NOTES

New York v. United States—INVALIDATION OF THE TAKE TITLE PROVISION OF THE LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985 AND ITS CONSEQUENCES

I. INTRODUCTION

In 1985 Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("1985 Amendments" or "LLRWPAA") to strengthen the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act" or "LLRWPA") which had ineffectively dealt with the growing problem of low-level radioactive waste disposal. The 1985 Amendments required the several states to address the problem of low-level radioactive waste and the concerns of the currently sited states.[1] In furtherance of that goal, the 1985 Amendments provided for the following: monetary incentives for

1. "Sited states" are the states which at the time of consideration of the 1985 Amendments had a low-level radioactive waste disposal site. These facilities were in Richland, Washington; Barnwell, South Carolina; and Beatty, Nevada (now closed).

finding a site either in the state or as part of a compact[2] with other states within a prescribed deadline, the right of states to form compacts and impose surcharges and eventually exclude waste not generated in the compact-region, and the requirement that states who did not comply with the 1996 deadline of the Act take title, possession, and liability of the waste if requested to do so.

The District Court dismissed the complaint filed by New York State against the United States[3] and the U.S. Court of Appeals for the Second Circuit affirmed.[4] On appeal, the United States Supreme Court held that under the Commerce Clause and the Spending Clause of the Constitution, Congress could constitutionally enact the monetary incentives for compliance and allow states with Low-Level Radioactive Waste (LLRW or "waste") disposal sites to exclude non-compact waste. The Court held invalid the take title provision, however, stating that Congress could not compel the states to take possession of the waste nor require them to implement congressional legislation. *New York v. United States*, 112 S.Ct. 2408 (1992).

A year and a half after the Supreme Court's decision, the United States is experiencing the same crisis that preceded the enactment of the 1980 Act and the 1985 Amendments: the United States lacks sufficient low-level radioactive waste disposal facilities and the deadlines for developing new sites have passed.[5] Further, since January 1, 1993 compacts are allowed to exclude waste from non-compact states.[6] While the States and compacts are under political pressure to try to find acceptable sites, generators are experiencing much more real pressures of costs and liability which

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2. Compacts are contracts or agreements between states. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting); *see also* U.S. CONST. art. I, § 10, cl. 3.

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

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

5. *See* Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437, 445-47 (1987); *see infra* note 10 and accompanying text (noting the three concerns preceding the 1985 Amendments).

6. 42 U.S.C. § 2021e(e) (1988). The Northwest and Rocky Mountain Compacts have been excluding waste since January 1, 1993. Richard R. Zuercher, *U.S. Ecology Challenges State Order Limiting LLW Charges at Richland*, 34 NUCLEONICS WEEK 6 (June 17, 1993).

have left them with three options for waste disposal: pay $170 per cubic foot to dispose waste at the facility in South Carolina, store the waste on-site or stop production.

This commentary on *New York v. United States* describes the background of the 1985 Amendments, briefly addresses the constitutional issues raised in the decision, and summarizes the Court's decision and the dissent. The analysis discusses the case within the context of other Supreme Court decisions, examines the decision's potential impact on environmental laws, and describes the current status of low-level radioactive waste disposal in the United States.

II. NEW YORK V. UNITED STATES

A. Background

In 1979 the federal and state governments found themselves confronted with a national crisis: two of the three disposal sites for the nation's low-level radioactive waste were temporarily closed.[7] Congress, upon the recommendation of the National Governor's Association (NGA), enacted the 1980 Act which allowed states to develop their own waste programs and form compacts, and set January 1, 1986 as the deadline after which the currently sited states (Washington, South Carolina, and Nevada) could restrict or deny access to their facilities.[8] The 1980 Act did not include any penalties for states who failed to address the LLRW issue. As the statutory deadline of January 1, 1986 approached, thirty-one states still had neither developed their own site nor obtained access to another state's site through a compact.[9] In light of the 1980 Act's failure, the NGA prepared new recommendations to address the following concerns: (1) insufficient pressure existed for additional siting under the current deadlines, (2) upholding the current deadline would create a disposal crisis in unsited and/or non-compact states, and (3) pressure of current

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7. New York v. United States, 112 S. Ct. 2408, 2414-15 (1992). *See also* Berkovitz, *supra* note 5, at 441.

8. *New York*, 112 S. Ct. at 2414-15; *see also* Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347; Berkovitz, *supra* note 5, at 445.

9. *New York*, 112 S. Ct. at 2415; Berkovitz, *supra* note 5, at 447. Reasons cited for not meeting the deadline included technical and political problems. *See id.* at 445 n.40.

deadlines would lead to inadequate siting.[10] Congress acted on the NGA recommendations and passed the 1985 Amendments,[11] strengthening the 1980 Act by providing time-lines, incentives, and non-compliance penalties for compact creation and for siting, and by extending the regional exclusion deadline to the end of 1992.[12] The major provisions of the 1985 Amendments are as follows:

1. Monetary incentives: if non-sited states did not meet various deadlines relating to siting or joining a compact, the sited states may impose a surcharge on the waste coming from those states.[13] Twenty-five percent of these surcharges would be deposited in a Department of Energy escrow account and would be paid back to the states in accordance with their subsequent compliance.[14]

2. Access incentives: after 1992, any compact region can deny access to waste from outside the region.[15]

3. Take title provision: waste generated after January 1, 1993 in states or compact regions lacking a disposal site became, upon the request of the owner or generator of the waste, the property and liability of the state in which it was produced.[16]

Under this law, the State of New York negotiated to join a compact, while also exploring the "go-it-alone" option of siting within the state.[17] New York eventually adopted the latter option.[18] Paralyzed by public opposition to the sites and the approaching deadline, the State and the two counties where the potential sites were to be located sued the United States, claiming that the legislation was unconstitutional.[19]

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10. Berkovitz, *supra* note 5, at 446.

11. *New York*, 112 S. Ct. at 2415; 42 U.S.C. § 2021b-2021j, *as amended* (1988).

12. 112 S. Ct. at 2415-16; *see also* 42 U.S.C. § 2021e.

13. 42 U.S.C. § 2021e(d) (1988).

14. 112 S. Ct. at 2416; 42 U.S.C. § 2021e(d)(2) (1988).

15. 42 U.S.C. § 2021e(e)(D) (1988).

16. *Id.* § 2021e(d)(2)(C) (1988); *New York*, 112 S. Ct. at 2416; *see also* Berkovitz, *supra* note 5, at 457 (The Senate added the take title provision to force action by the states).

17. *New York*, 112 S. Ct. at 2439.

18. *Id.* at 2439-40.

19. Leonard S. Greenberger & Kristen Smyth, *Inside Washington: Supreme Court Weakens Low-Level Waste Law*, 130 No. 3 Public Utilities Fortnightly 26 (1992).

