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1994]

NEW YORK v. UNITED STATES: THE CONSTITUTIONAL AND ENVIRONMENTAL FALLOUT FOR LOW-LEVEL WASTE DISPOSERS

I. INTRODUCTION

Disposal of low-level radioactive waste ("LLRW" or "low-level waste") in the United States has serious repercussions for a broad spectrum of society.¹ The United States faces a severe shortage of disposal space because state governments refuse to take responsibility for the disposal of low-level waste produced within their own states.² Further, the creation of new LLRW disposal facilities is a

1. Originally, low-level radioactive waste posed a serious problem for the scientific community in finding a safe method for disposing of the waste. See Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437, 440-41 (1987); see also DONALD L. BARLETT & JAMES B. STEELE, *FOREVERMORE: NUCLEAR WASTE IN AMERICA* 196-201 (1985) (discussing inefficiency of ocean dumping and shallow burial in water accessible trenches); Michael E. Burns & William Briner, *Setting the Stage, in LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 1, 30-38 (Michael E. Burns ed., 1988) (discussing drawbacks of land and water disposal of LLRW after World War II).

2. Berkovitz, *supra* note 1, at 437. The refusal to accept controversial waste is identified as the NIMBY or "not in my backyard" phenomenon. *Id.* One location-siting official eloquently stated the popular sentiment: "Nobody wants this stuff." Shawn Hubler, *Only California is on Track for Nuclear Dump*, L.A. TIMES, May 20, 1991, at A1.

For example, the failed re-election bid of Nebraska Governor Kay Orr was attributed to the Governor's participation in LLRW siting decisions. *Id.* Clearly, the political ramifications of siting legislation can frighten politicians into inactivity. A similar situation exists at the federal government level. See BARLETT & STEELE, *supra* note 1, at 48 ("Congress, the White House, and the bureaucracy, unable to think beyond the next election, have played politics so long with radioactive waste that neglect by default has become official policy."). See *Low-Level Radioactive Waste Disposal: Joint Hearings on S. 1517 and S. 1578 Before the Subcomm. on Energy Research and Development of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 47 (1985) [hereinafter *Joint Hearings*] (statement of Rep. Butler Derrick) (claiming politicians delay process to avoid political consequences of selecting waste disposal site).

complex and highly regulated process³ that causes fierce political disputes and protracted litigation.⁴

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act ("LLRWPA")⁵ to solve the LLRW disposal facility shortage. The LLRWPA's ultimate failure to remedy the LLRW problem led Congress to amend the LLRWPA by enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the "Act").⁶ The Act encourages states to create new disposal facilities by: 1) authorizing states to enter into multi-state agreements, such

3. Each state has its own laws governing the selection of low-level radioactive waste disposal sites. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.1701 (West 1992); N.Y. ENVTL. CONSERV. LAW § 29-0301 (McKinney 1984 & Supp. 1993); N.C. GEN. STAT. § 120-70.31-37 (1992). New York's siting laws demonstrate the complexities involved with selecting a location for a waste facility. In New York, the selection of LLRW disposal facilities is directed by the Commission for Siting Low-Level Radioactive Waste Disposal Facilities. N.Y. ENVTL. CONSERV. LAW § 29-0301 (McKinney 1984 & Supp. 1993). The Commission must find a method of disposal and then must select prospective sites for a LLRW facility. *Id.* § 29-0303. The Commission must then submit environmental impact studies and draft proposals for sites. *Id.* After a lengthy public hearing and comment period, the Department of Environmental Conservation must certify that the Commission's site selection conforms with applicable siting criteria. *Id.* § 29-0105. An advisory committee, independent of the Commission, acts as consultant, advisor, and watch-dog. *Id.* § 29-0501. After the selection process is complete, any action to establish a permanent LLRW facility, such as applying for licenses, permits or approvals, is subject to agency approval after a public comment period. *Id.* § 29-0503. An aggrieved party may seek judicial review of any offensive agency action. *Id.* § 29-0505(2).

The Commission must also promulgate financing requirements that must be met by prospective facility operators as a prerequisite to permit approval. *Id.* § 29-0701. To further complicate the Commission's task of site selection, New York provides that the management of LLRW is concurrently under the purview of the New York State Energy Research and Development Authority. N.Y. PUB. AUTH. LAW § 1854-b (McKinney 1984 & Supp. 1993).

4. *See, e.g.*, *Western Colo. Congress v. Colorado Dep't of Health*, 844 P.2d 1264, 1267 (Colo. Ct. App. 1992) (finding agency procedural error and allowing case to proceed); *Mayerat v. Town Bd. of Ashford*, 585 N.Y.S.2d 928, 929 (N.Y. App. Div. 1992) (allowing town to proceed with siting process because procedural errors were not made). *Richmond County v. North Carolina Low-Level Radioactive Waste Mgmt. Auth.*, 425 S.E.2d 468, 471 (N.C. Ct. App. 1993) (dismissing case for lack of justiciable issue).

5. Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347 (1980), *repealed by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842, (1986) (codified as amended at 42 U.S.C. §§ 2021b-2021j (1988 & Supp. III 1991)). For purposes of clarity, the 1980 law, now repealed will be referred to as "LLRWPA." The 1986 amendments, still in effect, which repealed the 1980 law will be referred to simply as "the Act."

6. Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842, (1986) (codified as amended at 42 U.S.C. §§ 2021b-2021j (1988 & Supp. III 1991)).

as compacts,⁷ to designate new sites;⁸ (2) providing monetary incentives to designate sites as new LLRW disposal facilities; and (3) sanctioning penalties for noncompliance with the Act. The LLRWPA and the Act proved unsuccessful: they maintained the status quo with regard to the availability of LLRW disposal space and spawned divisiveness among the states.⁹ In addition, the constitutionality of both statutes was challenged.¹⁰

In *New York v. United States*,¹¹ the United States Supreme Court upheld the incentive provisions of the Act.¹² The Court held, however, that the Act's penalty provision forces states to adopt a federal regulatory program and, therefore, the penalty provision is an unconstitutional use of congressional power.¹³ The court severed the unconstitutional penalty provision from the Act, thereby preserving the validity of the remainder of the Act.¹⁴

This Note first analyzes the characteristics of low-level waste. This Note then reviews the Act and its legislative history. It then summarizes the recent judicial inquiries into state sovereignty. Against this background, this Note suggests that the Supreme Court failed to define the parameters of state sovereignty because it did not analyze the Act in light of precedent. This Note also assesses whether states will be motivated to solve the LLRW disposal problem given the absence of any penalty provision.

7. *Id.* Compacts are congressionally authorized agreements that are contracts between two or more member states. Joseph R. Prochaska, Comment, *Low-Level Radioactive Waste Disposal Compacts*, 5 VA. J. NAT. RESOURCES LAW 383, 388-89 (1986). Congressional approval of compacts is required by the Compact Clause of the Constitution. U.S. CONST. art. I, § 10, cl. 3.

8. See 42 U.S.C. § 2021d.

9. See BARLETT & STEELE, *supra* note 1, at 227 (discussing Illinois' defection to more favorable compact); Michael E. Burns, *Living the Past, Facing the Future*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 279, 281-83 (Michael E. Burns ed., 1988) (listing Maryland and Delaware as states that used compact process for own interests); Leonard S. Greenberger, *Switching Compacts*, PUB. UTIL. FORT., Aug. 1, 1992, at 26 (documenting Wyoming's switch to Northwest compact because its compact site was closing).

10. See *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (upholding constitutionality of LLRWPA), *cert. denied sub nom. Don't Waste Wash. Legal Defense Found. v. Washington*, 461 U.S. 913 (1983); *Michigan v. United States*, 773 F. Supp. 997 (W.D. Mich. 1991) (finding Act constitutional).

11. 112 S. Ct. 2408 (1992).

12. *New York*, 112 S. Ct. at 2425-27.

13. *Id.* at 2435.

