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Constitutional Law - Tenth Amendment - State Sovereignty as a Limit on Congressional Power

Scott Gardner

CONSTITUTIONAL LAW—TENTH AMENDMENT—STATE SOVEREIGNTY AS A LIMIT ON CONGRESSIONAL POWER—The United States Supreme Court held that a federal statute offering the states an option between two unconstitutionally coercive regulatory techniques—either accepting ownership of radioactive waste generated within the state or regulating radioactive waste disposal according to Congress' direction—was beyond Congress' enumerated powers and infringed upon state sovereignty reserved by the Tenth Amendment.

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

Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985[1] ("LLRWPAA") in response to an anticipated shortage of low-level radioactive waste sites among the states.[2] The LLRWPAA declared a federal policy of holding each state responsible for providing for the disposal of all low-level radioactive waste generated within its borders.[3] It also authorized states to enter into regional interstate compacts, if desired, to provide for regional disposal sites for low-level radioactive waste.[4] The LLRWPAA provided three incentives to influence states to comply with the declared federal policy of providing for the necessary capacity to dispose of radioactive waste.[5]

The first provision, establishing the monetary incentives, declared that during a seven-year transition period: (1) states with radioactive disposal sites were authorized to charge a surcharge on

1. Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 USC §§ 2021b-2021j (1985).

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

3. *New York*, 112 S Ct at 2415. The LLRWPAA provides, in pertinent part, that: "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State." 42 USC § 2021c(a)(1)(A).

4. *New York*, 112 S Ct at 2415. The LLRWPAA provides: "[t]o carry out the policy set forth . . . the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 USC § 2021d(a)(2).

5. *New York*, 112 S Ct at 2416.

all radioactive waste received from other states;[6] (2) one-fourth of all such surcharges accumulated were to be collected by the Secretary of Energy who was then to place the funds collected in an escrow account;[7] and (3) states meeting goals enumerated by the LLRWPAA by certain deadline dates received payments from the escrow account with such payments to be used for the purpose of assuring the safe disposal of radioactive waste.[8]

The second provision, creating an access incentive, authorized that following the seven-year transition period, states with disposal sites could: (1) incrementally increase the cost of access to their sites for radioactive waste arriving from states not meeting the deadlines of the LLRWPAA; and (2) eventually deny access to their sites altogether to waste arriving from such states.[9]

The third provision—the take-title incentive—provided that each state producing radioactive waste and unable to provide for disposal of all such waste by a deadline date must, upon the request of the actual entity generating or owning such waste, either: (1) take title to and possession of the waste; or otherwise (2) be

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6. 42 USC § 2021e(d)(1) provides:

The disposal of any low-level radioactive waste under this section (other than low-level radioactive waste generated in a sited compact region) may be charged a surcharge by the State in which the applicable regional disposal facility is located. . . .

42 USC § 2021e(d)(1).

7. 42 USC § 2021e(d)(2)(A) provides: "Twenty-five per centum of all surcharge fees received by a State pursuant to [42 USC § 2021 e(d)(1)] . . . shall be transferred on a monthly basis to an escrow account held by the Secretary." 42 USC § 2021e(d)(2)(A).

8. 42 USC §§ 2021e(d)(1)-(2) provides: "The twenty-five per centum of any amount collected by a State under [42 USC § 2021e(d)(1)] . . . and transferred to the Secretary under [42 USC § 2021e(d)(2)(A)], shall be paid by the Secretary . . . if the milestone described . . . is met by the State in which such waste originated." 42 USC § 2021e(d)(2)(B)(i).

Any amount paid under [42 USC § 2012e(d)(2)(B)] . . . may only be used to—

(I) establish low-level radioactive waste disposalfacilities;

(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 . . . of low-level radioactive waste disposal facilities.

42 USC § 2021e(d)(2)(E)(i).

9. 42 USC § 2021e(e)(2)(A) provides:

If any State fails to comply . . .

(i) any generator of low-level radioactive waste within such region or non-member State shall . . . be charged 2 times the surcharge otherwise applicable under [42 USC § 2021e(d)] of this section; and

(ii) on or after January 1, 1987, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities. . . .

42 USC § 2021e(e)(2)(A).

liable for all damages incurred by the entity generating or owning the waste resulting from the state's failure to take title.[10]

In 1990, the State of New York and two of its counties ("New York") brought suit against the United States seeking a declaratory judgment that, inter alia, held all three incentive provisions of the LLRWPAA unconstitutional as being inconsistent with the Tenth Amendment[11] to the Constitution.[12] The United States District Court for the Northern District of New York dismissed the complaint.[13] On appeal, the United States Court of Appeals for the Second Circuit affirmed.[14] The United States Supreme Court granted certiorari.[15] Before the Supreme Court, New York contended that the Tenth Amendment limited the power of Congress to regulate as it had in the LLRWPAA, and that rather than regulating the generators, owners and disposers of radioactive waste directly, which would be well within Congress' power, Congress exceeded its power by directing the states to regulate in this area.[16]

The Supreme Court affirmed in part and reversed in part.[17] Jus-

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10. 42 USC § 2021e(d)(2)(C) provides:

> If 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 by January 1, 1996, 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, be obligated to take possession of the waste, and shall be liable for all damages directly 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, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 USC § 2021e(d)(2)(C).

11. The Tenth Amendment to the United States Constitution provides: "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." US Const, Amend X.

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

13. *New York v United States*, 757 F Supp 10, 13 (ND NY 1990), aff'd, 942 F2d 114 (2d Cir 1991), aff'd in part, rev'd in part, 112 S Ct 2408 (1992). The district court held that *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), and *South Carolina v Baker*, 485 US 505 (1988), essentially foreclosed the courts from interdicting in the exercise of federal power over the states unless there was a breakdown in the political process which protects the states from federal power. *New York*, 757 F Supp at 12. The district court found no such breakdown in this case. Id at 12-13.

14. *New York v United States*, 942 F2d 114, 121 (2d Cir 1991), aff'd in part, rev'd in part, 112 S Ct 2408 (1992). The court of appeals affirmed on the same grounds as given by the district court. *New York*, 942 F2d at 120-21.

15. *New York v United States*, 112 S Ct 856 (1992).