The constitutional provisions relevant to the noted case are Congress' powers under the Spending Clause,[20] the Commerce Clause,[21] the Compact Clause,[22] and the Supremacy Clause.[23]

The Spending Clause allows Congress to condition federal funds on "compliance by the recipient with federal statutory and administrative directives."[24] The Court's development of this clause has allowed the federal government to attain objectives not otherwise covered under its Article I powers.[25] Under the Commerce Clause, Congress may regulate any activity if it finds a rational basis connection between the activity and interstate commerce.[26] In today's national and interconnected economy, virtually every activity affects interstate commerce, and therefore Congress is able to "supplant the States from the significant sphere of activities envisioned for them by the Framers."[27] The Compact Clause requires that when states create a union that may enhance their powers, these states must obtain congressional approval of their compact.[28] Finally, under the Supremacy Clause, Congress may, "[a]s long as it is acting within the powers granted it under the Constitution, . . . impose its will on the States [and] . . . legislate in areas traditionally regulated by the States."[29]

B. The Court's Decision

The Court's decision turned on determining the line between state and federal powers.[30] The Court made this determination by

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20. U.S. CONST. art. I, § 8, cl. 1.

21. *Id.* at cl. 3.

22. *Id.* § 10, cl. 3.

23. U.S. CONST. art. VI, cl. 2.

24. South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

25. *Id.* at 207.

26. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting); *see, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942); *New York*, 112 S. Ct. 2408, 2419 (1992).

27. *Garcia*, 469 U.S. at 584 (O'Connor, J., dissenting).

28. Berkovitz, *supra* note 5, at 477-78. *See also* Joseph R. Prochaska, *Low-Level Radioactive Waste Disposal Compacts*, 5 VA. J. NAT. RES. L. 383 (1986).

29. Gregory v. Ashcroft, 111 S. Ct. 2395, 2400 (1991).

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

asking whether the Act was constitutional under Congress' Article I powers, or, alternatively, whether the Act infringed on the powers reserved to the States under the Tenth Amendment.[31]

The Court found that Congress could regulate the interstate market of waste disposal.[32] The incentives enacted in the 1985 Amendments were constitutional as long as the legislative process of the states was not commandeered.[33] Clearly, Congress could direct or motivate the states to act in a particular way.[34] For example, Congress could condition the receipt of federal funds on enacting a certain law.[35] Alternatively, Congress could offer the state the choice between creating an acceptable state program or "having state law pre-empted by federal regulation."[36] The Court noted that when applying either of these two methods, accountability increases if state regulations are encouraged because state officials are more responsive and more directly accountable to local concerns than federal officials.[37]

1. The Monetary and Access Incentives

The Court found that the monetary incentives[38] were a constitutional exercise of Congress' power to regulate commerce.

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31. *Id.*

32. *Id.* at 2419-20 (citing Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978)); *see also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 282 (1981) (". . . we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." (citing, *e.g.*, United States v. Byrd, 609 F.2d 1204, 1209-10 (7th Cir. 1979).

33. *New York*, 112 S. Ct. at 2420 (citing *Hodel*, 452 U.S. at 288).

34. *Id.* (citing *Hodel*, 452 U.S. at 288; FERC v. Mississippi, 456 U.S. 742, 761-62 (1982)).

35. *Id.* at 2423; *see, e.g.,* South Dakota v. Dole, 483 U.S. 203 (1987) (federal highway funds conditioned on 21-year-old drinking age).

36. *Id.* at 2424 (citing *Hodel*, 452 U.S. at 208); *see Hodel*, 452 U.S. at 272 (Surface mining act allowed states to develop their own program to deal with surface mining; if the state did not do so, "the Secretary [of the Interior] must develop and implement a federal . . . program" for the state.).

37. *Id.* at 2424.

38. *See supra* notes 13-14 and accompanying text. *See also* 42 U.S.C. § 2021e(d)(1) (1988).

The Court reasoned that, first, the states can burden interstate commerce with congressional approval;[39] second, the surcharge was "no more than a federal tax on interstate commerce;"[40] and third, the surcharge was a conditional exercise of the spending power.[41]

The access incentives[42] also represented a constitutionally permissible conditional exercise of the commerce power.[43] Unsited non-compact states had to choose between promulgating state regulations providing for local or regional waste disposal self-sufficiency, and subjecting their residents to denial of access to necessary disposal facilities.[44] The Court stressed that under this incentive structure the states were free to regulate depending on the needs and desires of their residents. The burden of inaction—no waste disposal facility—would be borne by the generators.[45]

2. The Take Title Provision

The take title provision provided the State with a choice between regulation of waste pursuant to Congress' direction, or taking title, possession and liability for waste generated within the state.[46] The Court found that just as Congress cannot command a state to assume liability for the actions of its citizens, Congress cannot command a state to assume possession of the waste which its waste generators create.[47] If, however, the states refused to take title of the waste, Congress would require the state to "implement legislation

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39. 112 S. Ct. at 2426.

40. *Id.*

41. *Id.* Petitioners did not claim that Congress violated the Spending Clause; however, the Court found that the four relevant conditions were satisfied. *Id.*

42. *See supra* note 15 and accompanying text. *See also* 42 U.S.C. § 2021e(d)(2) (1988).

43. 112 S. Ct. at 2427.

44. *Id.*; *cf. Hodel*, 452 U.S. at 288 ("If a state does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government.").

45. 112 S. Ct. at 2427.

46. *Id.* at 2427-28. The states are also responsible for some federal low-level radioactive waste generated within their borders with the exception of defense programs. Berkovitz, *supra* note 5, at 449.

47. 112 S. Ct. at 2428. The Court cites no direct precedent or authority for the propositions in this part of its opinion.

enacted by Congress."[48] In either case, the state "may not decline to administer the federal program."[49] The Court found that both choices were independently unconstitutional.[50] The state is left powerless—it "*must* follow the direction of Congress."[51] Consequently, the entire provision is unconstitutional.

Conceding that generally the federal government does not have the authority to coerce state governments, the United States nevertheless put forth three arguments for finding that the Act fell within a limited domain in which Congress could "coerce" the states to act pursuant to federal direction.[52] The Court rejected all three arguments. The Court first rejected the argument that the federal interest in this case was sufficiently important to overcome the general rule.[53] Although "the Court *has* . . . stated [that] it will evaluate the strength of federal interests," this case is distinguished from cases where Congress required implementation of *federal* regulation because here, Congress required the implementation of *state* regulations.[54] The Court next rejected the United States' argument that the Constitution allowed federal directives to state governments and to enforce directives against state officials.[55] The Court stated that the laws in the cases cited by the United States were federal laws applicable to individuals which are enforceable in state courts under the Supremacy Clause and not laws under which Congress mandated state regulations.[56] Finally, the Court rejected the

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48. *Id.* at 2428-29.

49. *Id.* at 2429.

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.*; *see* WF v. Mississippi, 456 U.S. 742, 762 ("[T]he Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." But the Court doubted "whether a state agency 'may be ordered actually to promulgate regulations having effect as a matter of state law.'" *Id.* at 763 n. 26 (quoting Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979))).

53. 112 S. Ct. at 2429. The Court leaves unanswered the question when the federal interest is sufficiently important.

54. *Id.* at 2429 (first emphasis in original) (citing, *e.g.,* EEOC v. Wyoming, 460 U.S. 226, 242 n. 17 (1983) and South Carolina v. Baker, 485 U.S. 505, 512-13 (1988)).

55. *Id.* at 2430.

56. *See id.* at 2430.

