Approved: Carl Dean Holmes

Date 3-17-93

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes at 3:30 p.m. on March 9, 1993 in Room 526-S of the Capitol.

All members were present except: Representative Ruff, excused

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mary Torrence, Revisor of Statutes
April Howell, Committee Secretary

Conferees appearing before the committee: William Craven, Kansas Sierra Club
Owen de Long, U of K Dept. of Political Science & Environmental Studies

Others attending: See attached list

Chairman Holmes called the meeting to order and asked the Committee for approval of Committee Minutes dated February 17, February 18, February 22, February 23, February 24 and February 25. Upon motion by Representative Grotewiel and seconded by Representative Long, the minutes dated February 17 through February 25 were approved.

The hearing was opened for the Opponents of **SB246** -Central Interstate low-level radioactive waste compact amendments.

William Craven presented his testimony to the Committee stating that the State of Kansas should withdraw from the compact and that any amendments to this Senate Bill should be rejected. In his opinion, Kansas is the likely second host state and will be on the receiving end of decommissioning wastes of nuclear power plants if this legislation passes. The decommissioning waste may include highly radioactive components. He outlined his concerns which included liability insurance coverage, definite site locations, enforcement of statutes in case of bankruptcy, future costs and fees. (Attachment 1)

Owen de Long submitted testimony in opposition of **SB246**. He advised the Committee that as a scholar in the field of Public Environment Policy, and as a former teacher of U.S. Constitutional Law, he felt that this legislation was being voted on without the proper information and the proper national and historical perspective with which to make individual decisions on this Bill. His testimony was in great detail and included several newspaper clippings and copies of related Supreme Court cases. (Attachment 2) He also submitted a copy of his paper, "Low-Level Radioactive Waste Disposal" he wrote in a Law and Public Policy class at the Department of Political Science at Kansas University. (Attachment 3)

The Chair then closed the hearing on **SB246** and opened the floor for debate by the Committee. Representative McClure made a motion for an amendment (Attachment 4) and the motion was seconded by Representative Lynch. Upon verbal vote, the motion failed.

Representative Lawrence made a motion to favorably pass the Bill. The motion was seconded by Representative Myers. Upon a show of hands, the motion passed; 10 in favor, 9 against. Representative Laura McClure, 119th District, asked that her vote be recorded in the minutes, she stated: *"I vote NO on **SB246**. I believe it sends the wrong message to the State of Nebraska. By passing these amendments to the radioacive waste compact, we imply that the site in Boyd County is an acceptable site. We are sending a blank check to pay for future remediations on a 320 acre site that contains 42 acres of wetlands and water tables of 5" to 15". I am also very concerned about the change in policy dealing with bankruptcy proceedings, and the uncertainty of availability of third party insurance to U.S. Ecology for the Boyd County site."*

The meeting adjourned at 6:15 p.m.
The next meeting is scheduled for March 10, 1993.

Date: March 9 '93

GUEST REGISTER

HOUSE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

NAME	ORGANIZATION	ADDRESS	PHONE
Ken Bahr	Ks. Hospital Assn.	Topeka	
Shelley Wells	Intern	Lawrence	
Bill Fuller	Kansas Farm Bureau	Manhattan	
Patrick Talkesley	KCDC / [illegible]	Topeka	
Charles Jones	KOHE	TOPEKA	
Harold Spiker	KOHE	Topeka	
Sue Lechtenberg	NOW	Wichita	
Russ Bishop	Panhandle Eastern	Houston Texas	
Jack Glaves	" "	Wichita, Kas	
Owen de Long	University of Kansas, Dept. of Pol. Sci. & Environmental Studies	410 West 18th St., #F, Lawrence, KS 66044	(913) 749-4366
Bill Craven	Sierra Club	Topeka	

SIERRA CLUB

Kansas Chapter

Central Interstate Low Level Radioactive Waste Compact Amendments
S.B. 246
Testimony of William Craven
Legislative Coordinator, Kansas Sierra Club
House Energy and Natural Resources Committee
March 9, 1993

Thank you, Mr. Chairman, for providing an opportunity for the Kansas Sierra Club to express its strong views on this bill. This bill is an important bill not only for those of us who are presently considering this policy, but it is far more important for the next generations who must live with—and pay for—the decisions which will be made as you consider this legislation.

At the outset, I want to make it clear that much of what was said yesterday by KDHE officials was, in my opinion, far from the whole story. The department seems far too concerned with the fate of investor-owned utilities which generate most of the low level radioactive waste (LLRW) in this state than it does with the public interest. The department also seems too interested in both strengthening a compact and in improving its own political position within a compact framework which is essentially obsolete.

My conclusion is that Kansas should withdraw from the compact, and many of the reasons which support that conclusion follow. As a consequence, the amendments before you should be rejected. One reason I want to advance now is that Kansas, as the likely second host state, will be on the receiving end of the early 21st century-decommissioning wastes of several nuclear power plants. It is public knowledge that in about 30 years, Wolf Creek will be preparing for decommissioning, as will the nuclear power plants in Louisiana. The nuclear power plants in Arkansas and Nebraska are older, and their decommissioning wastes could be bound for Kansas. This is a hard issue to get firm facts on, because so much of it is a question of timing, but what I just said are reasonable estimates. The committee should consider these possibilities as it deliberates on this bill.

A related point is the argument that what is LLRW is essentially trash. That statement was made yesterday. That may be true today, but as decommissioning occurs, major components of reactors will also be sent to these sites. That includes such highly radioactive components as the control rods and the reactor vessel itself. The spent fuel rods are considered high level waste. This raises the question of whether the Boyd County site, or a second compact site, is large enough to hold the volume of waste which may end up there. It seems quite unlikely.

First, however, assuming the compact language is only to be amended, it is on the specific issue of shared liability that I most sharply split company from KDHE's testimony. What rational reason is there for states, taxpayers, and

House E&NR
Attachment 1
3/9/93

ratepayers to subsidize utility companies in the generation of nuclear waste? Taxpayers have subsidized billions in developing nuclear power, and now we are asked to subsidize its waste. If I were a utility company, I couldn't think of a better deal. If and when something happens at this LLRW site—and it will, sooner or later, because it has at all prior sites—all of the entities listed in the bill may be brought into the liability chain. And guess who has the deepest pockets of all? As near as I can tell, it is the states.

Yesterday you were told that in this compact, states are to be last in the chain of liability and in a proportion to the waste they generate. But the fees which this amendment gives Nebraska the exclusive right to determine also include "the cost of defending or pursuing liability claims against any party or state." (page 4, line 26.) In other words, even if Kansas is not directly liable, Kansas, because of the shared liability language, will end up paying to defend litigation arising from the Boyd County site, a site which never should have been chosen. This language also creates the unusual possibility that Kansas has to pay for litigation against itself.

Under this compact, nuclear waste generators are treated much more generously than say, Vulcan out of Wichita, which is a national leader in generating hazardous waste. Vulcan can't rely on the state to bail it out if it has an accident while shipping hazardous waste to Emelle, Alabama, the largest hazardous waste dump in the nation. Nor can Vulcan rely on the state to share liability with it if the Alabama site is involved in litigation of any sort.

If I were Vulcan, or a similar company, I think I would trot up to Topeka and see if I couldn't talk the legislature into making the taxpayers liable for my accidents, too. Why shouldn't Vulcan come here and ask for a shared liability package? If this amendment is passed, there will be ample precedent.

It is also far from automatic that these costs will, or should be included in the rate base. The very basic requirement is that the expenses must first be found to be used and useful, and second, prudent and reasonable. Given what we now know about the administration of this compact, and the contractor, U.S. Ecology, and the announced intention to deny licensure by Nebraska, I suspect that a strong case can be made that the facility will never be used, and thus will never be useful. Given that, it is hard to argue that further expenditures will be both prudent and reasonable. It seems to me—and this I can virtually guarantee—that the utility companies are facing a major battle if they think Kansas ratepayers will roll over if and when there is an attempt to ratebase these expenditures. Precedent in this state, from the Wolf Creek construction case, is that construction work in progress can't be put in the ratebase until the construction is actually generating revenue for the company from the sale of energy.

When there is evidence that it is taxpayer money that is being squandered, the most conservative of you start bouncing off walls. Why is it that I don't hear any reaction to the fact that some $46 million has been spent on a facility facing an announced $90 million cost overrun and that disposal costs have quadrupled since the first announcement? Even if you don't appreciate the environmental issues, you should surely appreciate the fiscal arguments.

It is improper to argue, as did KDHE, that Kansas signed the compact, and is thus bound to follow the compact wherever it might lead. That is the path of

somebody who doesn't think for himself or herself. This issue—especially this issue—is always open to reconsideration and to new developments, of which there have been several. If I could impart just one thing here today, it is this: Don't approach this issue with blinders on.

Four events have eclipsed KDHE's insistence on adhering to the compact model for LLRW disposal, to the allegiance KDHE professes to the compact of which Kansas is a model, and the site which this compact has chosen, the site in Boyd County. First, the referendum in Boyd County in which a huge percentage of those voting rejected the site there negates the requirement of the compact that community consent be achieved. The vote in that referendum was 1,098-86 against the Boyd County site. That vote is now the subject of the Nebraska governor's lawsuit against the compact. Incidentally, instead of recognizing the validity of that vote, Secretary Harder, as the Kansas representative on the compact, supported the compact's decision to defend that litigation. That is a clear indication that the leadership of KDHE is in the camp of the utilities, not following the stated policy of the compact to avoid building a facility in an area where there is no community consent. It is also an indication that KDHE, while professing loyalty and paying lip service to the concept of Kansas' moral obligation to honor the laws of the states which formed this compact, selectively limits these concerns about morality to only those statutes which suit its purposes.

The second noteworthy event is the Nebraska Department of Environmental Quality's announced intention to deny the licensure of the Boyd County facility. This decision is not a "technical reason" as KDHE suggested. Instead, it is a decision which cuts to the heart of the proposed Boyd County site. The site in Boyd County has springs which have flowed on the surface for decades, even during the Dust Bowl. More than 40 acres of what U.S. Ecology once called "pristine wetlands" are on the site. Frequent ponding occurs on the surface, and the groundwater under the site is sometimes only 2-3 feet below the surface of the land. In my visit to Boyd County, I was shown pictures of duck hunters in boats exactly on top of the land where the dump is supposed to be. This is clearly a site which doesn't meet the requirements of the Nuclear Regulatory Commission, which prohibits a site in wetlands areas. It is true, as you heard yesterday, that the licensing decision rests with Nebraska. That does not mean, however, that this committee should ignore reality.

The third event is the recent decision in the case of New York v. United States, which stands for the proposition that federal law notwithstanding, states are free to make their own arrangements for disposal of their own waste. This decision, more than the first two events I mentioned, is of critical importance in sorting out what options Kansas has. The decision, especially the majority opinion of Justice O'Connor, made it clear that states do not have to dance to the tune of the utilities which generate the lion's share of the LLRW waste. If states have the political will—the guts—then they can require the utilities to dance to the song the states sing. In other words, while there may be some financial penalty to Kansas in abandoning this compact, there is no longer any reason to continue on this path which is not only wrong, but which will surely subject the state to far greater financial liability.

The bottom line in this case is that the decision removed the federal compulsion upon the states to provide disposal facilities, but it preserved the system of milestones and the financial and access incentives.

The LLRW Act and its amendments should be viewed as a tripod. The three legs of the tripod are (1) a surcharge which is paid to the federal government and which is returned to the states which meet the various milestones provided in the act; (2) access to a facility by states which met the milestones, and (3) a punitive "take title" provision which required states which failed to meet the milestones to take title to its waste and whatever liabilities go with it. This third leg also required states to make arrangements for disposal by January 1, 1996.

The milestones were to join a compact, to have the compact identify a site, and to complete a license application. No compact working on a new site has met all three milestones and it is increasingly unlikely that any will. This is the main reason you hear the complaint that this system is totally unworkable.

The final event that is important was the decision made in Illinois last fall. There, another compact involving Illinois and Kentucky had selected a site for a LLRW facility in Martinsville, Illinois. Our compact has spent $46 million on the Boyd County site. That compact had spent close to $90 million on the Martinsville site. That compact's rules provided that a three-member commission had to approve the site, and, following three months of testimony, that commission rejected the site. Testimony in that hearing lasted 72 days, there were 100 witnesses, and there were 20,000 pages of transcribed testimony. The governor of Illinois accepted the decision. The compact is back to square one, and I have not heard that the Southeast Compact is threatening Illinois or Kentucky with denial of access to Barnwell, as they have done to Nebraska. I could talk about the Martinsville case at length, but in the interests of time, I think what is most important is to know that the site was rejected for reasons of geology, hydrology, and site construction. Even if concrete can be made to last 500 years, one commission member said, that isn't good enough when some of the radionuclides will last for thousands, if not tens of thousands of years. We face that same issue in Boyd County. The facility could not be relied upon to isolate LLRW from the public, from water, and from the air. Aside from the convenience of subsidizing the generators of this waste, those are the only reasons for such a facility. The record in that case makes references to Boyd County, and the opinion of many people, including several scientific experts and the chairman of the Illinois commission, with whom I spoke, is that the Martinsville site was <u>superior</u> to that in Boyd County. Incidentally, that person is a former justice of the Illinois Supreme Court in case you had any misconceptions that he is a misguided member of the Sierra Club.

These four events have combined to eclipse the validity of the compact model. We are living in an era where the trend is to strengthen each state's voice in disposing of its own waste, and KDHE has failed to realize it. Instead, it argues in favor of amendments which weaken Kansas' control over its own waste and potentially subjects this state to untold millions in damages for waste not generated within this state.

Before I conclude, I have one point to make on the proposed Boyd County structure. US Ecology claims that its concrete structure will last 3,500 years. That is a claim not supported by any accepted scientific data. A claim that the concrete structure in Illinois would last 500 years was rejected in the Martinsville hearing. According to federal data, concrete may last as long as several hundred years, assuming weather and moisture conditions are favorable. Northern Nebraska is not such a place. But it doesn't really matter if the concrete lasts 500 or 3,500 years. Carbon-14, iodine-129, and niobium-94 have respective half-lives of 5,300, 17 million, and 20,000 years. These substances, which will be shipped in some quantity, however small, to Boyd County, will remain hazardous long after the proposed facility collapses.

As for the bill itself, first, the Sierra Club supports the amendments which extend another vote to Nebraska, and we wholeheartedly support making the compact subject to Nebraska's open meetings and public records act.

Conclusion.

With the compact arrangement, nuclear generators have managed to institutionalize the risks, hazards, and liability of their business. By institutionalize, I mean they have managed to make the public responsible for damages caused by their enterprise. Plain and simple, this is welfare for the largest companies in America. Governor Nelson in Nebraska, among others, has accurately described the compact as a front for the big generators.

