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THE LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT: AN OVERVIEW

*Deborah M. Mostaghel**

INTRODUCTION

If nuclear power was once the goose that laid the golden egg, nuclear waste is now an egg that nobody wants to hatch. Hospitals, universities, and manufacturers, as well as nuclear power plants, annually produce vast quantities of waste contaminated with varying levels of radioactivity. For years the generators of this waste simply burned their refuse, dumped it in streams, or stored it in underground trenches or metal drums.¹ The Atomic Energy Act of 1946² allowed private industry to participate in developing atomic energy for peaceful purposes but did not regulate the disposal of civilian nuclear wastes.³ This failure had a significant impact, as such waste is dangerous for a period longer than most human institutions themselves endure.⁴ Legislative attempts to compel safe disposal of waste illustrate the dilemmas of federalism which must be resolved to ensure that safe disposal becomes a reality. Congress's first attempt, the Low-Level Radioactive Waste Policy Act ("LLRWPA" or "Original Act") of 1980,⁵ enabled states to exercise some control

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1. Irvin L. White & John P. Spath, *Low-Level Radioactive Waste Disposal: How Are States Setting Their Sites?*, ENV'T, Oct. 1984, at 16, 20.

2. Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755, amended by Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011-2296 (1988)).

3. See S. REP. NO. 548, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S.C.C.A.N. 6933, 6934.

4. The ecology, soil chemistry, hydrology, geology, climate, and meteorology of sites in which to bury low-level radioactive waste must be evaluated for at least a 500-year period. Such a long time span is necessary because it is only after 500 years that the remaining radioactivity no longer poses "an unacceptable hazard to an intruder or public health and safety." 10 C.F.R. § 61.7(b)(5) (1991).

5. Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, 3348 (repealed 1986). Low-level radioactive waste consists of "material which has been contaminated by radioactive elements or radionuclides. Low-level radioactive waste is often defined by what it is not. It is not spent reactor fuel, wastes from reprocessed reactor fuel, uranium mine and mill

over the disposal of low-level nuclear waste. The LLRWPA authorized states to form regional *compacts* to choose sites for and license regional disposal facilities.⁶ In 1986, Congress amended the LLRWPA, enacting the Low-Level Radioactive Waste Policy Amendments Act ("LLRWPA" or "Amendments").⁷ The LLRWPA supplemented the 1980 Act by providing additional deadlines and monetary incentives for compliance.⁸ Nine regional compacts have subsequently been formed under the auspices of the Act and its Amendments.⁹ Each compact has made some progress toward selecting a host state¹⁰ and some host states have started the lengthy and emotionally-charged process of site selection.

The impetus for such progress was interrupted, however, as states waited for the outcome of New York's constitutional challenge to the Amendments in the Supreme Court.¹¹ New York, which had opted not to join a compact, challenged the constitutionality of the 1985 Amendments on the grounds that the incentives it provided violated the Tenth and Eleventh Amendments, as well as several other Constitutional provisions.¹² But while New York's challenge succeeded with regard to one provision,¹³ the remainder of the Act was upheld and remains in force.

This paper, answering questions raised in an earlier article,¹⁴ first sets out the events and policies that led to the enactment of the federal law and amendments that authorize state-organized regional

tailings or items contaminated with specified levels of transuranic elements." H.R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 15 (1985). Congress has yet to develop a workable solution to the problem presented by disposal of high-level nuclear wastes, those generated in the reprocessing of nuclear fuel, and others so classified by the Nuclear Regulatory Commission. See 42 U.S.C. § 10101(12) (1988); 10 C.F.R. § 61.2 (1993).

6. Low-Level Radioactive Waste Policy Act of 1980, 94 Stat. at 3348.

7. 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)).

8. *Id.* § 2021e.

9. *New York v. United States*, 112 S. Ct. 2408, 2416 (1992).

10. Since a low-level radioactive waste disposal facility's life expectancy is between 20 to 50 years, a new facility should be developed while the old one is operating. Most compacts require that a member state which has not yet served as a host state develop the new site. See U.S. DEP'T OF ENERGY, OFFICE OF EXTERNAL AFFAIRS, PERSPECTIVES: LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT 2 (1989).

11. See *New York v. United States*, 112 S. Ct. 2408 (1992) (striking down the take-title provision contained in the Amendments).

12. *Id.*; see also *infra* notes 184-92 and accompanying text (discussing New York's challenge to the statute).

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

14. Deborah M. Mostaghel, *Who Regulates the Disposal of Low-Level Radioactive Waste Under the Low-Level Radioactive Waste Policy Act?*, 9 J. ENERGY L. & POL'Y 73 (1988).

radioactive waste disposal. After analyzing what the amended statute requires, it examines the states' progress in forming and siting compacts. This article also considers the effects of state challenges to the Act and its Amendments. Finally, the conclusion notes problem areas that should be addressed with regard to nuclear waste disposal.

I. EVENTS AND POLICIES LEADING TO ENACTMENT OF THE LLRWPA AND THE LLRWPA

The Atomic Energy Act of 1946 was passed so soon after the end of World War II that atomic energy was "popularly associated only with the atom bomb"¹⁵ The role of private industry in developing atomic power was very restricted, as "the manufacture and use of atomic materials [was] a Government monopoly."¹⁶ The Atomic Energy Act of 1954 ("AEA")¹⁷ advocated a broader role for private industry, fostering a partnership between the private sector and the government to develop peaceful uses for atomic energy "to the maximum extent consistent with the common defense and security and with the health and safety of the public"¹⁸

The AEA, however, does not explicitly provide for the disposal of radioactive waste. Rather, the AEA generally states that nuclear facilities and materials should be regulated to protect the health and safety of the public.¹⁹ While states have traditionally enacted protective legislation in the areas of health, safety, and public welfare pursuant to their police power, states can regulate only those areas that are not preempted by federal legislation.²⁰ States may, for example, regulate railroads and highways,²¹ and they may also award public utility franchises.²² With narrow restrictions, a few states

15. S. REP. NO. 1699, 83rd Cong., 2d Sess. 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3456, 3457.

16. *Id.* at 3458.

17. Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2296 (1988)).

18. *Id.* § 2013(d).

19. *Id.* § 2012(e).

20. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6, at 401-545 (2d ed. 1988) (examining federalism-based limitations on state and local power).

21. *See, e.g.,* South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (allowing states to regulate the weight and width of vehicles that use their roads and railways as long as the regulations are intended to promote public safety objectives and not to benefit local economic interests).

22. *See, e.g.,* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) (Brandeis, J., dissenting) ("[T]he franchise to operate a pub-

may even regulate certain safety aspects of nuclear power. Section 274 of the AEA gives limited regulatory power to those states and authorizes the Atomic Energy Commission ("AEC") — and its successor, the Nuclear Regulatory Commission ("NRC")²³ — to enter into agreements with the individual states.²⁴ It also permits these so-called "agreement states" to assume authority to license and regulate (1) byproduct material,²⁵ (2) source material,²⁶ and (3) small quantities of special nuclear material.²⁷ Under this program, states may regulate those AEA licensees within their borders that use byproduct, source, and special nuclear material. The agreement states may also agree to be responsible for regulating some radiological safety hazards.²⁸

States first began trying to regulate the safety of nuclear power

lic utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State.") (quoting *Frost v. Corporation Comm'n*, 278 U.S. 515, 534 (1929)).

23. The Atomic Energy Commission was abolished on October 11, 1974. *See* Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1233 (codified as amended at 42 U.S.C. 5814(a) (1988)). The Energy Reorganization Act also established the Nuclear Regulatory Commission, which was given authority to implement the Atomic Energy Act. *See* 42 U.S.C. §§ 5841-49 (1988).

24. Act of Sept. 23, 1959, Pub. L. No. 86-373, § 274b, 73 Stat. 688 (1959) (codified as amended at 42 U.S.C. § 2021b(1988)). This 1959 Act, which amended the Atomic Energy Act of 1954, authorized the NRC to enter into agreements with any state and discontinued the NRC's regulatory authority with respect to byproduct materials, source materials, and special nuclear materials within the state.

25. 42 U.S.C. § 2021b (1988). The Atomic Energy Act of 1954 defines "by-product material" as:

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

Id. § 2014(e).

26. "Source material" is defined as:

(1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

Id. § 2014(z).

27. "Special nuclear material" is defined as:

(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

Id. § 2014(aa).

28. *Id.* § 2021b.

plants during the late 1960s and early 1970s.²⁹ Until 1983, however, case law held that the tone of the statute and its legislative history evidenced Congress's implied preemption of state regulation of nuclear plants.³⁰ In *Northern States Power Company v. Minnesota*,³¹ Northern had received a state operating permit requiring it to regulate radioactive discharges using more stringent criteria than those provided by the AEA.³² Northern filed suit, alleging that federal regulations under the AEA preempted Minnesota's authority to regulate discharges from power plants.³³ The United States Court of Appeals for the Eighth Circuit agreed, concluding that state regulation of nuclear power could conflict with Congress's intention that the AEA encourage the rapid growth of atomic energy for peaceful purposes.³⁴ In a similar setback for state regulation, the Seventh Circuit in 1982 held that the NRC has exclusive authority to regulate radiation hazards.³⁵ Finally, that same year the Ninth Circuit held that the federal government had reserved for itself the safety regulation of nuclear power.³⁶

Unlike states such as Minnesota, Illinois, and Washington, California successfully navigated the preemption waters by passing laws

29. See, e.g., Warren-Alquist State Energy Resources Conservation and Development Act, Ch. 276, § 2, 1974 Cal. Stat. 501 (codified as amended at CAL. PUB. RES. CODE §§ 25000-980 (West 1986 & Supp. 1993)); Spent Nuclear Fuel Act, P.A. 81-1516, 1980 Ill. Laws 3905 (codified as amended at 420 ILCS §§ 15/0.01-15/4 (1993)); Act of Feb. 12, 1967, Ch. 108, §§ 4, 6, 8-9, 1967 Mont. Laws 188, 191, 192, 194-95 (codified as amended at MONT. CODE ANN. §§ 75-3-101 to -405 (1993)).

30. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-53 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The Supreme Court's affirmance of *Northern States* would seem to suggest that other state laws attempting to regulate the safety of nuclear power plants would be struck down. *But see infra* note 34 and accompanying text (discussing Congress's response to the *Northern States* decision).

31. *Northern States*, 447 F.2d at 1149-53.

32. *Id.* at 1145.

33. *Id.*

34. *Id.* at 1153 (citing 42 U.S.C. §§ 2011-12 (1988)). Congress effectively overruled *Northern States* by passing the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7671 (1988 & Supp. II 1990)). These amendments give the states the authority to regulate commercial nuclear facilities and materials. A state may regulate radioactive air pollutants from such facilities once the state's procedures are approved by the Environmental Protection Agency. *Id.* § 7412(l)(1) (Supp. II 1990).

35. *Illinois v. General Elec. Co.*, 683 F.2d 206, 215 (7th Cir. 1982).

36. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (striking down a voter-approved initiative that would have prohibited the state from either receiving or storing radioactive waste produced outside the state). The Court of Appeals concluded that Washington's use of its police power to protect the health and safety of its citizens contravened the federal government's power to regulate the safety of nuclear power reserved to it by the AEA. *Id.* at 630-32.

addressing economic rather than safety concerns.³⁷ California's nuclear laws³⁸ took advantage of the fact that, while the federal government ensures the safety of nuclear power, the states generate and sell electricity.³⁹ Under California law, new reactors cannot be certified by the state until a technology to dispose of high-level nuclear waste is both identified and approved by the federal government.⁴⁰ In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,⁴¹ a utility, Pacific Gas & Electric Company ("PG&E"), sought a declaratory judgment that federal regulation of nuclear power preempted California's laws. The district court held in favor of PG&E,⁴² but on appeal the Ninth Circuit rejected PG&E's argument that *Northern States* was controlling.⁴³ The Court of Appeals upheld the California laws because it found California was exercising its traditional police power by basing the laws on economic factors.⁴⁴ On final appeal, the Supreme Court held that California's laws were motivated by economic rather than safety concerns and that the state law therefore did not conflict with the federal *purpose* of developing nuclear energy as expressed in the AEA.⁴⁵ This suggests that as long as states regulate the economic rather than the safety aspects of nuclear power, state laws will not conflict with the goals of the AEA.

37. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). In holding that § 25524.2 of the California Public Resources Code was not preempted by the Atomic Energy Act, the Court stated:

Congress, in passing the 1954 [Atomic Energy] Act . . . intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

Id.

38. California's nuclear laws are part of the Warren-Alquist State Energy Resources Conservation and Development Act. See CAL. PUB. RES. CODE §§ 25000-980 (West 1986 & Supp. 1993).

39. *Pacific Gas*, 461 U.S. at 194.

40. CAL. PUB. RES. CODE § 25524.1 (West 1986).

41. 461 U.S. 190 (1983).

42. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 489 F.Supp. 699 (E.D. Cal. 1980), *rev'd sub nom.* *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom.* *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

43. The Pacific Legal Foundation also challenged California's law. See *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979), *rev'd and rem'd*, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983). The case was consolidated with *Pacific Gas* on appeal, where the Ninth Circuit remanded *Pacific Legal Foundation* on the grounds that the plaintiff lacked standing. *Pacific Legal Found.*, 659 F.2d at 913-14, 928.

44. *Pacific Legal Found.*, 659 F.2d at 923-25.

45. *Pacific Gas*, 461 U.S. at 212, 216, 219.

At the federal level, problems at disposal sites in the 1970s forced Congress to rethink the issue of safety regulation in the area of nuclear waste disposal. From 1962 to 1971, the AEC licensed six commercial regional disposal sites for low-level radioactive wastes.⁴⁶ By 1978, however, three of the sites were closed due to groundwater pooling in the trenches used to bury the waste.⁴⁷ Moreover, improper waste packaging and transportation caused Washington and Nevada to temporarily close the sites located in their states in 1979.⁴⁸ That same year, Governor Richard Riley of South Carolina announced that the Barnwell site would reduce by half the volume of waste it was accepting no later than October 31, 1981.⁴⁹

Rather than passing a law dealing with waste disposal, however, Congress, "at the states' request, and in the interest of federalism, deferred action to allow the formulation of state-based and state-created proposals."⁵⁰ The states wanted a state-created plan for various reasons. The three states with existing disposal facilities worried that a plan created without their input could force their sites to become permanent repositories.⁵¹ There is also some indication that other states were dissatisfied with management at existing federal sites.⁵² In addition, *all* the states wanted to be able to choose disposal sites, rather than have them imposed by the federal govern-

46. Those sites were Beatty, Nevada, 1962; Maxey Flats, Kentucky, 1963; West Valley, New York, 1963; Richland, Washington, 1965; Sheffield, Illinois, 1967; and Barnwell, South Carolina, 1971. White & Spath, *supra* note 1, at 16, 20.

47. The site at West Valley, New York was closed in 1975. In 1977, the site at Maxey Flats, Kentucky stopped operating and the site at Sheffield, Illinois shut down in 1978. *Id.* at 16, 36.

48. H.R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 17 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2974, 3006.

49. Gary W. Hart & Keith R. Glaser, *A Failure to Enact: A Review of Radioactive Waste Issues and Legislation Considered by the Ninety-Sixth Congress*, 32 S.C. L. REV. 639, 775-77 (1981). United States Department of Energy statistics show that by 1982, Barnwell housed 14,694,226 cubic feet of low-level waste, approximately 44 percent of all the low-level waste generated in the U.S. between 1962 and 1982. *Id.* at 774.

50. *New York v. United States*, 942 F. 2d 114, 116 (2nd Cir. 1991), *aff'd*, 112 S. Ct. 2408 (1992) (citing H.R. REP. NO. 314, 1985 U.S.C.C.A.N. at 3007).

51. MIDWEST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT COMM'N, FREQUENTLY ASKED QUESTIONS AND ANSWERS ABOUT LOW-LEVEL RADIOACTIVE WASTE DISPOSAL AND THE MIDWEST COMPACT COMMISSION, Question 1.6 (1992) [hereinafter FREQUENTLY ASKED QUESTIONS].

52. *Id.* Congress specifically intended that the states would not have responsibility for disposing of waste generated or owned by the U.S. Department of Energy. Such waste, in addition to that generated by government research on atomic weapons, is disposed of at federal disposal facilities operated by the Department of Energy. *Id.* at Question 1.2; *see also supra* notes 25-28 and accompanying text (describing waste material that the states may regulate under strict limitations).

ment.⁵³ The National Governors' Association ("NGA") appointed a task force which recommended that each state be responsible for the disposal of non-federally produced low-level wastes generated within its borders.⁵⁴ The task force also recommended that the states be allowed to form interstate compacts for waste disposal and that these compacts be able to restrict waste disposal only to waste that was generated within the compact regions.⁵⁵ Congress incorporated the task force's suggestions when it enacted the Low-Level Radioactive Waste Policy Act in 1980,⁵⁶ adding the requirement that Congress give its consent before a compact could be formed and establishing January 1, 1986, as the date after which compacts could refuse to accept waste generated outside the region.⁵⁷

But the LLRWPA lacked effective incentives to induce states to comply with its provisions. Under the original Act, the Beatty, Richland, and Barnwell sites⁵⁸ were able to refuse access to their dumps after January 1, 1986 if they became part of a regional compact by that time. However, even if they became compact members within that time frame, they were still able to accept out-of-region waste and levy surcharges on the recalcitrant states that had shipped such waste. Thus the only motivation for a state to seek out membership in a compact was the fear of paying a surcharge at some later date. For most states, however, this fear paled beside the daunting likelihood of becoming their region's host state and having to establish a low-level waste depository within its borders.

After threats of closure from the operators of the three existing sites, the NGA negotiated a new "transition package" with the three depository states⁵⁹ that was enacted into law as the LLRWPA of 1985.⁶⁰ The Amendments' new deadline is January 1, 1996, a deadline the Amendments' framers believed states would be more likely to meet since the LLRWPA sets out periodic mile-

53. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 1.6.

54. *New York*, 942 F.2d at 117.

55. *Id.* at 116.

56. H.R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2974, 2976 (stating that the NGA proposal served as a foundation for H.R. 1083, which amended the LLRWPA to provide for a national low-level interstate compact system).

57. Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, § 4(a)(2)(B), 94 Stat. 3347, 3348 (repealed 1986).

58. *See supra* note 46 (listing the six sites the AEC licensed between 1962 and 1971).

59. H.R. REP. NO. 314, 1985 U.S.C.C.A.N. at 3007.

60. 42 U.S.C. §§ 2021b-2021j (1988).

stones for developing disposal sites and imposes surcharges on non-complying states.

II. WHAT THE STATUTE REQUIRES

A. *Forming Compacts*

The Act and its Amendments establish requirements that affect states forming compacts, as well as those choosing to remain independent. Perhaps most important is the requirement that a compact be composed of at least two states.⁶¹ Only a compact, not an individual state, may exclude from its dump waste produced outside the region.⁶² This provision was upheld on appeal in *Washington State Building & Construction Trades Council v. Spellman*,⁶³ the only case specifically construing the LLRWPA of 1980. In *Spellman*, the Ninth Circuit found that the state of Washington could not legally exclude out-of-state waste from its dumpsite because it had not yet formed an interstate compact.⁶⁴ Both the operators of the dumpsite at Richland, Washington and the United States challenged the constitutionality of the state's initiative prohibiting the "transportation and storage within Washington of radioactive waste produced outside the state."⁶⁵

The Richland site, one of three commercial low-level radioactive waste dumps still operating in the United States,⁶⁶ is located on a section of the Hanford Reservation that Washington leases from the federal government and subleases to the operator.⁶⁷ In *Spellman*, the plaintiffs argued that the initiative violated the Commerce Clause of the Constitution and that state authority to regulate nuclear waste disposal was preempted by the AEA and the LLRWPA.⁶⁸ The Federal District Court for the Eastern District of Washington agreed⁶⁹ and the Ninth Circuit affirmed.⁷⁰ The circuit

61. *Id.* § 2021b(4).

62. *Id.* § 2021e(a)(3)(B).

63. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

64. *Id.* at 630.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982).

70. *Spellman*, 684 F.2d at 632.

court's decision reflected traditional preemption and Commerce Clause analysis. In deciding against Washington on the preemption issue, the court found that the state's purpose in passing the initiative had been to use its police power to protect the health and safety of its citizens, a job the AEA reserves for the federal government.⁷¹ On the Commerce Clause question, the court found that the initiative failed all three parts of the test usually applied to state statutes that attempt to regulate the flow of interstate commerce.⁷² First, the initiative banned only out-of-state waste and thus failed to regulate in an evenhanded manner.⁷³ Second, the law failed to show how waste produced in Washington was in any way safer than out-of-state waste, and thus it did not fulfill a legitimate local purpose.⁷⁴ Third, the initiative failed to meet the requirement that it have only an incidental effect on interstate commerce, as the Richland site was receiving approximately 40 percent of the country's low-level waste.⁷⁵ The court found that if Washington had joined a compact, the compact could have eventually excluded producers of out-of-region wastes from gaining access to the compact's dump.⁷⁶ A noncompact state could not do this, however.⁷⁷ As the district court noted, only a "*compact* may preclude disposal of extra-regional waste in the *compact's* regional sites."⁷⁸

The requirement that a compact be composed of at least two states has important implications for states choosing not to join a compact. States that decide to "go it alone" must dispose of the waste generated within their borders either by opening their own dump or by arranging to ship waste to a dump located in another state or compact.⁷⁹ However, in order to comply with the statute, a state choosing to ship waste outside its boundaries must certify that the "stand-alone" state "will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level

71. *Id.* at 631.

72. The three-pronged test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is the test used to determine whether state laws that regulate interstate commerce will be upheld. These three criteria are: (1) evenhanded regulation; (2) fulfillment of a legitimate local public purpose; and (3) an incidental effect on interstate commerce. *Id.* at 142.

73. *Spellman*, 684 F.2d at 631.

74. *Id.*

75. *Id.*

76. *Id.* at 630.

77. *Id.*

78. *Spellman*, 518 F. Supp. at 932.

79. *Id.* at 933.

radioactive waste generated within such State and requiring disposal after December 31, 1992”⁸⁰ Presumably, this means a state can satisfy this requirement by showing that it has contracted with other states or compacts for the ongoing disposal of its waste. Of course, the stand-alone state can decide to open its own dump, but if it does it may not exclude waste from any out-of-state generator. The authority of a *compact* to exclude waste generated outside its region is therefore a state’s main incentive for joining a compact. Thus, opening a dump in a stand-alone state is fraught with risk. Other states attempting to comply with the statute’s directives to arrange to dispose of their wastes⁸¹ may seek to do so in the dump of an unaffiliated state, and that unaffiliated state has no authority to deny access to that out-of-state waste.⁸²

B. *More Carrots and Sticks*

In addition to the requirement that a compact be composed of at least two states, the second major requirement of the LLRWPA is that *non-sited* states and compacts must have met the statute’s milestones and deadlines and achieved operational disposal facilities by January 1, 1993.⁸³ To encourage non-sited states to meet the milestones, the Amendments contain both incentives and penalties. The operation of these incentives, surcharges, and penalty surcharges is detailed in the statute’s two interlocking time frames.⁸⁴ These time frames provide that sited states may levy surcharges on waste generators *in addition* to the customary disposal fees the generators paid for waste generated in non-sited states through 1992.⁸⁵ One quarter of this surcharge was kept in an escrow account, to be returned to the non-sited states upon compliance with the milestones.⁸⁶ The sited states kept the other three quarters of the surcharge.⁸⁷ If a non-sited state did not comply, the potential rebate reverted to the sited state.⁸⁸ An *additional* penalty surcharge was levied on the

80. 42 U.S.C. § 2021e(e)(1)(C)(ii) (1988).