United States' argument that since the Court may resolve interstate disputes, Congress, as an equal branch of the federal government, could also act as an arbiter between states.[57] Based on a discussion of the Framers' intent, the Court concluded that the statute only empowered Congress to regulate the trade directly and not to issue trade-related orders to state governments.[58]

Additionally, the Court, in an analogy to the separation of powers principle, held that states cannot enlarge Congress' power by simply consenting to such enlargement.[59] The three branches of government cannot voluntarily disengage their power, and similarly, states cannot expand Congress' authority by consent.[60] The Court thereby found the take title provision invalid and upheld the rest of the Act.[61]

3. The Dissent

Three Justices dissented and criticized the majority for "mischaracteriz[ing] the essential inquiry, misanalyz[ing that] inquiry . . ., and undervalu[ing] the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision."[62]

First, according to the dissenters, this Act was a compromise between states, to which Congress consented as required by the Constitution.[63] Congress could have preempted the regulation of waste disposal; instead, it "*unanimously* assented to the States'

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57. *Id.* at 2430.

58. *Id.* at 2431.

59. *Id.* at 2431-32.

60. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 118-37 (1976); INS v. Chadha, 462 U.S. 919, 944-59 (1983)).

61. Even though the Act contained no severability clause, the Court found the take title provision severable because the Act would remain fully operative and could attain its goals. *Id.* at 2434 (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). *But compare* 112 S. Ct. at 2447 n.3 (White, J., dissenting) ("[T]he compacts incorporated the provisions of the Act, including the take title provision. These compacts . . . survive the 'invalidation' of § 2021(e)(d)(2)(C) . . . . Congress did not 'direc[t]' the States to enter into these compacts . . .") *with* Berkovitz, *supra* note 5, at 481 n.183 ("[I]f any provision is held invalid, the entire Act will be invalid.").

62. 112 S. Ct. at 2435.

63. *Id.* at 2438; *see also* Berkovitz, *supra* note 5, at 457-58.

request for congressional ratification of agreements to which they had acceded."[64] Furthermore, reasoning that compacts are similar to contracts, and that by its actions New York had "assumed a contractual obligation with equals by permission of another government that is sovereign in the field," the actions of the State pursuant to the agreement made it party to the agreement and prevented it from repudiating the Act.[65]

Second, the dissent emphasized that a state can waive a fundamental right of sovereignty.[66] In *Petty v. Tennessee-Missouri Bridge Comm'n*, the Court upheld a state's waiver of the fundamental right to be sued.[67] Thus, under the "take title" provision, the State simply waived a fundamental aspect of its sovereignty when joining a compact.[68]

Third, the dissent asserted that the Court's citation to and reliance on *Hodel* and *FERC* is not authoritative noting that the language in *Hodel*, on which the majority relies, was dicta and that the passage from *FERC* was taken out of context.[69] In previous cases, the Court had never directly addressed the issue of whether Congress

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64. 112 S. Ct. at 2438 (emphasis in original). Note, however, that the take title provision was not part of the original act and was not proposed by the states; it was added by the Senate committee shortly before the bill was passed. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 177 n.37 (1992) [hereinafter *Leading Cases*] (citing Brief for the United States at 14 & n.27, New York v. United States, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558 and 91-563)).

65. 112 S. Ct. at 2440 (quoting West Virginia *ex rel* Dyer v. Sims, 341 U.S. 22, 35-36 (1951) (Jackson, J., concurring)); *see also id.* at 2439 (The state of New York negotiated with other states and acted pursuant to the statute taking full advantage of it.)

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

67. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-82 (1959) (Congress approves the compacts and the Court has the final say on the meaning); *see* 359 U.S. at 278 & 282 n.7.

68. 112 S. Ct. at 2441 (White, J., dissenting); *but see id.* at 2447 n.3 (Stevens, J., dissenting) (stating that the states that have ratified the compacts are still bound by the take title provision, even if the Act is invalid).

However, the take title provision in the 1985 Amendments was held invalid in *New York*. Since the Court has the final say on compacts in general, *see supra* note 67, the take title provision in the low-level radioactive waste disposal compacts are therefore presumptively invalid.

69. *Id.* at 2442 (White, J., dissenting); *see also id.* at 2420 (Stevens, J., dissenting).

can commandeer the states.[70] Indeed, the Court has upheld federal statutes where Congress has "directed States to undertake certain actions."[71] Consequently, "the more appropriate analysis should flow from *Garcia*."[72] The dissent notes that the emphasis in *Garcia* was on the political process to protect the "States as States" when Congress exercises its Commerce Clause powers.[73]

Finally, Justice White described several avenues through which Congress can constitutionally circumvent the ruling of *New York*. For example, Congress could use the spending power to withhold money from States unwilling to take title, Congress could regulate the producers of waste directly under the Commerce Clause, Congress could preempt low-level radioactive waste disposal, or

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70. *Id.* at 2442. The dissent implies that *New York v. United States* stands for the holding that Congress cannot direct the States to enact a certain law. *But see Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) ("[Justice Blackmun in *National League of Cities*] spoke of a balancing approach which did not outlaw federal power in areas 'where the federal interest is demonstrably greater.'"); *see also* 112 S. Ct. at 2429 ("the Court *has* . . . stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign . . ."); *Garcia*, 469 U.S. at 547 (majority opinion) ("[T]he Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States.") *and id.* at 550 ("With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.").

71. 112 S. Ct. at 2442 (citing Fry v. United States, 421 U.S. 542 (1975), Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981), FERC v. Mississippi, 456 U.S. 742 (1982)); *see also id.* at 2446-47 (Stevens, J., dissenting) (Justice Stevens writes that under the Articles of Confederation the Federal Government issued commands to the States. This power was not lost; the Constitution actually gave more power to the federal government. Furthermore, there are several areas where the Federal Government directs state governments including air, water and waste.).

72. *Id.* at 2443. In *Garcia*, the Court upheld the application of the Fair Labor Standards Act (FLSA) to the San Antonio public transit system under the Congress' commerce power. *Garcia*, 469 U.S. at 555-56. The Court rejected the traditional government functions test for preventing commerce power application to state employees and thereby overruled National League of Cities v. Usery. *Id.* at 546-47.

73. 112 S. Ct. at 2443-44 (White, J., dissenting) (citing *Garcia*, 469 U.S. at 554) ("[Justice O'Connor state[d]] that this Court in *Garcia* has left primarily to the *political process* the protection of the states against intrusive exercises of Congress' Commerce Clause powers." [Gregory v. Ashcroft, 111 S. Ct. 2395, 2413 (1991)]. (emphasis added).); *see also Garcia*, 469 U.S. at 551-53; Berkovitz, *supra* note 5, at 488-89 ("[N]o representative, governor or senator opposed the final bill.").

Congress could allow waste generators to sue states for not meeting the program deadlines.[74]

III. ANALYSIS OF THE DECISION

While the Court's decision prevents the federal government from commandeering the States, the Court also reduces the importance and limits the scope of public policy arguments for those federal actions which are sufficiently important to allow the federal government to commandeer the states. Since Justice O'Connor based her opinion mainly on cases that relied on *National League of Cities v. Usery*,[75] the Court implicitly reduces the impact and extent of *Garcia v. San Antonio Metro. Transit Auth.*[76] On a practical level, the decision puts the responsibility for waste disposal on generators and exacerbates the problems of newly sited non-compact states.