If you insist on passing this flawed legislation, several amendments seem essential. First, two very basic amendments should be to require proof of a very substantial amount of liability insurance on the part of US Ecology and proof of insurance on the part of the major generators in this state. Insurance limits of $750 million for US Ecology and half that for the operators of Wolf Creek may seem high, but they really aren't all that out of line. Those of you who follow large personal injury/environmental verdicts should know that these figures are not out of line.

Another essential amendment would re-work the shared liability provisions insofar as it affects the states if US Ecology declares bankruptcy. As it is currently worded, I read the amendment as creating an incentive for the company to declare bankruptcy and to shift its liability to others. The fact that bankruptcy is a system of federal law is not the answer. As written, this bill creates a shorter statute of limitations for the states, the compact, and the public to make recovery against a bankrupt debtor. Whether that statute is enforceable under the bankruptcy code is fairly debatable, but it is unwise language. It is yet another in a long line of lawyer's relief acts in the area of LLRW and in no way advances the public's interest.

Article III, § (d) of the compact permits Nebraska to establish fees to "cover all anticipated present and future costs associated with decommissioning, closure, institutional control, and extended care of the facility." What are those costs expected to be? Currently, my information is that the operators of Wolf Creek are not collecting money for those costs. Will there be sufficient money available from the generators to cover these costs? Is there any risk that these costs will damage the financial status of the two Kansas companies which own most of Wolf Creek?

How can fees be assessed to generators for remediation of a site over which they have no authority? Can't they argue that they had nothing to do with the how the site was selected, and that they own neither the waste nor the site? If that argument is successful, doesn't that increase the likelihood that damages will be shifted to the states?

Does anyone think that the language of Art. III, § (c), which permits the commission to approve the criteria by which rates are set, conflicts with the language of §d which grants that same authority to Nebraska?

Does the shared liability language mean that Kansas would be liable if, for example, a utility in a compact state declared bankruptcy? What would happen, for example, if Louisiana Power and Light declared bankruptcy? Shouldn't possibilities like that be addressed in the compact?

Under this amendment, relating to institutional control, Nebraska says it will be responsible for the site for 100 years after closure. Yet some elements of the waste remain radioactive for tens of thousands of years. Are you satisfied that the period of institutional control is long enough? Are you worried that the weak institutional control language, when combined with the shared liability which implicates Kansas, could expose the state to virtually unlimited liability, even if that liability is proportional?

Kansas should not be buffaloed by these companies, or by the compact which serves their needs. What we should do is reject the shared liability amendment, and withdraw from the compact. Many states are what are called "go it alone" states. They are not members of compacts, and are storing their own waste. They are not afraid of the consequences, nor should Kansas be. A large group of states are facing the same problem, facing the same crisis of conscience that Kansas is. I propose a compact of any of these interested "go-it-alone states," who each declare that each state remains responsible for its own waste. At least so far as Kansas is concerned, that waste should remain on-site at or near Wolf Creek and that Wolf Creek should also be the repository for the very small amount of waste generated by hospitals and universities and other industry. Community consent would be required. Wolf Creek has recently announced its intent to build storage space for five years worth of LLRW.

The reason for a compact of "go-it-alone" states is to avoid the possibility, however remote, that failure to belong to a compact means that out-of-state waste can be shipped into Kansas, or other members of this new compact.

If we do that, we will subject Kansas to some litigation, specifically the amount of fees which Kansas generators would have paid US Ecology. There are defenses to such a suit, but you should be aware of the prospect. The defenses include the fact that

Barnwell is leaking, and even if we get booted out of Barnwell, it is no real loss. After all, we are only talking about 14 months before Barnwell closes. Barnwell, according to some experts, is likely to become the largest Superfund clean-up site in the nation, after it is closed. One suspects that the exorbitant fees ($400 per cubic foot) charged to Kansas and users of that site has the expensive remediation costs there firmly in mind. Last week, KDHE talked about the moral responsibility we have to work with the states in our compact. Don't we have the same moral obligation not to pollute South Carolina?

The bottom line, so far as I am concerned, is that there is no reason to contaminate Boyd County, Nebraska, when Kansas already has a site at Wolf Creek which, like it or not, is a nuclear generator. It may not have been smart to build Wolf Creek without first figuring out what to do with its waste, but we did. Rather than transport that waste hundreds of miles, the least we can do is keep track of our own mess.

KDHE should recognize once and for all that the Boyd County, Nebraska site is not licensable, will never be built, should never be built, and if, by some strange quirk, it is built, it threatens to expose Kansas to millions of dollars in liability. If KDHE never recognizes these facts, it is unfortunate. However, it is disastrous if this committee fails to face these realities.

Thank you, and I will be pleased to respond to any questions.

TESTIMONY PRESENTED TO THE KANSAS HOUSE OF REPRESENTATIVES
ENERGY AND NATURAL RESOURCES COMMITTEE ON SENATE BILL 246

By

Owen de Long

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Public Environmental Policy,
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University of Kansas,
504 Blake Hall,
Lawrence, KS 66045,
(913) 749-4366.

March 9, 1993

STATEMENT OF OPPOSITION TO SENATE BILL 246:

Mr. Chairman, Distinguished Representatives, Ladies and Gentlemen: I come before you today as a concerned citizen of Kansas, as a scholar in the field of Public Environmental Policy, and as a former teacher of U.S. Constitutional Law. I come in a spirit of empathy with your difficulties with the subject of low-level radioactive waste disposition, in a spirit of cooperation with your efforts to deal with this intractable problem, and -- last but not least -- in a spirit of warning that the Senate Bill 246 before you will, if approved and signed, take the State of Kansas down exactly the opposite road from the one it should now be taking.

As the attached materials from the New York Times of December 28, 1992, from the Wall Street Journal of January 25, 1993, and from the U.S. Supreme Court case of New York v. United States of June 19, 1992 amply illustrate , the several states of this basically federal entity we call the United States of America are facing a political, environmental, and financial crisis of the highest order of magnitude over the problem of how successfully to isolate and permanently dispose of so-called "low-level" radioactive waste for thousands and tens and hundreds of

House E & NR
Attachment 2
3/9/93

thousands of years. I do not come before you today with a magic bullet to help you solve this problem for the State of Kansas and its citizens and all its future generations of citizens. But I do come before you in great fear that you are voting on this bill without either the proper information or the proper national and historical perspective with which to make your individual decisions on this bill.

The fact is that the Compact System established by the U.S. Congress in 1980 and 1985 to relieve itself of the burden of the problem of low-level radioactive waste is now falling apart in every region of the United States, as the attached clipping from the New York Times indicates. The second fact is that the primary generators of nuclear waste at the commercial level, both low and high, are the commercial nuclear-power generators, responsible for over 90% by volume of all the low-level radioactive waste this bill before you attempts further to deal with under the old and now outdated Compact System. For the third fact is that the June 1992 decision of the U.S. Supreme Court in the case of New York v. United States, a complete copy(as well as highlighted excerpts)of which is attached as an appendix to these remarks, creates a whole new political and legal landscape on the subject of State liability for the waste generated by commercial nuclear-power facilities within each State's borders. No longer can the U.S. Congress attempt to foist this problem onto the several States and off its own back, through what it thought was a clever "shell game," as some have called it, of commanding the States to "take title" to all low-level radioactive waste generated within their borders if they will not play the 1980 Compact game as amended in 1985 with "take title" as the new enforcement penalty. Justice Sandra Day O'Connor makes it crystal clear in her written opinion in the New York case you have before you of last June that this attempt by the U.S. Congress is explicitly unconstitutional under the Tenth Amendment of the United States Constitution.

The greatest myth perpetrated on you yesterday by the several proponents of Senate Bill 246 testifying before you at that time was the one asserting that if Kansas were to establish its own low-level radioactive waste facility, at Wolf Creek or at any other site of the citizens of Kansas's choosing, then all the other states in the United States would rush to send all their radioactive waste here. This is patent nonsense, on several grounds. First, a whole series of states have already decided to go it alone on the subject of low-level waste disposal, starting with New York State (which brought last year's Supreme Court case to Federal District Court two years earlier on just this point, among others). New York State has been followed in rapid succession by Texas, Michigan (which dropped out of the Midwest Compact recently), Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut (i.e. all of New England), and the District of Columbia. None of these states were in such fear of the other states dumping radioactive waste in them that they failed to declare their independence of the Compact scheme concocted by Congress in 1980 and 1985. Secondly, the New York case carries the strong implication -- if not outright explicit statement -- that the several States are now free to regulate low-level radioactive waste in any manner their governments, at the direction of their citizens, see fit. Thirdly, the Nuclear Regulatory Commission, in the light of this New York case, is not about to allow interstate radioactive dumping to occur, especially under the enlightened new leadership of Chairperson Selin. And fourthly, all the State of Kansas has to do find out about the ability of a state to exclude the waste of this kind from other states is to ask the Federal District Court for a Declaratory Judgment on the subject before proceeding to build, or designate, a low-level radioactive site exclusively for Kansas's waste.

As to the question of financial liability of the State, and the financial stability of generators like Wolf Creek, I can only refer you once

again to the attached article from the Wall Street Journal. Not only do the waste generators want the State to take title to their radioactive waste -- a precedent with dangerous implications for the State's taking title potentially to all kinds of hazardous waste generated within its borders by all kinds of facilities and industries -- but the nuclear-power generators also want to burden the State with financial liability for "decommissioning," or disassembling, the extremely "hot" nuclear plants within the next few years, since none of them have put away in excrow even one-tenth of the money it is now conservatively estimated they will need to accomplish this task, as the Wall Street Journal clipping again so ably documents for the whole 110 plants across the United States. My warning, good Legislators of Kansas, is today therefore to vote against any bill like Senate Bill 246 which only increases the State of Kansas's financial liability for low-level radioactive waste and all its environmental and human-health consequences. It does so, moreover, not just for waste generated in the State of Kansas but for such waste generated in five states, the five states of the outmoded Compact in which we find ourselves still ensnared. But I beg you not to make the further mistake of taking on even greater financial liability for the citizens of Kansas and their future generations, at just the very time when the Supreme Court of the United States has now freed you of this Compact obligation, freed to go your own way as ten other states around the country have already gone. I beg you , I plead with you, to reverse direction and go in the new direction of low-level radioactive waste independence and decreased financial liability for the State of Kansas, by voting against Senate Bill 246. I further submit for the record a 40-page paper I recently wrote on this subject for a seminar at the University of Kansas, and am now ready for your questions.

* * * * *

New York Times

MONDAY, DECEMBER 28, 1992

States, Failing to Cooperate, Face a Nuclear-Waste Crisis

By ROBERT REINHOLD
Special to The New York Times

LOS ANGELES, Dec. 27 — Thousands of hospitals, pharmaceutical makers and electric utilities across the country face grave new troubles in the new year, when it will become much more difficult and costly to dispose of their low-level radioactive wastes.

The problems grow from a 12-year-old Federal law that was intended to make the disposal of such waste more equitable to the states with dump sites. But political conflict and public opposition have frustrated attempts to carry out the law.

Under the law, the three states that have been accepting and burying radioactive waste can begin excluding on Jan. 1 any waste generated outside their own regions. Nevada will shut its dump at Beatty completely, and Washington State's site at Hanford will accept waste from only six other northwestern states and Hawaii.

One Dump Gains Monopoly

That will leave only one dump, in Barnwell, S.C., open for the rest of the country. The authorities there, enjoying a monopoly in an unwanted trade, will impose an access fee of $220 a cubic foot for waste from states outside the Southeast. That, plus transportation costs, will increase the disposal costs three- to fivefold for waste generators in California, New York and other states.

Even so, the South Carolina dump is to be closed to outsiders within 18 months and is scheduled to shut altogether by 1996. After that, given the emotional public opposition to new dumps, it remains unclear where the nation will be able to store the thousands of cubic feet of low-level radioactive waste, which includes equipment from nuclear power plants, contaminated clothing, radioactive substances used to track the flow of drugs in the body and radioactive cancer treatments.

The Federal Government disposes of high-level radioactive waste, like that from nuclear weapons production or spent fuel from nuclear power plants, but each state is responsible for its low-level waste.

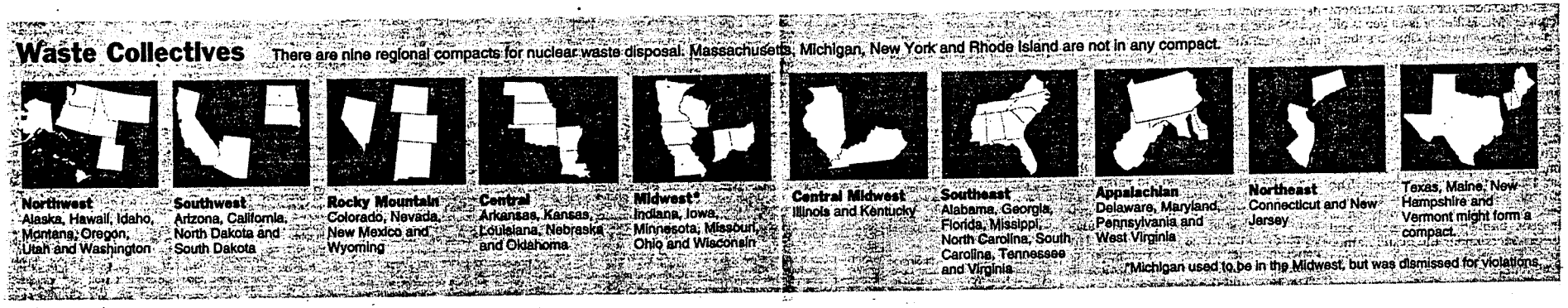
Gridlock and Opposition

The deepening crisis reflects the partial collapse of the system of interstate compacts Congress envisioned when it passed the Low-Level Radioactive Waste Policy Act of 1980. It encouraged states to join with neighboring states to build dumps so each region shared the burden equally. Nine such compacts were formed.

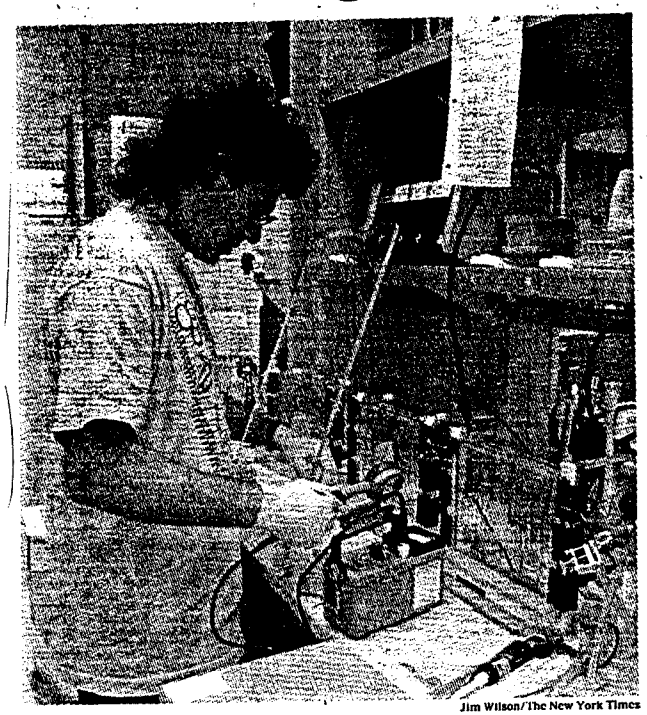
But years of political gridlock and determined local opposition blocked the creation of any new dump sites. New York State never joined a compact and must now rely entirely on South Carolina. Because they have failed to comply with the Federal law, Michigan, Rhode Island, New Hamp-

Continued on Page C7, Column 3

2-5



States, Failing to Cooperate, Head for Crisis Over Low-Level Nuclear Waste



Jim Wilson/The New York Times

In 1993, it will become much more difficult and costly for hospitals, pharmaceutical makers and electric utilities to dispose of low-level radioactive waste. Dan Herschlag, an assistant professor at the Stanford University Medical Center, used a Geiger counter to check for the presence of radioactive material during his research on RNA.