14. *Id.* at 2434. In its analysis, the Court stated: "[T]he Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste." *Id.*

II. BACKGROUND

A. The Characteristics of Low-Level Radioactive Waste

Low-level radioactive waste has never been explicitly defined; relevant statutes classify it by identifying what it is not.¹⁵ The low-level waste described in the Act is produced as a by-product from many sources, including hospitals,¹⁶ nuclear power plants,¹⁷ and research facilities.¹⁸ The amount of LLRW that is generated each year is unknown¹⁹ because government studies measure only the

15. The Act defines LLRW as "not high-level radioactive waste, spent nuclear fuel, or byproduct material . . ." 42 U.S.C. § 2021b(9)(A). The Act also defines LLRW by reference to 10 C.F.R. § 61.55. 42 U.S.C. § 2021c(a)(1)(B).

The Code of Federal Regulations uses several factors to classify waste as LLRW:

Determination of the classification of radioactive waste involves two considerations. First, consideration must be given to the concentration of long-lived radionuclides (and their shorter-lived precursors) whose potential hazard will persist long after such precautions as institutional controls, improved waste form, and deeper disposal have ceased to be effective. These precautions delay the time when long-lived radionuclides could cause exposures. In addition, the magnitude of the potential dose is limited by the concentration and availability of the radionuclide at the time of exposure. Second, consideration must be given to the concentration of shorter-lived radionuclides for which requirements on institutional controls, waste form, and disposal methods are effective.

10 C.F.R. § 61.55 (1992). The regulations provide technical specifications for classes A, B, and C waste, which are all classified as LLRW. *Id.* Class A waste has minimal environmental impact even in unstable forms; class B waste has an average half-life of 100 years; class C waste generally has a half-life of greater than 100 years. Berkovitz, *supra* note 1, at 448 n.52. Waste more radioactive than class C, generally considered high-level radioactive waste, has a minimum half-life of 500 years. *Id.*; see also E. William Colglazier & Mary R. English, *Low-Level Radioactive Waste: Can New Disposal Sites Be Found*, 53 TENN. L. REV. 621, 625-26 (1986).

16. Berkovitz, *supra* note 1, at 440. The negative impact the closure of LLRW disposal sites would have had on hospitals was cited as a major impetus for passing the Act. See 131 CONG. REC. S18,103 (daily ed. Dec. 19, 1985) (statement of Sen. Hart).

17. See Colglazier & English, *supra* note 15, at 625-26. The low-level waste produced at nuclear power plants consists of contaminated equipment and clothing. *Id.*

18. Berkovitz, *supra* note 1, at 439-40. Examples of LLRW include equipment used to protect the wearer from radiation, specimens and laboratory equipment contaminated with radioactive waste, and contaminated soil. *Id.* at 440.

19. Frank L. Parker, *Low-Level Radioactive Waste Disposal*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 85, 92 (Michael E. Burns, ed., 1988). During Congressional debate, one senator estimated that as much as 3.8 million cubic feet was being produced each year during the 1980s. 137 CONG. REC. S14,561 (daily ed. Oct. 3, 1991) (statement of Sen. Dodd).

amount of LLRW that is shipped for disposal and not the amount that is generated.²⁰

LLRW is hazardous, but its effects on human health vary with the duration and concentration of exposure to the waste and the radioactivity level of the particular waste.²¹ Although scientists disagree as to the threshold at which human health is endangered,²² scientists agree that prolonged exposure to low-level radiation is deleterious to human health.²³

Society's fear of LLRW results, in large part, from an inaccurate perception of the risks associated with exposure to low-level waste. First, the public confuses LLRW with the more hazardous substance, high-level radioactive waste.²⁴ Second, the public believes erroneous reports that LLRW, by itself, is highly dangerous.²⁵ Third, the public fears the wide variety of hazardous waste that is improperly disposed of with LLRW.²⁶

20. BARLETT & STEELE, *supra* note 1, at 181-94. Private studies have suggested that each year, nearly two million cubic feet of LLRW were unaccounted for in the government studies. *Id.* at 185.

The disparity in these studies suggests that Senator Kerry's estimates of LLRW generation, presented during debate in Congress on proposed amendments to the Act, were inaccurate. 138 CONG. REC. S10,983 (daily ed. Aug. 4, 1992) (statement of Sen. Kerry). Senator Kerry stated there was a 50% decrease in the production of LLRW, from a peak of 3.4 million cubic feet to 1.5 million cubic feet in 1988. *Id.*

21. See BARLETT & STEELE, *supra* note 1, at 306-09 (discussing deaths from excessive exposure to radiation, including scientist Marie Curie's death). As one writer stated, there is no evidence of deleterious health effects from "environmental [minimal] exposure" to LLRW, although the author conceded that prolonged and excessive exposure does produce harmful effects. Don G. Scroggin, *Low-Level Radiation: Cancer Risk Assessment and Government Regulation to Protect Public Health*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 159, 166 (Michael E. Burns ed., 1988).

22. Rosalyn S. Yalow, *Biologic Effects of Low-Level Radiation*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 239, 254-55 (Michael E. Burns ed., 1988) (stating lack of meaningful data makes it impossible to assess health risks from exposure to LLRW); see BARLETT & STEELE, *supra* note 1, at 298-99. Since there are so many variables in these studies, the results are contradictory and are often used to support inconsistent positions. *Id.* at 299 (stating radiation causes cancer and leukemia, although scientists cannot draw meaningful conclusions from this knowledge).

23. BARLETT & STEELE, *supra* note 1, at 298. Low-level waste disposal sites are normally safe because excessive exposure to LLRW, as distinguished from environmental or accidental exposure, is unlikely to occur at the sites. See *id.* at 181.

24. Timothy L. Peckinpugh, *The Politics of Low-Level Radioactive Waste Disposal*, in *LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS AND FEAR* 45 (Michael E. Burns ed., 1988).

25. See BARLETT & STEELE, *supra* note 1, at 185-95.

26. See *id.* at 181 (providing examples of high-level waste mixed in with low-level waste at LLRW disposal sites).

B. The Low-Level Radioactive Waste Policy Act of 1980

Prior to 1980, low-level waste disposal was virtually neglected by federal and state legislators.²⁷ There were only three operational LLRW disposal sites in the United States in 1980.²⁸ These disposal sites were overwhelmed by the increasing volume of LLRW.²⁹ Congress passed the LLRWPA in response to threats to permanently close the sites and actual, though temporary, closures at two of the sites.³⁰

By enacting the LLRWPA, Congress encouraged states to regulate low-level waste disposal through the formation of regional compacts that required congressional approval.³¹ Congress believed that these compacts, providing for rotation of LLRW disposal sites among compact states, would ease the shortage of disposal space and ensure an equal burden on member states.³² Under LLRWPA, compacts could refuse LLRW produced outside of the compact from compact facilities after 1986.³³ However, no compact was ratified by Congress before the LLRWPA was superceded.³⁴ LLRWPA's

27. See Prochaska, *supra* note 7, at 385-86.

28. *Joint Hearings*, *supra* note 2, at 289-97. These sites were located in Hanford, Washington; Beatty, Nevada; and Barnwell, South Carolina. *Id.* Of the six LLRW sites that were operational in the beginning of the 1970s, three were forced to close before 1980. *Id.* at 289. A facility in Sheffield, Illinois was closed in 1978 when it reached maximum capacity. *Id.* Through at least September 1992, that facility had experienced seepage of waste and still required cleanup and maintenance. See Danni Sabota, *Local Waste Firm Wins Latest Round in Legal Battle with State of Illinois*, Hous. Bus. J., Sept. 14, 1992, § 1, at 18. The site at Maxey Flats in Kentucky was closed in 1977 when contaminated water leaked into its waste trenches. *Joint Hearings*, *supra* note 2, at 289-91. As of August 1993, the cleanup of the Maxey Flats facility was still in progress. *Court Rules Kentucky Must Pay American Ecology for Maxey Flats Costs*, HAZARDOUS WASTE BUS., August 11, 1993, at 3. The facility in West Valley, New York, closed in 1975, after experiencing leakage similar to that which later occurred at Maxey Flats. Authorities had decontaminated at least a portion of the site as of December 1993. E. Michael Blake, *Twenty Nagging Questions and Not-Necessarily-Satisfying Answers About LLW Management in the United States*, NUCLEAR NEWS, December 1993, at 42.