The Court strikes a blow to the overriding federal policy interest.[77] Instead of upholding a joint state and federal solution to a serious national problem, it relied on arguments by the constitutional Framers to cripple the public policy rationale behind the solution. While the Framers' intent is important in determining a law's constitutionality, the Framers could hardly have imagined the existence of nuclear science and technology, much less recognize its potential dangers and interstate problems.[78]

Since public policy issues that concern the states and the nation are best represented and resolved in the political process which "ensures that laws that unduly burden the States will not be promulgated,"[79] an analysis under *Garcia* seems appropriate. Certain federal directives to states are allowed if they are the product of the

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74. 112 S. Ct. at 2445.

75. 426 U.S. 833 (1976).

76. 469 U.S. 528 (1985). However, in *New York*, the Court expressly declined to revisit *Garcia*. 112 S. Ct. at 2420.

77. 112 S. Ct. at 2429.

78. For example, New York produces 55,000 cubic feet of low-level waste a year. While most waste comes from nuclear power plants (e.g. contaminated tools, protective clothing, etc.) a portion comes from nuclear medicinal care and nuclear research. Greenberger, *supra* note 19.

79. *Garcia*, 469 U.S. at 556.

political process.[80] Even the dissent in *Garcia* admits that the test in *National League of Cities* "did not outlaw federal power in areas 'where the federal interest is demonstrably greater'" than the state interest.[81]

The Court leaves unanswered the question of what is a sufficiently important federal interest if low-level radioactive waste is insufficient. The answer to this question is important for the resolution of many environmental problems, especially those that involve interstate hazards and concerns equally as important and controversial as low-level radioactive waste.[82]

With their narrow reading of *Garcia*,[83] some members of the Court may be trying to make good on their promises to eventually

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[80]. The Court in *FERC* points out that the state courts have always been recognized as a "coequal part of the State's sovereign decision-making apparatus." FERC v. Mississippi, 456 U.S. 742, 763 n. 27 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977). Thus, if the federal government can direct the State courts, it can also direct the legislative and executive branches of the state. *Id.* In Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979), the Court unambiguously held that federal law could impose an affirmative obligation on state officials to prepare administrative regulations. Under such an analysis States could be directed to implement the regulations of the 1985 Amendments. Therefore, even if it is assumed that the take title provision is unconstitutional, although the majority in *New York* does not cite any sources in this section of its opinion, the required implementation of federal directives may be constitutional under the direction of state government argument noted in *FERC*, in addition to the political process argument of *Garcia*. 469 U.S. at 551-53. This would be reinforced by the public policy argument of Justice White in *New York*. 112 S. Ct. at 2435-38 (White, J., dissenting); *compare id.* at 2429.

[81]. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *see also id.* at 562 (Powell, J., dissenting); *Hodel* was also interpreted to find that there are situations in which the federal interest justifies state submission. *FERC*, 456 U.S. at 763 n. 28 (citing *Hodel,* 452 U.S. at 288 n.29).

[82]. At least one author sees LLRWPA as a model for hazardous waste disposal. Jonathan R. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1, 29-30 (1990). The Compact Clause in the context of the LLRWPA is discussed by Prochaska, *supra* note 28.

A brief history and more background on the Compact Clause as well as its applicability especially to the Great Lakes is found in J. David Prince, *State Control of Great Lakes Water Diversion*, 16 WM. MITCHELL L. REV. 107, 156-68 (Winter 1990); *see also* Dale D. Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy for the Disease Most Incident to a Federal Government,"* 17 ENVTL. L. 785 (Summer 1987).

[83]. 112 S. Ct. at 2420.

overturn *Garcia*.[84] Justice O'Connor's reliance on *Hodel* and *FERC*, which were both decided after *National League of Cities*, but before *Garcia*, provides additional evidence of this tendency.[85] If this trend continues, then the Court may be returning to the "traditional governmental function" standard of *National League of Cities*[86] for purposes of determining state immunity under the Commerce Clause.[87] This direction would result in two strains of cases. One strain would be based on the progenies of *National League of Cities*, such as *Hodel*, *FERC*, and perhaps *New York*. The other would rest on *Garcia*, but construe it very narrowly, applying it only to legislation applicable to both private parties and states.[88]

Even a narrow reading of *Garcia*, however, may make it applicable to the issues raised in *New York*. The invalidated take title provision applies to private parties and states—the State is only required to take possession "upon the request of the generator."[89] This places the duty of action first on the waste generator, who may then trigger the State's duty to act.

Finally, by removing the take title provision the Court removed from that legislation its strongest incentive for compliance. While there are several remedies available to Congress to "shore up" the 1985 Amendments,[90] it may now be plagued by the same problems as its predecessor: inability to enforce the law, delays in compliance and lack of adequate sites.[91]

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84. *See* 469 U.S. at 580 (Rehnquist, J., dissenting); 469 U.S. at 589 (O'Connor, J., dissenting).

85. *Hodel* was decided in 1981, *FERC* in 1982, and *Garcia* in 1985. The majority in *New York* distinguished *Garcia* on the grounds that it "concerns the circumstances under which the Congress may use the States as implements of regulation." 112 S. Ct. at 2420.

86. 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

87. *Garcia*, 469 U.S. at 530.

88. 112 S. Ct. 2420 ("[*New York*] is not a case in which Congress has subjected a state to the same legislation applicable to private parties." (citing FERC v. Mississippi, 456 U.S. 742, 758-59 (1982)).

89. 42 U.S.C. 2021e(d)(2)(C)(i) (1988).

90. 112 S. Ct. at 2445 (White, J., dissenting).

91. Berkovitz, *supra* note 5, at 445-47; *see also* Greenberger, *supra* note 19 (absence of take title provision may cause foot dragging in siting and an increase in fees for activities involving nuclear technology); *see, e.g., Inside Washington: Switching Compacts*, 130 No. 3

Further, if a State does not join a compact or does not have its own site, other compacts can exclude its waste. Currently, however, the government cannot take action against that state to enforce compliance.[92] The burden of waste disposal is carried by the generators.[93] In unsited, non-compact states, generators can no longer legally dispose of their waste. The generators may then be tempted to dispose of the waste illegally.[94] Illegal disposal, if undetected, then pushes the responsibility of waste cleaning back on the state. Alternatively, the generator could export the waste to a newly sited, non-compact state.[95] Since newly sited compacts can exclude waste,[96] while "go-it-alone" states cannot,[97] the latter must accept the

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Fortnight 26 (Public Utilities Fortnightly) Aug. 1, 1992; *but see* Greenberger, *supra* note 19 ("most siting commission and industry officials remained optimistic about the long-term future of their siting processes . . . . [T]he decision 'doesn't change the basic principle of federal law that gives states responsibility for disposing of low-level radioactive waste produced within their borders.'" (quoting Phillip Bayne, President of the U.S. Council on Energy Awareness)).

92. One option is to allow generators, who now have the burden, to sue their states. *See New York*, 112 S. Ct. at 2445 (citing Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990), Suter v. Artist M, 503 U.S. __, 112 S. Ct. 1360 (1992)).

