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New York v. United States: Federalism and the Disposal of Low-Level Radioactive Waste

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INTRODUCTION

Disposal of radioactive waste material is one of the most critical problems of modern times. Since 1954, when Congress enacted the Atomic Energy Act[1] (AEA) for the purpose of promoting the commercial use of radioactive materials, the growing use of nuclear energy for both military and non-military purposes has created a waste disposal crisis of substantial proportions.[2]

Radioactive waste is divided into low-level and high-level waste categories. The Nuclear Regulatory Commission (NRC) is responsible for regulating the management of low-level radioactive waste (LLRW), as well as a number of other nuclear-related operations, including commercial nuclear power plants.[3] LLRW "includes all radioactive waste that is not classified as spent fuel from commercial nuclear power plants, defense[-related] high-level radioactive waste from producing weapons, or uranium tailings."[4] It includes contaminated equipment, protective clothing, rags, and sludges, some of which is mixed with non-radioactive hazardous substances.[5]

Although 97 percent of LLRW is so slightly radioactive that it requires little or no shielding to protect the public, the remaining 3 percent consists of materials that must be shielded for periods ranging from 300 to several thousand years.[6] Some of the material classified as LLRW contains "'hot spots', where concentrations of radioactivity may be quite high."[7] Even aside from such hot spots, LLRW poses a threat to human health.[8] While nuclear power plants generate the bulk of

1. Atomic Energy Act, Pub. L. No. 83-703, 68 Stat. 921 (1954) (codified as amended at 42 U.S.C. §§ 2011-2297 (1988)).

2. *See, e.g.*, New York v. United States, 112 S.Ct. 2408, 2414-15 (1992).

3. Office of Technology Assessment (OTA), U.S. Congress, Partnerships Under Pressure: Managing Commercial Low-Level Radioactive Waste 9, 59 (1989) [hereinafter *OTA*].

4. *Id.* at 7.

5. *Id.* at 82-85; R. Lipschutz, Union of Concerned Scientists, Radioactive Waste: Politics, Technology, and Risk 33-34 (1980).

6. OTA, *supra* note 3, at 82.

7. Lipschutz, *supra* note 5, at 34.

8. *See, e.g.*, C. Straub, Atomic Energy Commission, Low-Level Radioactive Wastes-Their Handling, Treatment, and Disposal 329 (1964) (because all radioactive exposure damages living cells to some degree, human exposure to radioactivity should be minimized to the extent practicable); C. Fox, Atomic Energy Commission, Radioactive Wastes 11 (1965) (LLRW contains up to 1,000 times the concentration of radioactivity that is

LLRW, a significant quantity of LLRW is generated by industry, and academic and medical institutions.[9]

States are allowed to regulate LLRW that is generated by the private sector, as long as the regulations are compatible with, and at least as restrictive as, those of the NRC.[10] However, states may not regulate LLRW generated by NRC-licensed nuclear power plants.[11] The Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA, or the Act) attempted to solve the problem of insufficient LLRW disposal capacity in the United States by further shifting responsibility for LLRW disposal to the states.[12] The Act required each state to provide an approved disposal site that could be located either within that state or within a region formed by a compact including that state.[13] In June, 1992, the United States Supreme Court struck down a key provision of the Act that would have forced a state to take title to all LLRW generated within its borders if that state failed to meet a 1996 deadline for providing such a disposal site.[14]

This note will examine the constitutional basis for, and the consequences of, that decision. In addition, this note will suggest that the Court's new criterion for determining when a federal statute violates principles of federalism be replaced by a more coherent and workable test resting on a theory of political accountability and on the Guarantee Clause of the United States Constitution.[15]

BACKGROUND

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act[16] (the 1980 Act) in response to the threatened closing of two of

considered safe for direct release).

While the effects of radiation on the human body are imprecisely known, Lipschutz, *supra* note 5, at 5-6, it is clear that long-term exposure to low-level radiation can lead to cancer, reproductive failure, genetic defects, and birth abnormalities, and that statistically higher incidences of those diseases are associated with such exposure. *Id.* at 14-27.

9. OTA, *supra* note 3, at 82.

10. *Id.* at 9 n.10.

11. *Id.*

12. 42 U.S.C. §§ 2021b-2021j (1988).

13. 42 U.S.C. § 2021e(d)(2)(c) (1988).

14. New York v. United States, 112 S.Ct. 2408 (1992).

15. The text of the Guarantee Clause reads as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

16. Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573 (1980), 94 Stat. 3347, *repealed* by Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, Title I, 99 Stat. 1842 (1985) (codified as amended at 42 U.S.C. §§ 2021b-2021d (1988)).

the country's three LLRW storage facilities.[17] The threatened closings came on the heels of a 50 percent reduction in the quantity of radioactive waste accepted at the third facility.[18] The purpose of the 1980 Act was to hold each state responsible for locating a site or sites in which to dispose of all LLRW generated within that state's borders.[19] Pursuant to findings that disposal of waste is achieved "'most safely and efficiently . . . on a regional basis'", the 1980 Act gave states the option of forming regional compacts to dispose of LLRW, subject to ratification by Congress.[20] As an incentive to form such compacts, beginning in 1986, a ratified compact could exclude the importation of LLRW from states outside the compact.[21] Unlike its later-amended version, however, the 1980 Act did not provide any penalties for states choosing not to enter compacts.[22]

By 1985, it was apparent that the 1980 Act was not achieving its intended purpose.[23] Thirty-one states had not developed disposal systems or plans for the systems, and were about to be excluded from using the three existing facilities.[24] In response to a proposal by the National Governors' Association, Congress passed the Low-Level Radioactive Waste Policy Amendments Act (the Act or LLRWPAA).[25] The Act extended until 1992 the time during which the three existing disposal sites would be required to continue accepting out-of-state or out-of-region LLRW.[26]

The Act contained three key provisions. First, a monetary-incentive provision allowed the sited states[27] to begin demanding payment of a surcharge in 1986 for out-of-region waste.[28] Furthermore, the sited states could increase the surcharge biannually.[29] Twenty-five

17. New York, 112 S.Ct. at 2415. The facilities slated to close were Hanford, Washington and Beatty, Nevada, and the third facility was Barnwell, South Carolina. *Id.* at 2414. Without the express approval of Congress, the dormant commerce clause prohibited these states from excluding out-of-state waste, unless they shut down the disposal facilities entirely. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978).

18. New York, 112 S.Ct. at 2414.

19. *Id.* at 2415 (citing Pub.L. No. 96-573, § 4(a)(1), 94 Stat. 3348).

20. *Id.* (quoting Pub.L. No. 96-573, § 4(a)(1)(B), 94 Stat. 3348).

21. *Id.* (citing Pub.L. No. 96-573, § 4(a)(2)(B), 94 Stat. 3348).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (citing 42 U.S.C. § 2021e(a)(2)). "Out-of-region LLRW" refers to LLRW generated within the borders of states not belonging to the compact in question.