29. See BARLETT & STEELE, *supra* note 1, at 222-23.

30. See Berkovitz, *supra* note 1, at 441. The Beatty, Nevada site was closed twice in 1979, ostensibly due to mishandling of LLRW during transport to the site. *Id.* The Hanford, Washington facility was also temporarily closed in 1979, which prompted the governor of South Carolina to order reductions in the waste accepted at the Barnwell site. *Id.*

31. LLRWPA § 4(a)(2), Pub. L. No. 96-573, 94 Stat. 3347, 3348 (1980) (current version codified at 42 U.S.C. § 2021d (1988 & Supp. IV 1992)). The Act currently requires congressional approval and review. 42 U.S.C. § 2021d(c),(d).

32. 131 CONG. REC. S18,103 (daily ed. Dec. 19, 1985) (statement of Sen. Hart).

33. LLRWPA § (4)(a)(2)(B). As amended by the Act, the law still permits compacts to refuse LLRW generated outside the compact. See 42 U.S.C. § 2021d(c).

34. See Peckinpaugh, *supra* note 24, at 48-49.

greatest success came from pressuring the existing sites to continue to accept LLRW from all states, at least through 1985.³⁵

By 1985, however, no state had even selected a location for a new disposal site.³⁶ In addition to this lack of progress, each of the three operational sites planned to close in 1986, as authorized by the LLRWPA.³⁷ Congress amended the LLRWPA in response to the threatened closure of several nuclear research facilities, medical centers, and the three operational LLRW sites.³⁸

C. The Low-Level Radioactive Waste Policy Amendments Act of 1985

Congress enacted the Low-Level Radioactive Waste Policy Amendments Act late in the 1985 term.³⁹ The Act retained the LLRWPA's emphasis on multi-state compacts as the preferred method for regulating the disposal of low-level waste.⁴⁰ Unlike the LLRWPA, the Act established a number of deadlines for states to meet.⁴¹ The three major provisions of the Act provided for state surcharges on private waste generators, access denial by compacts in compliance with the Act's deadlines, and the take-title penalty for states that were not in compliance with the Act's deadlines.⁴²

35. *Id.* Peckinpaugh suggests that the LLRWPA's lack of incentives encouraged states to delay the compact approval process. *Id.*; see also 131 CONG. REC. S18,108 (daily ed. Dec. 19, 1985) (statement of Sen. Bradley) (attributing failure of LLRWPA to lack of incentives).

36. Peckinpaugh, *supra* note 24, at 48.

37. LLRWPA § 4(a)(2)(B). Any congressionally approved compact could deny access to its LLRW facility after January 1986. *Id.*; see also 131 CONG. REC. S18,116-17 (daily ed. Dec. 19, 1985) (statement of Sen. Thurmond) (reiterating threats to shut down sites in 1986 if legislation was not passed).

38. See Berkovitz, *supra* note 1, at 442. Berkovitz theorizes that a "national disposal system with only three sites for waste from all fifty states was vulnerable to disruption. Even a temporary shutdown of any of the sites, for whatever reason, could have created a widespread health and safety crisis." *Id.*; see also 131 CONG. REC. S18,106 (daily ed. Dec. 19, 1985) (statement of Sen. Thurmond) (stating amendment of LLRWPA was necessary to "avert a potential nationwide crisis.").

39. 131 CONG. REC. S18,103 (daily ed. Dec. 19, 1985) (statement of Sen. Hart). The Act set volume caps for the three sites, foreclosing the possibility that they will continue to function indefinitely as the nation's repositories. 42 U.S.C. § 2021e(b).

40. 42 U.S.C. § 2021b. Congress ratified seven compacts in 1985. Low-Level Radioactive Waste Policy Amendments Act of 1985, subtitle B, Pub. L. No. 99-240, §§ 221-227, 99 Stat. 1860-1924 (1985) (codified at 42 U.S.C. § 2021d(d)); see Peckinpaugh, *supra* note 24, at 53-55.

41. 131 CONG. REC. S18,103-04 (daily ed. Dec. 19, 1985) (statement of Sen. Hart).

42. 42 U.S.C. § 2021e.

Under the surcharge provision of the Act, states can impose surcharges on low-level waste generators.⁴³ The surcharges could then be used to help fund the establishment of new LLRW disposal sites.⁴⁴

Under the access denial provision, compact states are required to meet certain deadlines so they can exclude noncompliant states from using compact LLRW disposal sites.⁴⁵ Compacts and states that establish their own LLRW facilities have to meet certain deadlines to show they were making progress in establishing these new LLRW facilities.⁴⁶ States are penalized for failing to meet these deadlines.⁴⁷ These penalties include increased state surcharges on waste generators, and the denial of access to compact LLRW disposal facilities until the state or compact is in compliance with the applicable milestone.⁴⁸

Under the penalty provision, states that had not complied with the deadlines were required to take possession of all low-level waste generated within their state.⁴⁹ The take-title section was designed to "provide sufficient inducement to persuade even recalcitrant

43. 42 U.S.C. § 2021e(d)(1). The provision requires the Secretary of Energy to collect 25% of these surcharges from the states and to retain these funds in an escrow account. 42 U.S.C. § 2021e(d)(2)(A). The retained surcharges are then refunded when states comply with the deadlines imposed by the Act. 42 U.S.C. § 2021e(d)(2)(B). This section established rebate schedules based on compliance with the milestones in July 1986, January 1988, and January 1990. *Id.* The Act also provides that:

[a]ny amount paid under subparagraphs (B) or (C) [i.e., the rebates] may only be used to—

- (I) establish low-level radioactive waste disposal facilities;
- (II) mitigate the impact of low-level radioactive waste disposal facilities on the host State;
- (III) regulate low-level radioactive waste disposal facilities; or
- (IV) ensure the decommissioning, closure, and care during the period of institutional control of low-level radioactive waste disposal facilities.

42 U.S.C. § 2021e(d)(2)(E)(i).

44. *Id.*

45. 42 U.S.C. § 2021e(e).

46. 42 U.S.C. § 2021e(e)(1). The first deadline required that the state either prove it was a member of a ratified compact, or show its intent to establish its own site by July 1, 1986. *Id.* Second, the compacts had to identify the prospective siting state within the compact and noncompact states had to create a siting plan by January 1, 1988. *Id.* The third deadline, January 1, 1990, required either an application for a license to operate a disposal facility or certification of an intent to comply by 1993. *Id.* Finally, the Act required the submission of a complete application to the Nuclear Regulatory Commission for a license to operate a new LLRW facility by January 1, 1992. *Id.*

47. 42 U.S.C. § 2021e(e)(2).

48. *Id.*

49. 42 U.S.C. § 2021e(d)(2)(C). As originally enacted, the take-title section provided:

States to become part of the low-level compact process and work diligently to open new disposal facilities.”⁵⁰

D. Constitutional Inquiries into Infringements on State Sovereignty

Although Congress can enact legislation affecting the states,⁵¹ the Tenth Amendment prevents Congress from violating a state’s sovereignty.⁵² However, the extent of a state’s sovereignty and its power to regulate independent of congressional interference is unclear.

The inquiry into whether a federal statute violates state sovereignty begins from a historical perspective with *National League of Cities v. Usery*.⁵³ In *National League of Cities*, the Supreme Court held that a federal wage statute that was extended to regulate the working conditions of state government employees⁵⁴ violated the Tenth Amendment.⁵⁵ The Court used a three-prong test to determine

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; or

(ii) if such State elects not to take title to, take possession of, and assume liability for such waste . . . twenty-five per centum of any amount collected by a State . . . shall be repaid, with interest, to each generator from whom such surcharge was collected . . .

Id. States that failed to provide for the disposal of all LLRW by January 1, 1996 could not avail themselves of a surcharge refund for LLRW generators. *Id.*

50. 131 CONG. REC. S18,104 (daily ed. Dec. 19, 1985) (statement of Sen. Hart).

51. *New York v. United States*, 112 S. Ct. 2408, 2417-19 (1992).

52. *See United States v. Oregon*, 366 U.S. 643, 648-49 (1961). The Tenth Amendment 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.” U.S. CONST. amend. X.

53. 426 U.S. 833 (1976).