93. Greenberger, *supra* note 19 ("Gov. Mario Cuomo said that the court's decision . . . affirms . . . that those who create . . . waste will have to take the responsibility for disposing of it"; Cuomo also said that "the decision should help the process . . . [because] states and utilities might form partnerships to provide storage space" for the smaller waste producers.).

94. However, if the culprit can be identified, LLRW may be a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988). If nuclear substances are mixed with hazardous substances they clearly fall under Resource Conservation and Recovery Act's (RCRA) mixture rule, 40 C.F.R. 261, and thus under CERCLA § 101(14). Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k) (1988). *See also* 58 Fed. Reg. 7265 (1993) (140,000 cubic feet of mixed waste generated in 1990).

95. *See New York*, 112 S. Ct. at 2440 (White, J., dissenting) The problems of sited non-compact states was analyzed by L. David Condon, *The Never Ending Story: Low-Level Waste and the Exclusionary Authority of Non-Compacting States*, 30 NAT. RESOURCES J. 65 (Winter 1990).

96. 42 U.S.C. § 2021e(e)(2)(A)(ii) (1988).

97. City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27; *see also* Condon, *supra* note 95, at 76. The underlying assumption in this discussion is that the state is not a market participant and is licensing the facility to a private operator. *See* Prochaska, *supra* note 28, at 396-400 (discussing application of the Commerce Clause's market participant doctrine in the context of the 1985 Amendments).

waste of any state.[98] Ironically, the Court's holding in *New York* commandeers "go-it-alone" states into joining a compact or accepting waste from unsited non-compact states.[99] This holding discourages non-compact states from establishing disposal sites, and further thwarts the goal of the 1980 Act and the 1985 Amendments of establishing more disposal sites nationwide.[100] If the Court had upheld the take title provision of the 1985 Amendments, every state would have been required to provide for its own waste after 1993. Instead, waste generators, such as nuclear power plants and hospitals, located in states that have no site or that are not part of a compact, are left to fend for themselves.

IV. THE IMPACT OF NEW YORK V. UNITED STATES

A. Tenth Amendment and Federalism

New York v. United States establishes a new precedent for federalism and for Tenth Amendment cases. Although the Court implicitly limited *Garcia*,[101] recent district and circuit court decisions

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[98]. Most of the compacts include trigger clauses. Condon, *supra* note 95, at 70-71. Under a trigger clause, if one state increases its production to more than a fixed percentage of the region, that state becomes a disposal site host. A state can avoid a trigger by exporting its excess to a sited non-compact state which has to accept the waste since it may not exclude exports. The quarantine exception to the Commerce Clause does not apply here because for it to be in effect a state would have to totally ban low-level radioactive waste in its state. *See id.* at 77-78.

The disadvantage to sited non-compact states is resolvable through the reasoning of the Chief Justice. In *City of Philadelphia*, then-Justice Rehnquist found that solid waste was noxious and would fall under the quarantine exception of the Commerce Clause. *City of Philadelphia*, 437 U.S. at 632 (Rehnquist, J., dissenting). If low-level radioactive waste is also quarantinable each state then has the option of excluding it.

[99]. 112 S. Ct. at 2440 (White, J., dissenting). Indeed it becomes futile for any state to "go-it-alone" since this ultimately means that the state has to accept all waste shipped to it.

[100]. Berkovitz, *supra* note 5, at 438. *See also* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 1985 U.S.C.C.A.N. (99 Stat.) 2974, 2976. (The extension of the original deadline from 1986 to 1993 under which the currently sited states (Nevada, Washington, South Carolina) agreed to accept waste was contingent on, among other reasons: "Clear progress by *other* states and compacts in development of *new* disposal capacity." (emphasis added)).

[101]. *See supra* notes 83-88 and accompanying text.

have read *New York* in harmony with *Garcia*.[102] Private parties and states challenging federal statutes that arguably compel states to take certain actions have based these claims on *New York*.[103] Scholars have argued that *New York* is the Court's most recent attempt at finding a principled law of federalism.[104] Commentators find *New*

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[102]. Aheren v. New York, 807 F. Supp. 919 (N.D.N.Y. 1992), *aff'd,* Reich v. New York, 1993 U.S. App. LEXIS 21657 (finding triable issues of fact for FLSA application to New York police investigators). The District Court found that since *New York* had declined to revisit *Garcia*, *Garcia* is "the law of the land" for Tenth Amendment purposes. *Id.* at 927 (citing New York v. United States, 112 S. Ct. 2408, 2420 (1992)).

Parr v. California, 811 F. Supp. 507 (E.D. Cal. 1992) (state compliance with FLSA did not violate Tenth Amendment). The District Court stated that the Supreme Court is committed to *Garcia* and will not revisit it. *Id.* at 512. Further, *New York* "distinguished federal legislation applicable to both states and private parties from federal legislation forcing states to regulate in a particular way." *Id.*

May v. Arkansas Forestry Commission, 993 F.2d 632 (8th Cir. 1993) (Forest Commission employees' request for back pay under FLSA). The court reads *New York* in harmony with *Garcia*. *Id.* at 636.

[103]. *See* Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Seabird," 811 F. Supp. 1300, 1317-21 (N.D. Ill. 1992) (Plaintiff challenged the Abandoned Shipwreck Act (ASA) as unconstitutional because it forced states to take title of sunken vessels. The court distinguished the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA) as transferring title from an individual rather than from the United States as under the ASA and there was no penalty if the state did not follow Congress' direction in the ASA.)

Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) (finding Forest Restoration Conservation and Shortage Relief Act unconstitutional because state was coerced into promulgating regulations for timber export ban.).

[104]. H. Jefferson Powell, *The Oldest Question in Constitutional Law*, 79 VA. L. REV. 633 (1993). In an interesting article, Professor Powell traces the development of Justice O'Connor's federalism argument that gained the Court's approval in *New York*. However, Professor Powell points out that Justice O'Connor's basis in the framers' intent is misplaced and that her authorities may actually indicate the opposite of the proposition for which she cites them. *Id.* at 658-60. Prof. Powell then justifies Justice O'Connor's federalism on prudential grounds. *See id.* at 681-88.

Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1013-21 (1993). Althouse contrasts federalism as developed by Justices O'Connor and Blackmun. *New York*'s benefit is that it requires more state involvement and hence greater democracy. *Id.* at 1019. She also sees this case as the first case in a newly developing federalism. *Id.* at 1020-21.

York to stand for a resurgence and expansion of states' rights.[105] Overall, the impact of this decision on federalism and the federal government's authority over the states may be very broad.[106]

B. Environmental Law

The most recent application of *New York* in an environmental case is *Board of Natural Resources of the State of Washington v. Brown*[107] where the United States Court of Appeals for the Ninth Circuit, relying exclusively on *New York*, held the Forest Resources Conservation and Shortage Relief Act[108] (FRCSRA or the "Act") unconstitutional. The Court found that under the Act Washington had two options: to ban export of timber harvested on state lands, or to do nothing, in which case the state would violate its fiduciary duty in managing state land.[109] The court found that the Act unconstitutionally coerced the State and therefore violated the Tenth Amendment.[110]

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105. *Leading Cases*, *supra* note 64, at 178-83 (criticizing the Court for failing to decide this case (*New York*) under the Guarantee Clause and explaining why that would provide a more workable result).