27. "Sited states" refer to states in which LLRW disposal facilities are located. *See id.*

28. *Id.* (citing 42 U.S.C. § 2021e(d)(1)). The surcharge was imposed in addition to the usual disposal fees assessed by the disposal facilities. *Id.*

29. *Id.* Those surcharges would increase from $10 per cubic foot in 1986 to $40 per cubic foot in 1990. *Id.*

percent of the funds generated by the surcharges were to be placed in an escrow fund to reimburse states the same percentage of the already-paid surcharges as those states complied with various deadlines.[30] The deadlines were as follows: 1) states were required to pass legislation either to join a compact or to "go it alone" by July, 1986; 2) each state that joined a compact had to identify the state in the compact where the LLRW-disposal facility would be located, and develop a siting plan for the facility by January, 1988; and 3) each state that was to operate a LLRW-disposal facility was required to file an application for a license to operate the facility by January, 1990.[31] States failing to meet the deadlines could be assessed even greater surcharges.[32]

Second, a denial-of-access provision specified conditions under which LLRW generators could be denied access to the existing disposal sites.[33] If a state missed the July, 1986 deadline by six months, the January, 1988 deadline by one year, or the January, 1990 deadline at all, LLRW generators in that state could have been denied access to the Washington, Nevada, and South Carolina disposal facilities.[34]

Finally, the take-title provision required that any state failing to provide for a disposal site by January 1, 1996, either within the state itself or in another state within its compact region, would have to take title to all privately generated LLRW within its borders.[35] From that point on, the state would incur any liability stemming from damages caused by the waste.[36]

New York chose not to join a regional compact.[37] Instead, it enacted legislation pursuant to LLRWPAA providing for siting and construction of a disposal facility, and identified several potential sites.[38] However in 1990, because strong resistance to the plan by residents of the two counties where the potential sites are located threatened the future development of a disposal site, the state, along with the two counties, filed suit against the United States.[39]

The lawsuit challenged the constitutionality of the Act based on alleged violations of the Tenth and Eleventh Amendments, the Due Process Clause of the Fifth Amendment, and the Guarantee Clause.[40] The District Court for the Northern District of New York dismissed

30. *Id.* at 2416 (citing 42 U.S.C. §§ 2021e(d)(2), (e)(1)).
31. *Id.* (citing 42 U.S.C. § 2021 e(e)(1)(c)).
32. *Id.* (citing 42 U.S.C. §§ 2021e(e)(2)(A), (B), (D)).
33. *Id.* (citing 42 U.S.C. §§ 2021e(e)(1), (e)(2), (f)(1)).
34. *Id.*
35. *Id.* at 2416 (citing 42 U.S.C. § 2021e(d)(2)(C)).
36. *Id.*
37. *Id.*
38. *Id.* at 2416-17.
39. *Id.* at 2417.
40. *Id.*

New York's complaint.[41] New York appealed, but only on grounds of alleged violations of the Tenth Amendment and the Guarantee Clause.[42] The Court of Appeals for the Second Circuit affirmed the District Court's dismissal.[43] The Supreme Court, in an opinion written by Justice Sandra Day O'Connor, affirmed the lower court's ruling upholding the constitutionality of the monetary-incentive and denial-of-access provisions of LLRWPAA, but held that the take-title provision violated the Tenth Amendment.[44]

THE COURT'S REASONING

While the primary focus of this note is on the Court's decision regarding the take-title provision of LLRWPAA, a brief discussion of the Court's analysis of the other two key provisions is intended to help distinguish those provisions from the take-title provision in terms of federalism.

The Court began its analysis of the Act's monetary-incentive provision by asserting that "[r]egulation of the . . . interstate market in waste disposal is . . . well within Congress' authority under the Commerce Clause", because residents of one state commonly sell space in their disposal sites to residents of other states.[45] The Court then analyzed each of the three components of the monetary-incentive provision. First, the Court upheld the Act's authorization for sited states to impose a surcharge on LLRW, because Congress has the power to permit states to discriminate against interstate commerce.[46] Second, the Court upheld the provision requiring the Secretary of Energy to place a portion of the surcharge in an escrow account, analogizing federal

41. New York v. United States, 757 F.Supp. 10 (N.D.N.Y. 1990). The court's dismissal was based on its interpretation of Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), which prohibited review of national legislation affecting state authority, unless the legislation restricted a state's "ability to operate in the political arena", or treated the state inequitably as compared to other states. *Id.* at 13. *Garcia* is discussed *infra* notes 107-119 and accompanying text.

42. New York v. United States, 942 F.2d 114, 118 (2nd Cir. 1991).

43. *Id.* at 115. The Second Circuit essentially followed the reasoning of the district court, and added 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." *Id.* at 119. See also discussion on aspects of the legislative history of the Amendments *infra* notes 77-78 and accompanying text.

44. New York v. United States, 112 S.Ct. 2408 (1992).

45. *Id.* at 2419-20 (citing Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019, 2023 (1992)).

46. *Id.* at 2425-26.

receipt of part of the surcharge to a federal tax on interstate commerce.[47] Finally, the Court upheld the partial reimbursement of the surcharge to states that meet required deadlines, because such reimbursement falls within Congress' power under the Spending Clause.[48]

The denial-of-access provision was upheld, again because of Congress' power to allow states to discriminate against interstate commerce.[49] The Court did not consider this provision as a mechanism to force states to regulate LLRW according to the federal program, because states have the choice not to do so.[50] If a state chooses not to follow the federal guidelines, generators of LLRW within the state's borders may be prohibited from exporting the waste. In that case, the waste generators, rather than the states, will bear the burden imposed by the denial-of-access provision."[51]

While the above two provisions of the Act were deemed to encourage the states to provide for LLRW disposal facilities, the Court held that the take-title provision "crossed the line distinguishing encouragement from coercion,"[52] thereby violating the Tenth Amendment. The Court observed that although "the text of the Tenth Amendment[53] . . . is essentially a tautology", the amendment "reserve[s] power to the states . . . [where] an incident of state sovereignty is protected by a limitation on an Article I power."[54] The Court went on to establish such a limitation by adopting dicta from *Hodel v. Virginia Surface Mining and Reclamation Assn.* as the basis of its holding: "Congress may not simply 'commandee[r] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.'"[55]

In distinguishing *New York* from a line of cases that reflect the "unsteady path"[56] of the Court's modern Tenth Amendment jurisprudence, the Court emphasized that "this is not a case in which Congress has subjected a state to the same legislation applicable to private par-

47. *Id.* at 2426.

48. *Id.* at 2426-27.

49. *Id.* at 2427.

50. *Id.*

51. *Id.*

52. *Id.* at 2428. The search for the line between encouragement and coercion is, in essence, the heart of the Court's attempt to reinterpret the Tenth Amendment.

53. "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." U.S. Const. amend. X.

54. *New York*, 112 S.Ct. at 2418.

55. *Id.* at 2420 (quoting Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

56. *Id.* The "unsteady path" is principally reflected by three landmark cases: Maryland v. Wirtz, 392 U.S. 183 (1968); National League of Cities v. Usery, 426 U.S. 833 (1976); and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See infra* notes 91-163 and accompanying text for discussion of these and other pertinent cases.

ties."[57] In other words, LLRWPAA's take-title provision commands only the states themselves, not the individual citizens of the states. By contrast, the Fair Labor Standards Act[58] (FLSA), which was the subject of the modern landmark cases involving the Tenth Amendment, subjects state governments to a generally applicable law.[59] FLSA was upheld in its entirety in its most recent visit with the Court.[60]

The Surface Mining Control and Reclamation Act[61] of 1977 (SMCRA) is another statute the Court compared to LLRWPAA. While SMCRA is applicable only to the states, Congress gave the states the choice of enforcing the statute or withdrawing from the field and allowing the federal government to bear "the full regulatory burden."[62] The Court thus implied that the vice of LLRWPAA lies in relieving the federal government of any burden at all in disposing of LLRW, by compelling the states to choose between enforcing provisions of the Act and taking on the burden of owning the waste.