54. Fair Labor Standards Amendments of 1974, 29 U.S.C. § 203 (1970 & Supp. IV 1974). The statute amended the Fair Labor Standards Act to include all government employees, whereas prior to the amendments government employees were exempted and the provisions regulating wages applied only to private employers. *National League of Cities*, 426 U.S. at 839.

55. *National League of Cities*, 426 U.S. at 842-43. The Court overruled *Maryland v. Wirtz*, in which the Court had upheld the provisions of the same amended statute. *Id.* at 840 (citing *Maryland v. Wirtz*, 392 U.S. 183 (1968)). The Court stated: “We have repeatedly recognized that there are attributes of sovereignty attaching

whether the statute violated state sovereignty.⁵⁶ Under the test, the statute was unconstitutional if it (1) regulated the "States as States,"⁵⁷ (2) regulated areas that were "attribute[s] of state sovereignty,"⁵⁸ and (3) forced states to implement federal policies in areas of "traditional government functions."⁵⁹ The Court held that the federal wage statute was unconstitutional because it violated each prong of the test.⁶⁰ The Court considered the substantial costs that the statute imposed on the states a significant factor in reaching its decision.⁶¹

Although *National League of Cities* was never used to invalidate another federal statute,⁶² the Court, in several cases, used the *National League of Cities* analysis to test for violations of state sovereignty. In 1981, the Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Ass'n (Virginia Mining)*⁶³ upheld a federal mining statute, stating that it did not coerce the state to adopt a federal program or to expend its own resources at the direction of the federal government.⁶⁴ The *Virginia Mining* statute directed states to either implement their own regulatory program consistent with federal guidelines, or vacate the field to allow for a federal regulatory program.⁶⁵ The Court found it significant that the statute provided states with a choice and did not command states to

to every state government which may not be impaired by Congress" *National League of Cities*, 426 U.S. at 845.

56. William A. Isaacson, *Garcia v. San Antonio Metropolitan Transit Authority: Antifederalism Revisited*, 21 U. Tol. L. Rev. 147, 150 (1989).

57. *National League of Cities*, 426 U.S. at 854-56. The Court 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 [commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.

Id. at 854-55.

58. *National League of Cities*, 426 U.S. at 845.

59. *Id.* at 852.

60. *Id.* at 845-47.

61. *Id.* at 851.

62. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 12 (1988).

63. 452 U.S. 264 (1981). An association of coal companies, affected landowners, and the state of Virginia challenged the constitutionality of the Surface Mining and Reclamation Act of 1977. *Id.* at 273. The Court found that Congress had a rational basis for the Surface Mining Act, and therefore, it did not violate the Commerce Clause. *Id.* at 283.

64. *Id.* at 268.

65. *Virginia Mining*, 452 U.S. at 283-90. The Court held the statute was constitutional because it governed "only the activities of coal mine operators who are private individuals and businesses Thus there can be no suggestion that the

regulate. Therefore, according to the Court, the statute did not violate the Tenth Amendment under the *National League of Cities* test.⁶⁶

In 1982, in *Federal Energy Regulatory Commission. v. Mississippi (FERC)*,⁶⁷ the Supreme Court upheld a federal energy statute that directed states to consider federal guidelines when they promulgated energy regulations.⁶⁸ The statute did not command states to abide by federal guidelines, according to the Court.⁶⁹ In her dissent, Justice O'Connor termed the majority's analysis of the choice offered to states an "absurdity."⁷⁰

In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁷¹ the Supreme Court overturned *National League of Cities*.⁷² The Court replaced the *National League of Cities* test⁷³ with the "political

Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 288.

Other provisions of the statute allowed state regulation of certain activities in lieu of federal preemption. *Id.* The Court found this state regulation was the product of "co-operative federalism." The Court determined this was not an encroachment on state sovereignty because Congress merely permitted state regulation and did not compel it. *Id.* at 289-90. The argument that the threat of preemption coerced the state into regulating along federal guidelines was rejected. *Id.*

66. *Id.*

67. 456 U.S. 742 (1982). The state of Mississippi and several state energy agencies challenged the constitutionality of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). *Id.* at 752. The challengers contended that PURPA violated the Tenth Amendment because it directed states to consider federal energy regulations when regulating state utilities. *Id.* at 746-48. The Court upheld the statute against the Tenth Amendment challenge. *Id.* at 771.

68. *Id.* at 746-52. With regard to the mandatory consideration of federal standards, the Court stated that "[w]hile this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *Id.* at 761-62 (citation omitted). Since the states could choose to regulate according to federal standards or vacate the field, the Court found there was no evidence of congressional coercion. *Id.* at 766.

69. *Id.*

70. *Id.* at 781 (O'Connor, J., dissenting in part). Justice O'Connor implied that she felt the statute transformed state legislatures into "field offices of the national bureaucracy." *Id.* at 777. Justice O'Connor saw the choice offered by the statute—regulate according to federal guidelines or abandon the field—as hollow, and therefore, coercive. *Id.*

71. 469 U.S. 528 (1985) (5-4 decision).

72. *Id.* at 531.

73. Merritt, *supra* note 62, at 12-13. As many commentators have suggested, the *National League of Cities* doctrine established no parameters as to what "traditional government functions" were. *Id.* at 13. The *Garcia* Court stated that: "The attempt to draw the boundaries of state regulatory immunity in terms of 'traditional government function' is not only unworkable but is also inconsistent with established principles of federalism . . ." *Garcia*, 469 U.S. at 531.

process" test.⁷⁴ In doing so the Court reasoned that state sovereignty is best protected by the safeguards inherent in the political system.⁷⁵ Under the *Garcia* test, in order to prove that a federal statute is unconstitutional, a state must prove that the political process failed to protect its democratic interests during the passage of the challenged federal statute.⁷⁶

III. DISCUSSION

A. Facts, Procedure, and Holding of *New York v. United States*

The state of New York and two counties within the state⁷⁷ sued the United States, alleging that the Act violated the Tenth Amendment.⁷⁸ Both the District Court for the Northern District of New York⁷⁹ and the Court of Appeals for the Second Circuit held that the Act was constitutional.⁸⁰ The Second Circuit applied the *Garcia* test and concluded that the Act did not infringe upon New York's sovereignty.⁸¹ The court stated that the LLRWPA and the Act were

74. *Garcia*, 469 U.S. at 556. Justice Brennan proposed a similar test in his dissent in *National League of Cities*. See *National League of Cities v. Usery*, 426 U.S. 833, 876-78 (1976) (Brennan, J., dissenting). Justice Brennan stated:

Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States . . . and that the States are fully able to protect their own interests in the process. Congress is constituted of representatives in both the Senate and House elected from the States. Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves.

Id. (citations omitted).

75. *Garcia*, 469 U.S. at 552, 556-57. The Court reasoned that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556.

76. *Id.* The *Garcia* test was explained by the Court in *South Carolina v. Baker* in which the Court stated that a statute is unconstitutional by virtue of the Tenth Amendment only if it is the product of a seriously flawed political process. *South Carolina v. Baker*, 485 U.S. 505, 513-14 (1988).

77. *New York*, 112 S. Ct. at 2416. Allegany and Cortland counties in New York had been designated as the proposed locations of new LLRW sites. The counties challenged the Act to prevent the development of these sites. *Id.* at 2416-17. Those states with operational LLRW sites—Washington, Nevada, and South Carolina—intervened as defendants, ostensibly to protect the exclusionary provisions in the Act. *Id.* at 2417.

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

79. *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990).

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

81. *New York*, 942 F.2d at 119-20. In upholding the constitutionality of the Act, the Second Circuit cited various examples of state participation during the Act's passage. *Id.* The court found no "grievous defect in the political process." *Id.* at 120.

“paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics.”⁸²

In *New York*, the Supreme Court considered whether the Act infringed on New York’s sovereignty by compelling it to regulate LLRW disposal.⁸³ The Court held that the Act’s surcharge⁸⁴ and access denial⁸⁵ provisions were proper uses of congressional power.⁸⁶ The Court, however, held that the take-title provision⁸⁷ was unconstitutional, but the Court severed it from the remainder of the Act.⁸⁸

B. Analysis of the Supreme Court’s Holding in *New York v. United States*

The Court began its analysis in *New York* by stating that Congress, with its broad commerce powers,⁸⁹ could regulate low-level waste disposal.⁹⁰ The Court then addressed the constitutionality of the three disputed portions of the Act.