Scott Gardner, *Recent Decisions*, 31 DUQ. L. REV. 877 (1993) (finding support for the majority and reducing the opinion to a two-part test for federal laws under the Tenth Amendment: whether states are influenced to legislate; whether the law actually compels legislation).

John M. Lingelbach, *The Tenth Amendment and the Federal Power to Direct Low-Level Radioactive Waste Disposal: New York v. United States*, 26 CREIGHTON L. REV. 557 (1993) (stating that the Court departs from previous Tenth Amendment analysis and that under the previous Tenth Amendment cases the take title provision should have been upheld).

106. *See, e.g.,* Ira C. Lupu, *Constitutional Law Orbits*, 79 VA. L. REV. 1, 57-58 (*New York* may impact states' rights in enforcement of Religious Freedom Restoration Act and the proposed Freedom of Choice Act); *see also Leading Cases*, *supra* note 64, at 182 ("[A] broad reading of *New York* might wash away . . . post New-Deal precedents upholding federal regulation against state challenges.").

107. 992 F.2d 937 (9th Cir. 1993).

108. 16 U.S.C. §§ 620-620j (1990).

109. *Board of Natural Resources*, 992 F.2d at 947.

110. *Id.* at 949. Although only one section of the Act was unconstitutional, the court found it not severable and therefore held the entire Act unconstitutional. *Id.* at 948-49.

Board of Natural Resources illustrates *New York*'s potential impact on statutes requiring state action.[111] In light of the Ninth Circuit's decision, Congress will have to be extremely careful in delegating responsibilities to the states.[112] Permissibility of delegation may depend on who the statute regulates and whether it contains penalty provisions. For example, the Emergency Planning and Community Right-to-Know Act[113] (EPCRTKA) has as its goals to provide information on hazardous chemicals to the public and to use the information to develop local action plans in case of a release.[114] The two mechanisms for achieving these goals are local emergency planning boards and reporting requirements for facilities.[115] Section 301 of the EPCRTKA states that "the Governor of each State shall appoint a State emergency response commission . . . . If the Governor of any State does not designate a State emergency response commission . . . the Governor shall operate as the State emergency response commission."[116]

Arguably, the Governor, as head of the executive branch of state government, is "the state" for purposes of executing the laws.[117]

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111. *See also Leading Cases*, *supra* note 64, at 182 n.67 ("The reasoning in *New York* could readily lend itself to increased judicial scrutiny of congressional enactments on federalism grounds.").

112. For example, the Clean Air Act requires states to develop State Implementation Plans (SIPs), 42 U.S.C. § 7410 (CAA § 110). If a state fails to promulgate a SIP, CAA § 110(c) requires EPA to develop a Federal Implementation Plan (FIP). In essence, EPA would administer the entire SIP for the state, regulating the citizens rather than the state as a state. The air pollution control program has been based on regulation of individuals through the states. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION—LAW, SCIENCE AND POLICY 760-64 (1992).

Since regulation is *through* the states and not *of* the states, the CAA is not endangered by a Tenth Amendment challenge. *See also supra* note 32.

113. 42 U.S.C. §§ 11001-50 (1988).

114. *See generally* Steven J. Christiansen & Stephen H. Urquhart, *The Emergency Planning and Community Right to Know Act of 1986: Analysis and Update*, 6 B.Y.U. J. PUB. L. 235, 236 (1992). EPA's enforcement of EPCRTKA has improved public information and enhanced awareness of toxic chemicals. *Id.* at 258-59.

115. *Id.* at 236.

116. 42 U.S.C. § 11001(a) (1988).

117. An interesting analysis would be to determine what would have happened if the Forest Resource Conservation and Shortage Relief Act at issue in *Board of Natural Resources*

According to the logic in *New York* and *Board of Natural Resources*, section 301, and potentially the EPCRTKA, are invalid because the state can only choose between appointing a commission or being the commission. FRCSRA requires the state to issue regulations implementing the export ban.[118] Section 620c(d) explicitly requires states to promulgate regulations under the Administrative Procedure Act.[119] EPCRTKA requires the State planning commission to "establish procedures for receiving and processing requests from the public."[120] Procedures can be interpreted as regulations, but the provision is neither as explicit nor as direct as FRCSRA. Further, unlike the LLRWPAA which required States to take title to their waste, neither the EPCRTKA nor the FRCSRA provide for penalties against the State if it fails to establish a commission or fails to set regulations, respectively.[121] The invalidated section of FRCSRA, section 620c, can also be distinguished from EPCRTKA section 301 as applicable to the state, whereas EPCRTKA is aimed at regulating facilities.[122]

If the Governor is not "the state," then, according to the Supreme Court's finding in *FERC* that "federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions" are constitutional, the statute would be valid.[123] In sum, under the *FERC* interpretation, if Congress wanted to "coerce" states it would designate the Governor, otherwise it would designate "the state." Statutes currently in force and designating "the

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had referred to "the Governor" rather than "the state." Arguably, the effect would have been the same, since it is the governor or his/her designate who has to implement the laws.

118. *Board of Natural Resources*, 992 F.2d at 941 (citing 16 U.S.C. § 620c(d)).

119. *Id.* at 947.

120. 42 U.S.C. § 11001 (1988).

121. *See also* Zych v. Unidentified, Wrecked and Abandoned Vessel, 811 F. Supp. 1300 (N.D. Ill. 1992).

122. *See also supra* note 112 (discussing validity of Clean Air Act).

123. FERC v. Mississippi, 456 U.S. 742, 762 (citing Fry v. United States, 421 U.S. 542 (1975); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979); Testa v. Katt, 330 U.S. 386, 393 (1947)). In *Fry*, state employees were restricted to federal wage and salary limitations; in *Washington*, state government was asked to implement treaty provisions; and in *Testa*, a state court was required to enforce federal law. None of these cases provides for an affirmative duty of a state decision-maker, with the possible exception of *Washington*. That case can be distinguished as dealing with a treaty requirement. *See, e.g.,* Missouri v. Holland, 252 U.S. 416 (1920).

state" may be more closely scrutinized in light of *New York* and *Board of Natural Resources*.

C. Developments in LLRW Disposal Since New York v. United States

The initial reaction of the nuclear industry to the Supreme Court's decision in *New York v. United States* was surprisingly subdued. Most public statements indicated that the decision did not severely impact the overall system since the Court's decision left the compact system intact and allowed the exclusion of waste.[124] The industry believed that the compacts themselves provided for states to take title.[125] Since the Court validated the compacts, the decision did not affect obligations already established between states.[126] After the Supreme Court decision, the California Radioactive Materials Management Forum issued the following statement: "California's Secretary of Health and Welfare has acknowledged that if California fails to provide the needed [LLRW disposal] facilit[y] by January 1, 1993, the state will be liable for damages to users of radioactive materials in the Southwestern Compact."[127] So far, no generator has requested that a state take title to its waste. Although this issue could be litigated now, industry may wait until after January 1, 1996, when the effect of Nuclear Regulatory Commission (NRC) regulations for on-site storage go into effect creating a more justiciable issue.[128]

Despite Supreme Court approval of the general scheme, litigation surrounding the siting of LLRW disposal facilities is making compliance with the 1985 Amendments difficult. The development of regional waste compacts is already falling behind the congressional deadline[129] and the industry expects that it will take five years for new facilities to become operational and another ten

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124. E. Michael Blake, *Most Feel Supreme Court Did Not Alter Situation*, NUCLEAR NEWS, Aug. 1992, at 82.