81. *Id.* § 2021c.

82. *Id.* § 2021c(a)(1)(C).

83. *Id.* § 2021e(d)(2)(C).

84. The requirements of both time frames are set out in 42 U.S.C. § 2021e(a)-(g) (1988). It is necessary to read each section in conjunction with the other in order to understand how the two time frames interlock.

85. *Id.* § 2021e(d)(1).

86. *Id.* § 2021e(d)(2)(A)-(B).

87. *Id.*

88. *Id.* § 2021e(d)(2)(F).

waste disposed of by generators from a non-sited state.⁸⁹ Presumably, these generators would pressure their state legislators to follow the Act's requirements.

The first statutory time frame — the “access” time frame — runs from January 1, 1986 through January 1, 1996.⁹⁰ It initially established a seven-year period — which began on January 1, 1986 and ended on December 31, 1992 — during which the three states with operating regional disposal facilities had to make disposal capacity available for low-level waste generated by non-sited compacts and non-compact member states.⁹¹ At the end of this seven-year period, the three states with existing regional waste dumps were no longer required to accept out-of-region waste.⁹²

Even before this deadline, however, non-sited compacts and states that did not belong to a compact could avail themselves of the disposal capacity of the three existing sites during the seven-year period by satisfying a set of requirements detailed in a second time frame, the “milestone” time frame.⁹³ This second time frame extended from January 15, 1986⁹⁴ to January 1, 1992,⁹⁵ and therefore ran almost concurrently with the first seven years of the “access” time frame. If a state did not comply with these milestones in a timely manner, it still had access to the three waste dumps through the end of the seven-year period provided under the “access” time frame, after which the state became subject to surcharges⁹⁶ and milestone incentives.⁹⁷ States that did not join a compact or develop independent siting plans by the end of the first seven years of the “access” time frame continue to be governed by that time frame, which runs through January 1, 1996.⁹⁸ Since 1992, these states — still governed by the “access” time frame — have faced increasingly severe penalties, including the requirement that they have to take title to the

89. *Id.* § 2021e(e)(2)(A)-(C).

90. *Id.* §§ 2021e(a)(1), 2021e(d)(2)(C).

91. *Id.* § 2021e(a)(1).

92. *Id.* § 2021e(e)(2)(A).

93. *Id.* § 2021e(e).

94. *Id.* § 2021e(d)(2)(B)(i).

95. *Id.* § 2021e(e)(2)(D).

96. *Id.* § 2021e(d)(1).

97. *Id.* § 2021e(d)(2). Milestone incentives include the 25 percent surcharge fee paid by the waste generator to the sited state that was held in escrow until the waste generator's state complied with the LLRWPA. Once the state complied with the statute, the money was paid either to the state or the state's compact commission. *See infra* notes 100-29 and accompanying text (discussing the provisions and incentives contained in each time frame).

98. 42 U.S.C. § 2021e(d)(2)(C) (1988).

waste generated within their borders.⁹⁹ To show how the time frames interlock, their provisions are presented below in chronological order.

1. 1986

Under the "milestone" time frame, by July 1, 1986, each state was required to have either passed legislation showing an intention to enter into a compact or provided certification of its intent to develop a disposal facility within the state.¹⁰⁰ Under the "access" time frame, a state disposing of waste not generated in one of the three sited compact regions could have been charged a surcharge of up to ten dollars per cubic foot in 1986.¹⁰¹ Twenty-five percent of this surcharge was then deposited in an escrow account.¹⁰² If a state met the first milestone, on July 1, 1986 it received a rebate of 25 percent of the funds that were held in the escrow account.¹⁰³ If a state failed to meet the first milestone, generators of low-level waste within the state were charged two times the applicable surcharge for the period beginning July 1, 1986 and ending December 31, 1986.¹⁰⁴

2. 1987

Under the "access" time frame, a waste generator disposing of its waste in one of the existing sited compact regions could have been charged a surcharge not to exceed ten dollars per cubic foot in 1987 for waste not generated in the compact region.¹⁰⁵

3. 1988

Under the "milestone" time frame, each non-sited compact region was required either to have identified the state where the waste disposal facility would be located or chosen a developer for the facility and the site to be developed by 1988.¹⁰⁶ Either the compact region or the state in which the facility was to be located was also required

99. *Id.*

100. *Id.* § 2021e(e)(1)(A). For a discussion of the amount of waste produced in a year, see FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 6.

101. 42 U.S.C. § 2021e(d)(1)(A) (1988).

102. *Id.* § 2021e(d)(2)(A).

103. *Id.* § 2021e(d)(2)(B)(i). Rebates were to be paid within 30 days of July 1, 1986. *Id.* § 2021e(d)(2)(D).

104. *Id.* § 2021e(e)(2)(A)(i).

105. *Id.* § 2021e(d)(1)(A).

106. *Id.* § 2021e(e)(1)(B).

to have developed a siting plan.¹⁰⁷

Under the "access" time frame, if a state did not comply, the surcharge for 1988 disposal of waste generated outside the region was not to exceed \$20 per cubic foot.¹⁰⁸ Upon compliance with the milestone, 25 percent of the surcharge originally paid by the waste-generating state and deposited in escrow was rebated to that state or to the compact commission serving that state.¹⁰⁹ If the milestone was not accomplished by January 1, 1988, the penalty for failure to comply was that any generator in the region or state was charged two times the applicable surcharge¹¹⁰ for the period from January 1, 1988 through June 30, 1988, and was charged four times the surcharge for the period July 1, 1988 through December 31, 1988.¹¹¹

4. 1989

Under the "milestone" time frame, a non-sited compact region that did not meet the milestone of identifying the state where the facility would be located could, on or after January 1, 1989, be denied its access to the regional disposal facilities.¹¹² Under the "access" time frame, the out-of-region disposal surcharge was not to exceed \$20 per cubic foot.¹¹³

5. 1990

Under the "milestone" time frame, all non-sited compact regions or non-member states were required to have filed an application for a license to operate a waste dump by 1990.¹¹⁴ A non-member state, however, could have provided a written certification to the NRC that the state would be capable of providing for storage, disposal, or management of any low-level waste generated within the state and requiring disposal after December 31, 1992.¹¹⁵ The penalty for fail-

107. *Id.* § 2021e(e)(1)(B)(i). The siting plan was to provide "detailed procedures and a schedule for establishing a facility location and preparing a facility license application" *Id.*

108. *Id.* § 2021e(d)(1)(B).

109. *Id.* § 2021e(d)(2)(B)(ii). Rebates were to be paid within 30 days of January 1, 1988. *Id.* § 2021e(d)(2)(D).

110. *Id.* § 2021e(e)(2)(B)(i)(I).

111. *Id.* § 2021e(e)(2)(B)(i)(II).

112. *Id.* § 2021e(e)(2)(B)(ii).

113. *Id.* § 2021e(d)(1)(B).

114. *Id.* § 2021e(e)(1)(C)(i).

115. *Id.* § 2021e(e)(1)(C)(ii).

ure to comply was that the waste generated within the state or non-sited compact region might not have been accepted by existing disposal facilities.¹¹⁶ Under the “access” time frame, if a state did not comply, the surcharge for 1990 disposal of out-of-region waste was not to exceed \$40 per cubic foot.¹¹⁷ Once again, if a state did comply with the milestone, 25 percent of the surcharge originally paid by the waste-generating state and deposited in escrow for the period January 1, 1988 through December 31, 1989, was rebated to that state or to the compact commission serving that state.¹¹⁸

6. 1991

Under the “access” time frame, the surcharge for out-of-region disposal was not to exceed \$40 per cubic foot.¹¹⁹

7. 1992

Under the “milestone” time frame, a complete application for a license to operate a waste disposal facility within each non-sited compact region or non-member state should have been filed.¹²⁰ Also, if a non-sited compact region or non-member state failed to comply with the milestone, any waste generator within the region or state was charged three times the applicable surcharge for the period beginning June 1, 1992 and ending on the filing of the application.¹²¹

Under the “access” time frame, the surcharge for waste disposal was not to exceed \$40 per cubic foot.¹²² Further, under this time frame the 25 percent held in escrow between January 1, 1990 and December 31, 1992 was to be paid to the waste-generating state, or the compact commission serving such state, if the compact region or state of the waste’s origin could provide for disposal of all the waste generated within the region or state by January 1, 1993.¹²³

116. *Id.* § 2021e(e)(2)(C).

117. *Id.* § 2021e(d)(1)(C).

118. *Id.* § 2021e(d)(2)(B)(iii). Rebates were to be paid within 30 days of January 1, 1990. *Id.* § 2021e(d)(2)(D).

119. *Id.* § 2021e(d)(1)(C).

120. *Id.* § 2021e(e)(1)(D).

121. *Id.* § 2021e(e)(2)(D).

122. *Id.* § 2021e(d)(1)(C). Therefore, since the “milestone” time frame provided for a penalty in the amount of three times the maximum applicable surcharge under the “access” time frame (\$40), the maximum penalty for this time period was \$160 per foot (3 x \$40 + \$40).

123. *Id.* § 2021e(d)(2)(B)(iv).

8. 1993

Under the "access" time frame, if a compact region or non-member state failed to provide for disposal of all its low-level waste by January 1, 1993, it faced two alternatives.¹²⁴ One alternative was that at the request of the generator or owner, each state in which low-level waste was generated would be required to take title to and possession of the waste.¹²⁵ If the state failed to take possession as soon after January 1, 1993 as the generator or owner notified the state that the waste could be shipped, then the state was liable for damages incurred by the generator or owner flowing from the state's failure.¹²⁶ The second alternative was that if a state or region elected not to take title and possession, 25 percent of any amount collected during the period January 1, 1990 to December 31, 1992 would be repaid, with interest, to each generator from whom the surcharge was collected.¹²⁷

9. 1996

Finally, if a state or region in which low-level waste is generated is unable to provide for the disposal of all such waste by January 1, 1996, that state shall, at the request of the generator or owner of the waste, not only take title to the waste, but also be obligated to take possession of the waste.¹²⁸ Again, the state shall be liable for all damages to the generator or owner caused by the state's failure to take possession.¹²⁹

III. THE STATES' PROGRESS IN FORMING AND SITING COMPACTS

The LLRWPA dictates 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"¹³⁰ To carry out this goal, federal policy espouses regional disposal, with states entering into "such compacts as may be

124. *Id.* § 2021e(d)(2)(C).

125. *Id.*

126. *Id.* § 2021e(d)(2)(C)(i).

127. *Id.* § 2021e(d)(2)(C)(ii). As a result, the 25 percent rebate was an incentive for states to take possession of the waste.

128. *Id.* § 2021e(d)(2)(C).

129. *Id.* § 2021e(d)(2)(C)(ii). The state is only liable from the first point in 1996 at which the owner or generator notifies the state that the waste is available for shipment. *Id.*

130. *Id.* § 2021c(a)(1).

necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.”¹³¹

A. Formation of Compacts

1. Options

In enacting the amendments, Congress assumed that the states would align themselves regionally into six or eight compacts.¹³² As previously mentioned, Congress requires that a compact region be comprised of at least two states;¹³³ thus, the ability of a compact to exclude out-of-region waste is one of the incentives for each state to join a compact.¹³⁴ Each state has two options: (1) join a compact and participate in the decision as to which state will become the region's host site, with the concomitant ability to exclude waste generated outside the compact region; or (2) remain independent, in which case it must either (a) make disposal capacity available to its generators within the state at a site which it will not be able to close to out-of-state generators or (b) make arrangements to ship its waste to another state or compact (and pay a surcharge for the privilege).