82. *Id.* at 119.

83. *New York*, 112 S. Ct. at 2420. The majority analyzed the constitutionality of the Act in two parts. First, the Court considered Congress’s authority to pass the law. Second, the Court addressed whether the law violated state sovereignty. *Id.* at 2417.

84. 42 U.S.C. § 2021e(e)(1),(2). For a discussion of the relevant portions of the surcharge sections, see *supra* notes 43-44 and accompanying text.

85. 42 U.S.C. § 2021e(e). For a discussion of the access denial and penalty provisions, see *supra* notes 45-48 and accompanying text.

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

87. 42 U.S.C. § 2021e(d)(2)(C). For a discussion of the penalty or take-title provisions, see *supra* notes 49-50 and accompanying text.

88. *New York*, 112 S. Ct. at 2434. Justice O’Connor stated that a “choice between two unconstitutionally coercive regulatory techniques is no choice at all.” *Id.* at 2428. For a discussion of the Court’s severability analysis, see *infra* notes 109-11 and accompanying text.

89. See U.S. CONST. art. I, § 8, cl. 3. Congressional power to regulate interstate commerce also extends to areas that may be intrastate in character, but which influence or affect interstate commerce. See *Katzenbach v. McClung*, 85 S. Ct. 377 (1964).

90. *New York*, 112 S. Ct. at 2419-20. The disposal of waste has been deemed to be interstate commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621-24 (1978). In *City of Philadelphia*, the Supreme Court struck down a New Jersey law that banned the importation of out-of-state hazardous waste. *Id.* at 629. The *City of Philadelphia* Court rejected the suggestion that hazardous waste, because of its worthlessness, was not an article of interstate commerce, and stated: “All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” *Id.* at 622; see *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources*, 112 S. Ct. 2019 (1992) (invalidating restrictive waste disposal law). Since Congress regulates all interstate commerce, it has the power to regulate the disposal of LLRW. *New York*, 112 S. Ct. at 2419-20. Congress can also preempt any state regulation of LLRW that was contrary to federal regulations. *Id.*

In a majority opinion written by Justice O'Connor, the Court held that the Act's surcharge provisions were a permissible exercise of congressional power because the provisions encouraged, rather than compelled states' compliance with the Act.⁹¹ The Court viewed the provision that allowed states to impose a disposal fee as an acceptable burden on interstate commerce because Congress had unambiguously approved the burden by enacting the LLRWPA.⁹² The petitioners did not challenge the validity of the provision that allowed the Secretary of Energy to collect a portion of the surcharge revenue.⁹³ The Court also determined that the section providing rebates to compliant states was a legitimate use of Congress's spending power.⁹⁴ The Court noted that the receipt of federal funds based on compliance with federal regulations has been held to be constitutional.⁹⁵

The Court also validated the access denial provision of the Act.⁹⁶ The exclusionary provision authorizes compacts that had complied with the Act's deadlines to deny noncompliant states access to compact LLRW sites.⁹⁷ Under the Act, joining a compact is the only way to secure the benefit of the access exclusion incen-

91. *New York*, 112 S. Ct. at 2425-27.

92. *Id.* at 2425-26. States are permitted to burden interstate commerce when supported by an "expression of unambiguous intent of Congress." *Id.*

93. *Id.* at 2426. The petitioners argued that designating the escrow account as the destination for the surcharge monies violated the provision that all taxes must be paid into a general account. *Id.* The Court dismissed this argument, citing examples of federal statutes that provided for segregated trust funds. *Id.*

94. *Id.* at 2426-27.

95. *New York*, 112 S. Ct. at 2426-27 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). In *South Dakota v. Dole*, the Court held that "Congress may attach conditions on the receipt of federal funds . . ." *Id.* at 206. At issue in *Dole* was a requirement that South Dakota comply with a minimum drinking age in order to receive federal funds for highway repairs. *Id.*

Drawing on precedent, *Dole* established a four-prong test for determining whether a conditional grant of federal funds violated the Spending Clause. First, the condition must be intended to protect the general welfare of the states. *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (terming it settled law that Congress may spend to aid public welfare). Second, the condition must be clearly stated, so that the state is certain that the receipt of funds is dependent on compliance. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (finding statute using language "as a condition of" was clear conditional grant of funds). Third, the conditions must bear a reasonable relation to the federal interest being pursued. *See Massachusetts v. United States*, 435 U.S. 444, 461 (1978). Finally, there cannot be any independent constitutional bars to the conditional grant. *See Buckley v. Valeo*, 424 U.S. 1, 91 (1976).

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

97. 42 U.S.C. § 2021e(e)(2). For further discussion of the access denial provision, see *supra* notes 45-48 and accompanying text.

tives,⁹⁸ since noncompact states could not similarly deny access to out-of-state LLRW generators.⁹⁹

The Court upheld the Act's access denial provision because it found that states had a choice between abiding by federal regulations, or subjecting private waste generators within the state to higher surcharges and ultimately, the loss of access to out-of-state disposal facilities.¹⁰⁰ The Court stated that this "choice" preserved political accountability because states retained the power to choose between abiding by federal standards or pursuing different state policies.¹⁰¹ Without this "choice" Congress would be forcing the siting of controversial LLRW facilities without input from the affected states' citizens.¹⁰²

C. The Invalidation of the Take-Title Provision

The majority concluded that the take-title provision was invalid because it offered a choice between two unconstitutional options.¹⁰³ Under the take-title provision, the noncompliant state

98. 131 CONG. REC. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston).

99. Under the Act, only states that are in a compact are permitted to deny access. 42 U.S.C. § 2021e(e)(2); see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). For a discussion of the holding in *City of Philadelphia*, see *supra* note 90.

100. *New York*, 112 S. Ct. at 2427. Justice O'Connor stated that: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The 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. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress.

Id.

101. *Id.* at 2424. The Court emphasized that local citizens had the capacity to change federal policies that ran contrary to their interests. *Id.* By contrast, the Court stated that congressional compulsion removes political accountability because state officials "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." *Id.*

102. While congressional regulation would result in uniform national law, there are two drawbacks to federal regulation. First, siting of nuclear waste dumps is local in character; only local politicians have sufficient knowledge of the land and the populace to choose a site. Second, congressional regulation would reduce local accountability such that neighbors of the site would have only a whisper of a political influence in the site selection process. Merritt, *supra* note 62, at 61-62.

103. *New York*, 112 S. Ct. at 2428. The Court rejected the respondents' argument that the take-title provision was not ripe for judicial review because it would

could either take possession of the waste and assume all liability stemming from its possession, or it could regulate LLRW disposal according to the Act's deadlines.¹⁰⁴ The respondents in *New York* argued that the provision offered the state several valid and uncoerced options.¹⁰⁵ The majority disagreed, noting that each option resulted in direct congressional supervision or regulation of the state.¹⁰⁶ The majority characterized the take-title provision as federal legislation that compelled states to take action and, by so doing, "commandeered" state resources.¹⁰⁷ The Court found that the compulsive nature of the take-title provision distinguished it from the incentive portions of the Act.¹⁰⁸

The Court next addressed the severability of the take-title provision from the remaining constitutional provisions of the Act.¹⁰⁹ The *New York* Court reiterated that the severability of a single provision from a federal statute depends on the independence of the provision from the remainder of the statute.¹¹⁰ Relying on what it termed "common sense," the Court severed the take-title provision from the remainder of the Act.¹¹¹

not be effective until 1996. *Id.*; see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 200-03 (1983) (finding ripeness turns on preventing adverse effects of certain future consequences); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.") (internal quotations omitted). The Court stated that the time needed to find and build a site was too great to dismiss the case and rehear it in 1996. *New York*, 112 S. Ct. at 2428.

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

105. *Id.* The respondents argued that states had several options. The states could (1) contract for disposal with another state or compact; (2) build their own disposal facilities; or (3) permit private parties to build private LLRW facilities. *Id.*

106. *Id.* at 2429.