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

17. Id at 2414. Justice O'Connor delivered the opinion of the Court joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter and Thomas, and joined in part by Justices White, Blackmun and Stevens. Id. The Court affirmed the court of appeals decision insofar as it held the monetary incentive and access incentive provisions of the LLRWPAA constitutional. Id at 2427, 2435. It reversed the court of appeals decision insofar as it held

tice O'Connor, writing for the majority, began her analysis of the constitutional claim by noting that the Tenth Amendment restrained Congress' conferred powers, but that this restriction "is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology."[18] The Court settled that the Tenth Amendment merely confirmed that Congress' power was subject to restrictions that may reserve power to the states.[19] The proper inquiry, therefore, was deemed to be whether the state's sovereignty was protected by a restriction on Congress' enumerated Article I powers sought to be exercised here: the Commerce Power or the Spending Power.[20]

The Court next summarized three provisions of the Constitution, important to the required examination, which conferred power on the federal government. First, the Court reviewed Congress' Commerce Clause Power conferred by the Constitution[21] noting that its scope had expanded significantly over 200 years so that, today, activities at one time considered purely local were well within Congress' power to regulate interstate commerce.[22] Second, Congress'

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that the take-title incentive provision was constitutional. Id at 2429, 2435. Justice White wrote an opinion concurring in part and dissenting in part in which Justices Blackmun and Stevens joined. Id at 2414. Justice Stevens also filed a separate dissenting opinion. Id. Justice White's opinion concurred with the Court that the monetary incentive and access incentive provisions were constitutional. Id at 2435 (White concurring in part, dissenting in part). Both Justices White and Stevens dissented with respect to that part of the Court's decision which held the take-title incentive provision unconstitutional. Id at 2435, 2446-47 (Stevens concurring in part, dissenting in part).

18. Id at 2418. Justice O'Connor also stated:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."

Id at 2417-18 (citations omitted).

19. Id.

20. Id.

21. Article I confers upon the Congress the power to "regulate Commerce . . . among the several States. . . ." US Const, Art I, § 8, cl 3.

22. *New York*, 112 S Ct at 2419. "The scope of the power the commerce clause delegates to Congress was first suggested by Chief Justice Marshall in *Gibbons v Ogden*. . . . Marshall indicated that, in his view, congressional power to regulate 'commercial intercourse' extended to all activity having any interstate impact--however indirect." Laurence H. Tribe, *American Constitutional Law* § 5-4 at 306 (Foundation Press, 2d ed 1988). Thus, even though the federal government was designed as one of enumerated powers and, therefore, limited powers, virtually from the beginning the commerce powers were broadly interpreted. This broad interpretation was adhered to until 1887 when the Court adopted a formalistic approach. (See note 97 and accompanying text). In 1937 the Court abandoned the formal approach, and returned to Marshall's broad interpretation when it held in *NLRB v*

constitutionally conferred power to Tax and Spend[23] was examined and the Court recognized that Congress had the ability to set terms upon which it would disburse federal funds to the states.[24] Finally, it was noted that, through the Supremacy Clause,[25] Congress may preempt state regulation by regulating in a particular field within the confines of the Constitution.[26]

Justice O'Connor then reviewed the Court's most recent cases involving the interpretation of the Tenth Amendment, distinguishing between two separate lines of cases: those involving "generally applicable laws," and those in which Congress attempted to "direct or otherwise motivate the States to regulate in a particular field or in a particular way."[27] The Court cited *National League of Cities v Usery*,[28] *Garcia v San Antonio Metropolitan Transit Authority*,[29]

Jones & Laughlin Steel Corp., 301 US 1 (1937), that Congress could regulate labor relations at any manufacturing plant because work stoppage would affect interstate commerce. *Jones & Laughlin Steel Corp.*, 301 US at 41, 43. Tribe summarized the effect of the Court's interpretation: "[a]n activity which takes place wholly intrastate may now be subject to congressional regulation entirely because of the activity's impact in other states." Tribe, *American Constitutional Law* § 5-4 at 309. The Court's interpretation was further broadened in 1942 when it adopted an aggregate effect interpretation in *Wickard v Filburn*, 317 US 111 (1942), which held that Congress could control a single farmer's production of wheat for home use because, if all farmers were considered, in the aggregate the amount of wheat grown for personal use could rationally be thought to effect interstate commerce by altering supply and demand. *Wickard*, 317 US at 127-28. Thus, Congress has been held to have the power to regulate not only activities that have an effect on interstate commerce, but also activities of individuals if the class of such activities, in the aggregate, could rationally be thought of as affecting interstate commerce. Today it is recognized that Congress' commerce power is limited only by external restrictions such as the Bill of Rights and, to some extent, political restraints of the federal system. Tribe, *American Constitutional Law* § 5-7 at 313-14. See also note 103 and accompanying text.

23. Article I of the Constitution states that: "Congress shall have Power to lay and collect Taxes, . . . to pay the Debts and provide for the . . . general Welfare of the United States." US Const, Art I, § 8, cl 1.

24. *New York*, 112 S Ct at 2419. For example, the Court noted that the Spending Power permits Congress to stipulate the disbursement of highway funds upon the state's sanction of a certain minimum drinking age. Id.

25. Article VI of the Constitution provides that: "the Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, Art VI, § 2.

26. *New York*, 112 S Ct at 2419.

27. Id at 2420.

28. 426 US 833 (1976), rev'd, 469 US 528, 531 (1985).

29. 469 US 528 (1985). The Court upheld application of the Fair Labor Standards Act, which regulated minimum wage and maximum hour obligations of private and public employers to a municipally owned and operated mass transit system. *Garcia*, 469 US at 533. *Garcia* expressly overruled *National League of Cities*. *Garcia*, 469 US at 531. The Court held 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 par-

and *Gregory v Ashcroft*[30] as cases where Congress subjected the states to generally applicable laws.[31] The Court held that the instant case was "not a case in which Congress has subjected a State to the same legislation applicable to private parties," and therefore, did not require the Court to apply or to review the holdings of any of the cases involving such generally applicable laws.[32] It was held, instead, that this case was of the line in which Congress directed or influenced the states to regulate.[33]

The Court then reviewed two Tenth Amendment cases from the "directing or motivating States to regulate" line: *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.*[34] and *Federal Energy Regulatory Commission v Mississippi.*[35] Quoting *Hodel*, the Court set forth the premise that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' "[36] The Supreme Court found that a similar conclusion was reached in *FERC* in which the Court "observed that 'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.' "[37] Justice O'Connor then delved into the history of the Constitutional Congress indicating that the "[f]ramers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[38]

The Court then explored two of the methods by which Congress may encourage states to regulate in accordance with Congress' desires. First, Congress can, under its Taxing and Spending Power, set terms upon the receipt of federal funds, however, "[s]uch funds must (among other requirements) bear some relationship to the

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ticipation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." Id at 556.

30. 111 S Ct 2395 (1991).