2. Incentives

The surcharges, penalties, and take-title provisions seem to be effective incentives. The great weakness of the original Act was the absence of sufficiently powerful incentives to ensure compliance with the statute's goals. By 1985, Congress had approved seven compacts.¹³⁵ By 1992, after passage of the Amendments, Congress had ratified a total of nine compacts.¹³⁶ While only two other compacts have been approved since the LLRWPA was passed, this number does not reflect the furious activity that has taken place within the existing compacts and among the unaligned states: Since the Amendments were passed, seven states have moved from one com-

131. *Id.* § 2021d(a)(2).

132. 126 CONG. REC. 20,136 (daily ed. July 29, 1980) (statement of Sen. Thurmond).

133. 42 U.S.C. § 2021b(4) (1988).

134. 126 CONG. REC. 20,136 (daily ed. July 29, 1980) (statement of Sen. Thurmond).

135. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, §§ 201-27, 99 Stat. 1859 (1986) (codified as amended at 42 U.S.C. § 2021d notes (1988 & Supp II 1991)). See also *infra* note 143 and accompanying text (listing the seven compacts that were originally proposed).

136. *New York v. United States*, 112 S. Ct. 2408, 2416 (1992).

pact to another¹³⁷ and four unaligned states have joined new compacts.¹³⁸

The Amendments also resolved questions regarding who has ultimate authority over a compact.¹³⁹ Not only must Congress ratify each compact,¹⁴⁰ but the Amendments also require Congressional review of compacts every five years.¹⁴¹ The regulations also stipulate that Congress may dissolve a compact at any time if it breaks a state or federal law.¹⁴²

B. *Compacts Negotiated Before 1985*

Seven compacts¹⁴³ were negotiated by 1985, and they were subse-

137. These states were Wyoming, Iowa, Minnesota, Missouri, North Dakota, Arizona, and Utah.

138. South Dakota and California joined the Southwestern Compact, while Pennsylvania and West Virginia formed the Appalachian Compact. See 42 U.S.C. § 2021d notes (1988). However, one aligned state embarked on a course of conduct that would lead to its ouster from a compact; Michigan was kicked out of the Midwest Compact on July 14, 1991. See *infra* notes 155-80 and accompanying text (describing the circumstances that led to Michigan's ouster).

139. Mostaghel, *supra* note 14, at 87 ("Congress has given up its right to be the exclusive regulator in this case.").

140. 42 U.S.C. § 2021d(c)(2) (1988). The statute provides that "[a]ny authority in a compact to restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the compact region shall not take affect before . . . Congress by law consents to the compact." *Id.* § 2021d(c).

141. *Id.* § 2021d(d). Such review was not required under the Original Act.

142. *Id.* § 2021d(b)(4)-(5).

143. These seven original compacts were:

1) The Northwest Interstate Compact on Low-Level Radioactive Waste Management: Potential members were Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming;

2) The Central Interstate Low-Level Radioactive Waste Compact: Potential members were Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, and Oklahoma;

3) The Southeast Interstate Low-Level Radioactive Waste Management Compact: Potential members were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia;

4) The Central Midwest Interstate Low-Level Radioactive Waste Compact: Potential members were Illinois and Kentucky;

5) The Midwest Interstate Low-Level Radioactive Waste Management Compact: Potential members were Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin;

6) The Rocky Mountain Low-Level Radioactive Waste Compact: Potential members were Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming; and

7) The Northeast Interstate Low-Level Radioactive Waste Management Compact: Potential members were Connecticut, New Jersey, Delaware, and Maryland.

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, §§ 201-27, 99 Stat. 1859 (1986) (codified as amended at 42 U.S.C. § 2021d notes (1988 & Supp. II 1991)).

quently approved under Title II of the LLRWPA, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act ("Omnibus Compact Consent Act").¹⁴⁴ Passage of the Omnibus Compact Consent Act meant that the potential members of the seven ratified compacts had official compacts to join after completing the proper steps necessary to obtain state approval of membership. States and regions not designated as potential members of any compact at that time were California, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, Texas, Vermont, the District of Columbia, and Puerto Rico.¹⁴⁵

C. Current Compacts, Host States, and Unaffiliated States

After much jockeying back and forth, the current compact configuration includes nine compacts, all of which have at least one host state. These present-day compacts closely resemble the compacts negotiated in 1985, but with some variations in membership.¹⁴⁶

144. *Id.*

145. In 1988, the states negotiated and Congress approved two additional compacts. These were the Southwestern Low-Level Radioactive Waste Compact, open initially to Arizona and California, and the Appalachian States Low-Level Radioactive Waste Compact, open initially to Pennsylvania and West Virginia. See Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act, Pub. L. No. 100-712, §§ 1-5, 102 Stat. 4773 (1988) (codified as amended at 42 U.S.C. 2021d notes (1988)); Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub. L. No. 100-319, 102 Stat. 471 (1988) (codified as amended at 42 U.S.C. 2021d notes (1988)).

146. The current compact formations are as follows:

- 1) The Northwest Interstate Compact on Low-Level Radioactive Waste Management: Current members include Alaska, Idaho, Hawaii, Montana, Oregon, Utah, and Washington. Wyoming, originally a member, is now affiliated only with the Rocky Mountain Compact. The host state, as could be predicted, is Washington.
- 2) The Central Interstate Low-Level Radioactive Waste Compact: Current members include Arkansas, Louisiana, Kansas, Nebraska, and Oklahoma. No longer included are Iowa, Minnesota, Missouri, and North Dakota. The host state is Nebraska.
- 3) The Southeast Interstate Low-Level Radioactive Waste Management Compact: Current members include Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. The host state is currently South Carolina. The original configuration of this compact remains unchanged.
- 4) The Central Midwest Interstate Low-Level Radioactive Waste Compact: Current members include Kentucky and the host state Illinois.
- 5) The Midwest Interstate Low-Level Radioactive Waste Management Compact: Current members are Indiana, Iowa, Minnesota, Missouri, Ohio, and Wisconsin. Michigan is no longer a member of this compact, and Ohio is the host state.
- 6) The Rocky Mountain Low-Level Radioactive Waste Compact: Current members are Colorado, New Mexico, Nevada, and Wyoming, with Nevada serving as the host state. Initial potential members Arizona and Utah are no longer in this compact.
- 7) The Northeast Interstate Low-Level Radioactive Waste Management Compact: The current and original members of this compact include Connecticut, Delaware,

Ten states or regions remain unaffiliated as of this writing.¹⁴⁷ They are the District of Columbia, Puerto Rico, Maine, Massachusetts, Michigan, New Hampshire, New York, Rhode Island, Texas, and Vermont.¹⁴⁸ Of these ten, New Hampshire, Rhode Island, the District of Columbia, and Puerto Rico — each of which produces less than one percent of the nation's low-level waste — have no plans to develop waste disposal repositories.¹⁴⁹ The other states, with the possible exception of Michigan, are proceeding to select sites to comply with the milestones discussed above.¹⁵⁰

IV. CHALLENGES TO THE LLRWPA

Even with the Amendments' incentives, some states are still reluctant to commit themselves to the concept of shared waste disposal. Michigan and New York took two different paths to avoid the statute's ultimate strictures. Michigan joined a compact but then used every possible delay tactic, which included challenging the statute on constitutional grounds.¹⁵¹ Unlike Michigan, New York did not join a compact.¹⁵² And while New York did comply with the LLRWPA, it also challenged the statute in court.¹⁵³ New York's course of action resulted in the Supreme Court's invalidation of one

Maryland, and New Jersey. Both Connecticut and New Jersey have been designated host states.

8) The Southwestern Low-Level Radioactive Waste Compact: Current members include California, Arizona, North Dakota, and South Dakota, with California serving as the host state. The Dakotas are both additions to the compact's original configuration.

9) The Appalachian States Low-Level Radioactive Waste Compact: Current members are West Virginia and host state Pennsylvania.

GOVERNMENT ACCOUNTING OFFICE, LOW-LEVEL RADIOACTIVE WASTE COMPACTS AND UNAFFILIATED STATES, GAO illustration, GAO/RCED092-61 (1991) [hereinafter GAO Illustration] (available from the Midwest Low-Level Radioactive Waste Compact Commission).

147. *Id.*

148. Connecticut offered to buy space in a disposal facility to be built by Texas, but Texas refused because of Connecticut's high volume of waste. Texas instead will accept shipments from Vermont and Maine. Robert Tomsho, *Environment*, WALL ST. J., June 22, 1993, at B1.

149. GAO Illustration, *supra* note 146.

150. *Id.*

151. Michigan challenged the LLRWPA on the ground that it violated state sovereignty guaranteed by the Tenth Amendment. *Michigan v. United States*, 773 F. Supp. 997 (W.D. Mich. 1991). The court granted the government's motion to dismiss the case on the basis that the LLRWPA was a legitimate exercise of federal Commerce Clause regulatory authority. *Id.* at 1004-05. The court stated that the proper means of challenging the Act was to petition the Nuclear Regulatory Commission. *Id.*

152. *New York v. United States*, 112 S. Ct. 2408, 2416 (1992).

153. *Id.* at 2416-17.

of the Amendments' key provisions.¹⁵⁴ Although Michigan's conduct was more local in effect than that of New York, an examination of Michigan's behavior is useful because it exposes the weaknesses inherent in the LLRWPA that did not come up during New York's challenge to the statute.

A. Michigan and the Midwest Compact: Going No Place Fast

1. Formation of the Compact

The seven original members of the Midwest Compact — Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin — passed compact-enabling legislation in the early 1980s,¹⁵⁵ and Congress ratified the compact in 1985.¹⁵⁶ As is typical under such legislation, the compact is administered by a Compact Commission created by the member states.¹⁵⁷ Each state appoints a Compact Commissioner according to individual state law and the Commission holds annual meetings that are open to the public.¹⁵⁸ The compact cannot vote to add member states, nor can it accept out-of-region waste, unless the host states agree by affirmative vote.¹⁵⁹ Member states may withdraw from the compact only if they repeal the enabling legislation.¹⁶⁰ However, they may be ousted if the other member states find that they have failed to discharge their responsibilities either as a member state or as a host state.¹⁶¹ The Compact Commission selects a host state using criteria developed by its members, or a member state can volunteer to serve as the host state.¹⁶² A member state's responsibilities include paying fees as well as reviewing and commenting on the host state's site selection and disposal

154. *Id.* at 2427-28.

155. See 1983 Ind. Acts 1141 (codified at IND. CODE ANN. §§ 13-5-9-1 to -14 (Burns 1990 & Supp. 1993)); 1983 Iowa Acts 9 (codified at IOWA CODE ANN. § 457B (West Supp. 1993)); 1982 Mich. Pub. Acts 460 (codified at MICH. COMP. LAWS ANN. § 3.751 (West Supp. 1993)); 1983 Minn. Laws 2409 (codified at MINN. STAT. ANN. §§ 116C.831-.843 (West 1987 & Supp. 1993)); 1984 Mo. Laws 42 (codified at MO. ANN. STAT. §§ 260.700-.735 (Vernon Supp. 1993)); 1984 Ohio Laws 3494 (codified at OHIO REV. CODE ANN. §§ 3747.01-.05 (Anderson 1992)); 1983 Wis. Laws 1686 (codified at WIS. STAT. ANN. §§ 16.10-.12 (West 1986 & Supp. 1993)).

156. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, § 225, 99 Stat. 1859, 1892-1902 (1986) (codified as amended at 42 U.S.C. 2021d notes (1988 & Supp. II 1991)).

157. *E.g.*, IOWA CODE ANN. § 457B.1 art. III (West Supp. 1993).

158. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 2.2.