107. *Id.*

108. *New York*, 112 S. Ct. at 2428. The difference between the access incentive and the take-title penalty lies in who the provision affects. Under the access incentive provision, if states do not comply with the milestones, *private* waste generators will be taxed and lose access to waste facilities. Under the take-title provision, a state must either comply or the *state* must take possession of the waste and thereby assume all liability for damages caused by the waste. *Id.*

109. *Id.* at 2434.

110. *Id.* (citing *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987)). The fundamental question in determining the severability of a statutory provision is whether the absence of the unconstitutional provision will defeat the essential purpose of the statute. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987).

111. *New York*, 112 S. Ct. at 2434. The Court noted that absent the take-title provision, the Act still encourages states to become locally or regionally sufficient in disposing LLRW. *Id.* The *New York* Court did not analyze the Act's legislative history to determine the importance of the take-title provision in relation to the constitutionally sound portions of the statute. Compare *New York*, 112 S. Ct. at 2434 with *Brock*, 480 U.S. at 692-97.

D. The Dissenting Views

Justice White, joined by Justices Blackmun and Stevens, concurred with the majority's validation of the surcharge and access denial provisions.¹¹² However, the Justices dissented from the majority's invalidation of the take-title provision.¹¹³

Justice White asserted that New York's support of the Act throughout the legislative process should estop it from subsequently challenging the Act's constitutionality.¹¹⁴ Although the majority agreed that New York received a benefit from the Act's passage in that the Act kept the existing facilities open, the majority did not view the receipt of such a benefit as precluding a later attack on the Act's constitutionality.¹¹⁵

In *Brock*, the Court reviewed the legislative history of the statute to determine whether it was an essential part of the statute. *Id.* at 690-95. In *Brock*, the insignificance of the invalid provision during the legislative debate over the statute justified the Court's severance analysis. *Id.*

In *New York*, the Court paid scant attention to the legislative history of the Act, and did not base its severability finding on the expressed intent of Congress. *New York*, 112 S. Ct. at 2434. At least two legislators commented that the sole purpose of the Act was to add strict penalties for noncompliance to the LLRWPA. *See* 131 CONG. REC. S18,103-05 (daily ed. Dec. 19, 1985) (statement of Sen. Hart); 131 CONG. REC. S18,108 (daily ed. Dec. 19, 1985) (statement of Sen. Bradley).

112. *New York*, 112 S. Ct. at 2435 (White, J., dissenting).

113. *Id.*

114. *Id.* at 2440. Adopting the respondents' estoppel argument, Justice White wrote that New York

should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act.

Id.

The Supreme Court has stated that being a party to a compact agreement would be sufficient to support an estoppel theory. *See, e.g., West Virginia ex. rel Dyer v. Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring) ("West Virginia officials induced sister States to contract with her and Congress to consent to the Compact West Virginia should be estopped from repudiating her act . . ."). Although New York never joined a compact, the dissent viewed the Act as a compromise agreement to which New York was a party. *New York*, 112 S. Ct. at 2440 (White, J., dissenting). The majority countered that "[t]he fact that the Act . . . 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.

115. *New York*, 112 S. Ct. at 2432. The Court also reasoned that New York could not consent to an illegal provision, concluding that "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *Id.* at 2431.

Justice White stated that the majority should have analyzed *New York* under the *Garcia* test.¹¹⁶ Justice White found the distinctions drawn by the majority to be inapposite because the majority's analysis ignored the context of political compromise in which the Act was passed.¹¹⁷

E. Developments in the Wake of the Supreme Court Decision

The process of locating and building acceptable LLRW disposal facilities is already behind schedule.¹¹⁸ Four competing forces are working to further complicate and impede the process. First, the operational sites have begun issuing edicts to states announcing that access will be restricted unless states comply with the Act.¹¹⁹ Second, politicians are postponing siting legislation to avoid the political ramifications associated with siting decisions.¹²⁰ For instance, Nebraska Senator Kerry demanded a congressional investigation into the necessity of new sites, suggesting that LLRW is decreasing at a rate that will not sustain the need for the proposed sites.¹²¹ Third, concerned citizens are suing states to block the sit-

116. *Id.* at 2441-43 (White, J., dissenting). For further discussion of the applicability of the Tenth Amendment cases, see *infra* notes 127-32 and accompanying text.

117. *Id.* at 2438 (White, J., dissenting).

118. Hubler, *supra* note 2, at A1. New York has endured strong public opposition to its site selection process, forcing it to revise estimates of its earliest siting date to 1998. *Id.* Connecticut restarted its search for a facility in 1993, with one legislator announcing that legislative debates were a "ploy" to delay the site-selection process. Daniel P. Jones, *House Rules Out Three Sites for Dump*, HARTFORD COURANT, Apr. 2, 1992, at D1; Daniel P. Jones, *Low-Level Waste Needs Dump; Dump Needed for Low-Level Radioactive Waste*, HARTFORD COURANT, May 20, 1993, at A1.

119. Richard R. Zuercher, *States Must Show Siting Progress or Risk LLW Facilities Cut-Off*, NUCLEONICS WEEK, July 16, 1992, at 1. As of January 1, 1993, there were only two open LLRW sites—Barnwell and Richland (Hanford). *Northwest, Southeast Compacts only Regions with LLW Sites*, NUCLEAR WASTE NEWS, Jan. 7, 1993, at 1. The Richland site will continue accepting waste from its own compact and from the Rocky Mountain compact, pursuant to a contract, until it reaches its volume capacity. *Id.* The Barnwell site has existing contracts until July 1994 to accept waste from a variety of sources at increased costs. *Id.* Both sites have already denied access to Michigan in response to its dilatory siting tactics. Zuercher, *supra*, at 1. The access denial was upheld when Michigan challenged it in 1990. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992).

120. Peckinpugh, *supra* note 24, at 58; see generally *Joint Hearings*, *supra* note 2, at 152 (recalling contemplated extension of LLRWPA allowed Texas legislators to slow down siting process). Some states are delaying the process without fear of the Act's penalties. For example, Kansas will introduce a bill proposing that it withdraw from the Central Interstate compact, so that it will not be considered for a site. *Radwaste Compact: Nebraska Expected to Reject Dump Site*, GREENWIRE, Jan. 26, 1993, at 1.

121. 138 CONG. REC. S10,983 (daily ed. Aug. 4, 1992). Several studies show a decrease in the annual volume of LLRW. *Id.* (statement of Sen. Kerry); Burns,

ing process.¹²² And fourth, the Nuclear Regulatory Commission has proposed new regulations that would terminate all on-site storage of LLRW,¹²³ posing serious consequences for most LLRW generators.

IV. CRITICAL ANALYSIS

The Act's take-title provision, mandating that a state take possession of a substance that could subject the state to liability, had no equivalent in any other another federal statute.¹²⁴ Similar statutes imposing sanctions on states for noncompliance with federal regulations have been held unconstitutional.¹²⁵ Both of the choices in the Act imposed substantial costs on the states, either through exposure to liability or in the administration of an expensive state regulatory program.¹²⁶

supra note 9, at 288-89. Any recent decrease in the annual volume of LLRW is deceptive because it is probably due to on-site storage of waste by the generators. See BARLETT & STEELE, *supra* note 1, at 186. One official of EG & G, the company that conducts surveys for the government, attributed the fluctuation in waste numbers to increased on-site storage. *Id.* On-site storage is a dangerous method of reducing disposal costs. See *Joint Hearings, supra* note 2, at 300.

122. See, e.g. cases cited *supra* note 4.

123. 58 Fed. Reg. 6730 (Proposed Feb. 2, 1993).

124. *New York*, 112 S. Ct. at 2429. In its amicus brief, Connecticut echoed the idea that the take-title provision is unique. Brief of the State of Connecticut as Amicus Curiae in Support of Petitioner State of New York at 9, *New York v. United States*, 112 S. Ct. 2408 (1992) (No. 191-543). The lawyer for the respondents termed the take-title provision "a novel approach." Lyle Denniston, *Dumping on Congress Brings Partial Victory in Waste Disposal Case*, AM. LAW., Sept. 1992, at 93.