125. *Id.*

126. *Id. See also* 112 S. Ct. at 2447 n.3 (White, J. dissenting); Prochaska, *supra* note 28, at 388-91 (discussing compact law).

127. Blake, *supra* note 124, at 82.

128. *See infra* text accompanying notes 150-55.

129. *The Plan: At Age Two, Some Progress*, NUCLEAR NEWS, Jan. 1993, at 21 (review of the Nuclear Power Oversight Committee's strategic plan for building new nuclear plants).

years before the LLRW disposal system envisaged by the 1985 Amendments will serve the entire nation.[130]

The biggest problem which states and compacts face is siting.[131] Decision-makers have to deal with resistance from both communities and states and with a disproportionate amount of misunderstanding about LLRW and its risks.[132] Lengthy delays[133] through litigation and administrative procedure further frustrate the siting of new facilities. Parties opposed to LLRW disposal sites have sought to halt or delay the process by demanding additional hearings,[134] passing local ordinances,[135] demanding Environmental Impact Statements,[136] asserting rights to nuclear-free environment,[137]

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[130]. Betsy Tompkins, *Frustration Abounds Concerning Disposal*, NUCLEAR NEWS, Jan. 1993, at 44.

[131]. *See generally* MARY R. ENGLISH, SITING LOW-LEVEL RADIOACTIVE WASTE DISPOSAL FACILITIES: THE PUBLIC POLICY DILEMMA (1992).

[132]. Jorge Contreras, *In the Village Square: Risk Misperception and Decisionmaking in the Regulation of Low-Level Radioactive Waste*, 19 ECOLOGY L.Q. 481, 496-505. The danger of cancer from a properly operating LLRW facility is 5×10^{-6} compared with accidental electrocution for which the risk is 6.3×10^{-6}. However, the effects of LLRW are not very well known because there is not much data available. Recent data may, once analyzed, provide further information. *See* Patricia Kahn, *A Grisly Archive of Key Cancer Data*, 259 SCIENCE 448 (Jan. 22, 1993) (medical records of 450,000 former East German uranium miners may allow for a more conclusive study of impacts from low-level radiation).

[133]. Texas, for example, has been trying to site a low-level facility for 12 years. Tompkins, *supra* note 130, at 44.

[134]. The California Senate made the confirmation of the Secretary of Department of Health Services contingent on granting more hearings for the Ward Valley disposal site. The state budgeted $2.3 million for these hearings. The court struck down these hearings as an unconstitutional act of the committee. California Radioactive Materials Management Forum v. Department of Health Services, 19 Cal. Rptr. 2d 357 (1993). If DHS decides to grant a license to U.S. Ecology to develop the site in Ward Valley, opponents hope to further delay the process at the next administrative level: since the land is owned by the federal government, transferring it to the state requires an Environmental Impact Statement (EIS) under the National Environmental Policy Act. *Late News in Brief*, NUCLEAR NEWS, June 1993, at 21. Opponents hope to further delay the process through the EIS. *Id.*

[135]. In Nebraska, one township containing a potential disposal site has passed an ordinance prohibiting LLRW disposal. Paul Kemezis, *Compact Asks Court to Invalidate Nebraska Town's LLW Facility Ban*, 33 NUCLEONICS WEEK 7 (July 16, 1992). The compact and the licensee, U.S. Ecology, have brought suit in federal court claiming that since the state cannot ban LLRW, neither can the counties. *Id.*

[136]. Michigan sued the United States to require the Nuclear Regulatory Commission (NRC) to prepare EISs on licensing regulations and all LLRW disposal sites. But the court

and by insisting that there are already sufficient disposal facilities.[138] Further, new facilities are expensive.[139]

Difficulties also arise for communities willing to accept disposal facilities in return for lucrative payment packages[140] from other forces within their state. For example, in Illinois, despite the community support for the facility,[141] Illinois' need for a site and 71 days of public hearings, a three-person blue ribbon panel on October 9, 1992 decided against the proposed site because an aquifer was

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held Michigan had no standing since it was neither a licensee nor involved in any siting. The Tenth Amendment challenge of this case was mooted by *New York*. Michigan v. United States, 994 F.2d 1197 (6th Cir. 1993).

In North Carolina, groups opposed to the siting of a facility demanded a state EIS for the pre-characterization study of two sites in North Carolina. Richmond County v. North Carolina Low-Level Radioactive Waste Management Authority, 425 S.E.2d 468 (N.C. Ct. App. 1993). (The issue regarding preparation of an EIS was moot by the time it came to court because the study was virtually completed.)

See also Mayerat v. Town Bd. of the Town of Ashford, 585 N.Y.S. 2d 928 (1992) (holding that an EIS was not required before the town of Ashford could pass a resolution consenting to the State of New York's choice of the town as potential site because such a statement was required before siting).

[137]. In Nebraska, plaintiffs sought to stop development of LLRW disposal facility claiming, inter alia, that they had a fundamental right to be free of non-natural radiation. Concerned Citizens of Nebraska v. United States Nuclear Regulatory Comm'n, 970 F.2d 421, 426 (8th Cir. 1992).

[138]. Opponents to the Ward Valley facility in California have argued that the nation is not running out of LLRW disposal places. Richard R. Zuercher, *Lujan Pushes Federal Land Transfer for California LLW Disposal Site*, 34 NUCLEONICS WEEK 1 (Jan. 7, 1993).

[139]. U.S. Ecology based its charges for disposal at the Richland facility on a $11 million development cost for a new site. Zuercher, *supra* note 6. *See also* Contreras, *supra* note 132, at 527-28 (providing data on cost of siting).

[140]. For example, Chem-Nuclear Systems, Inc. (CNSI) was willing to pay, and the village was willing to accept, an annual payment of $2.15 million for locating in Martinsville, Illinois. Richard R. Zuercher, *Illinois Town Officials Affirm Support for Hosting LLW Facility*, 33 NUCLEONICS WEEK 1 (June 11, 1992). CNSI also would pay a $500,000 equivalent fee instead of real estate taxes, provide for an independent facility inspector with veto power and unlimited facility access, donate 1000 acres of land to the State of Illinois kept in natural state around the facility and build or donate an improved water supply and treatment facility capable of producing at least 1000 gallons per minute. *Id.*

[141]. *Id.*

discovered nearby.[142] Illinois had to begin its siting process from scratch and generators in Illinois and Kentucky now have to consider long-term on-site storage, or the high costs of disposing at the Barnwell, South Carolina site.[143] While the Court emphasized public accountability in invalidating the take title provision,[144] the actual effect of its decision finds such accountability lacking—the generators face the disposal problem alone, while the states are free to avoid this thorny political issue.[145]

Faced with the options of extremely expensive disposal and no disposal, on-site storage or waste reduction are viable alternatives for generators. If generators cannot properly dispose of their wastes they are likely to reduce production[146] or pass the higher costs of disposal on to consumers. In turn, consumers may experience, for example, less available and more expensive nuclear medicine and more expensive nuclear energy.[147]

Generators may also store their waste on-site for longer periods of time. This delay may be advantageous for much of nuclear medicine on the one hand, because the short half-lives rapidly make the waste virtually non-radioactive and therefore eliminate the need to dispose of it in a special facility.[148] On the other hand, longer on-site storage increases the probability of accidents.