159. *Id.* at Question 2.3.

160. *E.g.*, MINN. STAT. ANN. § 116C.831 art. VIII(e) (West 1987).

161. *E.g.*, MICH. COMP. LAWS ANN. § 3.751 art. VIII(f) (West Supp. 1993).

162. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Questions 3.1-3.2.

technology. The host state's primary responsibilities are to select a site, choose a disposal technology, and then make the site operational, all within the time frames set by the statute.¹⁶³

2. *Michigan Draws the Short Straw*

The Midwest Compact Commission formally designated four member states — Michigan, Minnesota, Ohio, and Wisconsin — as host states on February 27, 1987.¹⁶⁴ After the governors of these four states were notified of the designations, the designees entered a 90-day period within which they could have withdrawn from the compact without suffering any financial penalty.¹⁶⁵ None of the designated hosts exercised this option and, on June 30, 1987, the Compact Commission chose Michigan to site and build the compact's first regional dump.¹⁶⁶ The Commission considered various factors in selecting Michigan, including the volume of waste generated and the feasibility of transporting the waste.¹⁶⁷ Based on these same criteria, the Commission selected Ohio as the first alternate host state and Minnesota as the second alternate host state.¹⁶⁸

3. *Not a Gracious Host*

Michigan's lack of enthusiasm for developing a regional low-level nuclear waste disposal site became evident soon after its selection. In the fall of 1987, the same year Michigan was designated the first actual host, the Michigan legislature approved resolutions inviting Congress to review the disposal policies expressed in the Amendments and to declare a moratorium on siting facilities until the review was completed.¹⁶⁹ Throughout the next three years, Michigan took part in negotiations to set up agreements that would have provided the state with funds from the Commission to develop the site, with payback guaranteed by the Michigan utilities operating nu-

163. See *supra* note 155 and accompanying text (listing the legislation of each state authorizing the Midwest Compact).

164. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 3.1.

165. *Id.*

166. *Id.*

167. *Id.* at Question 3.2.

168. *Id.* at Question 3.1.

169. MIDWEST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT COMMISSION, ACTIONS BY MICHIGAN SHOWING THAT IT HAS FAILED TO DISCHARGE ITS OBLIGATION AS HOST STATE FOR THE MIDWEST COMPACT'S FIRST REGIONAL DISPOSAL FACILITY 1 (1991) [hereinafter ACTIONS BY MICHIGAN].

clear power plants.¹⁷⁰ The state's participation was so half-hearted that after negotiations concerning three separate agreements remained inconclusive, the utilities indicated to the Commission that "there was no reason for the utilities to proceed with negotiation of a Guaranty because they had no confidence in Michigan's siting program" ¹⁷¹ In 1987, the Michigan legislature passed "the most protective low-level radioactive waste containment facility site selection criteria in the nation."¹⁷² Then, in 1989, Michigan's governor, James Blanchard, threatened to introduce legislation withdrawing the state from the compact if member states did not join with Michigan in correcting flaws in the compact and seeking changes in federal laws.¹⁷³ Despite these actions, however, the Compact Commission in 1989 circulated a draft of a joint Governors' Certificate in order to comply with the 1990 federal milestone.¹⁷⁴ While the member states had four opportunities to review and revise drafts of the Certificate, all the compact's governors signed except Governor Blanchard.¹⁷⁵

Gubernatorial politics apparently made Michigan's status as a host state a "hot" issue. Governor Blanchard, seeking reelection in 1990, stated that "[o]ur goal is to keep a low-level radioactive waste dump out of Michigan."¹⁷⁶ His opponent, John Engler, stated in an election debate that he "would continue as Governor to fight the location of this dump in Michigan because ultimately in the nation there will only be three or four dumps and its [sic] in our interest to make sure one of them isn't in Michigan."¹⁷⁷

Michigan's restrictive siting criteria ultimately led to the elimination of most of the candidate sites in Michigan.¹⁷⁸ Eventually, the Michigan Senate passed a resolution requesting that the Midwest Compact relieve it of host status since it could not find a site.¹⁷⁹ Fed

170. *Id.* at 2-7.

171. *Id.* at 7.

172. *Id.* at 13 (citing 1979 Mich. Pub. Acts 204, §§ 333.26210-.26211 (codified at MICH. COMP. LAWS ANN. § 325.491 (West 1992))).

173. *Id.* at 1-2.

174. *Id.* at 7-8. The Governors' certification was required to comply with the 1990 federal milestone for development of new disposal facilities. 42 U.S.C. 2021e(e)(1)(C)(ii) (1988).

175. ACTIONS BY MICHIGAN, *supra* note 169, at 7-8. Governor Blanchard did submit certification under separate cover, but it did not contain a projected operation date that was included in the document the other governors signed. *Id.*

176. *Id.* at 8 (quoting Governor Blanchard's press release of February 9, 1990).

177. *Id.* (quoting the gubernatorial election debate of October 6, 1990).

178. *Id.* at 13-18.

179. *Id.* at 12. The Senate passed the resolution on May 17, 1990, but no action was taken by

up with Michigan's stalling tactics, the Midwest Compact revoked Michigan's membership on July 24, 1991.¹⁸⁰

4. What Can Be Learned From Michigan and the Midwest Compact?

Compacts may want to consider several factors that emerged as important during the four years Michigan remained a member of the Midwest Compact. First, Article VIII of the Midwest Compact provides for a 90-day period during which designated host states can withdraw from the compact.¹⁸¹ Ninety days, however, may be too short a time for a state to realistically ascertain whether or not it has suitable site areas available. On the other hand, Michigan's membership in the compact was not revoked until July 24, 1991, more than four years after it was designated the host state.¹⁸² Considering the relatively short overall time frame of the Amendments (under which states and compacts are to have disposal facilities in operation by 1996), allowing a potential host state four years to decide it does not want to remain in the compact is an indulgence the remaining member states can hardly afford.

Compacts might also want to consider the factors the Midwest Compact used in choosing the host states. The ranking of the states for purposes of determining host status was based mainly on waste generation, although transportation received some consideration as well.¹⁸³ It might be useful for future compacts to give greater consideration to a state's geographical makeup because some areas are physically unsuitable for waste disposal and knowing how great a percentage of a state's terrain might be unsuitable could affect a state's ranking.

Finally, in the future, member states should be required to reveal their siting criteria at the outset. A compact might also want to establish an upper limit on the restrictiveness of these criteria prior to the selection of a host state.

the Michigan House of Representatives. *Id.*

180. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 2.1.

181. Omnibus Low-level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, § 225, 99 Stat. 1859, 1901 (1986) (codified as amended at 42 U.S.C. 2021d notes (1988 & Supp. II 1991)).

182. FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 2.1.

183. *Id.* at Question 3.2.

B. New York's Constitutional Challenge: Striking at the Heart of the Amendments

Michigan was not alone in choosing to forego a nuclear waste compact. After breaking off compact negotiations with several northeastern states, New York decided not to join a compact but rather to develop its own waste disposal sites.¹⁸⁴ Pursuant to the incentives built into the 1985 Amendments, New York selected two counties as possible low-level waste dump sites.¹⁸⁵ However, in 1990 New York and the two counties filed suit in the United States District Court for the Northern District of New York against the United States, seeking a declaratory judgment that the LLRWPA's three incentives¹⁸⁶ violated the Tenth and Eleventh Amendments to the United States Constitution as well as the Guaranty and Due Process Clauses.¹⁸⁷ The District Court dismissed the complaint,¹⁸⁸ and the Second Circuit affirmed that decision.¹⁸⁹ On certiorari, the Supreme Court held that the monetary and access incentives were constitutional but that the take-title provision "crossed the line distinguishing encouragement from coercion";¹⁹⁰ it either lay "outside Congress' enumerated powers"¹⁹¹ or infringed "upon the core of state sovereignty reserved by the Tenth Amendment"¹⁹²

In laying the groundwork for the majority's analysis of the stat-

184. *New York v. United States*, 112 S. Ct. 2408, 2416 (1992).

185. *Id.* at 2416-17.

186. New York challenged the monetary, access, and take-title incentives. *Id.* at 2408; *see also supra* note 100-29 (discussing the incentives provided by the Amendments).

187. *New York v. United States*, 757 F. Supp. 10 (N.D.N.Y. 1990), *aff'd*, 942 F.2d 114 (2d Cir. 1991), *aff'd & rev'd*, 112 S. Ct. 2408 (1992).

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

189. *New York v. United States*, 942 F.2d 114 (2d Cir. 1991), *aff'd & rev'd*, 112 S. Ct. 2408 (1992).

190. *New York*, 112 S. Ct. at 2428. The plaintiffs did not appeal their Due Process and Eleventh Amendment claims. *Id.* at 2408.

191. *Id.* at 2429.

192. *Id.* The take-title provision, the strongest incentive in the Amendments, provides that a state or compact region unable to provide for the disposal of the low-level radioactive waste created in its state or region by the January 1, 1993 deadline would:

[U]pon the request of the generator or owner of the waste . . . take title to the waste, . . . be obligated to take possession of the waste, and . . . be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment

42 U.S.C. § 2021e(d)(2)(C)(i) (1988).

ute, Justice Sandra Day O'Connor examined the difference between federal and state power. She claimed that since the states retain significant sovereign authority under the Tenth Amendment,¹⁹³ when a Congressional action limits a particular aspect of state power the state power must be examined to see if it is protected by any Constitutional limits on Congressional power.¹⁹⁴ The Court noted that the LLRWPA authorizes states with disposal sites to impose surcharges on wastes shipped to the sites from other states.¹⁹⁵ If a state were to impose such surcharges unilaterally, its action might be considered a burden on interstate commerce under the Constitution's Commerce Clause.¹⁹⁶ However, the Court found the LLRWPA's surcharge provisions to be a legitimate exercise of Congress's ability to authorize states to place burdens on interstate commerce pursuant to the powers enumerated in the Commerce Clause.¹⁹⁷ Similarly, collecting a percentage of the surcharge¹⁹⁸ is a legitimate exercise of Congress's taxing power.¹⁹⁹ And the third part of the first set of incentives — the requirement that the states meet the statute's milestones before they can get back some of the escrowed funds²⁰⁰ — is also well within Congress's authority under the Spending Clause.²⁰¹ Since Congress possesses the authority to enforce the first set of incentives — the "monetary incentives" — its exercise of power is constitutionally legitimate; the resulting statutory incentives are not inconsistent with the Tenth Amendment and thus do not violate state sovereignty.²⁰²

The Court also held that the second set of incentives — which provide that sited compacts may gradually increase access costs to their sites and may ultimately deny access to waste generated outside the region²⁰³ — fall within the preemption aspect of Congress's commerce power. Where Congress has enacted a regulatory

193. 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.

194. *New York*, 112 S. Ct. at 2418 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)).

195. *Id.* at 2425.

196. *Id.* at 2425-26.

197. *Id.* at 2425.

198. *Id.* at 2426.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 2427.

203. *Id.*

scheme governing private activity that conflicts with a state regulation, that state regulation will fail.²⁰⁴ However, only conflicting regulations will be preempted; earlier cases examining federal regulation of private activity “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.”²⁰⁵ The Court noted that a state may or may not choose to regulate nuclear waste disposal, but if it does choose to do so, it must follow federal standards.²⁰⁶ Following federal standards in this case means establishing self-sufficiency either by developing a local dump or by joining a regional compact. But if a state chooses not to regulate nuclear waste at all it will not be able to develop a waste dump, and waste-producing residents would therefore have to search outside the state for a disposal facility. That search would subject the individual waste producers, but not the state, to the federal scheme under which sited states and compacts operate. Therefore, since the second set of incentives, the “access incentives,” offer a true choice to states — that is, whether or not to regulate — the Court concluded that these incentives do not interfere with state sovereignty and are not inconsistent with the Tenth Amendment.²⁰⁷

Justice O'Connor considered the third set of incentives to be fundamentally different from the first two. According to her analysis, the take-title provisions do not present the states with a true choice of whether or not to regulate. Rather, the states are presented with the choice of whether or not to accept ownership of and responsibility for the waste or to regulate according to the mandates of Congress.²⁰⁸

The Court did not consider this a choice at all because Congress does not possess the power to impose either of the two separate alternatives.²⁰⁹ The Court noted that Congress cannot simply transfer the ownership of waste from in-state generators to the state in which it was generated, or transfer liability for generators' damages to the

204. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, ‘anything in the constitutions or laws of any state to the contrary notwithstanding.’”) (citation omitted).