Yet another statute that the Court distinguished from LLRWPAA is the Public Utility Regulatory Policies Act[63] of 1978 (PURPA). PURPA mandated action by state utilities commissions, but that action only required consideration, and not enactment, of federal proposals.[64] Also, as in the case of SMCRA, states could choose to withdraw from the field of regulating utilities.[65]

The Court contended that an essential feature of the United States Constitution was to remedy the limited powers of the central government under the Articles of Confederation by allowing the national gov-

57. *New York*, 112 S.Ct. at 2420.

58. 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992).

59. *New York*, 112 S.Ct. at 2420.

60. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *See infra* text accompanying notes 107-119.

61. Pub. L. 95-87, 91 Stat. 445 (1977) (current version at 30 U.S.C. §§ 1201-1328 (1988 & Supp. IV 1992)).

62. *New York*, 112 S.Ct. at 2420 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)). *See infra* text accompanying notes 120-128.

63. Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3120 (codified as amended in scattered sections of 15 U.S.C., 16 U.S.C., and 42 U.S.C.).

64. *New York*, 112 S.Ct. at 2421 (citing FERC v. Mississippi, 456 U.S. 742, 764 (1982)). Justice O'Connor dissented from the *FERC* majority, asserting that the mandate to the utilities commissions to consider federal proposals amounted to a *commandeering* of the state agencies. *FERC*, 456 U.S. at 781 n.8 (O'Connor, J., dissenting in part). *See also infra* text accompanying notes 129-147.

65. *New York*, 112 S.Ct. at 2421 (citing *FERC*, 456 U.S. at 764). In her dissent in *FERC*, Justice O'Connor, in response to the notion that PURPA gave the states a choice whether to consider the federal proposals, drew an analogy between a state's withdrawing from the field of regulating utilities and the state's abolishing its legislature. *FERC*, 456 U.S. at 781-82 (J. O'Connor, dissenting in part). Here, again, is an illustration of the Court's continuing difficulty in distinguishing encouragement from coercion.

ernment to act "directly upon the citizens" without limiting the sovereignty of the states.[66] To illustrate the degree of state sovereignty comprehended by the Constitution, the Court quoted Alexander Hamilton as having exclaimed at New York's ratification convention: "But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible."[67] By drawing on this and similar comments by various Framers of the Constitution, the Court supported its thesis that while Congress can exercise its commerce powers directly on citizens of a state, it cannot "regulate state governments' regulation of interstate commerce."[68]

The Court considered the take-title provision to be just such an impermissible regulation of state regulatory authority, and labeled the provision a "commandeer[ing of] state governments into the service of federal regulatory purposes."[69] The take-title provision offered a state the choice of developing a disposal site for LLRW or ultimately taking title to privately generated waste. The Court deemed either option, standing alone as a federal mandate, to constitute compelled regulation.[70] The fact that states had a choice between regulating LLRW pursuant to congressional instructions and regulating it by taking title to the waste (also a congressional instruction) was immaterial, according to the Court's analysis.[71] As the Court put it, "A choice between two unconstitutionally coercive regulatory techniques is no choice at all."[72] The Court also feared that state officials would bear the brunt of public disapproval for decisions required by the Act, "while the federal officials who devised the regulatory program remain[ed] insulated from the electoral ramifications of their decision[s]."[73]

After striking down the take-title provision on Tenth Amendment grounds, the Court chose not to address the Guarantee Clause challenge of that provision.[74] However, as to the monetary-incentive

66. *New York*, 112 S.Ct. at 2421 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

67. *Id.* at 2423 (quoting 2 J. Elliot, Debates on the Federal Constitution 233 (2d ed. 1863)).

68. *Id.*

69. *Id.* at 2428.

70. *Id.* In particular, the Court claimed that a forced transfer of title to LLRW from waste generators to the states is equivalent to "a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* While the Court did not elaborate on the subsidy concept, presumably the essence of this subsidy is that it would transfer liability for the waste from the private generators to the state. If the state, rather than the generator, had to pay for the waste disposal costs as well as for personal and property damages caused by the waste, then the state, in effect, would be paying for what would otherwise be the generator's expenses.

71. *Id.*

72. *Id.*

73. *Id.* at 2424.

74. *Id.* at 2432. *See supra* note 15 for the text of the Guarantee Clause.

and denial-of-access provisions of LLRWPAA, the Court dismissed the Guarantee Clause challenge, because the possibility that New York might fail to receive the monetary incentives or lose the right to dispose of LLRW in another state did not "pose any realistic risk of altering the form or the method of functioning of New York's government."[75]

The dissent concurred with the majority's handling of the monetary-incentive and denial-of-access provisions, but would have upheld the take-title provision.[76] They saw LLRWPAA as essentially a ratification of an interstate compromise, developed by the National Governors' Association (NGA) and numerous other state officials, and thus analogous to a compact among all the states.[77] Therefore, according to their reasoning, the take-title provision was not imposed on the states by the federal government.[78]

The major point of disagreement raised by the dissenters was the failure of the majority to analyze the take-title provision under the Tenth Amendment test established in *Garcia v. San Antonio Metropolitan Transit Authority*.[79] According to that test, Congress' Commerce Clause power can only be limited by the courts where it is necessary to protect states from "possible failings in the national political process".[80] The dissent contended that LLRWPAA represents no "failing of the political process[,] . . . [because] the states were well able to look after themselves in the legislative process that culminated in [LLRWPAA's] passage."[81]

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75. *New York*, 112 S.Ct. at 2433.

76. *Id.* at 2435 (White, J., dissenting in part, joined by Blackmun and Stevens, J.J.).

77. *See generally id.* at 2435-41 (White, J., dissenting in part) for the dissent's view of the Act's legislative history and the NGA's lobbying efforts.

78. *Id.* In addressing the dissent's argument, the majority asserted that "[t]he fact that the Act, like much federal legislation, embodies a compromise among the States does not elevate the Act . . . to the status of an interstate agreement requiring Congress' approval under the Compact Clause." *Id.* at 2432.

The Court further stated that in any case, state officials cannot consent to an unconstitutional encroachment on state powers by Congress. *Id.* at 2431. In support of its assertion, the Court drew an analogy to the federal doctrine of separation of powers: "The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment." *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 118-37 (1976) and INS v. Chadha, 462 U.S. 919, 944-45 (1983)) (the President cannot consent to an infringement of his appointment power or veto power).

79. *New York*, 112 S.Ct. at 2441 (White, J., dissenting in part) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The dissent also criticized the majority for deriving the commandeering criterion from dicta found in cases that did not support the Court's decision in *New York*. *Id.* at 2442 (White, J., dissenting in part)).

80. *Id.* at 2443-44 (White, J., dissenting in part) (citing *Garcia*, 469 U.S. at 554).

81. *Id.* at 2444 (White, J., dissenting in part).

The dissent further pointed out that "[the] Court has upheld congressional statutes that impose clear directives on state officials."[82] The majority countered that those prior cases involved only the application of the Supremacy Clause, and addressed statutes that regulated individuals, including state officials, rather than mandating state regulation.[83]

A BRIEF MODERN HISTORY OF THE TENTH AMENDMENT

New York v. United States epitomizes the modern battle between the Commerce Clause[84] and the Tenth Amendment. Underlying this controversy is the age-old struggle between proponents of strong central government and proponents of states' rights.[85] The struggle is at the heart of fundamental questions about federalism. The Court's modern debate over this issue began in 1968 with *Maryland v. Wirtz*,[86] and has not been laid to rest. Because *New York* is the latest in a series of opinions that reflect this ongoing debate, an outline of what Justice O'Connor referred to as the "unsteady path"[87] of the Supreme Court's Tenth Amendment jurisprudence will help place the *New York* decision in better perspective.