Recognizing that some generators "may be forced to store their LLW on-site until disposal capacity is available . . ."[149] and that the development of new sites is seriously delayed, the NRC has proposed new regulations that alter on-site storage after January 1, 1996. Although NRC looks at long-time on-site storage as a last

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142. Richard R. Zuercher, *Illinois Back to Square One on LLW Disposal Facility Siting*, 33 NUCLEONICS WEEK 4 (Oct. 29, 1992); *see also Late News in Brief*, NUCLEAR NEWS, Nov. 1992, at 25.

143. Richard R. Zuercher, *Backers of Illinois LLW Site Say Review Panel Went Too Far*, 33 NUCLEONICS WEEK 11 (Nov. 12, 1992).

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

145. Contreras, *supra* note 132, at 521.

146. In a non-sited state, the costs of adequately storing LLRW or of disposal at Barnwell may be prohibitive; thus, small industrial concerns or individual physicians are considering discontinuing radioisotope use. Tompkins, *supra* note 130, at 44.

147. *See* Contreras, *supra* note 132, at 529.

148. Contreras, *supra* note 132, at 489.

149. 58 Fed. Reg. 6730 (1993).

resort option because such storage poses a greater threat to human health than disposal,[150] the generator, if it has documented that it has exhausted all other reasonably available waste management or final disposal options, may store the waste on-site.[151] Industry analysts argue, however, that without the take title provision, the practical effect of the regulations may be little more than creating correspondence between generators, state agencies and disposal sites.[152] The NRC could further relax these regulations, but doing so would greatly increase accident risks.[153]

The quantity of generated LLRW is relatively small compared to the cost of disposal,[154] and having many small sites is not economical.[155] One commentator suggests, based on an Office of Technology Assessment study of 1989, that three LLRW disposal sites are sufficient to handle the entire nation's wastes.[156] The amount of waste produced in 1989 was half of the amount produced in 1980.[157] Much waste is already being reduced by shredding and incineration.[158] Other proposed regulations allow generators to ship material to other facilities for processing and then have it shipped back to their site.[159]

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150. *NRC Hopes to Discourage Lengthy On-Site Storage*, NUCLEAR NEWS, Mar. 1993, at 70.

151. 58 Fed. Reg. 6730, 6733 (1993).

152. *Id.*

153. Contreras, *supra* note 132, at 524 n.262 ("[W]ith 100 sites, each with a 99% annual probability of avoiding an accident, the overall probability of having no accidents is 37%. If . . . each site has only a 98% chance of avoiding an accident, the annual probability of having no accident drops to only 13%.")

154. *Id.* at 521-23, 529.

155. *Id.* at 521.

156. *Id.* at 522.

157. *Id.* at 521.

158. Depending on the type of incineration procedure, LLRW volume can be reduced by factors of 30:1 to 100:1. STEWART W. LONG, UNITED STATES NUCLEAR REGULATORY COMM'N, THE INCINERATION OF LOW-LEVEL RADIOACTIVE WASTE 14-16 (1990). Although Japan and Europe do this, *id.* at 51, industry is currently rejecting LLRW incineration because it is too expensive compared to burying and because licensing is difficult and unpopular. *Id.* at ix.

159. *See* 10 C.F.R. 50.54; 57 Fed. Reg. 47978.

As the search for new sites continues, the facility in Richland, Washington remains open to generators in the Northwest and Rocky Mountain compacts.[160] The Barnwell site is temporarily open to everyone, but the charges are at a minimum of $170 per cubic foot[161] and generators must stipulate in the disposal contracts with the compact that they will continue to make efforts to develop LLRW facilities.[162]

There are several possible ways to speed up the siting process for new disposal facilities through incentives: for example, (1) Congress could reauthorize the 1985 Amendments implementing the alternatives suggested by Justice White in *New York*;[163] (2) State and federal governments could develop a new system of siting which better accounts for political, social and technical factors;[164] (3) the NRC could further relax its on-site storage regulations to allow more on-site storage; (4) Congress could withdraw its approval of compacts without state take title provisions;[165] or, (5) the NRC could invoke the emergency access provisions of the 1985 Amendments.[166] The means for solving the third LLRW disposal crisis are available; the question is whether Congress and the States have the political courage to act on them.

V. CONCLUSION

The Court in *New York v. United States* took a step forward in reinforcing regional compacts for waste disposal and other environmental problems and strengthened Congress' conditional

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160. Zuercher, *supra* note 138, at 6 (The Washington State Utilities and Transportation Commission made disposal fees subject to its approval because U.S. Ecology was operating a monopoly.).

161. Zuercher, *supra* note 138, at 6. One of the reasons why the South Carolina legislature decided to keep the Barnwell site open was the generation of revenues. Tompkins, *supra* note 130, at 44.

162. Richard R. Zuercher, *DOE Sets Eligibility Criteria for Rebates on LLW Surcharges*, 33 NUCLEONICS WEEK 3 (Oct. 8, 1992).

163. *See supra* note 74 and accompanying text.

164. Contreras, *supra* note 132, at 541-45.

165. *See* 42 U.S.C. § 2021d(d) (1988) (Congress has to consent to compacts every five years). *See also supra* note 68; 58 Fed. Reg. 6730 (1993) (constitutionality as applied to states not invalid); Prochaska, *supra* note 28, at 391.

166. Contreras, *supra* note 132, at 542 (citing 42 U.S.C. § 2021f (1988)).

spending and commerce powers. The Court also strengthened states' rights, but at the expense of public policy arguments supporting federal supervision over state governments. While it may be justifiable under a framers' intent analysis to protect the sovereignty of states from federal government commandeering, the urgency of modern problems like the national low-level radioactive disposal waste crisis suggests that the Court should base its analysis on more recent interpretations of the Constitution. The Court's analysis in this case also signals a return to the principles of *National League of Cities*, thereby narrowing the scope of the Court's holding in *Garcia*.

Finally, the Court's decision revives the problem of low-level radioactive waste disposal which should have been conclusively resolved under the 1985 Amendments. "LLW is still being generated and interstate compacts with licensed disposal sites are now empowered to refuse LLW from outside the compacts."[167] Since January 1, 1993, compacts have the authority to deny waste. The full impact of this deadline has been mitigated in part by South Carolina's decision to allow non-compact waste until June 30, 1994.[168] But the problem addressed by Congress in 1980 and 1985 is back in 1993: The United States is running out of LLRW disposal sites. As delays in siting continue, more on-site storage will be required and the risk of an accident will increase. Without an enforceable take title provision, government has no incentive to act, while generators remain liable.

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167. *NRC Hopes to Discourage Lengthy On-Site Storage*, NUCLEAR NEWS, Mar. 1993, at 70.

168. *See* 58 Fed. Reg. 6730 (1993).