Continued From Page A1

shire, Puerto Rico and the District of Columbia are barred from shipping to South Carolina and have no outlet.

Michigan was expelled from the Midwest Compact last year because it refused to permit creation of a dump site within its borders. As a result, the Veterans Administration Hospital in Ann Arbor, among others, sends patients out of state if they need radioactive materials for diagnosis or treatment. More than 36,000 cubic feet of waste have piled up temporarily at 53 locations in Michigan, and about 1,300 more cubic feet are added every month. The authorities have no idea what they are going to do with it.

California, which produces nearly 9 percent of the nation's low-level radioactive waste, has been planning for years — in a compact with Arizona and the Dakotas — to put a dump in Ward Valley, in the Mojave Desert near Needles, close to the Arizona border. But the project is tied up in complex legal and political knots, which are unlikely to unraveled before the South Carolina dump closes.

'In a Holding Pattern'

In the meantime, major producers like the Cedars-Sinai Medical Center, a 1,100-bed research hospital here in Los Angeles, can do little except worry. "We are in a holding pattern," said Donna L. Early, director of radiation and environmental safety. "I am not going to allow anybody to generate large quantities of radioactive waste until I know where I will dispose of it. We will have to ask, 'Can we do that kind of research?' "

The increasing problems with disposal has had some benefit, with production of low-level waste dropped to 1.4 million cubic feet in 1992 from 2.7 million cubic feet in 1985. Scientists are turning to methods that do not involve radiation. Companies and hospitals have become more efficient in using radioactivity and now often clean and reuse gloves and other equipment rather than discarding them.

> Hospitals and power plants are forced to unite.

The difficulty of disposal has become a major factor in whether California can prevent its promising biotechnology industry from leaving the state. Many of the companies, based mostly in San Diego and in the Silicon Valley near San Francisco, have considered moving to the Pacific Northwest or the Southeast to be near to the two functioning dumps.

"California's medical and biotechnology communities are all in peril," said Thomas Gray, president of Thomas Gray & Associates, a waste broker in Orange, Calif., who receives and packages waste from 150 hospitals and other producers in five Western states.

Critics say the situation is an unintended result of flawed Federal legislation that was meant to create equity among the states but that instead may cause a proliferation of badly controlled, environmentally risky storage sites at thousands of scattered locations as users make their own provisions. "We've moved in the opposite direction intended by Congress," said Alan D. Pasternak, technical director for Ms. Early's group. "This is a major political failure."

Ron Kuchera, director of the Missouri Department of Natural Resources, had even more pointed comments: "This is the worst piece of environmental legislation ever passed by Congress. What's worse, Congress won't revisit it because it's a pernicious issue, and obviously it has failed."

A 1985 amendment to the 1980 waste law extended the deadline for compliance from Jan. 1, 1986, to Jan. 1, 1993, and also required the states to assume legal possession and liability for any waste generated after Jan. 1, 1996.

In June, the United States Supreme Court, acting on a challenge to the amended waste law brought by New York State, upheld the law but struck down the provision imposing liability on the states for waste generated after Jan. 1, 1996. Critics said that ruling essentially eviscerated the law, removing the incentive for the states to find disposal sites for their wastes.

Producing Uncomfortable Allies

The situation is complicated because, while few object to using radioactivity to treat cancer patients, the largest producers of waste are nuclear power plants. Hospitals and drug makers find themselves in an uncomfortable alliance with the nuclear power industry. The Federal Department of Energy said that in 1990 electric utilities generated 56.2 percent of low-level waste nationally, industry 31.2 percent, governments 6.3 percent and hospitals and universities 6.2 percent.

Here in California, environmental groups have delayed the Ward Valley dump by persuading the Legislature that formal hearings before an administrative law judge were required. Leading the protest has been the Committee to Bridge the Gap, an antinuclear group based in Los Angeles that argues that the site poses a danger to groundwater under the desert and to the nearby Colorado River.

The president of the committee, Daniel O. Hirsch, says it would agree to opening Ward Valley if the dump was limited to only medical waste. Powerplant waste, he said, should be reclassified as intermediate or high-level waste and disposed of elsewhere.

Utilities Needed to Cut Costs

But without the utilities, cost would be prohibitive, said Ms. Early of Cedars Sinai. "If we take them out, then economically we do not have a site," she said. "The real driving force is the anti-nuclear power stance."

The Pacific Gas & Electric Company, the electric utility serving almost all of northern and central California, has a single nuclear plant at Diablo Canyon near San Luis Obispo that produces about 5,000 cubic feet of low-level radioactive waste a year. That compares with about 1,000 cubic feet produced each year by Cedars Sinai. A spokesman for the utility said it would ship its waste to South Carolina, b would prefer for the California site open and send its waste there.

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Closing Costs

Nuclear Utilities Face Immense Expenses In Dismantling Plants

Customers and Shareholders Face Years of Fighting Over Bearing the Burden

Respirators and Rubber Boots

MON., 1/25/93, A-1.

By Robert Johnson
And Ann de Roufignac
Staff Reporters of The Wall Street Journal

FORT ST. VRAIN, Colo. — Nuclear power has caused utilities so many headaches over the years that some are ready to just walk away from it. But they can't even do that.

Retiring old plants is turning out to be such a challenge that the visitors' center at a plant here, which once told schoolchildren about the marvels of atomic power, now entertains engineers who come from as far away as Japan to study the hugely costly and complex process of dismantlement.

Fort St. Vrain is the first fully operational commercial nuclear plant to be taken apart piece by piece. Its owner, Public Service Co. of Colorado, is among the growing ranks of utility companies now facing a harsh reality: Not only are some nuclear plants too expensive to run, but it may cost more to take them apart, in today's dollars, than it cost to build them in the first place.

It is a painful lesson — painful for the companies, for their shareholders and for their rate payers. Nuclear plant dismantling, says James Greene, a utilities consultant at the accounting firm of Arthur Andersen & Co., is "the big bogy out there waiting."

Costly Repairs

The Fort St. Vrain plant has become a symbol of the problem. There were no accidents here, no radiation leaks, no alarms about meltdowns. There was just a long list of temporary closings and costly repairs. The company figures the plant actually was in operation only about 15% of the time. Mark Stutz, a spokesman for the utility, says simply: "Our nuclear plant didn't work."

Fort St. Vrain was the first and only helium-cooled commercial reactor in the U.S. The rest are water-cooled, including the other 14 that have closed earlier than planned. Public Service of Colorado points out that the last straw that caused it to close Fort St. Vrain was a problem common in many water-cooled plants: cracks in the reactor's steam tubes.

The relatively small, 330-megawatt Fort St. Vrain plant cost $224 million to build in the 1970s. Taking it apart safely will cost $333 million; under an agreement with state regulators, the utility's customers will still be helping to pay for the plant's demise in the year 2005.

Larger-than-expected costs from early dismantling also loom for many of the 110 remaining U.S. nuclear plants in the U.S., threatening some utilities with huge bills for which they are utterly unprepared.

Saving for Retirement

The Nuclear Regulatory Commission requires utilities gradually to put aside as much as $135 million for each of their nuclear plants to cover the costs of dismantling — "decommissioning," in government parlance. But NRC officials acknowledge that this sum is far short of the real amount needed; they say they will soon issue sharply higher estimates of how much utilities should put away for the end of the atomic road.

A recent Stanford University study suggests that utilities should already have accumulated a total of $33 billion to have enough for eventual plant dismantling, but the NRC estimates that only $4 billion has been stashed so far. When Portland General Electric Co. in Oregon abruptly announced plans earlier this month to close its 67.5%-owned Trojan nuclear plant, the utility's coffers contained only 8% of the $488 million estimated to be its share of dismantling costs. It will try to wring the rest of its share from consumers in a regulatory battle that may take years.

Rising Estimates

The worst news is yet to come. Some utilities are already raising estimates of anticipated dismantling costs far higher than those forecast by the NRC. For example, American Electric Power Co., based in Columbus, Ohio, recently increased the dismantling forecast for its two nuclear units, whose combined 2,200-megawatt capacity is seven times that of Fort St. Vrain, to a sum in the range of $588 million to $1.1 billion — compared with a 1989 estimate of $340 million.

Similarly, Nebraska Public Power District, based in Columbus, Neb., more than tripled the dismantling-cost forecast for its 836-megawatt nuclear plant last year to $1.15 billion.

Moreover, the day of reckoning is far closer for many utilities than they imagined when they built their plants. Nuclear facilities are licensed by the NRC to operate for a supposed 40-year life cycle, but the 15 plants closed so far were open for an average of only 12.7 years; Fort St. Vrain ran for 10. And with the average per-kilowatt cost of running a nuclear plant now edging higher than the cost of a coal-fired plant, Department of Energy officials say privately that 25% of the remaining reactors may be closed in the next decade for economic reasons. That means utilities such as Public Service of Colorado, which planned a deliberate pace

Please Turn to Page A5, Column 1

Closing Costs: Utilities To Pay Dearly to Shut Old Nuclear Plants

Continued From First Page

of saving decommissioning funds over four decades, are being caught short.

Wall Street analysts say the utilities industry should have confronted the economic reality of decommissioning long ago. To be licensed to use nuclear power, utilities had to file plans showing how they would return an obsolete power-plant site to pristine condition. But they didn't have to calculate the expected cost of doing so, and fewer than a dozen utilities have made such estimates public.

The financial facts of nuclear decommissioning by utilities will usher in an era of lengthy regulatory battles over how much of the costs can be passed along to customers, industry officials predict. But the utilities themselves will almost certainly have to shoulder big chunks of the cost — thus eroding their profit margins, raising their debt totals and making it more expensive for them to borrow.

"I just hope I'm retired from rating utility bonds when most of this happens," says Daniel Scotto, a utility-bond analyst at Donaldson, Lufkin & Jenrette. "Tearing away the layers of decommissioning problems is like peeling an onion. Your eyes tear more and more."

In the six years since Public Service of Colorado's Fort St. Vrain operation went officially sour with a $200 million charge against earnings, the utility's net income has plunged to 13.8% of capital from 19.3% despite a lessened corporate tax rate, and its debt rating has been reduced four times by Standard & Poor's Corp.

For now, a number of utilities caught in similar squeezes are mothballing plants until they can accumulate dismantling funds or discover lower-cost ways to dispose of the facilities. The NRC allows utilities to wait up to 60 years before they must dismantle a plant that has been taken out of service. But maintaining, inspecting and securing such a facility can still cost up to $15 million a year. Says Ron Binz, director of Colorado's Office of Consumer Counsel: "You'll need generations of Doberman pinschers."

Such problems weren't foreseen in 1965, when Public Service of Colorado hired San Diego-based General Atomics to design the Fort St. Vrain plant at this former fur-trading post 35 miles north of Denver. This was still the age of innocence for nuclear-fueled electricity. It had been only 11 years since Lewis Strauss, chairman of the Atomic Energy Commission, issued his famous prediction that electricity would become "too cheap to meter," and only eight years since President Eisenhower had waved a makeshift "magic wand" to open the nation's first commercial reactor near Pittsburgh. Walt Disney published a nuclear primer called "Our Friend the Atom." Utility industry brochures depicted nuclear power making the Arctic balmy enough for a tourist to sunbathe on an iceberg, sipping a tropical

"We all really believed that the nuclear era would be one of declining electricity costs," says Duane Chapman, an economist at Cornell University and a former consultant to the Department of Energy. "Never in my wildest dreams did I think it would be this expensive."

When construction began on Fort St. Vrain in 1968, many environmentalists were still proclaiming nuclear power the answer to fossil-fuel pollution. The nuclear industry got one of its biggest boosts from the federal Clean Air Act of 1970, which toughened standards for coal plants. But by the time the plant opened in 1979, concerns about safety and waste disposal had long since replaced the rosy scenarios. At Fort St. Vrain, those concerns translated into mounting costs. 16X! 8X!

Public Service of Colorado had originally planned to operate the plant with 54 workers, but the number swelled to 400 even before it opened. Then the work force ballooned again, to 837, under the public scrutiny that developed after the Three Mile Island nuclear accident.

Plenty of Ammunition

Meanwhile, the plant was giving its critics plenty of ammunition. A spokesman for General Atomics says that the plant "was safe. Unfortunately, there were some bugs." The plant didn't consistently produce electricity at a cost that would provide the utility a profit under consumer-cost ceilings set by state regulators. "An economic disaster," concludes Colorado's consumer counsel, Mr. Binz.

"We were always under the gun from customers about this plant's costs," says Don Warembourg, the chief engineer.

Descendants of the plant's namesake, 1830s pioneer Marcellin St. Vrain, asked that the plant be called something else to save the family from embarrassment.

An early pamphlet about Fort St. Vrain put maintenance requirements at little more than a two-week refueling stint annually. In reality, the plant sat useless for months at a time. In 1986, the Public Service Commission of Colorado stopped the utility from charging for Fort St. Vrain's power until it got costs under control. Three years later, faced with a five-year repair job on the plant's cooling system, the utility gave up and closed the place.

Company officials mulled their options to delay dismantling for 60 years, but ultimately decided to start taking the plant apart last August. "We just couldn't see guarding the place for half a century," says Mr. Warembourg.

Extensive Preparations

Why is dismantling a plant so expensive? Engineers cite the extensive safety training required, the need to rotate workers to limit radiation exposure and the lengthy planning of every move in contaminated areas. Thomas LaGuardia, an engineer who consults with utilities about dismantling plants, says, "You need up to four hours to get ready to do some jobs that would be simple in a fossil-fuel plant. Sometimes you'll have to build mock-up reactors to practice, so you don't waste time on the real thing."

Nuclear dismantling is made tougher by the plant designs, which cram all the sensitive material into the smallest possible spaces to limit radioactive contamination. "This is hot, sweaty work by people wearing protective suits, respirators and rubber boots," says Mr. LaGuardia. "Productivity will go way down on these jobs."