In the late 1930s and early 1940s, cases addressing "New Deal" legislation greatly expanded the scope of the federal government's commerce powers. Those cases were based on the recognition that most commercial activities in an integrated national industrial economy affect interstate commerce; and, in the aggregate, such activities substantially affect interstate commerce.[88] This expansion of commerce powers is typified by the Fair Labor Standards Act of 1938 (FLSA).[89] FLSA, which was upheld in *United States v. Darby*, mandated a mini-

82. *Id.* at 2444 n.3 (White, J., dissenting in part) (citing Puerto Rico v. Branstad, 483 U.S. 219, 227-28 (1987); South Carolina v. Katzenbach, 383 U.S. 301, 319-20, 334-35 (1966); Testa v. Katt, 330 U.S. 386, 392-94 (1947)).

83. *Id.* at 2429-30. The majority saw no problem with requiring a state judge to enforce federal law or with the federal courts ordering state officials to personally comply with federal law. *Id.* at 2430.

84. U.S. Const. art. I, § 8, cl. 3.

85. *See* R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1210-1222 (1977) for discussion of the struggle between centralism and decentralism as it relates to environmental policy.

86. Maryland v. Wirtz, 392 U.S. 183 (1968).

87. *See supra* note 56.

88. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

89. Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992)).

mum hourly wage and minimum overtime rate for private-sector employees whose work involved commerce or the production of goods for commerce.[90]

A. *Maryland v. Wirtz*

Congress amended FLSA in 1961 to include *all* employees in any private enterprise "engaged in commerce or in the production of goods for commerce."[91] FLSA was amended again in 1966 to include employees of hospitals, certain other health-care institutions, and schools, whether those institutions were private or operated by a state or a state's subdivision.[92] *Maryland v. Wirtz* upheld the amendments by a 6-2 vote, justifying the extension of federal commerce powers, in part, on the grounds that "substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise," and ultimately disrupting interstate commerce.[93] The Court effectively affirmed Congress' plenary power under the Commerce Clause subject only to the existence of "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce."[94]

The dissent in *Wirtz* argued that the 1966 amendment to FLSA seriously invaded state sovereignty, in violation of the Tenth Amendment, by forcing states to choose between spending more money on schools and hospitals and curtailing services in those institutions.[95] The dissenters raised the specter of Congress going so far as to "draw up each State's budget" in the name of protecting commerce.[96]

B. *National League of Cities v. Usery*

Congress amended FLSA again in 1974, extending its coverage to nearly all employees of the states and their subdivisions.[97] The 1974 Amendments went too far for a more conservative Court, which, in *National League of Cities v. Usery*, overruled *Wirtz* by a 5-4 margin.[98] The *Usery* Court established a Tenth Amendment limit to federal statutes based on the Commerce Clause, holding invalid all regulations that

90. *Darby*, 312 U.S. at 100.

91. Maryland v. Wirtz, 392 U.S. 183, 186 (1968) (quoting 29 U.S.C. § 206 (1964 ed., Supp. II)) (quoted language is unchanged in the current version at 29 U.S.C. § 206 (supp. IV 1992)).

92. *Id.* at 186-187.

93. *Id.* at 192.

94. *Id.* at 190 (quoting Katzenbach v. McClung, 379 U.S. 294, 303-4 (1964)).

95. *Id.* at 201-3 (Douglas, J., dissenting).

96. *Id.* at 205.

97. National League of Cities v. Usery, 426 U.S. 833 (1976).

98. *Id.* at 855.

"operate to directly displace the states' freedom to structure integral operations in areas of traditional functions."[99] In the Court's opinion, the 1974 FLSA amendments sought to regulate the "States as States",[100] and caused a substantial increase in the costs of providing basic services.[101] As a result, the amendments "displace[d] state policies regarding the manner in which they will structure delivery of those . . . services."[102]

Justice Blackmun announced that he was joining the Court's opinion with the understanding that the new test would not "outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[103] The dissenters, on the other hand, pointed out that the Tenth Amendment had never before been interpreted to limit Congress' constitutionally authorized powers.[104] They described the new test as unworkable, because the Court failed to articulate any meaningful distinctions among the various state-operated services on which to determine whether federal regulation of those services would be constitutionally permissible.[105] Instead of attempting to make such a distinction, the dissent argued that the judiciary should play a limited role in reviewing federal law regulating commerce, because the national legislative process would adequately protect, and was designed to protect, state interests.[106]

C. Garcia v. San Antonio Metropolitan Transit Authority

Nine years later, *Usery* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, also by a 5-4 vote.[107] *Garcia* involved yet another dispute over the applicability of FLSA.[108] Justice Blackmun, switching sides and writing for a new majority, declared that the *Usery* test was indeed unworkable.[109] He supported his contention by cit-

99. *Id.* at 852.

100. *Id.* at 845.

101. *Id.* at 846-47.

102. *Id.* at 847.

103. *Id.* at 856 (Blackmun, J., concurring).

104. *Id.* at 861-73 (Brennan, J., dissenting). Justice Brennan asked rhetorically whether a state could "engage in business competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the Federal Government to regulate commerce". *Id.* at 872.

105. *Id.* at 872-80. For example, the dissent wondered why state-operated railroads should not be considered an essential governmental service, *id.* at 880 (citing *id.* at 854 n.18), while state-operated police and fire departments should be. *Id.* at 880.

106. *Id.* at 876-78. Justice Brennan contended that the courts' role in such cases should be limited to reviewing Congress' judgment as to what constitutes commerce. *Id.* at 876.

107. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

108. *Id.* at 530.

109. *Id.* at 546-47.

ing a long list of lower court opinions to demonstrate the difficulty in deciding which governmental functions are traditional.[110] *Garcia* effectively adopted the dissent's position in *Usery*, and rejected any limitation on congressional power under the Commerce Clause, except where necessary "to compensate for possible failings in the national political process."[111]

Citing the works of Framers James Madison and James Wilson, the Court observed that the federal government was politically structured to protect the states' sovereign interests.[112] The Court concluded that those interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[113] In upholding FLSA in its entirety, the Court said that it did not perceive any aspect of FLSA that was "destructive of state sovereignty."[114]

The dissenters, consisting of Justice O'Connor, along with three of the justices who formed the majority in *Usery*, reacted bitterly in three separate opinions.[115] Justice Powell argued that "[t]he States' role in our system of government is a matter of constitutional law, not of legislative grace."[116] Justice O'Connor observed that when the United States was founded, there was little inherent conflict in the Framers' intentions to diffuse power between the national government and the states, "because technology had not yet converted every local problem into a national one."[117] However, now that "virtually every state activity. . . arguably 'affects' interstate commerce," Congress is in position to take over the powers that the Framers envisioned for the states, thus threatening to erase the intended diffusion of power.[118] And Justice Rehnquist, in a terse statement, predicted that the principles articulated in *Usery* would "in time again command the support of a majority of the Court."[119]

D. Environmental Cases

While many of the recent cases dealing with principles of federalism involved the validity of labor laws such as FLSA, a few cases

110. *Id.* at 538-39. In Justice Blackmun's view, the net result of the lower court opinions was to establish an arbitrary, and sometimes contradictory, categorization of traditional and non-traditional functions. *Id.*

111. *Id.* at 554.

112. *Id.* at 549-52.