205. *New York*, 112 S. Ct. at 2427 (citing *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1980)).

206. *Id.* at 2427.

207. *Id.*

208. *Id.* at 2428.

209. *Id.*

state, because these transfers would amount to a federally-imposed subsidy of waste generators by the state.²¹⁰ In other words, the Court concluded that Congress does not possess the power to impose on the states the first alternative under the take-title provisions. According to the Court, such "federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."²¹¹

The Court found the second alternative, that the states must follow the dictates of the LLRWPA in order to avoid being forced to take title to the waste, to be "a simple command to state governments to implement legislation enacted by Congress,"²¹² a command without constitutional authority. Under the Commerce Clause, Congress can permit the states to discriminate against interstate commerce, as it did in the first two sets of incentives: one set allows sited states to impose surcharges on waste received from other states,²¹³ while the other allows states and compacts with waste dumps to increase the cost for out-of-state or out-of-region disposal and then to deny such disposal altogether.²¹⁴ Under the spending clause, the Court stated that Congress can put conditions on federal funding to the states, as it did in the first set of incentives by requiring the states to comply with the milestones before they can receive surcharge repayments.²¹⁵ However, the Court, finding no grant of authority that justified the take-title provision, held that the provision infringed the sovereignty reserved to the states by the Tenth Amendment.²¹⁶

The Court also set up a distinction between federal laws that affect both state *and* private activity and federal laws that affect only state activity.²¹⁷ According to the Court, laws affecting both state *and* private activity provide a viable choice: states may regulate according to federal standards or may enact state regulations not preempted by federal law.²¹⁸ Allowing the states to regulate subject to

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 2425-26.

214. *Id.* at 2427.

215. *Id.* at 2426-27.

216. *Id.* at 2429.

217. *See id.* at 2423-25.

218. *Id.* at 2420, 2424.

federal limitations has been called "cooperative federalism."²¹⁹ Laws regulating only state activity fail to provide any choice at all because not only must the states regulate, but they must regulate according to federal standards. A law which fails to give a state a choice of whether or not to regulate is perceived as inherently coercive,²²⁰ and it is this coercion that takes such laws out of the realm of cooperative federalism.

Justice O'Connor's analysis of federal-state interactions in *New York* reflects her approval of schemes that, like the Clean Air Act,²²¹ are structured as a "partnership between the States and the Federal Government, animated by a shared objective"²²² For Justice O'Connor, the key issue that determines if a federal law requiring state action is so coercive that it is unconstitutional is whether, under the law, the state retains accountability.²²³ According to the majority in *New York*, "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."²²⁴ Under Justice O'Connor's view, if the citizens of New York elect state officials to carry out their desire that New York not implement any provisions for nuclear waste dis-

219. *Id.* at 2424 (citing *Hodel v. Virginia Surface Mining & Recl. Ass'n.*, 452 U.S. 264, 289 (1980)). The *New York* court cited the following acts as examples of cooperative federalism: the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 (1988); the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1988); the Clean Water Act, 33 U.S.C. § 1251 (1988); and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1988). *New York*, 112 S.Ct. at 2424; see also Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) (discussing the notion of state autonomy and the effect federal law has on that autonomy); Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 874 (1985) (arguing that the theories underlying the notion of federalism dictate a much broader role for the Supreme Court in reviewing state court decisions); John M. Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984) (tracing the development of federalism and discussing how the modern-day conception of federalism differs from what the Framers intended).

220. See *New York*, 112 S. Ct. at 2424. See generally Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 60-70 (1988) (discussing the modest restraint that the Guarantee Clause of the U.S. Constitution places on federal attempts to commandeer state executive and legislative power). But see 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, 656-65 (1985) (arguing that Congress's use of the states as agents to implement national regulatory programs is justified to the extent that national political accountability exists).

221. Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).

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

223. *Id.*

224. *Id.*

positional, Congress could legitimately pass federal legislation to fill that gap. What the federal government cannot do, however, is pass legislation forcing New York to regulate a specific area, because New York's elected officials would no longer retain accountability for the laws they are required to enforce. According to Justice O'Connor, since one of the primary attributes of a sovereign is accountability for its actions, a federal law that forces a state to control its citizens' behavior but does not allow the state to be accountable to those citizens intrudes too far upon the sovereignty of the state. Such a law, therefore, cannot withstand a constitutional challenge under the Tenth Amendment.²²⁵

The majority in *New York* used the Tenth Amendment to justify its finding that the take-title provisions are an unconstitutional intrusion upon state sovereignty,²²⁶ but the opinion overlooked critical Tenth Amendment case law. The Court upheld the first two incentives because it could find some grant of authority to cover them, but the Court failed to find an appropriate home for the third incentive and subsequently held that it intruded upon an area of state authority. In deciding *New York*, however, Justice O'Connor declined to revisit the holdings of previous Tenth Amendment cases because, according to her analysis, the take-title provision applied only to state activity; it was "not a case in which Congress has subjected a State to the same legislation applicable to private parties."²²⁷ Since the take-title provision only regulated state and not

225. *See id.*

226. *Id.* at 2428.

227. *Id.* at 2420. Justice O'Connor did acknowledge the unsteady path the Court's jurisprudence has taken in this area but noted that it was not the time to revisit the holdings of those cases. *See, e.g.,* Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (holding that Missouri's mandatory retirement age for state judges did not violate the Age Discrimination in Employment Act since a state's authority to determine the qualifications of judges "lies at the heart of representative government"); South Carolina v. Baker, 485 U.S. 505 (1988) (finding that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which removed the federal income tax exemption for interest earned on long-term state and federal government bearer bonds, did not violate the Tenth Amendment); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *National League of Cities* and holding state employers are once again subject to the Fair Labor Standards Act); EEOC v. Wyoming, 460 U.S. 226 (1983) (ruling that the Tenth Amendment does not preclude extension of the Age Discrimination in Employment Act to cover state and local government employees as the Act was a valid exercise of Congress's powers under the Commerce Clause); Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (holding that Congress's authority to regulate labor relations in the railroad industry does not impair a state's ability to carry out its sovereign functions and is therefore not violative of the Tenth Amendment); National League of Cities v. Usery, 426 U.S. 833 (1976) (overruling *Wirtz* and holding state employers are not subject to Fair Labor Standards Act); Fry v. United States, 421 U.S. 542 (1975) (upholding the constitutionality of the Economic Stabilization Act of 1970); Maryland v.

private activity, it was not a "generally applicable law" such as those with which recent Supreme Court Tenth Amendment cases have been concerned.²²⁸ Therefore Justice O'Connor saw no need to analyze the LLWRPAA under Tenth Amendment precedent. Rather, using traditional Commerce Clause analysis, she characterized the statute as one that compels the states to fulfill federal mandates without giving them a choice of whether to regulate at all.²²⁹

But merely because a provision is not made under an affirmative grant does not necessarily mean it infringes on the Tenth Amendment. According to Justice Byron White's partial dissent in *New York*,²³⁰ the distinction between laws that regulate state and private activity and laws that regulate only state activity is an artificial distinction that allowed the Court to invalidate the take-title provision without analyzing the provision under Tenth Amendment case law.²³¹ As Justice White pointed out, "The Court's distinction between a federal statute's regulation of States and private parties for general purposes, as opposed to a regulation solely on the activities of States, is unsupported by our recent Tenth Amendment cases. In no case has the Court rested its holding on such a distinction."²³²

The question, according to Justice White, was not whether Congress had the power to regulate state or private disposal of nuclear waste but whether Congress could legitimately sanction the interstate compromises the states had reached.²³³ Under the Commerce Clause, Congress has the authority to regulate the interstate nuclear waste disposal market.²³⁴ Congress may also give the states the choice to regulate this activity according to federal standards or, if a state chooses not to regulate the area, to have the federal govern-

Wirtz, 392 U.S. 183 (1968) (holding that state schools and hospitals are subject to the Fair Labor Standards Act).

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

229. *Id.* at 2428-29.

230. *Id.* at 2435 (White, J., concurring in part and dissenting in part). Justice O'Connor expressed the unanimous view of the Court that the monetary and access provisions were constitutional. Joining her in holding the take-title provision unconstitutional were Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas. Justice White dissented with respect to the take-title provision, and was joined by Justices Harry Blackmun and John Paul Stevens. Justice Stevens also wrote a separate dissent regarding the take-title provision.

231. *Id.* at 2441 (White, J., concurring in part and dissenting in part).

232. *Id.* (White, J., concurring in part and dissenting in part) (stating that neither *National League* nor *Garcia* was decided based on this distinction).

233. *Id.* at 2435 (White, J., concurring in part and dissenting in part).

234. *Id.* at 2419-20.

ment regulate it instead.²³⁵ While this kind of legitimate choice does not violate the Tenth Amendment, validating a statute based solely on the existence of this kind of "either/or" choice provision overlooks other ways of viewing federal-state interactions. Justice White characterized the LLRWPA as an example of cooperative federalism because he thought it could best be understood as "collective state action,"²³⁶ as a "complex interstate agreement,"²³⁷ and as "a delicate compromise"²³⁸ among the states.

One commentator has called "cooperative federalism" a euphemism for "the substantial expansion of federal power at the expense of state authority,"²³⁹ positing an alternative characterization of the federal system as one of "interactive federalism."²⁴⁰ Although Justice White did not use this specific term, it seems to embody his concept of federalism. Under such a view, the LLRWPA is the mechanism through which collectively-negotiated compromises can be effectuated. Given that the states did not want Congress to set up a federal regulatory plan, the take-title provision is not an unconstitutional infringement on state autonomy but rather the states' selected means of enforcement.²⁴¹ The traditional Commerce Clause choice would have forced the states to regulate disposal of nuclear waste either according to the federal plan or to accept the fact that they could not regulate at all and have the federal plan fill the vacuum caused by the lack of state regulation. The states felt that this choice, though constitutionally permissible under the Commerce Clause, was too coercive.²⁴² Specifically, they did not want Congress to decide where the waste repositories would be.²⁴³ Instead, what they did want was to develop a solution at the state level.²⁴⁴ While

235. *Id.* at 2420.

236. *Id.* at 2439 (White, J., concurring in part and dissenting in part).

237. *Id.* at 2441 (White, J., concurring in part and dissenting in part).

238. *Id.* at 2446 (White, J., concurring in part and dissenting in part).

239. Redish, *supra* note 219, at 874.

240. *Id.* at 880-81.

241. See, e.g., *Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 3 (1983) (statement of Idaho Gov. John Evans, chairman of the Nuclear Power Subcommittee of the National Governors Association). Evans emphasized that each of the regions and their compacts had held strenuous negotiations in order to resolve problems unique to each region. *Id.* at 5. As a result, Evans urged Congress not to require rigid agreement in the compacts. *Id.*

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

243. *Id.* at 2437 (White, J., concurring in part and dissenting in part) (arguing that this would force the states to "submit to another federal instruction").