125. Merritt, *supra* note 62, at 62-63; see, e.g. EPA v. Brown, 431 U.S. 99 (1977). *Brown* was a collection of several cases that were rendered moot by changes in government regulations. *Id.* at 103-04. Each case involved a federal statute which imposed sanctions on states for failing to comply with federal regulations. *Id.* at 103. The government conceded that the sanctions were unconstitutional and agreed to change the statutes, thereby rendering the cases moot. *Id.*

But cf. *Bell v. New Jersey*, 461 U.S. 773 (1983) (holding that imposition of liability for misused funds does not interfere with state sovereignty); *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 879 (E.D. Pa. 1982) (citing Tenth Amendment upholding constitutionality of Pennsylvania law prohibiting expenditures for automotive emission program), *aff'd on other grounds*, 678 F.2d 470 (3d Cir. 1982), *cert. denied*, 459 U.S. 969 (1982). The statute in *Bell* imposed liability on a state for misusing federal funds which it had voluntarily accepted. *Bell*, 461 U.S. at 788-89. The Court likened the provision to a condition imposed on the receipt of federal funds. *Id.* at 790-91.

126. See *National League of Cities v. Usery*, 426 U.S. 833, 846-47 (1976). The Court in *National League* considered the substantial costs imposed by the statute on the states when it invalidated the statute. *Id.*; see also D. Bruce La Pierre, *Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 657 (1985).

The outcome in *New York* is laudable, but the holding is flawed to the extent that the Court ignored precedent. The majority erred in two areas of its analysis. First, the majority did not apply the *Garcia* test. Clearly, had it done so, the Court would have found the take-title provision constitutional. Second, the majority relied on dicta and inapposite cases to support its holding.

A. The *Garcia* Test Should Have Been Applied

The majority did not apply existing Tenth Amendment jurisprudence to *New York*.¹²⁷ The majority apparently disregarded its statement in *South Carolina v. Baker*¹²⁸ that “[t]he Tenth Amendment limits on Congress’ authority to regulate state activities are set out in *Garcia*”¹²⁹ The *Baker* language requires *Garcia*’s application to all cases that involve alleged infringements on state sovereignty.¹³⁰ In *New York*, the majority maintained that the Tenth Amendment cases were inapplicable because in those cases Congress had subjected the states to “the same regulation applicable to private parties.”¹³¹ This conclusion is unwarranted. As the dissent noted, *Virginia Mining* and *FERC* were not decided solely on the grounds that the legislation regulated private parties and states alike.¹³²

The thrust of the dispute in *New York* was whether the Act violated New York’s sovereignty. Any inquiry into violations of state sovereignty by federal statute must, therefore, involve the Tenth Amendment cases. Accordingly, the Court should have either applied *Garcia* because it is the controlling precedent in state sovereignty jurisprudence, or it should have overruled *Garcia*; it did neither.

B. Arguments for the Validation of the Take-Title Provision

Both the district court and the Second Circuit analyzed the Act in terms of *Garcia*’s political process test.¹³³ The Second Circuit

127. *New York*, 112 S. Ct. at 2441. One commentator stated: “The opinion [] undermines the theoretical underpinnings of the court’s Tenth Amendment precedents.” Gary S. Hook, *Clearing the Tracks for Federal Action*, THE RECORDER, Sept. 3, 1992, at 7.

128. 485 U.S. 505 (1988).

129. *Id.* at 512.

130. *Id.*

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

132. *Id.* at 2441 (White, J., dissenting).

133. *New York v. United States*, 942 F.2d 114 (2d Cir. 1991) (recognizing *Garcia* as starting point for Tenth Amendment analysis); *Michigan v. United States*, 773 F. Supp. 997 (D. Mich. 1991) (finding political process prevents laws that un-

praised the broad-based state involvement in the Act's creation.¹³⁴ In light of this, the Supreme Court's failure to apply the *Garcia* test to the Act is troubling; even the petitioners in *New York* conceded that the Act was not a violation of the Tenth Amendment.¹³⁵ However, during arguments before the Court, the petitioners sought to create a narrow exception to invalidate the Act, without overruling *Garcia*.¹³⁶

The *Garcia* test, based on the premise that the political process protects state sovereignty, has been criticized for two reasons. First, the underlying theory presumes that the political process will protect a state's interests, even though this assumption is probably invalid in modern politics.¹³⁷ Second, the theory fails to delineate what is a violation of the process.¹³⁸ However, the Court's analysis in *Garcia* was an improvement on the reasoning in *National League*, which was unclear as to what constituted "traditional government functions."¹³⁹ Furthermore, despite its flaws, *Garcia* remains precedent and should have been either followed or overruled by the Court in *New York*.¹⁴⁰

There are three arguments in favor of upholding the take-title provision. First, the Act was proposed and formulated by the states; thus, it is not the type of coercive regulation envisioned by the *New York* majority.¹⁴¹ Second, the take-title provision, while recognized

duly burden states from being enacted and Michigan's legislators participated in legislative passage of statute); *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990).

134. *New York*, 942 F.2d at 119. For the language used by the Second Circuit, see *supra* notes 80-82 and accompanying text.

135. *Denniston*, *supra* note 124, at 93.

136. *See id.* Peter Schiff, attorney for the petitioners, argued that the Act was unique in mandating state action. *Id.* In fact, Mr. Schiff's statement, "[W]e know of no other situation where the states have simply been mandated to take part in a particular activity," is remarkably similar to the anti-commandeering stance adopted by the majority. *Compare Denniston*, *supra* note 124, at 93 with *New York*, 112 S. Ct. at 2428.

137. Merritt, *supra* note 62, at 15. Professor Merritt states: "The Court's treatment of federal-state relations in *Garcia* is wholly unsatisfactory . . . because *Garcia*'s central assertion that the structure of federal politics protects the autonomy of state governments is simply wishful thinking." *Id.* Commentators have also criticized the Court for adopting a test which naively assumes that the political process will protect the itinerant voters of the states. *Id.* at 15 n.88.

138. *California v. Baker*, 485 U.S. 505, 512 (1988).

139. *See La Pierre*, *supra* note 126, at 581.

140. In his dissent, Justice White argued that if the majority had applied the *Garcia* test to *New York*, the six Justices would have concluded that the take-title provision was the product of state-driven compromise, not the product of congressional compulsion. *New York*, 112 S. Ct. 2441-43 (White, J., dissenting).

141. *See Hook*, *supra* note 127, at 7; *see also New York*, 112 S. Ct. at 2435 (White, J., dissenting).

as a stringent penalty, was debated by Congress and survived intact.¹⁴² Third, the take-title provision was a necessary cost imposed upon the states in return for the benefit of denying access to waste facilities, as provided for by the statute's exclusionary language.¹⁴³

C. *New York's* Analysis

The majority invalidated the take-title provision in part because the provision commandeered state action.¹⁴⁴ However, the Court's "commandeering" analysis rests on a foundation of dicta and unpersuasive analysis of case law.¹⁴⁵ The majority stated that the *Virginia Mining* decision was based solely on the statute's failure to "comandeer" state regulation.¹⁴⁶ Furthermore, the majority ignored the Court's attempt in *Virginia Mining* to portray the statute in *Virginia Mining* as the product of "cooperative federalism."¹⁴⁷ The Court in *Virginia Mining* upheld that statute because it regulated private coal mine operators and not the state.¹⁴⁸ The *New York* majority also based its anti-commandeering formulation on dicta used in the Supreme Court's decision in *FERC v. Mississippi*.¹⁴⁹ This conclusion, however, is unwarranted. In *FERC*, the Court did

142. 131 CONG. REC. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston); 131 CONG. REC. S18,120 (daily ed. Dec. 19, 1985) (statement of Sen. Levin).

143. 131 CONG. REC. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston); see Berkovitz, *supra* note 1, at 475, 479. The take-title language, as it applied to compacts, can be properly termed a condition of ratification; to be approved the compact had to consent to the Act's provisions. *Id.* In return for accepting the take-title provision, member states of compliant compacts gained the ability to deny access to noncompliant states. *Id.*

144. *New York*, 112 S. Ct. at 2420-21, 2428. "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 288 (1981)).

145. *Id.* at 2441-43 (White, J., dissenting). The majority relied on dicta in *Virginia Mining*. *Id.* at 2441-42 (White, J., dissenting). The Court upheld the *Virginia Mining* statute because it did not directly regulate the states. *Virginia Mining*, 452 U.S. at 287-88.