113. *Id.* at 552.

114. *Id.* at 554.

115. *Id.* at 557-79 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); *id.* at 579-80 (Rehnquist, J., dissenting); *id.* at 580-89 (O'Connor , J., dissenting, joined by Powell and Rehnquist, J.J.).

116. *Id.* at 567 (Powell, J., dissenting).

117. *Id.* at 581 (O'Connor, J., dissenting).

118. *Id.* at 584 (O'Connor, J., dissenting).

119. *Id.* at 580 (Rehnquist, J., dissenting).

have addressed the constitutionality of environmental statutes and regulations. Two such cases were cited by the *New York* court: *Hodel v. Virginia Surface Mining and Reclamation Assn.*[120] and *FERC v. Mississippi.*[121]

In *Hodel*, coal producers challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[122] SMCRA requires strip mining to be performed so as to minimize any ecological disturbance, and requires post-mining restoration of the land.[123] SMCRA, as distinguished from FLSA, is an example of a statute that imposes standards only on private parties. States have the choice between enforcing federal standards and leaving the regulation of the mining industry to the federal government.[124]

The *Hodel* Court, in a unanimous decision, held that SMCRA is within Congress' commerce powers[125] and does not violate the Tenth Amendment.[126] The Court found that SMCRA does not regulate the states as states, because the states are under no obligation to enact their own regulatory plans.[127] If a state chooses not to establish its own plan, the federal government will bear the entire burden of enforcing its standards in that state.[128]

FERC v. Mississippi involved a more controversial issue: a challenge by the State of Mississippi asserting that certain sections of the Public Utility Regulatory Policies Act of 1978 (PURPA) violated both the Commerce Clause and the Tenth Amendment.[129] The controversial sections of PURPA, Titles I and III, were designed to encourage energy conservation and fair utility rates by "direct[ing] state utility regulatory commissions and nonregulated utilities to 'consider' the adoption and implementation of specific 'rate design' and regulatory standards."[130] Titles I and III also allow citizens to sue in state court to force the commission to hold a hearing and decide whether to adopt the federal standards.[131]

120. 452 U.S. 264 (1981).
121. 456 U.S. 742 (1982).
122. *Hodel*, 452 U.S. at 264.
123. *Id.* at 269 (citing 30 U.S.C. § 1252(c) (Supp. III 1976)).
124. *Id.* at 271 (citing 30 U.S.C. § 1251(b) (Supp. III 1976)).
125. *Id.* at 276-83.
126. *Id.* at 286-93.
127. *Id.* at 287-88.
128. *Id.* at 288.
129. 456 U.S. 742, 752 (1982). For PURPA *see supra* note 63.
130. *FERC*, 456 U.S. at 746. These directives include certain detailed prescribed procedures. For example, the commission is required to hold a public hearing after notice to examine the standards; the commission must make public its reasons for not adopting the federal standards; and the Secretary of Energy has the right to intervene in the commission hearings required under PURPA. *Id.* at 748-49.
131. *Id.*

The Court held unanimously that PURPA falls within Congress' commerce powers.[132] However, only five members supported the finding that Titles I and III did not violate the Tenth Amendment. The five-member majority observed that PURPA "attempts to use state regulatory machinery to advance federal goals,"[133] but justified the attempt for two reasons. First, "Congress could have pre-empted the field" in regulating private utility activity.[134] Second, "the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals."[135] However, the Court acknowledged that it had never "sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations",[136] and had previously expressed doubt whether such a command would be valid.[137] Despite the Court's apparent discomfort in upholding Titles I and III, it justified its decision to do so, asserting that "PURPA does not require promulgation of *particular* regulations."[138]

Justice O'Connor was one of the four justices who disagreed with the Court on the constitutionality of Titles I and III. Her dissent foreshadowed her analysis in *New York*. Arguing that Titles I and III of PURPA "conscript state utility commissions into the national bureaucratic army",[139] she labeled PURPA a congressional commandeering of the state commissions.[140] In response to the majority's suggestion that merely compelling state consideration of a federal proposal is not a constitutionally significant intrusion on state powers,[141] Justice O'Connor charged that state agencies are not "think tanks to which Congress may assign problems for extended study."[142] She added that "compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."[143]

In a separate attack on PURPA, Justice O'Connor, while recognizing that the Court had not fully clarified the meaning of the term "traditional state function" as used by the *Usery* Court, asserted that

132. *Id.* at 753-58; *id.* at 775 (Powell, J., dissenting in part; O'Connor, J., dissenting in part).

133. *Id.* at 759.

134. *Id.* at 765.

135. *Id.*

136. *Id.* at 761-62.

137. *Id.* at 762, n. 26 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979)).

138. *Id.* (emphasis added).

139. *Id.* at 775 (O'Connor, J., dissenting in part).

140. *Id.* at 781 n.8.

141. *Id.* at 765 (majority opinion).

142. *Id.* at 777 (O'Connor, J., dissenting in part).

143. *Id.* at 787.

"[u]tility regulation is a traditional function of state government, and the regulatory commission is the most integral part of that function."[144] She argued that the state regulatory function includes the power to decide the structure of agency agendas.[145] Moreover, as a result of compelling the Mississippi commission to spend its limited resources on the consideration of federal proposals, the commission would be less able to address local problems and discharge its traditional functions.[146] She suggested, therefore, that PURPA violated the *Usery* test for compliance with the Tenth Amendment.[147]

E. Cases Since *Garcia*

Three years after *FERC* was decided, the *Garcia* court rejected the *Usery* traditional function test.[148] However, just as *Usery* failed to provide adequate guidelines for determining which functions are traditional and integral to state governments, neither does *Garcia* provide adequate guidelines to determine when the national political process has failed. Perhaps because of this lack of guidelines, no federal appellate court decision since *Garcia* has held a federal statute unconstitutional on the grounds that it resulted from a defect in the political process, unless *New York* can be interpreted as having done so.

The chief post-*Garcia* case involving a challenge to federal legislation based on an alleged defect in the political process was *South Carolina v. Baker.*[149] South Carolina alleged that the political process failed when Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[150] TEFRA abolished the federal income tax exemption for interest earned on bonds offered by state and local governments, except for bonds issued in registered form.[151] South Carolina argued that the political process failed, because Congress was not adequately informed when it enacted TEFRA.[152]

Rejecting South Carolina's argument, the Court asserted that "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation."[153] However, the Court did suggest some basis for applying the *Garcia* test: If Congress "singles out" a state in a manner that leaves it politically iso-

144. *Id.* at 781.
145. *Id.* at 779.
146. *Id.* at 781.
147. *Id.* at 782.
148. *See supra* notes 107-111 and accompanying text.
149. South Carolina v. Baker, 485 U.S. 505 (1988).
150. *Id.* at 513 (citing Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 § 310(b)(1), 96 Stat. 324, 596 (1982)).
151. *Id.* at 507-508 (citing TEFRA §310(b)(1)).
152. *Id.* at 513.
153. *Id.*

lated and powerless, the legislative act in question might manifest a defect in the political process.[154]

South Carolina also claimed that the statute commandeered state legislatures by forcing them to issue only registered bonds and to expend efforts to determine how to implement a new system of issuing state and local government bonds.[155] The Court rejected the argument, observing that "[s]uch 'commandeering' is . . . an inevitable consequence of regulating a state activity."[156] Federal regulations demand compliance in general, and states engaging in regulated activity often "must take administrative[,] and sometimes legislative[,] action to comply with federal standards."[157] Therefore, requiring state action to comply with a valid federal regulation cannot be deemed to present a constitutional defect.[158] The Court noted that cases prior to *Garcia* repeatedly affirmed congressional power to "impose federal requirements on States that States could meet only by amending their statutes."[159]