At Fort St. Vrain, the workers are finding that nothing is simple. Just getting access to some of the radioactive areas of the plant means sledgehammering aside tons of steel pipes and cement walls.

The huge amount of water used to cool other nuclear reactors wasn't supposed to be a problem at Fort St. Vrain's 1,400-degree core because this plant uses helium to control temperatures. But engineers have discovered they will have to pour a million gallons of water into the reactor vessel during dismantling as a radiation shield. And all that water must be chemically treated to remove radioactive resins.

Untold additional amounts of water must be used for washing workers' protective clothing. A quarantined laundry has been set up to wash up to 250 uniforms a day for the three years or so the project is expected to take.

"You wash all those suits and clean ions from that water. Then you cut up the washing machine and the dryer and pack the inside steel boxes. You chop up the floor underneath where the washer and dryer were," says James Krause, a Westinghouse Electric Corp. engineer consulting at Fort St. Vrain. "The last thing in the box is the Geiger counter you used to test everything, and you bury that, too." 3+4pt.

Public Service of Colorado figures it will take 39 months from start to finish to complete the dismantling of the Fort St. Vrain nuclear plant. But it plans to leave the outside walls standing, and eventually rebuild the innards to burn natural gas. "You can still bring your children to visit," says Clegg Crawford, vice president of electric production. "We won't have a nuclear reactor, of course. But we'll still be making electricity."

DISPLAY, Page 1, U.S. Supreme Court, June 19, 1992:

Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. See *Northeast Bancorp, Inc.* v. *Board of Governors, Fed. Reserve System*, 472 U. S. 159, 174–175 (1985). Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U. S., at 288; *FERC* v. *Mississippi*, 456 U. S., at 764–765.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any

DISPLAY, Page 2, U.S. Supreme Court, June 19, 1992:

federal program, if local residents do not view such expenditures or participation as worthwhile. Cf. *Hodel*, *supra*, at 288. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

We must initially reject respondents' suggestion that, because the take title provision will not take effect until January 1, 1996, petitioners' challenge thereto is unripe. It takes many years to develop a new disposal site. All parties agree that New York must take action now in order to avoid the take title provision's consequences, and no party suggests that the State's waste generators will have ceased producing waste by 1996. The issue is thus ripe for review. Cf. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 201 (1983); *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 144–145 (1974).

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating

DISPLAY, Page 3, U.S. Supreme Court, June 19, 1992:

While each view concedes that Congress *generally* may not compel state governments to regulate pursuant to federal direction, each purports to find a limited domain in which such coercion is permitted by the Constitution.

First, the United States argues that the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. This argument contains a kernel of truth: In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases 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; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State. See, *e.g.*, *EEOC* v. *Wyoming*, 460 U. S., at 242, n. 17; *Transportation Union* v. *Long Island R. Co.*, 455 U. S., at 684, n. 9; *National League of Cities* v. *Usery*, 426 U. S., at 853. The Court has more recently departed from this approach. See, *e.g.*, *South Carolina* v. *Baker*, 485 U. S., at 512–513; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S., at 556–557. But whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

2-10

June 19, 1992

The New York v. U.S. case, started upward toward the U.S. Supreme Court a month before CCN v. NRC (Feb. 1990), but with very different (successful) and devastating results. (to the Compact System)

NEW YORK, Petitioner

v

UNITED STATES et al. (91-543)

COUNTY OF ALLEGANY, NEW YORK, Petitioner

v

UNITED STATES et al. (91-558)

COUNTY OF CORTLAND, NEW YORK, Petitioner

v

UNITED STATES et al. (91-563)

505 US —, 120 L Ed 2d 120, 112 S Ct —

[Nos. 91-543, 91-558, and 91-563]

Argued March 30, 1992. Decided June 19, 1992.

In August 1992 120 L Ed 2nd U.S. Sup Ct. Reports (latest PB vol.)

Decision: State "take title" provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USCS § 2021e(d)(2)(C)) held to violate Tenth Amendment, but to be severable from remainder of Act.

SUMMARY

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USCS §§ 2021b et seq.) embodied a compromise whereby "sited" states—that is, states having low-level radioactive waste disposal sites—agreed to extend by 7 years the period in which they would accept waste from "unsited" states, while the unsited states agreed to end their reliance on the sited states by 1992. The Act required each state to be responsible for providing, either individually or in cooperation with other states, for the disposal of wastes generated within its borders, and three types of incentives were provided to encourage state compliance: (1) under the "monetary incentives" provisions of 42 USCS §§ 2021e(d)(1), 2021e(d)(2)(A), 2021e(d)(2)(B), sited states were authorized to collect a surcharge for accepting waste during the

See specifics Pages 149, 151, & 152 below

7 year extension, and a portion of those surcharges would go into an escrow account held by the United States Secretary of Energy and would be paid out to states which met a series of deadlines in complying with their obligations under the Act; (2) under the "access incentives" provisions of 42 USCS § 2021e(e)(2), states failing to comply with the statutory deadlines could be charged multiple surcharges by sited states for a certain period and then denied access altogether; and (3) under the "take title" provision of 42 USCS § 2021e(d)(2)(C), each state that fails to provide for the disposal of internally generated waste by a specific date must, upon request of the waste's generator or owner, take title to the waste, be obligated to take possession of the waste, and become liable for all damages incurred by the generator or owner as a consequence of the state's failure to take possession promptly. The state of New York and two of its counties, seeking a declaratory judgment that the Act violated the Federal Constitution's Tenth Amendment and the Constitution's guarantee clause (Art IV, § 4, guaranteeing to the states a republican form of government), filed suit against the United States in the United States District Court for the Northern District of New York. The District Court dismissed the complaint (757 F Supp 10), and the United States Court of Appeals for the Second Circuit affirmed (942 F2d 114).

On certiorari, the United States Supreme Court affirmed in part and reversed in part. In an opinion by O'CONNOR, J., expressing the unanimous view of the court in part (as to points 1 and 2 below) and joined in part (as to points 3-5 below) by REHNQUIST, Ch. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., it was held that (1) the "monetary incentive" provisions were not inconsistent with the Tenth Amendment, because (a) the surcharge authorization was a proper exercise of Congress' authority under the Constitution's commerce clause (Art I, § 8, cl 3) to authorize states to burden interstate commerce, (b) the Secretary's collection of a portion of the surcharges was no more than a federal tax on interstate commerce, and (c) the distribution of the escrow fund was a proper conditional exercise of Congress' authority under the Constitution's spending clause (Art I, § 8, cl 1); (2) the "access incentive" provisions of the Act did not violate the Tenth Amendment, but rather represented a conditional exercise of Congress' commerce power along the lines of those previously held by the Supreme Court to be within Congress' authority; (3) the "take title" provision was unconstitutional, either as lying outside Congress' enumerated powers or as violating the Tenth Amendment, because (a) an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, (b) a direct order to regulate, standing alone, would also be invalid, and therefore (c) Congress lacked the power to offer the states a choice between the two; (4) neither the "monetary incentive" provisions nor the "access incentive" provisions violated the guarantee clause, because (a) the provisions offered the states a legitimate choice rather than issuing an unavoidable command, so that the states retained the ability to set their legislative agendas and state government officials remained accountable to the local electorate, and (b) the twin threats that a state might lose out on a share of federal spending or that generators of radioactive waste might lose

damages would "commandeer" States into the service of federal regulatory purposes. On the other hand, requiring the States to regulate pursuant to Congress' direction would present a simple unconstitutional command to implement legislation enacted by Congress. Thus, the States' "choice" is no choice at all.

(h) The United States' alternative arguments purporting to find limited circumstances in which congressional compulsion of state regulation is constitutionally permissible—that such compulsion is justified where the federal interest is sufficiently important; that the Constitution does, in some circumstances, permit federal directives to state governments; and that the Constitution endows Congress with the power to arbitrate disputes between States in interstate commerce—are rejected.

(i) Also rejected is the sited state respondents' argument that the Act cannot be ruled an unconstitutional infringement of New York sovereignty because officials of that State lent their support, and consented, to the Act's passage. A departure from the Constitution's plan for the intergovernmental allocation of authority cannot be ratified by the "consent" of state officials, since the Constitution protects state sovereignty for the benefit of individuals, not States or their governments, and since the officials' interests may not coincide with the Constitution's allocation. Nor does New York's prior support estop it from asserting the Act's unconstitutionality.

(j) Even assuming that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out a claim that the Act's money incentives and access incentives provisions are inconsistent with that Clause. Neither the threat of loss of federal funds nor the possibility that the State's waste producers may find themselves excluded from other States' disposal sites can reasonably be said to deny New York a republican form of government.

2. The take title provision is severable from the rest of the Act, since severance will not prevent the operation of the rest of the Act or defeat its purpose of encouraging the States to attain local or regional self-sufficiency in low level radioactive waste disposal; since the Act still includes two incentives to encourage States along this road; since a State whose waste generators are unable to gain access to out-of-state disposal sites may encounter considerable internal pressure to provide for disposal, even without the prospect of taking title; and since any burden caused by New York's failure to secure a site will not be borne by other States' residents because the sited regional compacts need not accept New York's waste after the final transition period.

942 F2d 114, affirmed in part and reversed in part.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, Souter, and Thomas, JJ., joined, and in Parts III-A and III-B of which White, Blackmun, and Stevens, JJ., joined. White, J., filed an opinion concurring in part and dissenting in part, in which Blackmun and Stevens, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part.

APPEARANCES OF COUNSEL

Peter H. Schiff argued the cause for petitioners.
Lawrence G. Wallace argued the cause for federal respondents.
William B. Collins argued the cause for state respondents.

OPINION OF THE COURT

Justice **O'Connor** delivered the opinion of the Court.

[1a, 2a, 3a, 4a, 5a] This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In this case, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub L 99-240, 99 Stat 1842, 42 USC § 2021b et seq. [42 USCS §§ 2021b et seq.]. The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

I

We live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year. See App 110a-111a; 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, 439-440 (1987).

Our Nation's first site for the land disposal of commercial low level radioactive waste opened in 1962 in Beatty, Nevada. Five more sites opened in the following decade: Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971). Between 1975 and 1978, the Illinois site closed because it was full, and water management problems caused the closure of the sites in Kentucky and New York. As a result, since 1979 only three disposal sites—those in Nevada, Washington, and South Carolina—have been in operation. Waste generated in the rest of the country must be shipped to one of these three sites for disposal. See Low-Level Radioactive Waste Regulation 39-40 (M. Burns ed 1988).

In 1979, both the Washington and Nevada sites were forced to shut down temporarily, leaving South

Carolina to shoulder the responsibility of storing low level radioactive waste produced in every part of the country. The Governor of South Carolina, understandably perturbed, ordered a 50% reduction in the quantity of waste accepted at the Barnwell site. The Governors of Washington and Nevada announced plans to shut their sites permanently. App 142a, 152a.

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the Low-Level Radioactive Waste Policy Act, Pub L 96-573, 94 Stat 3347. Relying largely on a report submitted by the National Governors' Association, see App 105a-141a, Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently . . . on a regional basis." § 4(a)(1), 94 Stat 3348. The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States. § 4(a)(2)(B), 94 Stat 3348. The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities; not surprisingly, these were the compacts formed around South Carolina, Nevada, and Washington, the three sited States. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal. The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The 1985 Act was again based largely on a proposal submitted by the National Governors' Association. In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate. The Act directs: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State," 42 USC § 2021c(a)(1)(A) [42 USCS § 2021c(a)(1)(A)], with the exception of certain waste generated by the Federal Government, §§ 2021c(a)(1)(B), 2021c(b). The Act authorizes States to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." § 2021d (a)(2). For an additional seven years beyond the period contemplated by the 1980 Act, from the beginning of 1986 through the end of 1992, the three existing disposal sites "shall make disposal capacity available for low-level radioactive waste generated by any source," with certain exceptions

not relevant here. § 2021e(a)(2). But the three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact—in 1986-1987, $10 per cubic foot; in 1988-1989, $20 per cubic foot; and in 1990-1992, $40 per cubic foot. § 2021e(d)(1). After the seven-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region. § 2021d(c).

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

1. *Monetary incentives.* One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy. § 2021e(d)(2)(A). The Secretary then makes payments from this account to each State that has complied with a series of deadlines. By July 1, 1986, each State was to have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State. §§ 2021e(e)(1)(A), 2021e(d)(2)(B)(i). By January 1, 1988, each unsited compact was to have identified the State in which its facility would be located, and each compact or standalone State was to have developed a siting plan and taken other identified steps. §§ 2021e(e)(1)(B), 2021e(d)(2)(B)(ii). By January 1, 1990, each State or compact was to have filed a complete application for a license to operate a disposal facility, or the Governor of any State that had not filed an application was to have certified that the State would be capable of disposing of all waste generated in the State after 1992. §§ 2021e(e)(1)(C), 2021e(d)(2)(B)(iii). The rest of the account is to be paid out to those States or compacts able to dispose of all low level radioactive waste generated within their borders by January 1, 1993. § 2021e(d)(2)(B)(iv). Each State that has not met the 1993 deadline must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received. § 2021e(d)(2)(C).

2. *Access incentives.* The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter. § 2021e(e)(2)(A). States that fail to meet the 1988 deadline may be charged double surcharges for the first half of 1988 and quadruple surcharges for the second half of 1988, and may be denied access thereafter. § 2021e(e)(2)(B). States that fail to meet the 1990 deadline may be denied access. § 2021e(e)(2)(C). Finally, States that have not filed complete applications by January 1, 1992, for a license to operate a disposal facility, or States belonging to compacts that have not filed such applications, may be charged triple surcharges. §§ 2021e(e)(1)(D), 2021e(e)(2)(D).

3. *The take title provision.* The third type of incentive is the most severe. The Act provides:

> "If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by

January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly 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, 1996, as the generator or owner notifies the State that the waste is available for shipment." § 2021e(d)(2)(C).

These three incentives are the focus of petitioners' constitutional challenge.

In the seven years since the Act took effect, Congress has approved nine regional compacts, encompassing 42 of the States. All six unsited compacts and four of the unaffiliated States have met the first three statutory milestones. Brief for United States 10, n 19; id., at 13, n 25.

New York, a State whose residents generate a relatively large share of the Nation's low level radioactive waste, did not join a regional compact. Instead, the State complied with the Act's requirements by enacting legislation providing for the siting and financing of a disposal facility in New York. The State has identified five potential sites, three in Allegany County and two in Cortland County. Residents of the two counties oppose the State's choice of location. App 29a-30a, 66a-68a.

Petitioners—the State of New York and the two counties—filed this suit against the United States in 1990. They sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution. The States of Washington, Nevada, and South Carolina intervened as defendants. The District Court dismissed the complaint. 757 F Supp 10 (NDNY 1990). The Court of Appeals affirmed. 942 F2d 114 (CA2 1991). Petitioners have abandoned their Due Process and Eleventh Amendment claims on their way up the appellate ladder; as the case stands before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause.