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

32. Id.

33. Id.

34. 452 US 264 (1981). *Hodel* upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977 which preempted state regulation in the field of surface mining except when a state adopted the federal regulation. *Hodel*, 452 US at 268.

35. 456 US 742 (1982). *Federal Energy Regulatory Commission v Mississippi* ("FERC") upheld the Public Utility Regulatory Policy Act of 1978 ("PURPA") which required state agencies regulating utilities to give consideration to twelve proposed rate schemes and provide federally prescribed feedback comments. *FERC*, 456 US at 745. PURPA was upheld because there was "nothing in PURPA directly compelling the States to enact a legislative program." Id at 765.

36. *New York*, 112 S Ct at 2420 quoting *Hodel*, 452 US at 288.

37. *New York*, 112 S Ct at 2420 quoting *FERC*, 456 US at 761-62.

38. *New York*, 112 S Ct at 2423.

purpose of the federal spending."[39] The Court stated that it is not unusual that the terms conditioning receipt of such funds influence a state's legislature.[40]

Second, the Court noted that where Congress has the power to regulate an activity under the Commerce Clause, Congress has the ability to influence state legislatures by offering the states the choice of either regulating that activity in accordance with federal standards or, by virtue of the Supremacy Clause, having the state's law preempted by federal regulation of the activity.[41] The Court reasoned that with either of these constitutionally acceptable methods, Congress could ultimately achieve its goal to encourage states to comply with a federal standard, and at the same time, leave accountability with the entity enforcing the federal standard upon the state's residents.[42]

Using these principles, the Court analyzed the three challenged LLRWPAA provisions. Both the monetary incentive and access incentive were found to be consistent with the Tenth Amendment, and therefore, constitutional.[43] Initially, the Court examined the three steps of the monetary incentive, the first step being the authorization to states having disposal sites to impose a surcharge for waste arriving from non-sited states.[44] This was found to be a valid exercise of Congress' power to authorize states to burden interstate commerce.[45] The second step, concerning the Secretary of Energy's collection of one-fourth of the surcharge, was found to be no more than a valid federal tax on interstate commerce.[46] The third step, involving the disbursement of funds from the escrow account to states meeting the LLRWPAA enumerated goals, was found not to

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39. Id. The Court cited *South Dakota v Dole*, 483 US 203 (1987), which upheld a federal statute that withheld federal highway funds from any state which had a minimum drinking age of less than 21 years. *South Dakota*, 483 US at 206.

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

41. Id at 2424 citing *Hodel*, 452 US at 288, and *FERC*, 456 US at 764-65.

42. *New York*, 112 S Ct at 2424. The Court reasoned that should the state legislature choose to comply with the federal standards, then the citizens would hold the state officials accountable. Id. If the state legislature had chosen not to comply and the federal government stepped in to regulate, then the citizens would hold the federal officials accountable. Id. The Court pointed out that were Congress to direct state legislatures to regulate, instead of offering a choice, the accountability of state and federal officials would be lessened. Id.

43. Id at 2427.

44. Id at 2415.

45. Id at 2426. The Court cited *Wyoming v Oklahoma*, 112 S Ct 789 (1992), which held that the Negative Commerce Clause limit on States' power to burden interstate commerce can be lifted by Congress' expression of an "unambiguous intent." *Wyoming*, 112 S Ct at 802.

46. *New York*, 112 S Ct at 2426.

exceed Congress' Spending Power authority to condition receipt of federal funds.[47] This was because, inter alia, the conditions imposed were related to the purpose of the federal spending.[48] The Court held that since all three steps of the monetary incentive were within Congress' Article I Commerce Clause and Taxing and Spending Clause Powers, the incentive was not inconsistent with the Tenth Amendment.[49]

Second, the Court analyzed the access incentive which authorized states having disposal sites to, eventually, deny access to their sites to waste arriving from states not regulating in accordance with the federal guidelines.[50] This presented the non-sited states with the option of either regulating in accordance with the federal standards or not so regulating and having state regulation preempted by federal regulation.[51] Federal preemption in this case would take the form of state residents, producing or owning waste, being subject to the federal regulation authorizing sited states to deny them access.[52] The Court held that since the regulation of the activity was within the scope of Congress' Commerce Clause Power, the access incentive was a valid conditional use of Congress' Commerce Clause Power, and therefore, was not inconsistent with the Tenth Amendment.[53]

The take-title incentive of the LLRWPAA, however, was found by the Court to be outside Congress' enumerated powers and inconsistent with the Tenth Amendment.[54] The take-title incentive offered states the choice of either: (1) taking title to or being held liable for radioactive waste generated within its boundaries; or (2) regulating in accordance with the LLRWPAA.[55] The Court held that, with respect to the first alternative standing alone, the Constitution would neither permit Congress to transfer title to radioactive waste from its owner to state governments nor would it permit Congress to declare that states would become liable for the waste

47. Id at 2426-27.
48. Id.
49. Id at 2427.
50. Id.
51. Id.
52. Id.
53. Id. The Court stated the where federal regulation of private activity was within the scope of the Commerce Clause, it had recognized the ability of Congress to offer states the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. Id citing *Hodel*, 452 US at 288; and *FERC*, 456 US at 764-65.
54. *New York*, 112 S Ct at 2429.
55. Id at 2428. See note 10 for the text of 42 USC § 2021e(d)(2)(C), the take-title incentive provision.

owner's damages by refusing to take title.[56] Either federal action, said the Court, "would 'commandeer' state governments into the service of federal regulatory purposes, and would . . . be inconsistent with the Constitution's division of authority between federal and state governments."[57]

Likewise, the Court found that the second alternative, regulating in accordance with the LLRWPAA, standing alone, constituted a "command to state governments to implement legislation enacted by Congress. . . . [T]he Constitution does not empower Congress to subject state governments to this type of instruction."[58] Because, the Court reasoned, either alternative, standing alone, would be beyond Congress' power, it is also beyond Congress' power to offer the states a choice between the two.[59] This dilemma was summarized in the Court's statement: "[a] State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress."[60]

Because the provision offered the states a choice between two unconstitutionally coercive alternatives, the provision directly compelled the states to enact federal regulation. This was "an outcome," the Court stated, "that has never been understood to lie within the authority conferred upon the Congress by the Constitution."[61] Thus, the Court held that because the take-title provision was beyond Congress' constitutionally conferred authority,[62] the provision was inconsistent with the Tenth Amendment, and therefore, was not constitutional.[63]

In a dissenting opinion,[64] Justice White argued, with respect to the Tenth Amendment issue, that the Court's analysis was flawed since it: (1) built its argument on the unsupportable distinction between generally applicable laws and laws directing states to regulate; (2) derived its rule of law from precedent not supporting its analysis; (3) failed to apply the test found in the cases on which it based its rule; and (4) failed to apply the most recent and appro-