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

147. See *id.* The Second Circuit seemed to imply that the Act was also the product of "cooperative federalism." *New York v. United States*, 942 F.2d 114, 119-20 (2d Cir. 1991).

148. *Virginia Mining*, 452 U.S. at 299.

149. *New York*, 112 S. Ct. at 2420. Justice O'Connor wrote in *New York*: "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.* (quoting *FERC v. Mississippi*, 456 U.S. at 762 (1982)). Justice O'Connor omitted the remainder of the sentence from *FERC* which stated: "there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC v. Mississippi*, 456 U.S. at 762.

not validate the statute at issue solely on the grounds that it did not compel state action.¹⁵⁰

Furthermore, the majority's reliance on the *Virginia Mining* and *FERC v. Mississippi* cases is questionable because the precedential value of these holdings has not been fully understood. Commentators have expressed confusion as to whether these cases support congressional employment of the states as regulatory agents, which is contrary to Justice O'Connor's state sovereignty rationale.¹⁵¹ In addition, the Court has also expressed doubts whether the anti-commandeering language, relied on by the majority in *New York*, survived *Garcia*.¹⁵² Thus, the Court's failure to address *Garcia* in the *New York* decision, while relying on two cases that are arguably ambiguous, has created considerable confusion.

V. IMPACT

A. *New York's* Effects on the States and Industry

As a practical matter, the Supreme Court in *New York* ignored the realities involved in siting new LLRW facilities. States will not expedite their site-selection process because they face no penalties for failing to comply with the Act.¹⁵³ Examples abound of states that are already locked in litigation or engaged in political squabbles over LLRW disposal siting decisions.¹⁵⁴

Another result of the *New York* decision is that noncompliant, noncompact states will not incur penalties for failing to meet the Act's deadlines, but private generators within the state, forced to

150. *FERC v. Mississippi*, 456 U.S. at 758-68. In *FERC*, the Court found that the energy statute forced states to implement federal regulations, and to that extent, it constituted congressional pre-emption of the area. *Id.* The language of the statute permitted states to consider implementing federal regulations. *Id.* at 746-48. The Court emphasized that the possibility of pre-emption was a strong inducement, but it was not coercion for the states to implement federal guidelines. *Id.* at 766-67.

151. Berkovitz, *supra* note 1, at 472; La Pierre, *supra* note 126, at 608-09, 616; Merritt, *supra* note 62, at 60-61. Berkovitz stated that "[b]y treating *FERC* as a pre-emption case, . . . the majority left unresolved the issue of whether the federal government can command a state to act in furtherance of federal goals." *Id.*

152. *California v. Baker*, 485 U.S. 505, 512-13 (1988). The Court stated: "The extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* . . . is far from clear." *Id.* at 513; see also *Nevada v. Skinner*, 884 F.2d 445, 448, 453-54 (9th Cir. 1989) (recognizing that some parts of *FERC* may survive *Garcia*), *cert. denied*, 493 U.S. 1070 (1990).

153. Todd Woody, *State's Radioactive Dump: Is It too Hot to Handle?*, THE RECORDER, June 30, 1992, at 1 (stating *New York* decision "may have removed the gun from California lawmakers' heads . . ."). *Id.*

154. For further discussion of these problems, see *supra* notes 4, 118 and accompanying text.

store their own waste, may incur substantial tort liability.¹⁵⁵ Justice White predicted that severing the Act's take-title provision will ultimately subject states to indemnification suits for failing to take action to comply with the Act.¹⁵⁶ State inaction will eventually cost private generators the right to dispose LLRW in other states.¹⁵⁷

The costs produced by the lack of access to LLRW facilities, and the concomitant increased surcharges at the operating facilities,¹⁵⁸ create a dilemma for certain industries. Those industries must decide to either store LLRW on-site or discontinue the use of radioactive materials. The dangers associated with storing LLRW on site are easily imagined.¹⁵⁹ The increasing use of on-site storage portends that many private waste generators will be sued for damages caused by on-site environmental exposure to LLRW. The alternative, discontinuing the use of radioactive materials, would have a crippling effect on the energy industry and the medical research and treatment industries.¹⁶⁰

B. The Future and Possible Solutions

One legislative solution to the LLRW problem would be to reinstate the take-title provision so that it applies only to compacts. Compacts are not treated as states; rather, they are interstate agreements without individual state sovereignty.¹⁶¹ Due to their unique nature, compacts are immune from the anti-commandeering lan-

155. See Woody, *supra* note 153, at 1. Woody suggests that generators that store waste on site will be subject to tort actions for damages caused by exposure to their waste. Woody, *supra* note 153, at 1.

156. *New York*, 112 S. Ct. at 2445 (White, J., dissenting). One lawyer projected that California will face lawsuits caused by the stockpiling of radioactive waste. Woody, *supra* note 153, at 1.

157. Leonard S. Greenberger & Kristen Smyth, *Supreme Court Weakens Low-Level Waste Law*, PUB. UTIL. FORT., Aug. 1, 1992, at 1

158. *Northwest, Southeast Compacts only Regions with LLW Sites*, NUCLEAR WASTE NEWS, Jan. 7, 1993, at 1 (noting Barnwell's surcharges tripled).

159. Betsy Tompkins, *Frustration Abounds Concerning Disposal*, NUCLEAR NEWS, Jan. 1993, at *1 available in LEXIS Nexis Library, Magazine file. A dangerous side-effect caused by the disposal crisis is the emergence of unlicensed private disposal facilities. *Id.* Such facilities are rife with safety hazards and corruption. *Id.*

160. Robert Reinhold, *States, Failing to Cooperate, Face a Nuclear-Waste Crisis*, N.Y. TIMES, Dec. 28, 1992, at A1. In Michigan, the Veteran's Administration Hospital sends patients out of the state for procedures involving radioactive materials. Meanwhile, 36,000 cubic feet of LLRW is in storage. *Id.* One hospital official commented: "I am not going to allow anybody to generate large quantities of radioactive waste until I know where I will dispose of it. We will have to ask, 'Can we do that kind of research?'" *Id.*

161. For a discussion of compacts, see *supra* note 7.

gauge referred to in *New York*.¹⁶² Since the Supreme Court has upheld legislation requiring compact member states to waive their constitutional rights,¹⁶³ legislation that predicated the take-title provision on membership in a compact could be upheld on similar grounds. Therefore, Congress could amend the Act by applying the take-title provision solely to compacts that failed to comply with federal regulation.

In *New York*, by avoiding the *Garcia* test, the Supreme Court gave little guidance as to the status of state sovereignty law. To clarify its position, the Court should consider adopting a balancing test that would first require the federal government to demonstrate a national interest in the legislation. An example of such an interest is the need to regulate low-level waste disposal before it overwhelms the nation's existing disposal infrastructure. The state could then prevent federal regulation only by establishing a lack of political accountability by federal legislators, or by showing that there are compelling local interests that countervail the national interest.

The Supreme Court, in severing the take-title provision, has left a confusing test for determining whether state sovereignty has been violated. Only by revisiting *Garcia* can the Court clarify what standard it will apply during future review of state sovereignty violations.

Without action by the government, either amending the Act at the federal level or establishing new sites on the state level, the nation's low-level waste disposal system will be overwhelmed. As a result, courts will continue to be deluged with litigation attempting to block proposed LLRW sites. Intergovernmental cooperation is imperative to solving the LLRW disposal shortage.

Rhett Traband

162. 131 CONG. REC. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston).

The liability for consequential damages is not being imposed on the States. The States that enter into compacts accept the terms of the legislation we are enacting. By entering into compacts, States assume the risk that they may incur the penalties set forth in the act for failure to comply with its provisions. In return for assumption of this risk, these States receive the benefits of the act, chief of which is the right to exclude low-level radioactive waste

Id.

163. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (upholding compact legislation waiving individual states' immunity as condition of joining compact). Even the dissent in *Petty* agreed that Congress may attach conditions to compact membership which waive constitutional rights of the states. *Id.* at 285-86 (Frankfurter, J., dissenting).