Justice O'Connor provided the sole dissenting vote in *South Carolina v. Baker*, basing her dissent on the doctrine of intergovernmental tax immunity, rather than on Tenth Amendment grounds.[160] She said that the Court "fail[ed] to inquire into the substantial adverse effects on state and local governments that would follow from federal taxation of the interest on state and local bonds."[161] While she acknowledged that the taxation of interest earned on unregistered state and local bonds was less burdensome than a tax on the interest from all state and local bonds, she feared that the tax was part of the gradual erosion of state sovereignty.[162] Her dissent included a quote from Professor Lawrence Tribe that has echoed throughout modern Tenth Amendment cases: "If there is any danger [of Congress obliterating the states], it lies 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."[163]

ANALYSIS

New York appears to have reached the correct result. The take-title provision of LLRWPAA would have operated as a sanction against

154. *Id.*
155. *Id.* at 514.
156. *Id.*
157. *Id.* at 514-15.
158. *Id.* at 515.
159. *Id.*
160. *Id.* at 530-34 (O'Connor, J., dissenting).
161. *Id.* at 531.
162. *Id.* at 533.
163. *Id.* (quoting L. Tribe, American Constitutional Law 381 (2d ed. 1988)). *See also* FERC v. Mississippi, 456 U.S. 742, 774-75 (1982) (Powell, J., dissenting in part) (same, but fuller, quote).

states that do not develop a LLRW disposal facility alone or in conjunction with other states by 1996. The provision would have imposed on aberrant states not merely a fine, but an unquantifiable liability. In addition, the sanction would have represented a forced subsidy from the state to private industry. As such, the sanction was potentially far more punitive than any previously imposed by the federal government in the exercise of its commerce powers.

Such liability would have been potentially far more costly to states than the burdens imposed by federal statutes such as the Fair Labor Standards Act, the Surface Mining Control and Reclamation Act, the Public Utility Regulatory Policies Act, or the Tax Equity and Fiscal Responsibility Act. In these times, when many states are in great financial difficulty and are struggling to provide basic services, the forced taking of title to radioactive wastes could very well have threatened states' ability to function in a way that the imposition of minimum-wage laws could not have come close to doing.

Not only was the take-title provision potentially disastrous to nonconforming states, but it also did not result from the degree of consensus that would be provided by an interstate agreement pursuant to the Compact Clause, as suggested by the dissent.[164] Even if the National Governors' Association were an appropriate forum for arriving at interstate agreements, the take-title provision was not part of the original compromise that the Association presented to Congress.[165]

The fact that the Court has shorn LLRWPAA of its take-title provision should not prevent the Act from achieving its essential goals. The policy behind the Act was to distribute responsibility for LLRW disposal among the states, and to encourage the management of LLRW disposal on a regional basis.[166] To achieve this result, Congress had to eliminate the constitutional prohibition on states from erecting barriers to the shipment of waste between states.[167] The take-title provision was not a necessary part of eliminating that barrier.

With the 1992 deadline having passed, LLRW generators in New York no longer have the right to export the waste outside New York, unless the state forms a regional compact with other states. The original sited states, Washington, Nevada, and South Carolina, are only

164. *See supra* notes 77-78 and accompanying text. A compact generally requires not only congressional ratification, but also legislative ratification by each state involved in the compact. *See, e.g.*, Columbia Gorge United-Protecting People and Property v. Yeutter, 20 Envtl. L. Rep. (Envtl. L. Inst.) 21,162 (Litigation) (D. Or. May 23, 1990) (No. 88-1319-P4).

165. D. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Amendments Act of 1985?*, 11 Harv.Envtl.L.Rev. 437, 457-58 (1987).

166. 42 U.S.C. §§ 2021c(a)(1), 2021d(a)(1) (1988).

167. *See supra* note 17 and accompanying text.

obligated to receive LLRW from states within their respective compacts,[168] and then only in accord with the agreements upon which their respective compacts are based.[169] Any other state that develops a disposal site as part of a regional compact will also be able to exclude LLRW generated outside the region.[170] As a result, the burden on the sited states is diminished, while states not belonging to compacts that include a sited state have the responsibility for finding new solutions to the problem of LLRW disposal. In addition, interstate transportation of LLRW will be regionally confined, and, as a result, there will probably be fewer accidents on the nation's highways involving the waste.

On the other hand, it is possible that without the take-title provision, a state, such as New York, will have less incentive to develop a waste disposal site than before. If LLRW generators have no place to send the waste, they may store it on site, thus creating a safety problem. However, New York could condition new construction of nuclear power plants, or expansion of existing plants, on the development of waste-disposal facilities, if it can show, independently of safety concerns, that allowing the construction in the absence of available disposal facilities would have serious economic repercussions.[171] Such state action would likely encourage utilities to develop less polluting and cheaper means of generating energy.

Alternatively, the federal government could build and operate its own disposal site in New York.[172] Although such federal preemption of state authority would not encourage waste generators to create less LLRW, the State of New York would not have to administer or pay for the operation.

A. The Court's Holding and Dictum

While the outcome of *New York* seems reasonable, the Court's reasoning lacks clarity, and its holding is both vague and muddied by confusing dicta. The Court's holding may be framed as follows: A fed-

168. 42 U.S.C. § 2021e(f)(1)(B)(ii) (1988).

169. *See* 42 U.S.C. § 2021d(c) (1988).

170. *Id.* In theory, another state could develop a disposal site and not join a compact, in which case that state would lack the authority under the Act to exclude the importation of out-of-state LLRW destined for private disposal facilities. It seems highly unlikely that a state would want to do that.

171. The Court has noted that "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic [but not for safety] reasons." Pacific Gas & Electric v. State Energy Resources Conservation Comm'n, 461 U.S. 190, 223 (1983). *See also* 42 U.S.C. § 2021d(b)(5) (1988) (LLRWPAA does not "diminish[], or otherwise affect[] state law."). Professor Berkovitz suggests that states could possibly even order a cessation of all existing LLRW generation. Berkovitz, *supra* note 165, at 486.

172. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

eral action that is not directed at private parties, but "commandeer[s] state governments into the service of federal regulatory purposes," is unconstitutional.[173] Just as the traditional-function test in *Usery* and the procedural-defect test in *Garcia* failed to provide clear guidelines for determining when a violation of the Tenth Amendment exists, the new "commandeering" test suffers from the same lack of clarity. For example, the Court does not indicate whether *any* federal mandate to a state government for regulatory purposes would constitute a commandeering, no matter how slight the intrusion. However, Justice O'Connor's dissenting opinions in *FERC* and *Baker* suggest that, in her opinion, it would, at least where legislative or administrative action is involved.[174] An additional problem with the new test is that the term "commandeering" connotes a federal takeover of state government. Such use of hyperbole may tend to distort the issues that underlie the Constitution's allocation of state and federal powers.

It is also unclear where *Garcia* stands in the wake of *New York*. On one hand, the Court chose neither to apply the *Garcia* holding to the facts of *New York* nor to "revisit" *Garcia*, because *New York* did not involve legislation that was directed both at the states and at private parties.[175] This indicates that the Court did not intend to overrule *Garcia*. On the other hand, in the final paragraph of the Court's opinion, the Court delivered what might appear to be the central holding of *New York*, but is in reality dictum: "The Federal Government may not compel the States to enact or administer a federal regulatory program."[176] If it is assumed that the Fair Labor Standards Act (FLSA), the statute upheld by the *Garcia* court, is a federal regulatory program as comprehended by the *New York* court, then FLSA and similar statutes would seem to stand on shaky constitutional ground.