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56. *New York*, 112 S Ct at 2428.
57. Id.
58. Id.
59. Id.
60. Id at 2429.
61. Id.
62. Id.
63. Id at 2435.
64. Justice White concurring in part and dissenting in part, joined by Justices Blackmun and Stevens. Id (White concurring in part, dissenting in part).

priate test.[65] The dissent stated that the Court's distinction between federal statutes which regulate states and private parties alike (generally applicable laws), and those which regulate only "the activities of States," was not supported by the Court's recent Tenth Amendment decisions since, in no case, had the Court based a decision on that distinction.[66] The dissent maintained that such a distinction was irrelevant in an analysis of Congressional power relative to the Tenth Amendment since "[a]n incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties."[67]

Justice White next argued that the Court's premise that Congress may not commandeer state legislatures was not supported by either *Hodel* or *FERC*.[68] The dissent pointed out that the Court's rule in *Hodel* was drawn from a statement in dictum[69] not necessary to its holding.[70] Likewise, the dissent also discounted the Court's rule extracted from *FERC*,[71] by maintaining that the full quotation as it appeared in *FERC*[72] meant merely that the Court had not yet had the opportunity to decide whether the federal government may command the states to enact legislation.[73] Justice White concluded that since neither case expressly held that Congress may not direct states to legislate, and since both cases actu-

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65. Id at 2441 (White concurring in part, dissenting in part).

66. Id. The recent decisions Justice White cited were: *Gregory v Ashcroft*, 111 S Ct 2395 (1991); *South Carolina v Baker*, 485 US 505 (1988); *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985); *EEOC v Wyoming*, 460 US 226 (1983); and *National League of Cities v Usery*, 426 US 833 (1976).

67. *New York*, 112 S Ct at 2441 (White concurring in part, dissenting in part). Justice White also stated that: "[t]he alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties." Id.

68. Id at 2443.

69. The statement referred to reads: "[t]hus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel*, 452 US at 288.

70. *New York*, 112 S Ct at 2442 (White concurring in part, dissenting in part).

71. The Court had, in its opinion, stated: "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *New York*, 112 S Ct at 2420 quoting *FERC*, 456 US at 761-62.

72. Id at 2442. Justice White stated:

> [T]he passage reads: "*While* 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 2442 (White concurring in part, dissenting in part) (citations omitted) (emphasis in original) quoting *FERC*, 456 US at 761-62.

73. *New York*, 112 S Ct at 2442 (White concurring in part, dissenting in part).

ally upheld federal regulation that directed states to undertake certain actions,[74] he remained "unconvinced that either *Hodel* or *FERC* supported the rule announced by the Court."[75]

The dissent's third argument asserted that if the cases cited by the Court did stand for the rule that Congress may not direct the states to regulate, then it would be proper to apply the test set forth in *FERC* which "was to assess whether the alleged intrusion on the state sovereignty 'do[es] not threaten the State's separate and independent existence' and do[es] not impair the ability of the States 'to function effectively in a federal system.' "[76] Justice White stated that neither prong of the *FERC* test raised a constitutional problem in the instant case, and that therefore, even applying the decisions selectively chosen by the Court, the Court's analysis of the take-title provision failed.[77]

The dissent then proposed that, even if the instant case did not involve a generally applicable law, the proper analysis of the take-title provision was that of *Garcia* in which the Court held that the political process itself restrained Congress' Commerce Clause powers.[78] Justice White, having previously discussed at length the involvement of state leaders as proponents of the LLRWPAA,[79] implied that since New York was involved in, and was a proponent of, the passage of the LLRWPAA at both the gubernatorial and federal representative levels, the political process was at work, and thus, restrained this exercise of Commerce Clause power to the extent necessary to preserve state sovereignty.[80] He concluded by stating his disagreement with the majority's holding that the take-title provision was unconstitutional.[81]

In a separate opinion,[82] Justice Stevens maintained that the con-

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74. See notes 34, 35 and accompanying text.

75. *New York*, 112 S Ct at 2443 (White concurring in part, dissenting in part).

76. Id (citations omitted) quoting *FERC*, 456 US at 765-66.

77. *New York*, 112 S Ct at 2443 (White concurring in part, dissenting in part).

78. Id. Justice White quoted the following passage from *Garcia*:

> [W]e are 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. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'

New York, 112 S Ct at 2443-44 (White concurring in part, dissenting in part) quoting *Garcia*, 469 US at 554. See note 29 and accompanying text.

79. *New York*, 112 S Ct at 2435-38 (White concurring in part, dissenting in part).

80. Id at 2444.

81. Id at 2445.

82. Justice Stevens concurring in part and dissenting in part. Id at 2446 (Stevens

cept that Congress did not have the power to command states to execute legislation enacted by Congress was false.[83] Also, the Tenth Amendment "surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I."[84] Justice Stevens pointed out that the federal government directed states in many areas, as evidenced by its regulation of state-operated railroads, school systems, prisons and elections.[85] Therefore, there was no reason why Congress could not also command states to enforce federal standards for the disposal of radioactive waste.[86]

In order to fully comprehend the *New York* decision, an examination of the Constitution and prior Supreme Court Tenth Amendment decisions is essential. The Tenth Amendment was modeled after Article II of the Articles of Confederation which reserved to the states "every power . . . which is not by this Confederation expressly delegated to the United States. . . ."[87] This reservation of power was not included in the Constitution originally, nor was its language carried over four years later into the Tenth Amendment where the word "expressly" was omitted from the Tenth Amendment.[88] The intent of the Framers is reflected in Federalist 44, in which Madison stated that had the language of Article II of the Articles of Confederation been adopted "Congress would be continually exposed, as their predecessors [had] been, to the alternative of construing the term '*expressly*' with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction."[89]

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concurring in part, dissenting in part).

83. Id. Justice Stevens stated that there was nothing in the Constitution nor in its history that restrained Congress from commanding states to enact legislation. Id.

84. Id.

85. Id.

86. Id at 2447.

87. Article II of the Articles of Confederation provides:

> Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

Art Confed, Art II.

88. See note 11 for the text of the Tenth Amendment.

89. Federalist 44 (Madison) in Jacob E. Cooke, ed, *The Federalist* 299, 303 (Wesleyan Univ Press, 1961)(emphasis in original). Madison went on to say:

> As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interest by doing nothing; or of violating the Constitution by exercising powers indispensably necessary and proper; but at the same time, not *expressly* granted.

