428.

135. The dissenters in *New York* point out that the passages cited from *FERC* and *Hodel* represent only dictum and were not essential to the holdings in those cases. Rather, the dissenters interpreted those statements as meaning that "we have not had the occasion to address whether Congress may 'command' the States to enact a certain law . . . [and] this case does not raise that issue." *Id.* at 2442. However, the majority felt that *New York* did present the question left open in *FERC* and

even applying the procedural safeguards test from *Garcia*, the result in *New York* would be the same. The dissent accepted that “States were well able to look after themselves in the legislative process that culminated in the 1985 Act’s passage.”<sup>137</sup> Petitioners argued that state sovereignty was not jeopardized by the 1985 Act because the Act “embodies a bargain among the sited and unsited States.”<sup>138</sup> However, while the two sets of incentives the Court found constitutional were part of the state-negotiated compromise, the take-title provision was not. Rather, it was “inserted by Congress at the eleventh hour” to secure passage of the 1985 Act and lacked widespread support.<sup>139</sup> This piece of legislative history illustrates that, even where states play a significant role in proposing federal legislation, the procedural safeguards of the political process, alone, are inadequate.

The Constitution’s framers intended that state sovereignty be protected by something more than the political process, and the Court acknowledged this in *New York*. Declining to apply *Garcia*, Justice O’Connor nevertheless addressed and rejected the argument that the political process adequately protects state sovereignty. She explained that “the Constitution divides authority between the federal and state governments for the protection of individuals, not for the benefit of state governments as abstract political entities.”<sup>140</sup> Thus, a federal statute which exceeds congressional powers would be unconstitutional even if it was created with the states’ consent.<sup>141</sup> Justice O’Connor stressed the importance of the federal structure, as opposed to the political process, in maintaining the clear lines of political accountability.<sup>142</sup> In so doing, she struck a blow to the limited

*Hodel*, and they answered it in the negative. *Id.* at 2420-21.

136. *Id.* at 2442. The dissenters noted that “An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that ‘commands’ specific action also applies to private parties.” *Id.* at 2441.

137. *Id.* at 2444.

138. *Id.* at 2431.

139. Brief for the Council of State Governments as Amicus Curiae in Support of Petitioners, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558, 91-563) at 16. Senator Thurmond of South Carolina proposed the take-title provision during Senate hearings on December 19, 1985. He urged the Senate to adopt his amendment to “help avert a potential nationwide crisis,” and warned them that “[t]he Governors of the sited States . . . have given all they are willing to give, and they have indicated they will close their sites if this legislation is not enacted by January 1, 1986.” 131 CONG. REC. S18,102 (daily ed. Dec. 19, 1985) (statement of Sen. Thurmond).

140. *Id.* at 2431. The Court warned that such “departures from the federal structure” were in the “personal interests” of federal and state officials seeking to “avoid being held accountable to the voters for the choice of location” of unpopular radioactive waste disposal sites. *Id.* at 2432. The Court also noted that when Congress exceeds its authority as it did in this case, “the departure from the constitutional plan cannot be ratified by the consent of state officials.” *Id.* at 2431.

141. *Id.*

142. *Id.* at 2431-32. As one commentator notes, “federalism is one of the constitutional re-

protection *Garcia* left to states and reopened the way for states to challenge, on Tenth Amendment grounds, federal incursions into state sovereignty.

*Congress May Entice, Pre-empt, But Not Command*

The *New York* Court recognized that Congress already has significant constitutional powers to encourage states to address environmental problems, and it declined to expand those powers. The Court explained that Congress' constitutional powers to regulate under the Commerce Clause and its taxing and spending powers, coupled with the ability to exert power under the Supremacy Clause, have enabled the federal government to increasingly extend its reach, while "the authority of the States has correspondingly diminished."<sup>143</sup> The facts in *New York* illustrate both Congress' ability to expand the federal reach through traditional constitutional powers and the states' efforts to curtail that expansion.<sup>144</sup>

Since the 1970s, Congress has increasingly federalized environmental law and policy.<sup>145</sup> The federal government has dominated the environmental arenas by passing legislation such as the Clean Air Act<sup>146</sup> and the Resource Conservation and Recovery Act.<sup>147</sup> Such statutes typically set national standards, but rely on financial and regulatory incentives to encourage states to adopt their own programs with federal supervision.<sup>148</sup> The federal government generally reserves the right to withdraw adminis-

strains designed to check the political process; the process, therefore, cannot guard the principle." Deborah Merritt, *The U.S. Supreme Court Year in Review, 1991-1992, Reviving State Sovereignty*, N.J.L.J., Aug. 24, 1992, at 12.