II

A

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p 491 (C. Rossiter ed 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," Gregory v Ashcroft, 501 US ——, ——, 115 L Ed 2d 410, 111 S Ct 2395 (1991); and while the Tenth Amendment makes explicit that "[t]he 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"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as Martin v Hunter's Lessee, 1 Wheat 304, 324, 4 L Ed 97 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

[6] These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, e.g., Perez v United States, 402 US 146, 28 L Ed 2d 686, 91 S Ct 1357 (1971); McCulloch v Maryland, 4 Wheat 316, 4 L Ed 579 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, e.g., Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985); Lane County v Oregon, 7 Wall 71, 19 L Ed 101 (1869). In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See United States v Oregon, 366 US 643, 649, 6 L Ed 2d 575, 81 S Ct 1278 (1961); Case v Bowles, 327 US 92, 102, 90 L Ed 552, 66 S Ct 438 (1946); Oklahoma ex rel. Phillips v Guy F. Atkinson Co., 313 US 508, 534, 85 L Ed 1487, 61 S Ct 1050 (1941).

It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." United States v Darby, 312 US 100, 124, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941). As Justice Story put it, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). This has been the Court's consistent understanding: "The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." Garcia v San Antonio Metropolitan Transit Authority, supra, at 549, 83 L Ed 2d 1016, 105 S Ct 1005 (internal quotation marks omitted).

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power bythe First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is

not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

The benefits of this federal structure have been extensively catalogued elsewhere, see, e.g., Gregory v Ashcroft, supra, at ——-——, 115 L Ed 2d 410, 111 S Ct 2395; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum L Rev 1, 3-10 (1988); McConnell, Federalism: Evaluating the Founders' Design, 54 U Chi L Rev 1484, 1491-1511 (1987), but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." United States v Butler, 297 US 1, 63, 80 L Ed 477, 56 S Ct 312, 102 ALR 914 (1936).

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. Among the provisions of the Constitution that have been particularly important in this regard, three concern us here.

First, the Constitution allocates to Congress the power "[t]o regulate Commerce . . . among the several States." Art I, § 8, cl 3. Interstate commerce was an established feature of life in the late 18th century. See, e.g., The Federalist No. 42, p 267 (C. Rossiter ed 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power. See, e.g., Katzenbach v McClung, 379 US 294, 13 L Ed 2d 290, 85 S Ct 377 (1964); Wickard v Filburn, 317 US 111, 87 L Ed 122, 63 S Ct 82 (1942).

Second, the Constitution authorizes Congress "to pay the Debts and provide for the . . . general Welfare

of the United States." Art I, § 8, cl 1. As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to "fix the terms on which it shall disburse federal money to the States." Pennhurst State School and Hospital v Halderman, 451 US 1, 17, 67 L Ed 2d 694, 101 S Ct 1531 (1981). Compare, e.g., United States v Butler, supra, at 72-75, 80 L Ed 477, 56 S Ct 312, 102 ALR 914 (spending power does not authorize Congress to subsidize farmers), with South Dakota v Dole, 483 US 203, 97 L Ed 2d 171, 107 S Ct 2793 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). While the spending power is "subject to several general restrictions articulated in our cases," id., at 207, 97 L Ed 2d 171, 107 S Ct 2793, these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget.

The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." US Const, Art I, § 8, cl 18. See, e.g., Legal Tender Case (Juilliard v Greenman), 110 US 421, 449-450, 28 L Ed 204, 4 S Ct 122 (1884); McCulloch v Maryland, 4 Wheat, at 411-421, 4 L Ed 579.

Finally, the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, Art VI, cl 2. As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted. See, e.g., Shaw v Delta Air Lines, Inc., 463 US 85, 77 L Ed 2d 490, 103 S Ct 2890 (1983). We have observed that the Supremacy Clause gives the Federal Government "a decided advantage in th[e] delicate balance" the Constitution strikes between State and Federal power. Gregory v Ashcroft, 501 US, at ——, 115 L Ed 2d 410, 111 S Ct 2395.

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

B

[7] Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive

waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Cf. Philadelphia v New Jersey, 437 US 617, 621-623, 57 L Ed 2d 475, 98 S Ct 2531 (1978); Fort Gratiot Sanitary Landfill, Inc. v Michigan Dept. of Natural Resources, 504 US —, —, 119 L Ed 2d 139 (1992). Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path. See Maryland v Wirtz, 392 US 183, 20 L Ed 2d 1020, 88 S Ct 2017 (1968) (state schools and hospitals are subject to Fair Labor Standards Act); National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976) (overruling Wirtz) (state employers are *not* subject to Fair Labor Standards Act); Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985) (overruling National League of Cities) (state employers are once again subject to Fair Labor Standards Act). See also New York v United States, 326 US 572, 90 L Ed 326, 66 S Ct 310 (1946); Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975); Transportation Union v Long Island R. Co., 455 US 678, 71 L Ed 2d 547, 102 S Ct 1349 (1982); EEOC v Wyoming, 460 US 226, 75 L Ed 2d 18, 103 S Ct 1054 (1983); South Carolina v Baker, 485 US 505, 99 L Ed 2d 592, 108 S Ct 1355 (1988); Gregory v Ashcroft, 501 US —, 115 L Ed 2d 410, 111 S Ct 2395 (1991). This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. Cf. FERC v Mississippi, 456 US 742, 758-759, 72 L Ed 2d 532, 102 S Ct 2126 (1982).

This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

1

[8a] As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264, 288, 69 L Ed 2d 1, 101 S Ct 2352 (1981). In Hodel, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did *not* "commandeer" the States into regulating mining. The Court found that "the

States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. 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." Ibid.

The Court reached the same conclusion the following year in FERC v Mississippi, supra. At issue in FERC was the Public Utility Regulatory Policies Act of 1978, a federal statute encouraging the States in various ways to develop programs to combat the Nation's energy crisis. We observed that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." Id., at 761-762, 72 L Ed 2d 532, 102 S Ct 2126. As in Hodel, the Court upheld the statute at issue because it did not view the statute as such a command. The Court emphasized: "Titles I and III of [the Public Utility Regulatory Policies Act of 1978 (PURPA)] require *only consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 456 US, at 764, 72 L Ed 2d 532, 102 S Ct 2126 (emphasis in original). Because "[t]here [wa]s nothing in PURPA 'directly compelling' the States to enact a legislative program," the statute was not inconsistent with the Constitution's division of authority between the Federal Government and the States. Id., at 765, 72 L Ed 2d 532, 102 S Ct 2126 (quoting Hodel v Virginia Surface Mining & Reclamation Assn., Inc., supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352). See also South Carolina v Baker, supra, at 513, 99 L Ed 2d 592, 108 S Ct 1355 (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests"); Garcia v San Antonio Metropolitan Transit Authority, supra, at 556, 83 L Ed 2d 1016, 105 S Ct 1005 (same).

These statements in FERC and Hodel were not innovations. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See Coyle v Oklahoma, 221 US 559, 565, 55 L Ed 853, 31 S Ct 688 (1911). The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." Lane County v Oregon, 7 Wall, at 76, 19 L Ed 101 (emphasis added). The Court has made the same point with more rhetorical flourish, although perhaps with less precision, on a number of occasions. In Chief Justice Chase's much-quoted words, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks

to an indestructible Union, composed of indestructible States." Texas v White, 7 Wall 700, 725, 19 L Ed 227 (1869). See also Metcalf & Eddy v Mitchell, 269 US 514, 523, 70 L Ed 384, 46 S Ct 172 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); Tafflin v Levitt, 493 US 455, 458, 107 L Ed 2d 887, 110 S Ct 792 (1990) ("under our federal system, the States possess sovereignty concurrent with that of the Federal Government"); Gregory v Ashcroft, 501 US, at ——, 115 L Ed 2d 410, 111 S Ct 2395 ("the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress "could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such." Amar, Of Sovereignty and Federalism, 96 Yale LJ 1425, 1447 (1987).

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, p 108 (C. Rossiter ed 1961). As Hamilton saw it, "we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government." Id., at 109. The new National Government "must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations . . . . The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals." Id., No. 16, p 116.

The Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. 1 Records of the Federal Convention of 1787, p 21 (M. Farrand ed 1911). Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it has under the Articles of Confederation. 1 id., 243-244. These two plans underwent various revisions as the Convention progressed, but they remained the two primary options discussed by the delegates. One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. As Randolph explained the distinction, "[t]he true question is whether

we shall adhere to the federal plan [i.e., the New Jersey Plan], or introduce the national plan. The insufficiency of the former has been fully displayed . . . . There are but two modes, by which the end of a Gen[eral] Gov[ernment] can be attained: the 1st is by coercion as proposed by Mr. P[aterson's] plan[, the 2nd] by real legislation as prop[osed] by the other plan. Coercion [is] *impracticable, expensive, cruel to individuals.* . . . We must resort therefore to a national *Legislation over individuals.*" 1 id., at 255-256 (emphasis in original). Madison echoed this view: "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." 2 id., at 9.

Under one preliminary draft of what would become the New Jersey Plan, state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in this case: "[T]he laws of the United States ought, as far as may be consistent with the common interests of the Union, to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required." 3 id., at 616. This idea apparently never even progressed so far as to be debated by the delegates, as contemporary accounts of the Convention do not mention any such discussion. The delegates' many descriptions of the Virginia and New Jersey Plans speak only in general terms about whether Congress was to derive its authority from the people or from the States, and whether it was to issue directives to individuals or to States. See 1 id., at 260-280.

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. 1 id., at 313. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State's convention: "This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. . . . But this legal coercion singles out the . . . individual." 2 J. Elliot, Debates on the Federal Constitution 197 (2d ed 1863). Charles Pinckney, another delegate at the Constitutional Convention, emphasized to the South Carolina House of Representatives that in Philadelphia "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." 4 id., at 256. Rufus King, one of Massachusetts' delegates, returned home to support ratification by recalling the Commonwealth's unhappy experience under the Articles of Confederation and arguing: "Laws, to be effective, therefore, must not be laid on states, but upon individuals." 2 id., at 56. At New York's convention, Hamilton (another delegate in Philadelphia) exclaimed: "But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Then we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Noth-

ing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." 2 id., at 233. At North Carolina's convention, Samuel Spencer recognized that "all the laws of the Confederation were binding on the states in their political capacities, . . . but now the thing is entirely different. The laws of Congress will be binding on individuals." 4 id., at 153.

[9, 10] In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., FERC v Mississippi, 456 US, at 762-766, 72 L Ed 2d 532, 102 S Ct 2126; Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US, at 288-289, 69 L Ed 2d 1, 101 S Ct 2352; Lane County v Oregon, 7 Wall, at 76, 19 L Ed 101. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

2

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

[11] First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." South Dakota v Dole, 483 US, at 206, 97 L Ed 2d 171, 107 S Ct 2793. Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, id., at 207-208, and n 3, 97 L Ed 2d 171, 107 S Ct 2793; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices. See Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum L Rev 847, 874-881 (1979). Dole was one such case: The Court found no constitutional flaw in a federal statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age. Similar examples abound. See, e.g., Fullilove v Klutznick, 448 US 448, 478-480, 65 L Ed 2d 902, 100 S Ct 2758 (1980); Massachusetts v United States, 435 US 444, 461-462, 55 L Ed 2d 403, 98 S Ct 1153 (1978); Lau v Nichols, 414 US 563, 568-569, 39 L Ed 2d 1, 94 S Ct 786 (1974); Oklahoma v Civil Service Comm'n, 330 US 127, 142-144, 91 L Ed 794, 67 S Ct 544 (1947).

Second, where Congress has the

authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. Hodel v Virginia Surface Mining & Reclamation Assn., Inc., supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352. See also FERC v Mississippi, supra, at 764-765, 72 L Ed 2d 532, 102 S Ct 2126. This arrangement, which has been termed "a program of cooperative federalism," Hodel, supra, at 289, 69 L Ed 2d 1, 101 S Ct 2352, is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat 816, as amended, 33 USC § 1251 et seq. [33 USCS §§ 1251 et seq.], see Arkansas v Oklahoma, 503 US —, —, 117 L Ed 2d 239, 112 S Ct 1046 (1992) (Clean Water Act Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective"); the Occupational Safety and Health Act of 1970, 84 Stat 1590, 29 USC § 651 et seq. [29 USCS §§ 651 et seq.], see Gade v National Solid Wastes Management Assn., 520 US —, —, 120 L Ed 2d 73, 112 S Ct — (1992); the Resource Conservation and Recovery Act of 1976, 90 Stat 2796, as amended, 42 USC § 6901 et seq. [42 USCS §§ 6901 et seq.], see United States Dept. of Energy v Ohio, 503 US —, —, 118 L Ed 2d 255, 112 S Ct 1627 (1992); and the Alaska National Interest Lands Conservation Act, 94 Stat 2374, 16 USC § 3101 et seq. [16 USCS §§ 3101 et seq.], see Kenaitze Indian Tribe v Alaska, 860 F2d 312, 314 (CA9 1988), cert denied, 491 US 905, 105 L Ed 2d 695, 109 S Ct 3187 (1989).

By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. 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.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal

officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. See Merritt, 88 Colum L Rev, at 61-62; La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 Nw U L Rev 577, 639-665 (1985).

With these principles in mind, we turn to the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.

III

[12a] The parties in this case advance two quite different views of the Act. As petitioners see it, the Act imposes a requirement directly upon the States that they regulate in the field of radioactive waste disposal in order to meet Congress' mandate that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 42 USC § 2021c(a)(1)(A) [42 USCS § 2021c(a)(1)(A)]. Petitioners understand this provision as a direct command from Congress, enforceable independent of the three sets of incentives provided by the Act. Respondents, on the other hand, read this provision together with the incentives, and see the Act as affording the States three sets of choices. According to respondents, the Act permits a State to choose first between regulating pursuant to federal standards and losing the right to a share of the Secretary of Energy's escrow account; to choose second between regulating pursuant to federal standards and progressively losing access to disposal sites in other States; and to choose third between regulating pursuant to federal standards and taking title to the waste generated within the State. Respondents thus interpret § 2021c(a)(1)(A), despite the statute's use of the word "shall," to provide no more than an option which a State may elect or eschew.

[12b, 13, 14] The Act could plausibly be understood either as a mandate to regulate or as a series of incentives. Under petitioners' view, however, § 2021c(a)(1)(A) of the Act would clearly "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US, at 288, 69 L Ed 2d 1, 101 S Ct 2352. We must reject this interpretation of the provision for two reasons. First, such an outcome would, to say the least, "upset the usual constitutional balance of federal and state powers." Gregory v Ashcroft, 501 US, at ——, 115 L Ed 2d 410, 111 S Ct 2395. "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance," ibid. (internal quotation marks omitted), but the Act's amenability to an equally plausible alternative construction prevents us from possessing such certainty. Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v Florida Gulf Coast

Building & Construction Trades Council, 485 US 568, 575, 99 L Ed 2d 645, 108 S Ct 1392 (1988). This rule of statutory construction pushes us away from petitioners' understanding of § 2021c(a)(1)(A) of the Act, under which it compels the States to regulate according to Congress' instructions.