Perhaps the *New York* court meant to add a reminder to the above-quoted statement that it referred only to federal mandates that are applicable solely to the states. However, whether or not the Court intended the statement as a warning about federal mandates in general, there remains the question of what the Court considered to be a state-administered "federal regulatory program." Presumably, such a program is one in which the state government enforces a federal regulation on the private sector. If that is the case, then the application of FLSA to the situation in *Garcia*, where the City of San Antonio was required only to pay the minimum wage to some of its own employees, would not constitute a federal regulatory program. However, under this definition, it is far from clear that a state's taking title to privately

173. New York v. United States, 112 S.Ct. 2408, 2428 (1992).

174. *See supra* notes 139-147, 160-163 and accompanying text.

175. *New York*, 112 S.Ct. at 2420.

176. *Id.* at 2435.

generated LLRW constitutes the administration of a regulatory program either. Regulating LLRW would be directing private industry to deal with the waste in a certain manner, while taking title to the waste would be tantamount to removing the problem of LLRW disposal from industry entirely.

Even a state's providing a disposal site, the state's alternative under the take-title provision to taking title to the LLRW, would not in itself clearly constitute regulation of the private sector. However, it comes closer to meeting the above-presumed definition of "regulatory program" than does the state's taking title to the waste.[177] Still, because the Court failed to define "regulatory program", it is unclear whether or why the Court considers LLRWPAA to mandate a regulatory program while it considers FLSA *not* to mandate such a program. If, in fact, the Court believed FLSA to be a mandated regulatory program, then it is unclear why the Court closed its opinion with a broad statement that would seem to call for the invalidation of a FLSA-type statute. Consequently, the Court's reason for invalidating the take-title provision, while leaving *Garcia* unscathed, is less than convincing.

B. The Court's Ignoring *Garcia*

The Court's reason for not applying *Garcia* to the facts of *New York* is also unpersuasive. First, although it is true that FLSA is a federal statute that applies to the private sector as well as to the states, the focus of the *Garcia* court was not on the distinction between general and specific applicability of a statute, but rather on the unworkability of the "traditional governmental function" test.[178] In fact, the *Garcia* court was "convinced that the 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."[179] This principle, on which the *Garcia* holding was based, whether or not well founded,

177. The action of providing a waste disposal site could be interpreted as controlling where private business sends its LLRW, and hence be deemed a regulatory program. However, such provision of a regional or local disposal site makes it easier for waste generators to dispose of their waste. Analogously, while setting speed limits is an example of regulating vehicular traffic, it is not clear that building roads constitutes regulatory activity. The former places a restriction on the operation of motor vehicles, while the latter expands the options of the motor vehicle operator.

178. Garcia v. San Antonino Metro. Transit Auth., 469 U.S. 528, 538 (1985). It also bears noting that Justice O'Connor, in her dissent in *Garcia*, considered the general applicability of a federal statute to be only a minor factor in evaluating its validity. "It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party .... It remains relevant that a State is being regulated ...." *Id.* at 588 (O'Connor, J., dissenting).

179. *Id.* at 554.

appears to apply to the facts of *New York* no less than it does to the facts of *Garcia*.

Second, if a federal statute that compels state administration of a federal regulatory program constitutes a commandeering of state government, it is hard to see how such a statute that also applies directly to the citizenry[180] represents any less of a commandeering. Although the Court did not explain the significance of the distinction between generally applicable laws that apply to state and local governments and laws that compel state action only, it hinted at that significance in its discussion on the accountability of public officials.[181] The Court observed that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[182] The Court further pointed to the choice of a disposal-facility location as the state action that would likely draw public disapproval, thus implying that the process of making that choice is the objectionable regulatory program.[183]

However, the Court failed to explain how the take-title provision differs from FLSA and other generally applicable statutes in terms of their effect on accountability. The Court's assumption that federal officials will be held accountable when exercising federal preemption powers because their decision is made "in full view of the public"[184] does not address this distinction. After all, LLRWPAA, as a congressional decision, was made as much "in the full view of the public" as any enactment of a federal statute that preempts state decisionmaking.

C. LLRWPAA, FLSA, and Political Accountability

The crucial distinction between the take-title provision[185] and FLSA is that the latter affects the national electorate much more directly than would the former. Because FLSA is directed at private en-

180. The *Garcia* court stressed that the mass transit agency "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employees, public as well as private, have to meet." *Id.*

181. New York v. United States, 112 S.Ct. 2408, 2424, 2432 (1992).

182. *Id.* at 2424 (citing D. La Pierre, *Political Accountability in the National Political Process - The Alternative to Judicial Review of Federalism Issues*, 80 Nw.U. L. Rev. 577, 639-665 (1985); D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988)).

183. *New York*, 112 S. Ct. at 2432.

184. *Id.* at 2424.

185. Here the take-title provision is assumed to include LLRWPAA's mandate to states to provide disposal facilities, because the take-title provision would become operative only where a state fails to make provisions for a disposal site by January 1, 1996. 42 U.S.C. § 2021e(d)(2)(C)(ii) (1988).

terprise as well as state governments, business executives are direct targets of the legislation, and they have considerable means to influence the outcome of the election of their national representatives. Consumers are also affected by FLSA, although less directly, and they, too, have the potential to cause the defeat of those national legislators who inflict excessively burdensome labor regulations on the body politic. Moreover, FLSA has committed the resources of the federal government to the enforcement of the minimum-wage laws, thereby affecting the entire national electorate. To the extent that the electorate, which includes business people, consumers, and taxpayers, becomes dissatisfied, it can and will hold Congress accountable.[186]

On the other hand, the national electorate is much less likely to hold Congress accountable for LLRWPAA's take-title provision. Because citizens were not directly affected by the provision, and because the states would have had to make difficult choices regarding the siting of the disposal facilities, the citizens of those states would likely have held state officials primarily accountable for unpopular choices, as the *New York* court so aptly observed.[187]

The Court made reference to the significance of Congress's decision not to commit its own resources to cover the financial and administrative costs required by LLRWPAA.[188] However, by focusing largely on the distinction between congressional encouragement and congressional compulsion,[189] the Court missed the opportunity to stress

186. Professor La Pierre has labeled this phenomenon a "political check" on Congress' power to intrude on state authority. La Pierre, *supra* note 182, at 639. He agrees with the majority in *Garcia* that the national political process generally safeguards states' sovereignty, but he believes that *Garcia* offered neither an adequate explanation of *how* the states are protected nor a method for determining *when* the political process fails. *Id.* at 581. La Pierre argues that although the national political process acts as a restraint on Congress' power to diminish state autonomy in applying policies approved by a national majority, it only does so in the presence of political checks that make Congress politically accountable for the exercise of that power. *Id.* at 639. Those checks are: 1) the tendency of the people directly affected (and to a lesser extent, those indirectly affected) by the statute in question to "assign the blame or credit to Congress", *id.* at 646; and 2) the tendency of the taxpayers, who are burdened by the congressional expenditure of financial and administrative resources needed to enforce the statute, to hold Congress accountable. *Id.* at 647.