143. *New York*, 112 S. Ct. at 2419. However, the Court emphasized that while the "scope of the Federal Government's authority with respect to the States has changed over the years . . . the constitutional structure underlying and limiting that authority has not." *Id.*

144. As the respondents noted: "That the States pressured the federal government to turn the low-level waste dilemma over to them fully reflects the resurgence of the states as political actors within the drama of American federalism." Brief of Respondents States of Washington, Nevada and South Carolina, *supra* note 122, at 12.

145. ROBERT V. PERCIVAL et al., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 118 (1992). Before the flurry of federal legislation in the 1970s, environmental regulation was more traditionally viewed as a matter of state and local public health and safety, falling within the purview of state police powers (*See, e.g.,* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)). As Percival notes, "the federalization of environmental law was a product of concern that state and local authorities lacked the resources and political capability to control problems that were becoming national in scope." *Id.* at 118.

146. 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991).

147. 42 U.S.C. §§ 6901-6992k (1988), as amended by Act of Oct. 6, 1992, 42 U.S.C.S. §§ 6901-6992k (Law. Co-op. Supp. 1993).

148. PERCIVAL, *supra* note 145, at 188. For example, state eligibility to receive Superfund cleanup funding is tied to states' ability to assure treatment or disposal of hazardous waste generated in the state. 42 U.S.C. § 9604(c)(9) (1988).

tration of these programs from states not meeting federal standards.<sup>149</sup> In some areas the federal government has chosen to pre-empt states entirely.<sup>150</sup> Thus, Congress has a number of tools available to create federal, state, or cooperative federalism solutions to environmental problems.

As the federal government advances environmental legislation, states have the burden of implementing regulations and programs, without the resources to get the job done.<sup>151</sup> The *New York* Court expressed concerns about the states becoming “mere political subdivisions” or “regional offices” of the federal government.<sup>152</sup> Professor Tribe has warned that the increasing reach of the federal hand poses a danger found “in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.”<sup>153</sup> The Court recognized this danger in the take-title provision and refused to see it as a legitimate extension of Congress’ enumerated powers.<sup>154</sup>

### *States Remain Masters of Their Own Destinies*

The states’ important role in developing the 1985 Act signaled their efforts to become more prominent players in the environmental arena.<sup>155</sup> States, like Congress, already have tools at their disposal to craft regional and cooperative federalism solutions to environmental

149. See, e.g., the Resource Recovery and Conservation Act provides, in part, that “[w]henver . . . a State is not administering and enforcing a program . . . in accordance with requirements of this section . . . the Administrator shall withdraw authorization of such program and establish a Federal program . . . .” 42 U.S.C. § 6926(e) (1988).

150. For example, the Toxic Substances Control Act provides for national regulation of chemicals, 15 U.S.C. § 2605 (1988 and Supp. 1993); the Federal Insecticide, Fungicide, and Rodenticide Act requires national pesticide registration, 7 U.S.C. § 136a (1988 and Supp. 1993); and provisions of the Clean Air Act govern vehicle emissions, 42 U.S.C. § 7412(d) (1988 & Supp. III 1991).

151. PERCIVAL, *supra* note 145, at 119 (citing EPA, A Preliminary Analysis of the Public Costs of Environmental Protection 1981-200 (1990)).

152. *New York*, 112 S. Ct. at 2434. However, perhaps acknowledging this federalization of environmental policy, pre-*New York* Supreme Court observers believed that the Court’s recent decisions showed a decisive deference to the federal government in the area of environmental policy, and predicted the Court would uphold the provisions at issue in *New York*. See, e.g., Richard C. Reuben, *Federalism Favored in Environmental Cases*, CHI. DAIL. L. BULL., June 12, 1992, at 5.