The omission of one word in translating Article II of the Articles of Confederation into the Tenth Amendment was seized upon twenty-eight years later by Chief Justice Marshall in *McCulloch v Maryland*,[90] striking the first judicial blow to the Tenth Amendment. *McCulloch* presented the question of whether Congress, under its Article I enumerated powers, had the authority to incorporate a bank.[91] The Court held that the act incorporating the bank was constitutional.[92] With respect to the Tenth Amendment, the Court noted that there is no language in the Constitution "which, like the Articles of Confederation, excludes incidental or implied powers."[93] The Court found that since the framers of the Tenth Amendment omitted the word "expressly," they meant to avoid the difficulties which resulted from its inclusion in the Articles of Confederation,[94] namely, the construction of the term so that the government was left without any real powers, save those few expressly granted in Article I, narrowly construed.[95]

This interpretation of the Tenth Amendment continued for ninety-nine years until a brief resurgence during the "laissez faire" era[96] of the first part of this century. In 1918, the Court, in *Hammer v Dagenhart*,[97] called the Tenth Amendment back into service to help justify a limit to the Commerce Clause power of the Congress. The issue raised in *Dagenhart* was whether Congress could use its power to regulate interstate commerce to prohibit the transportation of manufactured goods in interstate commerce.[98] The factories producing such goods employed children below a certain age.[99] The Court determined that the objective of the federal act

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Federalist 44 (Madison) in Cooke, ed, *The Federalist* at 303-04 (emphasis in original).

90. 17 US (1 Wheat) 316 (1819).

91. *McCulloch*, 17 US at 401.

92. Id at 423.

93. Id at 406.

94. Id at 406-07.

95. See note 89 and accompanying text.

96. Tribe, *American Constitutional Law* § 5-4 at 307-08 (cited in note 22). From 1887 to 1937 the Court adhered to a doctrine of narrow formalism which restricted congressional power. Id. By way of illustration, prior to 1887 the Court followed Marshall's principle that "congressional power to regulate [interstate commerce] extended to all activity having any interstate impact—however indirect." Id at 306. Thereafter, and up to 1937, the Court substituted a formal characterization of economic activity in determining what was interstate commerce. "This half-century is usually remembered as one in which the Court repeatedly struck down congressional action as unauthorized under the commerce clause." Id at 307.

97. 247 US 251 (1918), rev'd, *United States v Darby*, 312 US 100, 117 (1941).

98. *Dagenhart*, 247 US at 269.

99. Id. The act in question provided, in pertinent part, that:

was to standardize the ages at which children could be employed within the states, and reasoned that the constitutional grant of power to regulate interstate commerce was not "intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."[100] Therefore, it was held that such regulation was "repugnant to the Constitution" and not within Congress' Commerce Clause power.[101] In support of its conclusion, the Court paraphrased the Tenth Amendment stating: "[i]n interpreting the Constitution it must never be forgotten that . . . to [the states] and to the people the powers not *expressly* delegated to the national government are reserved."[102]

The Court's reversion to the Articles of Confederation language in interpreting the Tenth Amendment as a limitation on Congress' Article I powers may have been anomalous, and at any rate was dashed in the "New Deal" era[103] when, in 1941, the Court overruled *Dagenhart* in *United States v Darby*.[104] The issue before the Court in *Darby* was similar to that in *Dagenhart*: whether Congress, via the Fair Labor Standards Act ("FLSA"), could: (1) prohibit from interstate commerce the shipment of goods manufactured by employees earning less than a prescribed minimum wage; and (2) prohibit the employment of workers engaged in the manufacture of goods for interstate commerce at less than the minimum wage standard.[105] The FLSA was challenged as a violation of the

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> [N]o producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce . . . any article or commodity the product of any . . . factory . . . situated in the United States, in which within thirty days prior to the removal of such products therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week. . . .

Act of Sept 1, 1916, 39 Stat 675 (1916).

100. *Dagenhart*, 247 US at 273-74.

101. Id at 276.

102. Id at 275 (emphasis added).

103. Tribe, *American Constitutional Law* § 5-22 at 386 (cited in note 22). As Tribe stated with respect to this era:

> In the years after 1937, the Supreme Court essentially offered the Congress *carte blanche* to regulate the economic and social life of the nation, its actions subject only to the requirements of the Bill of Rights. Individual rights alone operated as trump cards over those exercises of congressional power affirmatively authorized by the Constitution. States' rights, in contrast, were not an override; they were a residue.

Id.

104. 312 US 100 (1941).

105. *Darby*, 312 US at 108.

Commerce Clause and the Tenth Amendment.[106] The Court, in holding that the FLSA was within Congress' authority, stated that the Tenth Amendment did not affect its decision because the Tenth Amendment "states but a truism that all is retained which has not been surrendered," and went on to state that "[t]here is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments."[107] Thus, whatever restraint, if any, the Tenth Amendment may have imposed on Congress' powers, the limits were not secured in its language since the text of the Tenth Amendment merely confirms that all that is not conferred upon Congress belongs to the states.

The recent cases interpreting the Tenth Amendment trace within a shorter time frame an even more turbulent path. In 1968, the FLSA was again before the Supreme Court in *Maryland v Wirtz*.[108] In a 1966 amendment to the FLSA, the scope of the minimum wage and maximum hour provisions was expanded to employees of schools and hospitals, including state owned schools and hospitals.[109] Thus, as opposed to previous Tenth Amendment cases, a federal statute proposed to regulate not only private enterprises, but also those run by the states. Maryland challenged the statute insofar as it applied to state employees, as an interference with the sovereignty of states.[110] However, the Court upheld the FLSA as valid under the Commerce Clause and not invalid as interfering with state sovereignty.[111] The Court found the application of the FLSA to hospitals and schools was a valid exercise of the power to regulate interstate commerce.[112] Moreover, where a "State is engaging in economic activities that are validly regulated by the Federal government when engaged in by private persons, the State too may be forced to conform."[113] Although the *Wirtz* Court did not address the Tenth Amendment issue directly, it did

106. Id at 111.

107. Id at 124. The Court said additionally: "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power. . . ." Id.

108. 392 US 183 (1968), rev'd, *National League of Cities v Usery*, 426 US 833, 854-55 (1976).

109. *Wirtz*, 392 US at 186-87.