These checks are generally present in the case of legislation that is applicable both to state and private activity, and they "provide vicarious protection for the states' interests." *Id.* at 648-649. La Pierre argues that the application of FLSA to public employees is covered by the political checks, but only for those public employees with counterparts in the private sector who provide similar goods and services. *Id.* at 649-650. The first political check is not present, for example, where FLSA is applied to the police, because the application "falls exclusively or primarily on the states" and their subdivisions. *Id.* at 649 n.381.

187. *See supra* notes 181-183 and accompanying text.

188. *New York*, 112 S.Ct. at 2424.

189. *Id.*

that it is precisely the failure to commit national resources that allows Congress to escape political accountability by federal taxpayers. Although the national electorate, in terms of the individuals who comprise it, is the sum of the state electorates, it is not politically the sum of those electorates. Each state would have a unique set of problems connected with the federal program, and would be faced with a unique set of choices for which its particular electorate would hold it accountable.

The consequence to a state for not choosing to develop and operate a disposal site would have been the forced ownership of the LLRW generated within its borders. Such a burden would arguably be even more onerous than developing and operating a disposal site, because the state would potentially be subject to enormous liability. That liability would also be a burden borne solely by the state. In the event that the liability became actualized, the state would undoubtedly face difficult budgetary choices due to the drain on its treasury. Once again, Congress would be insulated from the brunt of citizen anger resulting from unpopular choices made by the state under the circumstances.

D. How the Court Could Have Applied *Garcia*

Although there is a significant distinction in terms of political accountability between generally applicable federal statutes and statutes that are directed solely at the states, the Court need not have ignored *Garcia* in its analysis of the take-title provision. The Court missed the opportunity to explain that the lack of accountability may be a defect in the political process that requires a Tenth Amendment safeguard. Had the Court attempted to apply *Garcia* to the facts of *New York*, it would have had to ask whether the take-title provision resulted from a defect in the national political process in a way to make it destructive of state sovereignty.[190] Of course, the Court might not have found such a defect. If the Court limited its inquiry to the test suggested in *Baker*, it probably would have upheld the take-title provision, because, in the process of enacting LLRWPAA, New York was not "singled out in a way that left it politically isolated and powerless."[191]

However, there are at least two ways in which the Court could have found a defect in the political process. One would be to analyze LLRWPAA in terms of political accountability using the methodology suggested above. The Court, in fact, did discuss political accountability, but it assumed incorrectly that any federal statute that mandates state action would enable Congress to avoid being held accountable. In any event, the Court could have concluded that the shift in politi-

190. *See supra* text accompanying notes 111-114.

191. *See supra* note 154 and accompanying text.

cal accountability occasioned by the take-title provision stemmed from the sort of defect to which the *Garcia* court alluded.

A second means of discovering such a defect would be to ask whether the statute has the potential to impose such a financial burden on the state as to seriously threaten the state's ability to govern. The take-title provision, if applied to a state that was unable to find a suitable LLRW disposal site, would impose unlimited and uncertain liability on the state by shifting all of private industry's LLRW liability onto the state. Given the danger of LLRW to human and environmental health, such an imposition of liability could trigger a grave financial crisis for the state in the event of a serious accident or a series of accidents, unless the federal government were committed to incurring a substantial part of that liability. The power of the federal government to contribute to the weakening of a state government in this manner is arguably a defect in the national political process.

Thus the Court could have justified its invalidation of the take-title provision by finding a defect in the national political process and applying *Garcia* to determine the existence of a Tenth Amendment violation. The Court could have done that with only minimal clarification of the procedural-defect test. The *New York* court also could have invoked the Guarantee Clause.[192] If the federal government could saddle a state with liability that could threaten its ability to govern, it could be deemed not to guarantee that state's right to a republican form of government.[193]

CONCLUSION

The take-title provision of LLRWPAA was correctly invalidated by the Court. The provision was intended to force states to choose between providing disposal facilities for commercially generated LLRW and incurring total liability for the waste. It could have had a disastrous effect on a state that was either unable or unwilling to carry out the federal mandate. Furthermore, the take-title provision was not necessary to achieve the essential purpose of LLRWPAA.

However, the Court's reasoning in reaching its decision was not clearly structured, and its holding is rather vague. The Court's lack

192. *See supra* note 15.

193. *See* Merritt, *supra* note 182. Professor Merritt suggests employing the Guarantee Clause in general, rather than the Tenth Amendment, to establish a "limit on federal power to meddle with state sovereignty." *Id.* at 1-2. She interprets the Guarantee Clause as prohibiting the federal government from destroying state governments. *Id.* at 40-41. Her thesis also involves political accountability, *id.* at 61, and reaches conclusions that are similar to those of Professor La Pierre.

of clear guidelines may result in unnecessarily broad interpretations of what constitutes a commandeering of state government. Such interpretations may even be encouraged by the Court's dictum calling for the prohibition on the congressional imposition of federal regulatory programs on the states. This is especially troublesome, as the Court did not make clear what it means by a regulatory program.

Although the Court distinguished *Garcia* on the grounds that FLSA is a statute aimed at both the states and private activities while the take-title provision was aimed only at the states, it did not explain the significance of that distinction in terms of federalism principles. The Court correctly observed that Congress insulated itself from political accountability in saddling the states with the burdens imposed by LLRWPAA, but it failed to explain how Congress would be held politically accountable for enacting the amendments to FLSA. In essence, the Court ignored *Garcia*, and missed the opportunity to show how the take-title provision resulted from a defect in the national political process.

The Court could have asserted that the take-title sanction posed a serious threat to the ability of state governments to govern, because of its considerable potential financial effect. Congressional power to impose such a liability on states is an example of a defect in the national process, because it allows for a significant weakening of state sovereignty by the federal government. Also, because a state's ability to maintain a republican form of government is dependent on its ability to govern, such congressional power arguably violates the Guarantee Clause. Striking down the take-title provision as a violation of the Guarantee Clause would represent the narrowest holding consistent with the Court's decision, as long as the Court made it clear that its decision was based on the enormity of the financial burden imposed on the states.

To construct a broader holding, the Court could have relied on a more clearly developed theory of political accountability, whereby a presumed power of Congress to substantially shift political accountability from itself to state and local governments represents a defect in the national political process. Not every statute that appears to "commandeer" state and local government substantially shifts accountability in this manner. FLSA is an example of such a statute that does not insulate Congress from accountability, because the state is only one of a number of affected enterprises, and because Congress has committed national resources to enforcing the statute. The take-title provision, on the other hand, possessed neither of these qualities. The provision was directed only at the states, and Congress committed essentially no national resources either to the development of LLRW-disposal facilities or to the acquisition of liability for the waste.

Either of the above alternatives to the commandeering test would provide a reasonable basis for deciding when to invalidate a federal statute on federalism grounds. Either alternative would have left many recent federal statutes on stable, rather than shaky, ground.[194] More importantly, they would have brought *New York* into harmony with *Garcia*, and would have clarified *Garcia*'s procedural-defect test, thereby rendering the test a workable tool for deciding when a federalism question should be reviewed by the courts.

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194. Not all statutes discussed in this note would clearly survive the application of the political accountability test. PURPA is a notable exception. Although PURPA is intended to affect private industry, its provisions are directed solely at the states. Further, Congress did not commit any federal resources to enforcing PURPA, and therefore stands to avoid accountability. The main distinction between PURPA and LLRWPAA in terms of political accountability lies in the magnitude of their intrusion on the states. *See* La Pierre, *supra* note 182, at 660-662. Whether PURPA would survive the accountability test would depend on whether or not the magnitude of the intrusion were a factor in the application of the test.