244. *Id.* at 2436-37 (White, J., concurring in part and dissenting in part) (citing H.R. REP. NO.

the states realized that Congress's authority was needed to implement the plan, Congress's role was seen as that of a referee who keeps all the players in the game, not as a super player who could come onto the field to replace a state player.²⁴⁵ The states' solution looked like the first half of the traditional Commerce Clause choice: the states could regulate according to federal standards, although these were actually the same standards the states themselves had asked Congress to incorporate into the statute. The states rejected the second half of the Commerce Clause choice: they did not want the government to have the option of stepping in to fill the void in the instance a state chose not to regulate according to federal standards.²⁴⁶ Therefore, rather than rejecting the take-title provision because it did not fit the mold of a legitimate choice under the Commerce Clause, the Court could have formulated a different question: Whether cooperative federalism allows the states to give up the second half of a Commerce Clause choice provision? A review of Tenth Amendment case law suggests that the answer to this question is "yes."

The very Tenth Amendment cases that Justice O'Connor failed to revisit in striking down the take-title provision²⁴⁷ appear to support the states' ability to negotiate with each other and with Congress to solve the waste disposal problem. These Tenth Amendment cases focus on "ascertaining the constitutional line between federal and state power."²⁴⁸ In *Fry v. United States*,²⁴⁹ which concerned a state challenge to the Economic Stabilization Act of 1970,²⁵⁰ the Supreme Court stated that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."²⁵¹ To control high

314, 99th Cong., 1st Sess., pt 2, at 18 (1985); 126 CONG. REC. 20,135-136 (daily ed. July 29, 1980) (statement of Sen. Thurmond)). See also FREQUENTLY ASKED QUESTIONS, *supra* note 51, at Question 1.5.

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

246. *Id.* at 2436-37 (White, J., concurring in part and dissenting in part).

247. See *supra* note 227 (noting cases that illustrate the unsteady path of Tenth Amendment jurisprudence).

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

249. *Fry v. United States*, 421 U.S. 542, 547 (1975).

250. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 201, 84 Stat. 799 (1970) (codified as amended at 12 U.S.C. § 1904 (1988 & Supp. IV 1992) ("The Act . . . provided for its expiration on April 30, 1974."))

251. *Fry*, 421 U.S. at 547.

rates of inflation, the Act had authorized the President to stabilize wages and salaries,²⁵² with the annual salary increases of covered employees not to exceed 5.5 percent.²⁵³ Ohio applied for approval under the statute of a 10.6 percent increase,²⁵⁴ but the Pay Board, established under the statute to oversee wage and salary controls, denied approval of such an increase.²⁵⁵ Two state employees sought to compel the state to honor the increase, and the Ohio Supreme Court granted their writ of mandamus and ordered payment.²⁵⁶ The United States then filed suit to enjoin Ohio from making the payments.²⁵⁷ On certification from the district court, the Temporary Emergency Court of Appeals held that the Act applied to state employees, concluding that this type of federal interference with state affairs was justifiable since large wage increases to large numbers of employees would substantially affect commerce.²⁵⁸ The Supreme Court later affirmed this decision.²⁵⁹

Similarly, the Amendments' take-title provision, which required states to provide for disposal or take title to the waste, can arguably be viewed as regulating purely intrastate activity. But eliminating this take-title provision from the statute hampers the LLRWPA's ability to force states to comply with its timetable. If a state does not move quickly to fulfill the statute's dictates, time for accessing the existing waste sites will run out. States will then put pressure yet again on Congress to force the sited states to keep their dumps open. Such pressure by any particular state, combined with similar activity on the part of the other non-sited states, may be seen as activity affecting interstate commerce. Thus, the *New York* Court could have found that the Commerce Clause validated the take-title provision.

The state employees who brought the action in *Fry* contended that applying the Economic Stability Act to state employees was an interference with state sovereignty.²⁶⁰ The *Fry* Court replied that while the Tenth Amendment "is not without significance,"²⁶¹ it only

252. Economic Stabilization Act, 12 U.S.C. § 1904 (1988 & Supp. IV 1992).

253. *Fry*, 421 U.S. at 544.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 545.

258. *Id.* at 547.

259. *Id.* at 548.

260. *Id.* at 547 n.7.

261. *Id.*

protects the states against a Congressional exercise of power “that impairs the States’ integrity or their ability to function effectively in a federal system.”²⁶² The *Fry* Court determined that the Economic Stability Act’s “wage restriction regulations constituted no such drastic invasion of state sovereignty.”²⁶³ Although the *Fry* Court did not deal specifically with the question of accountability, elected Ohio officials complying with the Act had no control over wage increases for state employees; irate state citizens thus were not able to hold those elected officials accountable. Yet Justice O’Connor saw the requirement at issue in *New York* — that the states take title to the waste — as an impairment of state sovereignty because state officials would not be accountable to the citizens.²⁶⁴ Such a narrow view of accountability does not consider the ability of citizens to affect national policy through voting for federal representatives and could, therefore, effectively throttle many otherwise viable attempts at cooperative federalism.²⁶⁵ The federal sphere should encompass creative attempts at problem solving, such as the LLRWPA’s take-title provision, even if the result is to impose restrictions on state autonomy that might seem to implicate the Tenth Amendment.

But if the provision is justifiable under the Commerce Clause, the Tenth Amendment need not be implicated at all. In *National League of Cities v. Usery*,²⁶⁶ the Supreme Court set out criteria by which a state activity would be considered beyond the reach of federal regulation.²⁶⁷ At issue in *National League* was whether Congress could, under the Commerce Clause, force the states to comply with the minimum-wage and overtime provisions of the Fair Labor Standards Act,²⁶⁸ areas that were considered “traditional governmental functions.”²⁶⁹ In enjoining enforcement of various provisions of that act, the *National League* Court invoked the Tenth Amend-

262. *Id.*

263. *Id.*

264. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

265. See La Pierre, *supra* note 220, at 639-46.

266. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

267. *National League*, 426 U.S. at 842-46.

268. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1988).

269. *National League*, 426 U.S. at 851-52. The court included fire prevention, police protection, sanitation, public health, and parks and recreation as activities well within the arena of functions traditionally performed by state and local governments. *Id.* at 851 n.16.

ment²⁷⁰ and held that the act operated to "displace the States' freedom to structure integral operations in areas of traditional governmental functions."²⁷¹ The criteria outlined in *National League*, however, look to the federal statute rather than state activity to define an unacceptable federal command and to elucidate protected areas of state activity. The *National League* Court stated that a statute is unacceptable if it regulates the "States as States,"²⁷² if it addresses a matter that is an "attribute of state sovereignty,"²⁷³ and if compliance with it would impair a state's ability "to structure integral operations in areas of traditional governmental functions."²⁷⁴ The Court, however, did not explain what it meant by "States as States," "attribute of state sovereignty," or "traditional governmental function." These phrases, though, would not remain vague for long.

Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,²⁷⁵ the Court determined whether the Fair Labor Standards Act could be applied to a municipal mass-transit system.²⁷⁶ In upholding such an application, the Court overruled *National League* because the distinctions that *National League* tried to draw between the appropriate spheres of state and federal authority were so amorphous as to be "unsound in principle and unworkable in practice."²⁷⁷ Although it was the product of a divided Court, *Garcia* remains the Court's most definitive guide to analyzing at what point federal action impermissibly intrudes upon the states' sovereign sphere. The *Garcia* Court rejected the notion that *a priori* definitions of state sovereignty can be used to identify the scope of federal power under the Commerce Clause,²⁷⁸ declaring that state sovereignty is "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially-created limitations on federal power."²⁷⁹

270. *Id.* at 842-43 (citing *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)) (arguing that the Tenth Amendment prohibits Congress from acting in a way that inhibits the states' ability to function effectively in the federal system).

271. *Id.* at 852.

272. *Id.* at 854.

273. *Id.* at 845.

274. *Id.* at 852.

275. 469 U.S. 528 (1985).

276. *Id.* at 530.

277. *Id.* at 546.

278. *Id.* at 548.

279. *Id.* at 552.

The Court began to flesh out what it meant by procedural safeguards three years later in *South Carolina v. Baker*,²⁸⁰ which dealt with the constitutionality of sections of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").²⁸¹ Congress enacted TEFRA to improve compliance with federal tax laws in an attempt to reduce the federal deficit. Since unregistered bonds could be bought, sold, and given as gifts without leaving a "paper trail,"²⁸² Congress decided that all bonds, whether issued by states, the United States, or private corporations, should be subject to a registration requirement.²⁸³ South Carolina brought suit in the Supreme Court, claiming that this provision was invalid under the Tenth Amendment.²⁸⁴ To analyze the provision under the Tenth Amendment, the Court treated it as if it "directly regulated States by prohibiting outright the issuance of bearer bonds."²⁸⁵ The Court restated *Garcia's* holding that the limits on federal authority over the states are structural, rather than substantive: "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulatable state activity."²⁸⁶ With regard to political process defects, the Court pointed out that South Carolina did not allege that it was deprived of a right to take part in the national political process.²⁸⁷ Rather, South Carolina argued that the process was flawed because the act was passed "by an uninformed Congress relying upon incomplete information."²⁸⁸ The Court responded that neither *Garcia* nor the Tenth Amendment allows courts to "second-guess the substantive basis for congressional legislation."²⁸⁹ It then concluded that since the political process was not defective, the Tenth Amendment was not implicated.²⁹⁰

Although the *New York* Court found that the LLRWPA's take-

280. 485 U.S. 505 (1988).

281. *Id.* at 507 (citing § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 596 (repealed October 22, 1986)).

282. *Baker*, 485 U.S. at 509.

283. *Id.* at 510.

284. *Id.*

285. *Id.* at 511.

286. *Id.* at 512 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-54 (1985)).

287. *Id.* at 513.

288. *Id.*

289. *Id.*

290. *Id.*

title provision violated the Tenth Amendment, the Court did not analyze it under *Garcia*'s rationale.²⁹¹ Had the Court relied on *Garcia* in examining the issues presented in *New York*, it might have found that the political process was not defective and that the Tenth Amendment was thus not implicated. The *Garcia* Court pointedly rejected the kind of *a priori* definitions on which the *New York* Court facilely relied.²⁹² Justice O'Connor found the take-title provision unconstitutional because it took away a state government's accountability to its voters. To the extent that a law impedes a state government's responsibility to represent and be accountable to the citizens of the state, the law prevents the state from "functioning as a sovereign."²⁹³ But the LLRWPA need not be viewed as impeding a state government's responsibility and accountability. The states fulfilled their responsibility to their citizens when, acting through the NGA, they negotiated a state-created and state-implemented plan.²⁹⁴ The accountability requirement was also satisfied because the elected officials at the state level are the ones who decide how a state will approach problems of local, state, and national ramifications, such as the disposal of nuclear waste. These officials are directly accountable, of course, to their constituents during their tenure in office. The NGA approached Congress with the concept of a state-created disposal plan in response to an outcry that the states wanted to implement local control.²⁹⁵ The NGA sought to meld state consensus by holding more than a dozen different meetings.²⁹⁶ The LLRWPA was based on a bill that "'represent[ed] the diligent negotiating undertaken by' the National Governors' Association and 'embodied' the 'fundamentals of their settlement.'"²⁹⁷ The

291. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992) (stating that *Garcia* is not applicable if Congress has not subjected a state to the same legislation that applies to private parties).

292. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1975).

293. *New York*, 112 S. Ct. at 2429.

294. *Id.* at 2436 (White, J., concurring in part and dissenting in part).

295. *Id.* (citing H. R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 18-19 (1985), which addresses South Carolina's announcement in 1979 regarding limits on the amount of waste it would receive annually). See generally *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (finding that a Washington statute which prohibited the transportation and storage in the state of radioactive waste produced outside the state violated both the Supremacy and Commerce Clauses). See also *supra* notes 63-78 and accompanying text (discussing the *Spellman* decision). Local control also factored into the energy laws of California, Illinois, and Minnesota.

296. *New York*, 112 S. Ct. at 2437 (White, J., concurring in part and dissenting in part).