110. Id at 193. "[T]he argument is made in terms of interference with 'sovereign state functions.' " Id.

111. Id at 188.

112. Id at 192.

113. Id at 197.

indicate that it was holding to the *Darby* interpretation of the amendment when it stated that "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[114]

In a dissenting opinion,[115] however, Justice Douglas specifically addressed the Tenth Amendment issue and found that the FLSA disrupted state fiscal policy and threatened states' autonomy in the regulation of the health care and education fields, and therefore, was an invasion of state sovereignty as protected by the Tenth Amendment.[116]

In 1976, the pendulum swung again when, in *National League of Cities v Usery*,[117] the Court, 5 to 4, overturned *Wirtz*.[118] The case involved the 1974 amendment to the FLSA which expanded the minimum wage and maximum hour standards of the FLSA to virtually all state employees.[119] The Court found the challenged provisions unconstitutional,[120] and set forth the rule that an exercise of Congress' Commerce Clause Power is unconstitutional whenever it "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[121] In so holding, the *National League of Cities* Court was the first to find that state sovereignty imposed a definite limit on

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114. Id at 198.

115. Justice Douglas wrote a dissenting opinion in which Justice Stewart joined. Id at 201 (Douglas dissenting).

116. Id at 201-03 (Douglas dissenting).

117. 426 US 833 (1976), rev'd, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 531 (1985).

118. *National League of Cities*, 426 US at 854-55.

119. Id at 836. The FLSA amendment also applied to employees of state political subdivisions. Id. Appellants, a variety of states and municipalities, challenged the minimum wage and maximum hour provisions and sought declaratory and injunctive relief on the grounds that the provisions " 'infringed a constitutional prohibition' running in favor of the States as States." Id at 836-37.

120. Id at 852. The Court determined that the power to determine the wages to be paid to state employees was an "undoubted attribute of State sovereignty." Id at 845. The Court also held that the challenged minimum wage and maximum hour provisions would "impermissibly interfere with the integral governmental functions" of the states and their subdivisions, and therefore, were unconstitutional. Id at 851-52.

121. Id at 852. The Court in *Hodel*, 452 US at 287-88, stated that the test of whether an exercise of Congressional Commerce Clause Power is unconstitutional under *National League of Cities* was:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Id at 287-88 (citations omitted).

Congress' commerce power.[122]

In 1981, the Court decided *Hodel v Virginia Surface Mining and Reclamation Association*,[123] the first of three divergent line of Tenth Amendment cases preceding *New York v United States*, in which Congress sought to influence or direct states *alone*, as opposed to previous Tenth Amendment cases where states and private enterprises were *both* regulated. *Hodel* involved the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which set forth federal standards for private coal mine operators.[124] Although SMCRA is for the most part depictable as a generally applicable law, one of the challenged provisions gave states the option of either regulating surface coal mining operations in accordance with the prescribed federal standards,[125] or having any regulation of surface coal mining not in compliance with the federal standards preempted by federal regulation,[126] which is characteristic of a law directing or influencing a state to legislate.

Virginia challenged SMCRA as unconstitutional contending that SMCRA exceeded Congress' power as limited by *National League of Cities*, and that the threat of federal preemption coerced the states into legislating in accordance with SMCRA.[127] The Court held that SMCRA was not invalid under either contention since: (1) SMCRA did not regulate states as states as prohibited by *National League of Cities*; and (2) SMCRA did not compel states to regulate in accordance with federal standards since it left the states with the choice of either implementing legislation that complied with SMCRA itself or yielding to a federally administered regulatory program.[128]

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122. Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv Envir L Rev 437, 467 (1987).

123. 452 US 264 (1981).

124. *Hodel*, 452 US at 268-69.

125. The Court summarized the pertinent portion of SMCRA:

> Included among [the performance] standards are requirements governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegitation of mined areas; and (g) spoil disposal.

Id at 269.

126. Id at 271-72.

127. Id at 289.

128. Id at 288. With respect to the rejection of the second contention the Court stated: "[t]hus, there can be no suggestion that [SMCRA] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id.

In 1982, a second Tenth Amendment case involving the federal government directing the states to regulate came before the Supreme Court. *FERC v Mississippi*[129] involved the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which directed state utility regulatory commissions to consider a series of federal rate designs and regulatory standards, and to follow hearing and comment procedures when evaluating those designs and standards.[130] Mississippi challenged the PURPA provisions as an invasion of state sovereignty in violation of the Tenth Amendment.[131] After determining that the regulation of utilities was a federally preemptable field, the Court held, 5 to 4, that the challenged provisions of PURPA did not violate the Tenth Amendment since they did "not involve the compelled exercise of Mississippi's sovereign powers,"[132] nor was there anything in the provisions " 'directly compelling' the states to enact a legislative program."[133] As in *Hodel*, the Court reasoned that since PURPA left to the states the option of either continuing to regulate, but according to the federal conditions, or simply abandoning the field of utility regulation, "PURPA should not be invalid simply because . . . Congress adopted a less intrusive scheme and allowed states to continue regulating" where it could have preempted the state outright.[134] The Court did note, however, that the choice to not regulate would be a difficult one for states since in *FERC*, unlike *Hodel*, Congress failed to provide an alternative federal regulatory mechanism in the event of state default.[135]

In a dissenting opinion,[136] Justice O'Connor found that the provisions satisfied the *National League of Cities* test, and therefore, would have found PURPA unconstitutional for that reason.[137] The dissent went on to reject the Court's argument that Congress adopted the less intrusive scheme by allowing the states to continue regulating on the condition they consider the federal standards, stating that federal preemption in this case would have been

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129. 456 US 742 (1982).

130. *FERC*, 456 US at 746-49.

131. Id at 752.

132. Id at 765, 769.

133. Id at 765.

134. Id at 764-65.

135. Id at 766.

136. Justice O'Connor concurred in part and dissented in part, in which Chief Justice Burger and Justice Rehnquist joined. Id at 775 (O'Connor concurring in part, dissenting in part).

137. Id at 779-80.

preferable to the PURPA scheme in that it would be far less burdensome to the state governmental bodies.[138]

The Court faced another Tenth Amendment challenge to a generally applicable law in *Garcia v San Antonio Metropolitan Transit Authority*,[139] and reversed itself again.[140] *Garcia* examined the application of the FLSA minimum wage and maximum hour standards to a municipally owned and operated mass transit system.[141] In an opinion written by Justice Blackmun, and joined by the four dissenters of *National League of Cities*,[142] the Court overruled *National League of Cities*, 5 to 4, on the grounds that the "attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' was not only unworkable but was also inconsistent with established principles of federalism."[143] The Court did not, however, go on to set forth a new standard by which the judiciary could determine limitations on congressional power with respect to state sovereignty, but instead, held that the political process, and not the judiciary, was responsi-

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138. Id at 786-87.

139. 469 US 528 (1984).