153. TRIBE, *supra* note 54, at 381.

154. *New York*, 112 S. Ct. at 2428.

155. Brief of Respondents, States of Washington, Nevada and South Carolina, *supra* note 122, at 11. Respondents stated:

Decentralized regulation of low-level radioactive wastes in the United States constitutes an experiment in regulatory federalism that will test the popular propositions that States can resolve complex environmental problems and that multi-State, regional institutions can serve an effective intermediary role between State and nation.

*Id.*

problems. For example, the Compact Clause<sup>156</sup> provides states with the means to form interstate agreements with congressional approval. States have used this powerful tool successfully to form regional water compacts to resolve water allocation disputes on interstate waterways, rather than turning to Congress or the courts for equitable apportionment.<sup>157</sup> With Congress' cooperation, states have expanded the concept of interstate compacts in creative ways and increased their influence in the environmental arena. For example, in *Seattle Master Builders Association v. Pacific Northwest Electric Power Conservation Planning Council*,<sup>158</sup> an interstate compact providing its members with substantial powers to impose energy conservation standards on a federal agency, withstood a constitutional challenge.<sup>159</sup>

### *Congress' Role as Enforcer After New York*

When states work cooperatively with each other and with the federal government, environmental problems are more effectively addressed. Unfortunately, problems such as waste disposal engender a "not in my backyard" mentality rather than cooperation.<sup>160</sup> In such matters, states may have to turn to Congress to intervene. In *New York*, states with existing disposal sites touted the "indispensable role of the take title provision in th[e] compromise as a means of assuring States' compliance."<sup>161</sup> Their concerns were real, and in the aftermath of *New York* the fate of regional compacts created to address LLRW problems remains uncertain. Congress has yet to make further changes to LLRW legislation, and Nevada has closed its facility in Beatty, leaving members of the Rocky Mountain Compact without a disposal site.<sup>162</sup> Without

156. U.S. CONST. art. 1, § 10, cl. 3.

157. David E. Prange, *Regional Water Scarcity and the Galloway Proposal*, 17 ENVTL. L. 81, 88 (1986). Prange notes that "[t]he most frequent alternative to interstate compacts is equitable apportionment litigation [which is] less favored because it inevitably results in ad hoc resource allocation and because it requires the courts to delve into technical resource specialty areas . . . [and] fails to consider the plurality of interests involved in regional water allocation." *Id.* at 88-89.

158. 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

159. Under the Seattle compact, the Council has the authority to develop and impose mandatory energy conservation standards on local governments within its geographic jurisdiction which impact design and construction practices in the private building sector. According to one commentator, "[t]he compact agency's standards arguably were enforceable through recommendations, if not directives, issued to a federal agency, the Bonneville Power Administration (BPA)." Dave Frohnmayer, *The Compact Clause, the Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act*, 17 ENVTL. L. 768 (1987).

160. In *New York*, Justice O'Connor noted that "[m]ost citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes." *New York*, 112 S. Ct. at 2432.

161. Brief of Petitioner New York, *supra* note 4 at 23.

162. Nevada closed the Beatty site in January of 1993. *Nuclear Waste Dump Will Close*, L.A. TIMES January 3, 1993, at B-3. As a result, members of the Rocky Mountain Compact, including Wyoming, Colorado, Nevada, and New Mexico, were left without a facility for disposal of their

the threat of the take-title provision, it appears states have slowed efforts to select disposal sites,<sup>163</sup> and the problem of LLRW persists. Not unmindful of the seriousness of the LLRW problem, the Court, nevertheless, warned that “the Constitution protects us from our own best intentions: It divides power . . . so that we may resist the temptation to concentrate power . . . as an expedient solution to the crisis of the day.”<sup>164</sup>

The lesson from *New York* is not that Congress is precluded from acting as a referee in disputes among the states, but that it is precluded from doing so in the manner it chose in the take-title provision. The result preserves state sovereignty and does not affect states’ efforts to become more prominent players in the environmental arena. Legitimate, constitutional avenues remain open to states when they are deadlocked on environmental issues. They can ask Congress to intervene using its commerce, spending, and pre-emption powers. For example, the Court recently struck down several states’ laws which placed differential taxes or outright bans on out-of-state hazardous waste.<sup>165</sup> However, Congress will likely pass legislation allowing the states to do precisely what the Court forbade them from doing on their own.<sup>166</sup> Under the Constitution, and the Court’s decision in *New York*, the states can ask Congress to intervene in this manner, and Congress may do so through its power to regulate interstate commerce.