[12c] We therefore decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act. Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

A

The first set of incentives works in three steps: First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

[1b, 15] The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, see, e.g., Wyoming v Oklahoma, 502 US ——, ——, 117 L Ed 2d 1, 112 S Ct 789 (1992); Cooley v Board of Wardens of Port of Philadelphia, 12 How 299, 13 L Ed 996 (1851), that limit may be lifted, as it has been here, by an expression of the "unambiguous intent" of Congress. Wyoming, supra, at ——, 117 L Ed 2d 1, 112 S Ct 789; Prudential Ins. Co. v Benjamin, 328 US 408, 427-431, 90 L Ed 1342, 66 S Ct 1142, 164 ALR 476 (1946). Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress' approval, the States can clearly do so *with* Congress' approval, which is what the Act gives them.

[1c] The second step, the Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Cf. United States v Sanchez, 340 US 42, 44-45, 95 L Ed 47, 71 S Ct 108 (1950); Steward Machine Co. v Davis, 301 US 548, 581-583, 81 L Ed 1279, 57 S Ct 883, 109 ALR 1293 (1937).

The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. See generally South Dakota v Dole, 483 US, at 207-208, 97 L Ed 2d 171, 107 S Ct 2793. The expenditure is for the general welfare, Helvering v Davis, 301 US 619, 640-641, 81 L Ed 1307, 57 S Ct 904, 109 ALR 1319 (1937); the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. 42 USC § 2021e(d)(2)(E) [42 USCS § 2021e(d)(2)(E)]. The conditions imposed are unambiguous, Pennhurst State School and Hospital v Halderman, 451 US, at

17, 67 L Ed 2d 694, 101 S Ct 1531; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure, Massachusetts v United States, 435 US, at 461, 55 L Ed 2d 403, 98 S Ct 1153; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition. Lawrence County v Lead-Deadwood School Dist., 469 US 256, 269-270, 83 L Ed 2d 635, 105 S Ct 695 (1985).

Petitioners contend nevertheless that the *form* of these expenditures removes them from the scope of Congress' spending power. Petitioners emphasize the Act's instruction to the Secretary of Energy to "deposit all funds received in a special escrow account. The funds so deposited shall not be the property of the United States." 42 USC § 2021e(d)(2)(A) [42 USCS § 2021e(d)(2)(A)]. Petitioners argue that because the money collected and redisbursed to the States is kept in an account separate from the general treasury, because the Secretary holds the funds only as a trustee, and because the States themselves are largely able to control whether they will pay into the escrow account or receive a share, the Act "in no manner calls for the spending of federal funds." Reply Brief for Petitioner State of New York 6.

The Constitution's grant to Congress of the authority to "pay the Debts and provide for the . . . general Welfare" has never, however, been thought to mandate a particular form of accounting. A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose. See, e.g., 23 USC § 118 [23 USCS § 118] (Highway Trust Fund); 42 USC § 401(a) [42 USCS § 401(a)] (Federal Old-Age and Survivors Insurance Trust Fund); 42 USC § 401(b) [42 USCS § 401(b)] (Federal Disability Insurance Trust Fund); 42 USC § 1395t [42 USCS § 1395t] (Federal Supplementary Medical Insurance Trust Fund). The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner. Petitioners' argument regarding the States' ability to determine the escrow account's income and disbursements ignores the fact that Congress specifically provided the States with this ability as a method of encouraging the States to regulate according to the federal plan. That the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power.

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

[2b] In the second set of incen-

tives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. See Northeast Bancorp, Inc. v Board of Governors, Fed. Reserve System, 472 US 159, 174-175, 86 L Ed 2d 112, 105 S Ct 2545 (1985). Where federal regulation of private activity is within the scope of the Commerce Clause, we have 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. See Hodel v Virginia Surface Mining & Reclamation Association, 452 US, at 288, 69 L Ed 2d 1, 101 S Ct 2352; FERC v Mississippi, 456 US, at 764-765, 72 L Ed 2d 532, 102 S Ct 2126.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Cf. Hodel, supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

[3b] The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

[16] We must initially reject respondents' suggestion that, because the take title provision will not take effect until January 1, 1996, petitioners' challenge thereto is unripe. It

THE KEY STATEMENT OF THIS CASE, RE: STATE SOVEREIGNTY & ITS C'N CITIZENS' POWERS, under the 10th Amendment to the U.S. Constitution.

takes many years to develop a new disposal site. All parties agree that New York must take action now in order to avoid the take title provision's consequences, and no party suggests that the State's waste generators will have ceased producing waste by 1996. The issue is thus ripe for review. Cf. Pacific Gas & Elec. Co. v State Energy Resources Conservation and Development Comm'n, 461 US 190, 201, 75 L Ed 2d 752, 103 S Ct 1713 (1983); Regional Rail Reorganization Act Cases, 419 US 102, 144-145, 42 L Ed 2d 320, 95 S Ct 335 (1974).

[3c] The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of 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. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Hodel v Virginia Surface Mining & Reclamation Assn., Inc., supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, however, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.

IV

Respondents raise a number of objections to this understanding of the limits of Congress' power.

A

The United States proposes three alternative views of the constitutional line separating state and federal authority. While each view concedes that Congress *generally* may not compel state governments to regulate pursuant to federal direction, each purports to find a limited domain in which such coercion is permitted by the Constitution.

[8b] First, the United States argues that the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. This argument contains a kernel of truth: In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases 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; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State. See, e.g., EEOC v Wyoming, 460 US, at 242, n 17, 75 L Ed 2d 18, 103 S Ct 1054; Transportation Union v Long Island R. Co., 455 US, at 684, n 9, 71 L Ed 2d 547, 102 S Ct 1349; National League of Cities v Usery, 426 US, at 853, 49 L Ed 2d 245, 96 S Ct 2465. The Court has more recently departed from this approach. See, e.g., South Carolina v Baker, 485 US, at 512-513, 99 L Ed 2d 592, 108 S Ct 1355; Garcia v San Antonio Metropolitan Transit Authority, 469 US, at 556-557, 83 L Ed 2d 1016, 105 S Ct 1005. But whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to en-

(A) U.S. Congress cannot "command" states to regulate.

act *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

[17] Second, the United States argues that the Constitution does, in some circumstances, permit federal directives to state governments. Various cases are cited for this proposition, but none support it. Some of these cases discuss the well established power of Congress to pass laws enforceable in state courts. See Testa v Katt, 330 US 386, 91 L Ed 967, 67 S Ct 810, 172 ALR 225 (1947); Palmore v United States, 411 US 389, 402, 36 L Ed 2d 342, 93 S Ct 1670 (1973); see also Mondou v New York, N. H. & H. R. Co., 223 US 1, 57, 56 L Ed 327, 32 S Ct 169 (1912); Claflin v Houseman, 93 US 130, 136-137, 23 L Ed 833 (1876). These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the supreme Law of the Land," enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.

[18] Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law. See Puerto Rico v Branstad, 483 US 219, 228, 97 L Ed 2d 187, 107 S Ct 2802 (1987); Washington v Washington State Commercial Passenger Fishing Vessel Assn., 443 US 658, 695, 61 L Ed 2d 823, 99 S Ct 3055 (1979); Illinois v City of Milwaukee, 406 US 91, 106-108, 31 L Ed 2d 712, 92 S Ct 1385 (1972); see also Cooper v Aaron, 358 US 1, 18-19, 3 L Ed 2d 5, 78 S Ct 1401 (1958); Brown v Board of Ed., 349 US 294, 300, 99 L Ed 1083, 75 S Ct 753 (1955); Ex parte Young, 209 US 123, 155-156, 52 L Ed 714, 28 S Ct 441 (1908). Again, however, the text of the Constitution plainly confers this authority on the federal courts, the "judicial Power" of which "shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ; [and] to Controversies between two or more States; [and] between a State and Citizens of another State." US Const, Art III, § 2. The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply. See Puerto Rico v Branstad, supra, at 227-228, 97 L Ed 2d 187, 107 S Ct 2802 (overruling Kentucky v Dennison, 24 How 66, 16 L Ed 717 (1861)).

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law,

propositions that by no means imply any authority on the part of Congress to mandate state regulation.

Third, the United States, supported by the three sited regional compacts as amici, argues that the Constitution envisions a role for Congress as an arbiter of interstate disputes. The United States observes that federal courts, and this Court in particular, have frequently resolved conflicts among States. See, e. g., Arkansas v Oklahoma, 503 US ——, 117 L Ed 2d 239, 112 S Ct 1046 (1992); Wyoming v Oklahoma, 502 US ——, 117 L Ed 2d 1, 112 S Ct 789 (1992). Many of these disputes have involved the allocation of shared resources among the States, a category perhaps broad enough to encompass the allocation of scarce disposal space for radioactive waste. See, e.g., Colorado v New Mexico, 459 US 176, 74 L Ed 2d 348, 103 S Ct 539 (1982); Arizona v California, 373 US 546, 10 L Ed 2d 542, 83 S Ct 1468 (1963). The United States suggests that if the Court may resolve such interstate disputes, Congress can surely do the same under the Commerce Clause. The regional compacts support this argument with a series of quotations from The Federalist and other contemporaneous documents, which the compacts contend demonstrate that the Framers established a strong national legislature for the purpose of resolving trade disputes among the States. Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as Amici Curiae 17, and n 16.

While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state regulation. The Constitution established Congress as "a superintending authority over the reciprocal trade" among the States, The Federalist No. 42, p 268 (C. Rossiter ed 1961), by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments. As Madison and Hamilton explained, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." Id., No. 20, p 138.

B

[19a] The sited State respondents focus their attention on the process by which the Act was formulated. They correctly observe that public officials representing the State of New York lent their support to the Act's enactment. A Deputy Commissioner of the State's Energy Office testified in favor of the Act. See Low-Level Waste Legislation: Hearings on HR 862, HR 1046, HR 1083, and HR 1267 before the Subcommittee on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 99th Cong, 1st Sess 97-98, 190-199 (1985) (testimony of Charles Guinn). Senator Moynihan of New York spoke in support of the Act on the floor of the Senate. 131 Cong Rec 38423 (1985). Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped

much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of State sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Coleman v Thompson, 501 US ——, ——, 115 L Ed 2d 640, 111 S Ct 2546 (1991) (Blackmun, J., dissenting). "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." Gregory v Ashcroft, 501 US, at ——, 115 L Ed 2d 410, 111 S Ct 2395 (1991). See The Federalist No. 51, p 323.

[19b, 20] Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the Branches of the Federal Government clarifies this point. The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment. In Buckley v Valeo, 424 US 1, 118-137, 46 L Ed 2d 659, 96 S Ct 612 (1976), for instance, the Court held that the Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. See National League of Cities v Usery, 426 US, at 842, n 12, 49 L Ed 2d 245, 96 S Ct 2465. In INS v Chadha, 462 US 919, 944-959, 77 L Ed 2d 317, 103 S Ct 2764 (1983), we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Presidents' approval of hundreds of statutes containing a legislative veto provision. See id., at 944-945, 77 L Ed 2d 317, 103 S Ct 2764. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely

to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

[21, 22] Nor does the State's prior support for the Act estop it from asserting the Act's unconstitutionality. While New York has received the benefit of the Act in the form of a few more years of access to disposal sites in other States, New York has never joined a regional radioactive waste compact. Any estoppel implications that might flow from membership in a compact, see West Virginia ex rel. Dyer v Sims, 341 US 22, 35-36, 95 L Ed 713, 71 S Ct 557 (1951) (Jackson, J., concurring), thus do not concern us here. The fact that the Act, like much federal legislation, embodies a compromise among the States does not elevate the Act (or the antecedent discussions among representatives of the States) to the status of an interstate agreement requiring Congress' approval under the Compact Clause. Cf. Holmes v Jennison, 14 Pet 540, 572, 10 L Ed 579 (1840) (plurality opinion). That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.

V

Petitioners also contend that the Act is inconsistent with the Constitution's Guarantee Clause, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." US Const, Art IV, § 4. Because we have found the take title provision of the Act irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government, we need only address the applicability of the Guarantee Clause to the Act's other two challenged provisions.

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the "political question" doctrine. See, e.g., City of Rome v United States, 446 US 156, 182, n 17, 64 L Ed 2d 119, 100 S Ct 1548 (1980) (challenge to the preclearance requirements of the Voting Rights Act); Baker v Carr, 369 US 186, 218-229, 7 L Ed 2d 663, 82 S Ct 691 (1962) (challenge to apportionment of state legislative districts); Pacific States Tel. & Tel. Co. v Oregon, 223 US 118, 140-151, 56 L Ed 377, 32 S Ct 224 (1912) (challenge to initiative and referendum provisions of state constitution).

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in Luther v Borden, 7 How 1, 12 L Ed 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to decide what government is the established one in a State." Id., at 42, 12 L Ed 581. Over the following century, this limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts." Colegrove v Green, 328 US 549, 556, 90 L Ed 1432, 66 S Ct 1198 (1946) (plurality opinion).

This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. See Kies v Lowrey, 199 US 233, 239, 50 L Ed 167, 26 S Ct 27 (1905); Forsyth v Hammond, 166 US 506, 519, 41 L Ed 1095, 17 S Ct 665 (1897); In re Duncan, 139 US 449, 461-462, 35 L Ed 219, 11 S Ct 573 (1891); Minor v Happersett, 21 Wall 162, 175-176, 22 L Ed 627 (1875). See also Plessy v Ferguson, 163 US 537, 563-564, 41 L Ed 256, 16 S Ct 1138 (1896) (Harlan, J., dissenting) (racial segregation "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See Reynolds v Sims, 377 US 533, 582, 12 L Ed 2d 506, 84 S Ct 1362 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. See, e. g., L. Tribe, American Constitutional Law 398 (2d ed 1988); J. Ely, Democracy and Distrust: A Theory of Judicial Review 118, n, 122-123 (1980); W. Wiecek, The Guarantee Clause of the U. S. Constitution 287-289, 300 (1972); Merritt, 88 Colum L Rev, at 70-78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn L Rev 513, 560-565 (1962).

[4b] We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. As we have seen, these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate. The twin threats imposed by the first two challenged provisions of the Act—that New York may miss out on a share of federal spending or

that those generating radioactive waste within New York may lose out-of-state disposal outlets—do not pose any realistic risk of altering the form or the method of functioning of New York's government. Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in this case.

VI

Having determined that the take title provision exceeds the powers of Congress, we must consider whether it is severable from the rest of the Act.