140. *Garcia*, 469 US at 531.

141. Id at 533. The San Antonio Metropolitan Transit Authority ("SAMTA") had, up until the *National League of Cities* decision in 1976, complied with the 1966 amendment to the FLSA which extended federal minimum wage and maximum hour standards to all schools, hospitals and mass-transit carriers, private and public, and which was held in *Wirtz* to be constitutional. In 1976, SAMTA ceased compliance with the FLSA, however, in 1979, the Department of Labor issued an opinion that SAMTA, as a municipally owned mass transit carrier, was not immune from the FLSA under *National League of Cities*. SAMTA sought a declaratory judgment in the district court that *National League of Cities* precluded application of the FLSA to SAMTA, in which action Garcia, a SAMTA employee, intervened. The district court held twice (the second time was on remand from the Supreme Court following direct appeal) that SAMTA was immune from the FLSA regulation pursuant to *National League of Cities*. *Garcia*, 469 US at 534-36.

142. Justices Brennan, White, Marshall and Stevens dissented in *National League of Cities*, while Justice Blackmun conditionally concurred in that case on the understanding that the Court's decision set forth a balancing test which would allow demonstrably greater federal interest to trump interests of state sovereignty. *National League of Cities*, 426 US at 856 (Blackmun concurring). Thus, Justice Blackmun was the swing vote which allowed a 5-4 reversal of *Wirtz* in *National League of Cities*, and a 5-4 reversal of *National League of Cities* in *Garcia*.

143. *Garcia*, 469 US at 531. The Court stated:

> Our examination of this "function" standard applied in these and in other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

Garcia, 469 US at 531. Note, however, that the Court did not overrule either *Hodel* or *FERC*.

ble for protecting state sovereignty from federal encroachment.[144] The Court found that the political process provided built-in restraints through state participation in the federal system, and thus, ensured that laws unduly burdening the states would not be promulgated.[145] Therefore, with respect to the challenged FLSA provisions, the Court stated that since the provisions were a valid exercise of Congress' Commerce Clause Power to regulate private and public activities alike, they were not violative of state sovereignty.[146]

The dissent[147] strongly disapproved of the Court's decision because the announced rule "substantially altered the federal system embodied in the Constitution," and because consideration by elected officials participating in the federal system was insufficient to protect state sovereignty since legislation is drafted not by representatives, but by non-elected staff personnel.[148] The dissenters maintained that it was the responsibility of the courts to interpret the Constitution and determine the limits the Tenth Amendment imposed on Congressional power.[149]

South Dakota v Dole[150] was the most recent case prior to *New York* in which the Court addressed a Tenth Amendment issue involving federal direction to, or influencing of, states to legislate. *Dole* involved a federal statute which directed the Secretary of Transportation to withhold a portion of otherwise allocable federal highway funds from states which had a drinking age of less than 21,[151] and thus, presented the states with a choice of either legislating to adopt the federally acceptable minimum drinking age, or not so legislating and being denied a percentage of their federal highway funding.[152] Although the statute was not challenged as being inconsistent with the Tenth Amendment,[153] the Court did briefly

144. *Garcia*, 469 US at 552.

145. Id at 556. The Court's theory was that since states participate in the federal political process (through their citizens electing Senators, Representatives and the President) the structure of the federal government itself protected the state's sovereignty. Id.

146. Id.

147. Justice Powell, with whom Chief Justice Burger and Justices Rehnquist and O'Connor joined, dissented. Id at 557 (Powell dissenting).

148. Id at 557, 576.

149. Id at 570.

150. 483 US 203 (1987).

151. *Dole*, 483 US at 205.

152. Id at 205, 210-11.

153. South Dakota, which had a drinking age of 19, challenged the statute on the grounds that: (1) it was beyond Congress' power to tax and spend; and (2) it violated the Twenty-First Amendment's reservation to the states of the power to impose restrictions on

address a perceived Tenth Amendment issue.[154] The Court, in pertinent part, "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to . . . [turn] into compulsion."[155] The Court found, however, that since the percentage of federal funding that would be denied a state refusing to comply with the minimum drinking age provision was relatively small, the condition on the grant of federal funds did not rise to the level of coercion, and therefore, was a valid use of the Spending Power not in violation of the Tenth Amendment.[156]

Finally, before the Court in *South Carolina v Baker*[157] was the first challenge of a generally applicable law since *Garcia*. *Baker* involved a federal tax statute, applicable to both private entities and states, which gave states and municipalities issuing bonds the option of either issuing bonds in registered form or having their bonds subject to federal taxation.[158] South Carolina challenged the statute as unconstitutional under the Tenth Amendment on the grounds that it essentially required states to issue bonds in registered form, and that the political process had failed.[159] The Court held the statute constitutional and rejected the state's contention that the political process failed since "South Carolina ha[d] not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in any way that left it politically isolated and powerless."[160] Significantly, the Court expressly distinguished between laws regulating state activities—generally applicable laws—and laws "seek[ing] to control or influence the manner in which States regulate".[161] With respect to the later, the Court acknowledged that the rule suggested in *FERC*

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the sale of liquor. Id at 205.

154. Id at 210.

155. Id at 211 (citations omitted).

156. *Dole*, 483 US at 211-12. The Court found that South Dakota, in choosing not to comply, would be denied five percent of its federal highway funds. Id at 211.

157. 485 US 505 (1988).

158. *Baker*, 485 US at 510. The statute at issue was the Tax Equity and Fiscal Responsibility Act of 1982, 26 USC § 103(j) (1982), which repealed the exemption from federal taxation of interest earned on state and municipal bonds unless such bonds were issued in registered form. 26 USC § 103(j)(I). Id at 507.

159. *Baker*, 485 US at 510-12.

160. Id at 512-13. *Baker* thus extended the *Garcia* rule in that it appeared to foreclose judicial review of a Tenth Amendment challenge altogether unless a state alleged it has been deprived of the right to participate in the political process or that it has been singled out and politically isolated. Id. Therefore, unless a challenging state can show it was refused access to the national political process, the Court will find the law was not in violation of the Tenth Amendment.