The Constitution’s framers provided a flexible federal structure under which Congress and the states have many tools for crafting solutions to complex policy problems like waste disposal. The *New York* Court rightly preserved the separation of powers inherent in that structure. In so doing, it underscored the important role states play in the federal system, not as agents of the federal government, but as sovereign entities.

### *Wyoming’s Radioactive Waste Controversies*

The aftermath of the *New York* decision, and the subsequent dissolution of the Rocky Mountain Compact, had an immediate, but short-lived impact on Wyoming. Anticipating the Beatty, Nevada facility closing, the Wyoming legislature repealed the state’s membership in the Rocky Mountain Compact

waste. Leonard S. Greenberger, *Switching Compacts*, 130 PUB. UTIL. FORT. 3, 28 (Aug. 1, 1992).

163. As of late August, 1993, 42 states have formed nine interstate compacts, but no disposal sites have been selected. The Washington site remains open, but South Carolina has announced it will stop accepting out-of-region waste after July 1, 1994, at which time widespread on-site storage by generators is expected. *Radioactive Waste*, *Env’tl. Rep. (BNA)* 777, 778 (August 27, 1993).

164. *New York*, 112 S. Ct. at 2434.

165. *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

166. Vicki A. O’Meara, *State-Federal Relations in Environmental Law*, ALI-ABA Course of Study in Environmental Law, Feb. 11, 1993.

in March 1992, and enacted its membership in the Northwest Interstate Compact.<sup>167</sup> Wyoming will now send its LLRW to the Hanford disposal facility in Washington.<sup>168</sup> Despite resolution of its responsibilities under the LLRW Act of 1985, the state has encountered several recent controversies regarding other types of radioactive waste. These controversies help illustrate the importance of preserving a role for states in addressing the complex issue of radioactive waste disposal.

When several companies showed an interest in siting a commercial radioactive waste disposal facility in Wyoming, the legislature reacted by passing more stringent laws governing the siting of such facilities.<sup>169</sup> Under the weight of increased siting requirements, the companies lost interest in the project.<sup>170</sup> When Fremont County began studying the prospect of siting a Monitored Retrievable Storage (MRS) facility for high-level radioactive waste in the Gas Hills area in early 1992, the state plunged into an emotional debate pitting economic development against health and safety concerns.<sup>171</sup> Governor Sullivan ultimately halted the study and ended prospects of siting this type of facility in Wyoming for the foreseeable future.<sup>172</sup> More recently, Wyoming's Department of Environmental Quality (DEQ) rejected a request by Pathfinder Mines Corporation to allow it to accept up to 800,000 tons of radioactive uranium waste from out-of-state uranium mills at its Shirley Basin mill tailings pond in Wyoming.<sup>173</sup> Under the DEQ ruling, Pathfinder may

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167. WYO. STAT. §§ 9-6-206 to 210 (Supp. 1993).

168. Telephone Interview with Roger Fransen, Legal and Natural Resource Specialist, Wyoming State Planning and Coordinator's Office (November 3, 1993). Wyoming generates just a few cubic feet per year of the kind of waste at issue under the LLRW Act in controversy in New York. Wyoming's LLRW comes primarily from research activities at the University of Wyoming. *Id.*

169. Telephone Interview with David Finley, Administrator, Solid and Hazardous Waste Division, Wyoming Department of Environmental Quality (November 1, 1993) [hereinafter Finley Interview]. The proposed facility would have accepted various categories of radioactive waste, including both high- and low-level radioactive waste. See WYO. STAT. § 35-11-503 (b)-(c) (1988 & Supp. 1993) for the siting requirements and WYO. STAT. § 35-11-103(d)(v) (Supp. 1993) for a definition of "commercial radioactive waste management facility."