[23, 24] "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Alaska Airlines, Inc. v Brock, 480 US 678, 684, 94 L Ed 2d 661, 107 S Ct 1476 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause, . . . Congress' silence is just that—silence—and does not raise a presumption against severability." Id., at 686, 94 L Ed 2d 661, 107 S Ct 1476. Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated. As the Court has observed, "it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment." Reagan v Farmers' Loan & Trust Co., 154 US 362, 396, 38 L Ed 1014, 14 S Ct 1047 (1894). See also United States v Jackson, 390 US 570, 585-586, 20 L Ed 2d 138, 88 S Ct 1209 (1968).

[5b] It is apparent in light of these principles that the take title provision may be severed without doing violence to the rest of the Act. The Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste. It still includes two incentives that coax the States along this road. A State whose radioactive waste generators are unable to gain access to disposal sites in other States may encounter considerable internal pressure to provide for the disposal of waste, even without the prospect of taking title. The sited regional compacts need not accept New York's waste after the seven-year transition period expires, so any burden caused by New York's failure to secure a disposal site will not be borne by the residents of other States. The purpose of the Act is not defeated by the invalidation of the take title provision, so we may leave the remainder of the Act in force.

VII

Some truths are so basic that, like

the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse.

[25] States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p 245 (C. Rossiter ed 1961), reserved explicitly to the States by the Tenth Amendment.

[8c, 26, 27] Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them. The judgment of the Court of Appeals is accordingly affirmed in part and reversed in part.

SEPARATE OPINIONS

Justice **White**, with whom Justice **Blackmun** and Justice **Stevens** join, concurring in part and dissenting in part.

The Court today affirms the constitutionality of two facets of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), Pub L 99-240, 99 Stat 1842, 42 USC § 2021b et seq. [42 USCS §§ 2021b et seq.]. These provisions include the monetary incentives from surcharges collected by States with low-level radioactive waste storage sites and rebated by the Secretary of Energy to States in compliance with the Act's deadlines for achieving regional or in-state disposal, see §§ 2021e(d)(2)(A) and 2021e(d)(2)(B)(iv), and the "access incentives," which deny access to disposal sites

for States that fail to meet certain deadlines for low-level radioactive waste disposal management. § 2021e(e)(2). The Court strikes down and severs a third component of the 1985 Act, the "take title" provision, which requires a noncomplying State to take title to or to assume liability for its low-level radioactive waste if it fails to provide for the disposal of such waste by January 1, 1996. § 2021e(d)(2)(C). The Court deems this last provision unconstitutional under principles of federalism. Because I believe the Court has mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision, I can only join Parts III-A and III-B, and I respectfully dissent from the rest of its opinion and the judgment reversing in part the judgment of the Court of Appeals.

I

My disagreement with the Court's analysis begins at the basic descriptive level of how the legislation at issue in this case came to be enacted. The Court goes some way toward setting out the bare facts, but its omissions cast the statutory context of the take title provision in the wrong light. To read the Court's version of events, see ante, at ———, 120 L Ed 2d, at 133–134, one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), Pub L 96-573, 94 Stat 3347, and its amendatory Act of 1985, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal preemption or intervention, but rather congressional sanction of interstate compromises they had reached.

The two signal events in 1979 that precipitated movement toward legislation were the temporary closing of the Nevada disposal site in July 1979, after several serious transportation-related incidents, and the temporary shutting of the Washington disposal site because of similar transportation and packaging problems in October 1979. At that time the facility in Barnwell, South Carolina, received approximately three-quarters of the Nation's low-level radioactive waste, and the Governor ordered a 50 percent reduction in the amount his State's plant would accept for disposal. National Governors' Association Task Force on Low-Level Radioactive Waste Disposal, Low-Level Waste: A Program for Action 3 (Nov. 1980) (hereinafter A Program for Action). The Governor of Washington threatened to shut down the Hanford, Washington, facility entirely by 1982 unless "some meaningful progress occurs toward" development of regional solutions to the waste disposal problem. Id., at 4, n. Only three sites existed in the country for the disposal of low-level radioactive waste, and the "sited" States confronted the undesirable alternatives either of continuing to be the dumping grounds for the entire Nation's low-level waste or of eliminating or reducing in a constitutional manner the amount of waste accepted for disposal.

The imminence of a crisis in low-level radioactive waste management cannot be overstated. In December 1979, the National Governors' Asso-

ciation convened an eight-member task force to coordinate policy proposals on behalf of the States. See Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing before the Senate Committee on the Judiciary, 98th Cong, 1st Sess, 8 (1983). In May 1980, the State Planning Council on Radioactive Waste Management submitted the following unanimous recommendation to President Carter:

> "The national policy of the United States on low-level radioactive waste shall be that every State is responsible for the disposal of the low-level radioactive waste generated by nondefense related activities within its boundaries and that States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility." 126 Cong Rec 20135 (1980).

This recommendation was adopted by the National Governors' Association a few months later. See A Program for Action 67; HR Rep No. 99-314, pt 2, p 18 (1985). The Governors recognized that the Federal Government could assert its preeminence in achieving a solution to this problem, but requested instead that Congress oversee state-developed regional solutions. Accordingly, the Governors' Task Force urged that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to the low-level waste disposal problem." A Program for Action 6.

The Governors went further, however, in recommending that "Congress should authorize the states to enter into interstate compacts to establish regional disposal sites" and that "[s]uch authorization should include the power to exclude waste generated outside the region from the regional disposal site." Id., at 7. The Governors had an obvious incentive in urging Congress not to add more coercive measures to the legislation should the States fail to comply, but they nevertheless anticipated that Congress might eventually have to take stronger steps to ensure compliance with long-range planning deadlines for low-level radioactive waste management. Accordingly, the Governors' Task Force

> "recommend[ed] that Congress defer consideration of sanctions to compel the establishment of new disposal sites until at least two years after the enactment of compact consent legislation. States are already confronting the diminishing capacity of present sites and an unequivocal political warning from those states' Governors. If at the end of the two-year period states have not responded effectively, or if problems still exist, stronger federal action may be necessary. But until that time, Congress should confine its role to removing obstacles and allow the states a reasonable chance to solve the problem themselves." Id., at 8-9.

Such concerns would have been mooted had Congress enacted a "federal" solution, which the Senate considered in July 1980. See S 2189, 96th Cong, 2d Sess (1980); S Rep No. 96-548 (1980) (detailing legislation calling for federal study, oversight, and management of radioactive waste). This "federal" solution, however, was opposed by one of the sited State's Senators, who introduced an amendment to adopt and implement

the recommendations of the State Planning Council on Radioactive Waste Management. See 126 Cong Rec 20136 (1980) (statement of Sen. Thurmond). The "state-based" solution carried the day, and as enacted, the 1980 Act announced the "policy of the Federal Government that . . . each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders." Pub L 96-573, § 4(a)(1), 94 Stat 3348. This Act further authorized States to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste," § 4(a)(2)(A), compacts to which Congress would have to give its consent. § 4(a)(2)(B). The 1980 Act also provided that, beginning on January 1, 1986, an approved compact could reserve access to its disposal facilities for those States which had joined that particular regional compact. Ibid.

As well described by one of the amici, the attempts by States to enter into compacts and to gain congressional approval sparked a new round of political squabbling between elected officials from unsited States, who generally opposed ratification of the compacts that were being formed, and their counterparts from the sited States, who insisted that the promises made in the 1980 Act be honored. See Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae 12-14. In its effort to keep the States at the forefront of the policy amendment process, the National Governors' Association organized more than a dozen meetings to achieve a state consensus. See H. Brown, The Low-Level Waste Handbook: A User's Guide to the Low-Level Radioactive Waste Policy Amendments Act of 1985, p iv (Nov. 1986) (describing "the states' desire to influence any revisions of the 1980 Act").

These discussions were not merely academic. The sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act. Thus, as the end of 1985 approached, the sited States viewed the January 1, 1986 deadline established in the 1980 Act as a "drop-dead" date, on which the regional compacts could begin excluding the entry of out-of-region waste. See 131 Cong Rec 35203 (1985). Since by this time the three disposal facilities operating in 1980 were still the only such plants accepting low-level radioactive waste, the unsited States perceived a very serious danger if the three existing facilities actually carried out their threat to restrict access to the waste generated solely within their respective compact regions.

A movement thus arose to achieve a compromise between the sited and the unsited States, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States' assurances that they would develop alternate disposal facilities. As Representative Derrick explained, the compromise 1985 legislation "gives nonsited States more time to develop disposal sites, but also establishes a very firm timetable and sanctions for failure to live up [to] the agreement." Id., at 35207. Representative Markey added that "[t]his compromise became the basis

for our amendments to the Low-Level Radioactive Waste Policy Act of 1980. In the process of drafting such amendments, various concessions have been made by all sides in an effort to arrive at a bill which all parties could accept." Id., at 35205. The bill that in large measure became the 1985 Act "represent[ed] the diligent negotiating undertaken by" the National Governors' Association and "embodied" the "fundamentals of their settlement." Id., at 35204 (statement of Rep. Udall). In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.

There is no need to resummarize the essentials of the 1985 legislation, which the Court does ante, at ——, ——, 120 L Ed 2d, at 135–136. It does, however, seem critical to emphasize what is accurately described in one amicus brief as the assumption by Congress of "the role of arbiter of disputes among the several States." Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as Amici Curiae 9. Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

II

To justify its holding that the take title provision contravenes the Constitution, the Court posits that "[i]n this provision, Congress has crossed the line distinguishing encouragement from coercion." Ante, at ——, 120 L Ed 2d, at 149. Without attempting to understand properly the take title provision's place in the interstate bargaining process, the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion. The Court candidly begins with an argument respondents do *not* make: that "the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments." Ante, at ——, 120 L Ed 2d, at 150. "Such a forced transfer," it continues, "standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." Ibid. Since this is *not* an argument respondents make, one naturally wonders why the Court builds its analysis that the take title provision is unconstitutional around this opening premise. But having carefully built its straw man, the Court proceeds impressively to knock him down. "As we have seen," the Court teaches, "the Constitution does not empower Congress to subject state governments to this type of instruction." Ante, at ——, 120 L Ed 2d, at 150.

Curiously absent from the Court's analysis is any effort to place the take title provision within the overall context of the legislation. As the discussion in Part I of this opinion suggests, the 1980 and 1985 statutes were enacted against a backdrop of national concern over the availability of additional low-level radioactive waste disposal facilities. Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses, but instead it *unanimously*

assented to the States' request for congressional ratification of agreements to which they had acceded. See 131 Cong Rec 35252 (1985); id., at 38425. As the floor statements of Members of Congress reveal, see supra, at ——, 120 L Ed 2d, at ——, the States wished to take the lead in achieving a solution to this problem and agreed among themselves to the various incentives and penalties implemented by Congress to insure adherence to the various deadlines and goals.[1] The chief executives of the States proposed this approach, and I am unmoved by the Court's vehemence in taking away Congress' authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States' concessions.

A

In my view, New York's actions subsequent to enactment of the 1980 and 1985 Acts fairly indicate its approval of the interstate agreement process embodied in those laws within the meaning of Art I, § 10, cl 3, of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." First, the States—including New York—worked through their Governors to petition Congress for the 1980 and 1985 Acts. As I have attempted to demonstrate, these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. Second, New York acted in compliance with the requisites of both statutes in key respects, thus signifying its assent to the agreement achieved among the States as codified in these laws. After enactment of the 1980 Act and pursuant to its provision in § 4(a)(2), 94 Stat 3348, New York entered into compact negotiations with several other northeastern States before withdrawing from them to "go it alone." Indeed, in 1985, as the January 1, 1986 deadline crisis approached and Congress considered the 1985 legislation that is the subject of this lawsuit, the Deputy Commissioner for Policy and Planning of the New York State Energy Office testified before Congress that "New York State supports the efforts of Mr. Udall and the members of this Subcommittee to resolve the current impasse over Congressional consent to the proposed LLRW compacts and provide interim access for states and regions without sites. *New York State has been participating with the National Governors' Association and the other large states and compact commissions in an effort to further refine the recommended approach in HR 1083 and reach a consensus between all groups.*" See Low-Level Waste Legislation: Hearings on HR 862, HR 1046, HR 1083, and HR 1267 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong, 1st Sess, 197 (1985) (testimony of Charles Guinn) (emphasis added).

Based on the assumption that

1. As Senator McClure pointed out, "the actions taken in the Committee on Energy and Natural Resources met the objections and the objectives of the States point by point; and I want to underscore what the Senator from Louisiana has indicated—that it is important that we have real milestones. It is important to note that the discussions between staffs and principals have produced a[n] agreement that does have some real teeth in it at some points." 131 Cong Rec 38415 (1985).

"other states will [not] continue indefinitely to provide access to facilities adequate for the permanent disposal of low-level radioactive waste generated in New York," 1986 N.Y. Laws, ch 673, § 2, the State legislature enacted a law providing for a waste disposal facility to be sited in the State. Ibid. This measure comported with the 1985 Act's proviso that States which did not join a regional compact by July 1, 1986, would have to establish an in-state waste disposal facility. See 42 USC § 2021e(e)(1)(A) [42 USCS § 2021e(e)(1)(A)]. New York also complied with another provision of the 1985 Act, § 2021e(e)(1)(B), which provided that by January 1, 1988, each compact or independent State would identify a facility location and develop a siting plan, or contract with a sited compact for access to that region's facility. By 1988, New York had identified five potential sites in Cortland and Allegany Counties, but public opposition there caused the State to reconsider where to locate its waste disposal facility. See Office of Environmental Restoration and Waste Management, U. S. Dept. of Energy, Report to Congress in Response to Public Law 99-240: 1990 Annual Report on Low-Level Radioactive Waste Management Progress 32-35 (1991) (lodged with the Clerk of this Court). As it was undertaking these initial steps to honor the interstate compromise embodied in the 1985 Act, New York continued to take full advantage of the import concession made by the sited States, by exporting its low-level radioactive waste for the full 7-year extension period provided in the 1985 Act. By gaining these benefits and complying with certain of the 1985 Act's deadlines, therefore, New York fairly evidenced its acceptance of the federal-state arrangement—including the take title provision.

Although unlike the 42 States that compose the nine existing and approved regional compacts, see Brief for United States 10, n 19, New York has never formalized its assent to the 1980 and 1985 statutes, our cases support the view that New York's actions signify assent to a constitutional interstate "agreement" for purposes of Art I, § 10, cl 3. In Holmes v Jennison, 14 Pet 540, 10 L Ed 579 (1840), Chief Justice Taney stated that "[t]he word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, *and upon which both are acting*, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; . . . and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." Id., at 572, 10 L Ed 579. (emphasis added). In my view, New York acted in a manner to signify its assent to the 1985 Act's take title provision as part of the elaborate compromise reached among the States.

The State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its

bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act. Cf. West Virginia ex rel. Dyer v Sims, 341 US 22, 35-36, 95 L Ed 713, 71 S Ct 557 (1951), Jackson, J., concurring: "West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact. . . . Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. *After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant*, West Virginia should be estopped from repudiating her act. . . ." (Emphasis added.).