161. Id at 514.

"survive[d] *Garcia* or pose[d] constitutional limitations independent of those discussed in *Garcia*."[162]

Thus, in the recent history of Tenth Amendment cases, the Court has developed two lines of cases, each apparently having its own standards for determining whether a Congressional act is in violation of the Tenth Amendment. In the *Wirtz*, *National League of Cities*, *Garcia*, and *Baker* line of cases, at issue was a generally applicable law regulating the activities of states and private enterprises alike. Under *Garcia* and *Baker*, the most recent rule with respect to the Tenth Amendment is that the political process ensures that laws that interfere with state sovereignty will not be promulgated,[163] and that "judicially created limitations on federal power" are not proper.[164] A Congressional act can only be successfully challenged under the Tenth Amendment by the state showing that it was excluded from participating in the political process.[165]

In the *Hodel*, *FERC*, and *Dole* line of cases, at issue was a federal law which either directed or influenced states to legislate in accordance with federal standards. The rule with respect to the Tenth Amendment developed in those cases is that Congress may not compel states to legislate. In each case, a Congressional act was upheld because the laws always gave states the option of either legislating in accordance with federal standards, or not so legislating and facing either federal preemption in the field[166] or a diminution of federal funding.[167]

Considering that *Garcia* did not overrule the *Hodel* line of cases nor did it purport to make its rule applicable to instances where Congressional acts sought to direct or compel states to legislate, the Supreme Court's decision in *New York* with respect to the

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162. Id at 513. The Court stated that it need not address to what extent *FERC* survived *Garcia* since the case before the Court involved a generally applicable law, not a law which sought to control or influence the way in which states regulate. *Baker*, 485 US at 513-14. Note that this acknowledgment was made in the majority opinion which was joined in by Justices White, Blackmun and Stevens. Id at 507. These Justices, in their dissents in *New York*, claimed that there was *no* distinction between the two types of laws and that, even if there was, *Garcia* provided the proper rule of law. In fact, Justice White indicated in his dissent that *Baker* was one of the Court's recent Tenth Amendment cases *not* supporting such a distinction between the two types of laws. *New York*, 112 S Ct at 2441 (White concurring in part, dissenting in part). See note 66 and accompanying text.

163. *Garcia*, 469 US at 556.

164. Id at 552.

165. *Baker*, 485 US at 512-13.

166. *Hodel*, 452 US at 288; and *FERC*, 456 US at 764-65.

167. *Dole*, 483 US at 210-11.

take-title provision of the LLRWPAA was predictable.[168] The Court properly found that the challenged provisions of the LLRWPAA were of the "directing or compelling states to legislate" line of cases because the LLRWPAA sought to influence states to legislate with respect to disposal of low-level radioactive waste according to Congress' scheme. Applying the rule implicit in that line of cases, that Congress may not direct or compel states to legislate, the Court correctly found that the take-title provision was unconstitutional because it commandeered the states into the service of the federal government either by being forced to take title to radioactive waste, or regulating according to Congress' direction.

The dissent, although compelling on its face, grounded its argument on the premise that the Court had never before recognized a distinction between generally applicable laws and laws seeking to direct states to legislate, and reasoned, therefore, that the Court was incorrect in not applying the *Garcia* rule to this case. In *Baker*, however, all three *New York* dissenters joined in the majority opinion which not only expressly distinguished between generally applicable laws and laws seeking to direct states to legislate, but also indicated that the rule of *FERC* survived the *Garcia* decision.[169]

Also, application of the *Garcia* rule to instances where federal law seeks to direct states to legislate, as Justice White would have the Court do,[170] would be unsound. Such a rule would allow Congress to "commandeer" state legislatures and direct them to pass whatever law Congress instructed them to pass so long as the state was not excluded from the political process.[171] As Justice O'Connor argued, such methods of enacting state law would tend to lessen

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168. Indeed, both Justices O'Connor and Rehnquist were already on record as predicting the rebirth of a *National League of Cities* type principle which would again protect state sovereignty from Congressional overreaching. Responding to the Court's rule in *Garcia*, Justice Rehnquist stated: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." *Garcia*, 469 US at 580 (Rehnquist dissenting). Similarly, Justice O'Connor stated: "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility." Id at 589 (O'Connor dissenting).

169. *Baker*, 485 US at 513-14. Important to the Court's decision in *Baker* was that the challenged Congressional act "[did] not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate." Id at 514. See also notes 161, 162 and accompanying text.

170. *New York*, 112 S Ct at 2443 (White concurring in part, dissenting in part).

171. Id at 2420 quoting *Hodel*, 452 US at 288. See notes 36, 37 and accompanying text.

the accountability of elected representatives,[172] and would leave citizens with the impression that state officials are not sensitive to local needs. The *New York* rule will probably be found to be practical in future Tenth Amendment litigation since it requires a court to determine only: (1) whether the challenged law seeks to direct or influence states to legislate, and if so, (2) whether the law actually directs, or is so coercive as to compel, the states to legislate in accordance with Congress' instructions. If the answer to both prongs is yes, then the law is unconstitutional as being inconsistent with the Tenth Amendment. Otherwise, either the *Garcia* rule applies, because the law is a generally applicable law, or the law is constitutional, because it does not direct or compel states to legislate.[173]

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172. See note 42 and accompanying text. From the viewpoint of a state citizen, it appears that the state legislature has proposed, debated and enacted state law, and therefore, state representatives should be held accountable. Where Congress has directed a state to legislate, however, the state legislature has merely, under duress, rubber stamped federal policy. Thus, state representatives are held accountable without responsibility, while Congress has authority without accountability. Id at 2424.

173. The Court's decision in *New York* also raises the question of the future of *Garcia*. The district court deciding *New York* speculated that "it may well be this case which results in *Garcia* being overturned." *New York*, 757 F Supp at 13. Nonetheless, on its face, *New York* leaves *Garcia* intact since, as the Court noted, the challenged provisions of the LLRWPAA did not involve generally applicable law, and therefore, did not present an occasion to revisit the holding of the *Garcia* line of cases. *New York*, 112 S Ct at 2420. However, *Garcia*, as some commentators have noted, is no less questionable than the precedent it overruled. Berkovitz, *Waste Wars*, 11 Harv Envir L Rev at 470 (cited in note 123). The meager judicial protection of state sovereignty provided for in *Garcia* was further diminished in *Baker* so that, today, Tenth Amendment protection is merely a procedural presumption that a generally applicable law is constitutional unless a state can show that it was excluded from the political process. Indeed, it will be difficult for a state to show failure of the political process because in neither *Garcia* nor *Baker* did the Court set forth what would comprise a failure of the political process. Like leaving a child to mind a candy store, the Court in *Garcia* put the responsibility of protecting the states from intrusion in their sovereignty by Congress in the hands of Congress itself. Given that the *Garcia* rule forecloses judicial review in a critical area of Constitutional law, the conservative shift of the Court in the past decade, and that the *New York* decision restored a principle of state sovereignty, it is not unlikely that *Garcia* will become another pothole in the uncertain road traveled in recent Tenth Amendment cases.