297. *Id.* at 2437-38 (White, J., concurring in part and dissenting in part) (quoted in 131 CONG.

LLRWPA and the LLRWPA are therefore examples of state governments holding themselves accountable to their voters, and not the other way around.

Further, New York was one of the states that “worked through their Governors to petition Congress for the 1980 and 1985 Acts.”²⁹⁸ New York adhered to the Act and the Amendments by entering into and withdrawing from compact negotiations,²⁹⁹ and in passing a state law to site a state waste disposal facility.³⁰⁰ It had actually selected five possible sites at the time it filed its lawsuit and it continued to take full advantage of the LLRWPA’s time extension for sending waste to the three sited compacts.³⁰¹ In fact, Justice White in his dissent considered that New York’s actions bespoke such a degree of approval of, cooperation with, and profit under the Acts that New York should have been “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.”³⁰² New York, however, did not allege any flaw in the political process leading to the enactment of the LLRWPA or the LLRWPA.³⁰³ The Court’s statement that the Amendments caused state officials to “consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution”³⁰⁴ simply ignores the considerable procedural safeguards in place during the extensive negotiations leading to the LLRWPA’s passage.

Under *Garcia*, the LLRWPA does not invade the states’ sovereignty, but instead recognizes that sovereignty. *New York* did not concern a circumstance in which Congress used the states as “implements of regulation.”³⁰⁵ Rather, the situation was the converse: the states, in an attempt to solve an intractable problem intimately affecting each of them, struck a deal with Congress. The states would set up the rules under which they wanted nuclear waste dis-

REC. 35,204 (daily ed. Dec. 9, 1985) (statement of Rep. Udall)).

298. *Id.* at 2439 (White, J., concurring in part and dissenting in part).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 2440 (White, J., concurring in part and dissenting in part).

303. *Id.* at 2439 (White, J., concurring in part and dissenting in part).

304. *Id.* at 2432.

305. *Id.* at 2420.

posal to be dealt with and then Congress would pass those rules, initially as the LLRWPA and, five years later, as the LLRWPA. The federal goals of the Act and the Amendments were none other than the states' goals. Although the take-title provision was not part of the deal negotiated by the NGA,³⁰⁶ the NGA had "anticipated that Congress might eventually have to take stronger steps to ensure compliance with long-range planning deadlines"³⁰⁷ Recognizing that the 1980 Act's fatal flaw was its lack of an ultimate sanction on noncomplying states, the Senate added the take-title provision³⁰⁸ to make the state-initiated Amendments fully effective.³⁰⁹ Viewing the take-title provision as Congress's commandeering³¹⁰ of the states' legislative processes overlooks the history and purpose of the original Act and the Amendments.

The sited states fought the characterization of the take-title provision as an unconstitutional infringement of state sovereignty by asking how a federal statute could be an impermissible encroachment on state sovereignty when state officials had consented to its enactment.³¹¹ Justice O'Connor found this to be a troubling question.³¹² To answer it, she relied on a recent Supreme Court dissent stating that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."³¹³ As *Garcia* pointed out, however, the procedural safeguards woven into the fabric of the federal system ensure that the federal government does not infringe the liberties of citizens.³¹⁴

In holding that the take-title provision invades the states' sphere

306. See *id.* at 2436 (White, J., concurring in part and dissenting in part).

307. *Id.*

308. See 131 CONG. REC. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston) (stating that the take-title provision "insures that the State will not be able to avoid the financial consequences of failure to provide adequately for the disposal of its low-level radioactive waste").

309. H.R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 19 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2974, 3008.

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

311. *Id.* at 2431.

312. *Id.*

313. *Id.* (quoted in *Coleman v. Thompson*, 111 S. Ct. 2546, 2570 (1991) (Blackmun, J., dissenting)). Justice O'Connor also quoted *Gregory v. Ashcroft*: "Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 2431 (citing *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991)). Justice O'Connor then went on to say that when Congress exceeds its authority relative to the States, such behavior cannot be ratified by the "consent" of state officials. *Id.*

314. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 529 (1985).

of authority, the Court prophesied that similar departures from traditional federal structure could be sought by either the federal or state government because they might be in the personal interest of both federal and state officials.³¹⁵ To illustrate this point, the Court posited a scenario: If a federal official could choose a disposal site or could direct a state to make that choice, the federal official would most likely have the state choose and thus avoid accountability to the voters. If a state official could either select the dump site or let the federal official choose, the state official would very likely prefer that the federal official make the choice for the same reason.³¹⁶ But the Court did not conclude from its cynical hypothetical that this would result in the absolute elimination of the voters' power to express their views about their elected officials through the ballot box. Instead, the Court feebly concluded that where the "interests of public officials thus may not coincide with the Constitution's inter-governmental allocation of authority . . . federalism is hardly being advanced."³¹⁷

If voter accountability is the sole criterion motivating the Court to overturn the take-title provision, such accountability was inherent in the development of the act from its inception. The states explicitly sought a method through which they themselves could choose the location of a disposal site, laying their elected officials open to voter retribution.³¹⁸ Federalism is hardly being advanced when a procedurally sound, state-created, and state-endorsed method to keep states in control of a process of vital concern to them is truncated because of the Court's own narrow view of accountability. Finally, in light of the fact that the states would have to yield if Congress chose to preempt the field,³¹⁹ the states' ability to get Congress to do what they want shows the "process" of federalism actively at work. As the *Garcia* Court pointed out, "The political process ensures that laws that unduly burden the States will not be promulgated."³²⁰ If Congress had, indeed, preempted the field and tried to pass something like the Act and the Amendments without recognizing the autonomy the states demonstrated they were capable of exercising,

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

316. *Id.*

317. *Id.*

318. See *supra* notes 294-97 and accompanying text (outlining the role of the states in creating the Original Act and its Amendments).

319. *New York*, 112 S. Ct. at 2419-20.

320. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

passage of the legislation might well have been impossible or, at the very least, slow and difficult. As it is, some states would have preferred that the LLRWPA and the LLRWPA not be passed; those states are the same ones that have been slow to act under the statute's mandates.³²¹ But there were no procedural flaws that justified overturning the Act's key enforcement provision. Seen in light of the statute's history and purpose, the LLRWPA is not coercive; it does not deny voters the chance to vote out of office those who developed it, and rather than intruding on state autonomy, it respects that autonomy.

The *New York* Court held that the take-title provision was severable from the rest of the Amendments.³²² In the Court's view, the take-title provision could be severed "without doing violence to the rest of the Act."³²³ The Act would still be "operative" and would still serve "Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste."³²⁴ The Court stated that the Act still included "two incentives that coax the States along this road."³²⁵ The Court pointed out that if waste generators in a noncomplying state cannot obtain access to other states' disposal sites, the generators may well exert pressure on their own recalcitrant state to comply with the Original Act and Amendments, even without the state being forced to take title.³²⁶ Specifically with regard to New York, the Court pointed out that the "sited regional compacts need not accept New York's waste after the seven-year transition period expires"³²⁷ Practically, this means that New York may continue to export its waste until 1996.³²⁸ By then it must have arrangements in place for shipping its waste to an out-of-state depository or it must have already opened its own waste dump, available for use by both New York's as well as out-of-state waste producers.³²⁹

321. *See supra* notes 155-80 and accompanying text (discussing Michigan's ouster from the Midwest Compact).

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

323. *Id.*

324. *Id.*

325. *Id.* The Court took the teeth out of the LLRWPA; without the take-title provision, the Amendments are not much more effective than the 1980 Act they replaced.

326. *Id.*

327. *Id.*

328. 42 U.S.C. § 2021e(d)(2)(C) (1988).

329. *See supra* note 79-82 and accompanying text (discussing the disadvantages of opening a dump when a state is not a member of a compact).

While the *New York* Court spoke in general terms about the severability of the take-title provision, according to Justice Stevens's dissent, the provision "remains enforceable against the 44 States that have joined interstate compacts . . . because the compacting States have, in their agreements, embraced that provision and given it independent effect."³³⁰ Thus the practical effect of this case is limited to those states that were not members of compacts at the time of the decision.³³¹

V. CONCLUSION

The LLRWPA was the second piece of federal legislation dealing with the ubiquitous problem of low-level nuclear waste disposal. Congress had to amend the original 1980 Act to give it more effective authority. Under this enhanced authority, the states proceeded more or less in step³³² with the Amendments' modified schedule until the Supreme Court invalidated one of the key provisions in *New York*.³³³ The Court struck down the take-title provision, under which states that did not meet the statute's time frame for waste disposal provisions would have to take title to and responsibility for the waste generated within their borders. The Court found that the take-title provision was an impermissible command to state governments to regulate according to the dictates of Congress. The Court did not analyze the case under prevailing Tenth Amendment precedent such as *Garcia v. San Antonio Metropolitan Transit Authority*.³³⁴ If it had done so, the Court might have found the provision to be a viable example of cooperative federalism. Although the Court intended to protect New York from federal legislation that would impair its sovereignty, it completely overlooked the procedural safeguards required by *Garcia*, safeguards that were in place during the development of the Amendments. In striking down the take-title provision, the Court removed the strongest incentive for states to cooperate with the LLRWPA.

Nonconstitutional challenges to the Act, such as the steps Michi-

330. *New York*, 112 S. Ct. at 2447 n.3 (Stevens, J., concurring in part and dissenting in part).

331. New York could try to negotiate space in another state's or compact's dump, or it could follow Texas's lead and arrange to sell space in its own dump to a state with smaller waste volumes. See *supra* note 148 (discussing Texas's dealings with the New England states).

332. But see *supra* notes 155-80 and accompanying text (describing the actions of Michigan which eventually led to its removal from the Midwest Compact).

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

334. 469 U.S. 528 (1985).

gan took prior to its ouster from the Midwest Compact, suggest some procedural responses Congress could make. For example, Congress could attempt to cap the restrictiveness of state site selection criteria. At some trigger point, a waffling host state that finally withdraws from a compact might be made to pay the added surcharges the other states incur as a result of their reliance on the host state to locate a site.

New York's constitutional challenge also suggests some possible legislative responses. Justice White, in his dissent in *New York*, outlined three possibilities. First, Congress could authorize the take-title provision under the Spending Clause by making a state's willingness to take title a condition for receiving its share of collected surcharge monies.³³⁵ Secondly, if a state does not either establish a dump for its wastes or negotiate space in some other state's or compact's dump by the statute's deadline, Congress could directly regulate that state's nuclear waste producers pursuant to its Commerce Clause power.³³⁶ Finally, White noted that Congress could create a right in the generators to sue state officials for failing to establish the disposal options provided for in federal-state programs.³³⁷

Whatever response Congress chooses to make with regard to the *New York* decision, the LLRWPA's legality in areas except the take-title provision has been established. The states fought hard to make disposing of low-level nuclear waste their responsibility and the take-title provision grew directly out of that fight. Subject to all the customary procedural safeguards in place during its enactment, the take-title provision could have been found to be a legitimate exercise in cooperative federalism, notwithstanding Tenth Amendment review. Even though the Court held that the take-title provision was unconstitutional with regard to New York, states already in compacts remain bound by *all* the LLRWPA's provisions. While it is probable that no state really wants to begin operating a nuclear waste disposal facility, the states already committed to compacts are making progress in meeting the LLRWPA's goals. The take-title provision is the bite behind the LLRWPA's bark. Nipped into action by that provision as they are, compacting states probably find compliance with the time frames less painful than might be anticipated because they participated in the drafting of the LLRWPA,

335. *Id.* at 2445 (White, J., concurring in part and dissenting in part).

336. *Id.*

337. *Id.* at 2445-46 (White, J., concurring in part and dissenting in part).

from its conception through its realization. Despite the *New York* decision, the state-based and state-created LLRWPA remains a viable demonstration of federalism.