170. Finley Interview, *supra* note 169.

171. Mike Sampson, *Rationale for Fremont Nuclear Waste Study Contained in Grant Application*, CASP. STAR-TRIB., February 23, 1992, at B-1. In 1992, Fremont County was awarded a \$100,000 grant from the U.S. Department of Energy to study the possibility of locating an MRS facility in the Gas Hills area. Such facilities are designed for the temporary storage of spent fuel rods from nuclear power plants until a permanent disposal site can be found. The facility would have been licensed to operate for forty years as an above-ground storage site for spent nuclear fuel from commercial nuclear reactors, which is considered high-level radioactive waste. Mike Sampson, *NRC: MRS not Essential for Public Health, Safety*, CASP. STAR-TRIB., March 12, 1992, at B-1.

172. Under the terms of Fremont County's grant, the County Commissioners or the Governor could stop the study at any time in the process. Mike Sampson, *Rationale for Fremont Nuclear Waste Study Contained in Grant Application*, *supra* note 170, at B-1. The Governor became concerned that the county was lured by the prospect of jobs and related economic development opportunities, but was "blind to the statewide and regional impacts of a facility of this type." *Id.*

173. *Mining Firm Irks Sponsors of Waste Law*, ROCKY MOUNT. NEWS, March 2, 1993, at 6.



dispose of 20,400 tons of waste from the in situ leaching process of uranium mining and not a wide category of other radioactive wastes allowed under Pathfinder's federal license with the Nuclear Regulatory Commission.<sup>174</sup> Pathfinder is challenging that ruling and the state's authority to regulate the company, arguing that federal government regulations pre-empt Wyoming from regulating in this manner.<sup>175</sup>

These three scenarios highlight the sensitive nature of importing out-of-state radioactive waste and siting waste disposal facilities. The outright rejection of the MRS facility may reflect a NIMBY approach, but the state's efforts to tighten its solid waste management laws and ensure compliance with its permitting and review process shows a sensitivity for citizens' concerns about health and safety issues. Imposing federal solutions on state and local communities will not extinguish such concerns. However, if states are full partners in solving environmental problems, citizens who must live with the consequences will have an opportunity to debate the costs and benefits of environmental solutions.

### CONCLUSION

In *New York*, the Supreme Court limited the approach to cooperative federalism that Congress chose in the take-title provision of the 1985 LLRW Act. It rejected the notion that the only check on Congress' power to impact states under the Commerce Clause is the political process. Despite considerable state input into the process that created the 1985 Act, the take-title provision failed because it was an overextension of Congress' constitutional power and an infringement on states' ability to decide their own destinies. The Court declined to expand Congress' power, and instead, returned the federalism debate to an emphasis on the division of powers in the Constitution and the importance of the Tenth Amendment as a shield for state sovereignty.

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The request was made under a "de minimus" exemption in the state's solid waste management laws which allows companies to add small amounts of in situ uranium mining waste to existing mill tailings sites without going through normal DEQ in situ permitting process required under WYO. STAT. § 35-11-427 (1988). The exemption is for:

(A) Uranium mill tailings facilities licensed by the United States Nuclear Regulatory Commission which receive in situ leaching uranium mining by-product materials or are specifically authorized by the department on a limited basis to receive small quantities of wastes defined in section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. § 2014(e)(2)) which were generated by persons other than the facility owner or operator or which were generated at a location other than the location of the facility, or both . . . .

WYO. STAT. § 35-11-103(d)(v)(A) (1988 & Supp. 1993).

174. Hugh Jackson, *DEQ Rejects Big Pathfinder Waste Request*, CASP. STAR-TRIB., March 23, 1993, at A-1.

175. Finley Interview, *supra* note 169.

After *New York*, Congress can still intervene in states' efforts to take responsibility for solving the nation's environmental problems, but it must do so under traditional Commerce, Spending, and Pre-emption powers, without upsetting the delicate balance of powers the framers wisely built into the Constitution.

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