B

Even were New York not to be estopped from challenging the take title provision's constitutionality, I am convinced that, seen as a term of an agreement entered into between the several States, this measure proves to be less constitutionally odious than the Court opines. First, the practical effect of New York's position is that because it is unwilling to honor its obligations to provide in-state storage facilities for its low-level radioactive waste, *other* States with such plants *must accept* New York's waste, whether they wish to or not. Otherwise, the many economically and socially-beneficial producers of such waste in the State would have to cease their operations. The Court's refusal to force New York to accept responsibility for its own problem inevitably means that some other State's sovereignty will be impinged by it being forced, for public health reasons, to accept New York's low-level radioactive waste. I do not understand the principle of federalism to impede the National Government from acting as referee among the States to prohibit one from bullying another.

Moreover, it is utterly reasonable that, in crafting a delicate compromise between the three overburdened States that provided low level radioactive waste disposal facilities and the rest of the States, Congress would have to ratify some punitive measure as the ultimate sanction for noncompliance. The take title provision, though surely onerous, does *not* take effect if the generator of the waste does not request such action, or if the State lives up to its bargain of providing a waste disposal facility either within the State or in another State pursuant to a regional compact arrangement or a separate contract. See 42 USC § 2021e(d)(2)(C) [42 USCS § 2021e(d)(2)(C)].

Finally, to say, as the Court does, that the incursion on state sovereignty "cannot be ratified by the 'consent' of state officials," ante, at ——, 120 L Ed 2d, at 154, is flatly wrong. In a case involving a congressional ratification statute to an interstate compact, the Court upheld a provision that Tennessee and Missouri had waived their immunity from suit. Over their objection, the Court held that "[t]he States who are parties to the compact by accepting it *and acting under it assume the conditions* that Congress under the Constitution attached." Petty v Tennessee-Missouri Bridge Comm'n, 359 US 275, 281-282, 3 L Ed 2d 804, 79 S Ct 785 (1959) (emphasis added). In so holding, the Court determined

that a State may be found to have waived a fundamental aspect of its sovereignty—the right to be immune from suit—in the formation of an interstate compact even when in subsequent litigation it expressly denied its waiver. I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases. Hard public policy choices sometimes require strong measures, and the Court's holding, while not irremediable, essentially misunderstands that the 1985 take title provision was part of a complex interstate agreement about which New York should not now be permitted to complain.

III

The Court announces that it has no occasion to revisit such decisions as Gregory v Ashcroft, 501 US ——, 115 L Ed 2d 410, 111 S Ct 2395 (1991); South Carolina v Baker, 485 US 505, 99 L Ed 2d 592, 108 S Ct 1355 (1988); Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985); EEOC v Wyoming, 460 US 226, 75 L Ed 2d 18, 103 S Ct 1054 (1983); and National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976); see ante, at ——, 120 L Ed 2d, at 140, because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." Ibid. Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is unpersuasive. I have several difficulties with the Court's analysis in this respect: it builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality.

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. Moreover, the Court makes no effort to explain why this purported distinction should affect the analysis of Congress' power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible theory. Certainly one would be hard-pressed to read the spirited exchanges between the Court and dissenting Justices in National League of Cities, supra, and in Garcia v San Antonio Metropolitan Transit Authority, supra, as having been based on the distinction now drawn by the Court. An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.

Even were such a distinction to be

logically sound, the Court's "anti-commandeering" principle cannot persuasively be read as springing from the two cases cited for the proposition, Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264, 288, 69 L Ed 2d 1, 101 S Ct 2352 (1981), and FERC v Mississippi, 456 US 742, 761-762, 72 L Ed 2d 532, 102 S Ct 2126 (1982). The Court purports to draw support for its rule against Congress "commandeer[ing]" state legislative processes from a solitary statement in dictum in Hodel. See ante, at ——, 120 L Ed 2d, at 140: "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting Hodel, supra, at 288, 69 L Ed 2d 1, 101 S Ct 2352). That statement was not necessary to the decision in Hodel, which involved the question whether the Tenth Amendment interfered with Congress' authority to pre-empt a field of activity that could also be subject to state regulation and not whether a federal statute could dictate certain actions by States; the language about "commandeer[ing]" States was classic dicta. In holding that a federal statute regulating the activities of private coal mine operators was constitutional, the Court observed that "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." 452 US, at 292, 69 L Ed 2d 1, 101 S Ct 2352.

The Court also claims support for its rule from our decision in FERC, and quotes a passage from that case in which we stated that "'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.'" Ante, at ——, 120 L Ed 2d, at 141 (quoting 456 US, at 761-762, 72 L Ed 2d 532, 102 S Ct 2126). In so reciting, the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning. In full, the passage reads: "*While* this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. EPA v Brown, 431 US 99, 52 L Ed 2d 166, 97 S Ct 1635 (1977), *there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.*" Ibid. (citing Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975) (emphasis added).[2] The phrase highlighted by the Court merely means that we have not had the occasion to address whether Congress may "command" the States to enact a certain law, and as I have argued in Parts I and II of this opinion, this case does not raise that issue. Moreover, it should go without saying

2. It is true that under the majority's approach, Fry is distinguishable because it involved a statute generally applicable to both state governments and private parties. The law at issue in that case was the Economic Stabilization Act of 1970, which imposed wage and salary limitations on private and state workers alike. In Fry, the Court upheld this statute's application to the States over a Tenth Amendment challenge. In my view, Fry perfectly captures the weakness of the majority's distinction, because the law upheld in that case involved a far more pervasive intrusion on state sovereignty—the authority of state governments to pay salaries and wages to its employees below the federal minimum —than the take title provision at issue here.

that the *absence* of any on-point precedent from this Court has no bearing on the question whether Congress has properly exercised its constitutional authority under Article I. Silence by this Court on a subject is not authority for anything.

The Court can scarcely rest on a distinction between federal laws of general applicability and those ostensibly directed solely at the activities of States, therefore, when the decisions from which it derives the rule not only made no such distinction, but validated federal statutes that constricted state sovereignty in ways greater than or similar to the take title provision at issue in this case. As Fry, Hodel, and FERC make clear, our precedents prior to Garcia upheld provisions in federal statutes that directed States to undertake certain actions. "[I]t cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way," we stated in FERC, "or even to 'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of "integral governmental functions."' " 456 US, at 766, 72 L Ed 2d 532, 102 S Ct 2126. I thus am unconvinced that either Hodel or FERC supports the rule announced by the Court.

And if those cases do stand for the proposition that in certain circumstances Congress may not dictate that the States take specific actions, it would seem appropriate to apply the test stated in FERC for determining those circumstances. The crucial threshold inquiry in that case was whether the subject matter was pre-emptible by Congress. See 456 US, at 765, 72 L Ed 2d 532, 102 S Ct 2126. "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement *in a pre-emptible field*—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." Id., at 771, 72 L Ed 2d 532, 102 S Ct 2126 (emphasis added). The FERC Court went on to explain that if Congress is legislating in a pre-emptible field—as the Court concedes it was doing here, see ante, at ——— - ———, 120 L Ed 2d, at 148—the proper test before our decision in Garcia was to assess whether the alleged intrusions on state sovereignty "do not threaten the States' 'separate and independent existence,' Lane County v Oregon, 7 Wall 71, 76 [19 L Ed 101] (1869); Coyle v Oklahoma, 221 US 559, 580 [55 L Ed 853, 31 S Ct 688] (1911), and do not impair the ability of the States 'to function effectively in a federal system.' Fry v United States, 421 US, at 547, n 7 [44 L Ed 2d 363, 95 S Ct 1792]; National League of Cities v Usery, 426 US, at 852 [49 L Ed 2d 245, 96 S Ct 2465]." FERC, supra, at 765-766, 72 L Ed 2d 532, 102 S Ct 2126. On neither score does the take title provision raise constitutional problems. It certainly does not threaten New York's independent existence nor impair its ability to function effectively in the system, all the more so since the provision was enacted pursuant to compromises reached among state leaders and then ratified by Congress.

It is clear, therefore, that even under the precedents selectively chosen by the Court, its analysis of the take title provision's constitutionality in this case falls far short of being persuasive. I would also sub-

mit, in this connection, that the Court's attempt to carve out a doctrinal distinction for statutes that purport solely to regulate State activities is especially unpersuasive after Garcia. It is true that in that case we considered whether a federal statute of general applicability —the Fair Labor Standards Act—applied to state transportation entities but our most recent statements have explained the appropriate analysis in a more general manner. Just last Term, for instance, Justice O'Connor wrote for the Court that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 [83 L Ed 2d 1016, 105 S Ct 1005] (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system)." Gregory v Ashcroft, 501 US ——, ——, 115 L Ed 2d 410, 111 S Ct 2395 (1991). Indeed, her opinion went on to state 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." Ibid. (emphasis added).

Rather than seek guidance from FERC and Hodel, therefore, the more appropriate analysis should flow from Garcia, even if this case does not involve a congressional law generally applicable to both States and private parties. In Garcia, we stated the proper inquiry: "[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' " 469 US, at 554, 83 L Ed 2d 1016, 105 S Ct 1005 (quoting EEOC v Wyoming, 460 US, at 236, 75 L Ed 2d 18, 103 S Ct 1054). Where it addresses this aspect of respondents' argument, see ante, at ——— - ———, 120 L Ed 2d, at 153–155, the Court tacitly concedes that a failing of the political process cannot be shown in this case because it refuses to rebut the unassailable arguments that the States were well able to look after themselves in the legislative process that culminated in the 1985 Act's passage. Indeed, New York acknowledges that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." Pet for Cert in No. 91-543, p 7. The Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights.

Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste, and Congress has acceded to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington. New York itself participated and sup-

ported passage of this legislation at both the gubernatorial and federal representative levels, and then enacted state laws specifically to comply with the deadlines and timetables agreed upon by the States in the 1985 Act. For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.[3]

IV

Though I disagree with the Court's conclusion that the take title provision is unconstitutional, I do not read its opinion to preclude Congress from adopting a similar measure through its powers under the Spending or Commerce Clauses. The Court makes clear that its objection is to the alleged "commandeer[ing]" quality of the take title provision. See ante, at ——, 120 L Ed 2d, at 150. As its discussion of the surcharge and rebate incentives reveals, see ante, at ———, 120 L Ed 2d, at 147–148, the spending power offers a means of enacting a take title provision under the Court's standards. Congress could, in other words, condition the payment of funds on the State's willingness to take title if it has not already provided a waste disposal facility. Under the scheme upheld in this case, for example, monies collected in the surcharge provision might be withheld or disbursed depending on a State's willingness to take title to or otherwise accept responsibility for the low-level radioactive waste generated in state after the statutory deadline for establishing its own waste disposal facility has passed. See ante, at ——, 120 L Ed 2d, at 147-148; South Dakota v Dole, 483 US 203, 208-209, 97 L Ed 2d 171, 107 S Ct 2793 (1987); Massachusetts v United States, 435 US 444, 461, 55 L Ed 2d 403, 98 S Ct 1153 (1978).

Similarly, should a State fail to establish a waste disposal facility by the appointed deadline (under the statute as presently drafted, January 1, 1996, § 2021e(d)(2)(C)), Congress has the power pursuant to the Commerce Clause to regulate directly the producers of the waste. See ante, at ———, 120 L Ed 2d, at 148. Thus, as I read it, Congress could amend the statute to say that if a State fails to meet the January 1, 1996 deadline for achieving a means of waste disposal, and has not taken title to the waste, no low-level radioactive waste may be shipped out of the State of New York. See, e.g., Hodel, 452 US, at 288, 69 L Ed 2d 1, 101 S Ct 2352. As the legislative history of the 1980 and 1985 Acts indicates, faced with the choice of federal pre-emptive regulation and self-regulation pursuant to interstate agreement with congressional consent and ratification, the States decisively chose the latter. This background suggests that the threat of federal pre-emption may suffice to induce States to accept responsibility for failing to meet critical time deadlines for solving their low-level radioactive waste disposal problems, especially if that federal intervention also would strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities. And of course, should Congress amend the statute to meet the Court's objection and a State refuse to act, the National Legislature will have ensured at least a federal solution to the waste management problem.

Finally, our precedents leave open the possibility that Congress may create federal rights of action in the generators of low-level radioactive waste against persons acting under color of state law for their failure to meet certain functions designated in federal-state programs. Thus, we have upheld § 1983 suits to enforce certain rights created by statutes enacted pursuant to the Spending Clause, see, e.g., Wilder v Virginia Hospital Assn,, 496 US 498, 110 L Ed 2d 455, 110 S Ct 2510 (1990); Wright v Roanoke Redevelopment and Housing Authority, 479 US 418, 93 L Ed 2d 781, 107 S Ct 766 (1987), although Congress must be cautious in spelling out the federal right clearly and distinctly, see, e.g., Suter v Artist M, 503 US ——, 118 L Ed 2d 1, 112 S Ct 1360 (1992) (not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous). In addition to compensating injured parties for the State's failure to act, the exposure to liability established by such suits also potentially serves as an inducement to compliance with the program mandate.

V

The ultimate irony of the decision today is that in its formalistically

3. With selective quotations from the era in which the Constitution was adopted, the majority attempts to bolster its holding that the take title provision is tantamount to federal "commandeering" of the States. In view of the many Tenth Amendment cases decided over the past two decades in which resort to the kind of historical analysis generated in the majority opinion was not deemed necessary, I do not read the majority's many invocations of history to be anything other than elaborate window dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's lawmaking authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 56-59 (1927); H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (1973); Corwin, The Passing of Dual Federalism, 36 Va L Rev 1 (1950); Wiecek, The Reconstruction of Federal Judicial Power, 1863-1875, 13 Am J Legal Hist 333 (1969); Scheiber, State Law and "Industrial Policy" in American Development, 1790-1987, 75 Calif L Rev 415 (1987); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale LJ 453 (1989). While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress' powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature's authority than may have existed in the late 18th-century.

Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congressional statutes that impose clear directives on state officials, including those enacted pursuant to the Extradition Clause, see, e.g., Puerto Rico v Branstad, 483 US 219, 227-228, 97 L Ed 2d 187, 107 S Ct 2802 (1987), the post-Civil War Amendments, see, e.g., South Carolina v Katzenbach, 383 US 301, 319-320, 334-335, 15 L Ed 2d 769, 86 S Ct 803 (1966), as well as congressional statutes that require state courts to hear certain actions, see, e.g., Testa v Katt, 330 US 386, 392-394, 91 L Ed 967, 67 S Ct 810, 172 ALR 225 (1947).

rigid obeisance to "federalism," the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. This legislation was a classic example of Congress acting as arbiter among the States in their attempts to accept responsibility for managing a problem of grave import. The States urged the National Legislature not to impose from Washington a solution to the country's low-level radioactive waste management problems. Instead, they sought a reasonable level of local and regional autonomy consistent with Art I, § 10, cl 3, of the Constitution. By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. Because the Court's justifications for undertaking this step are unpersuasive to me, I respectfully dissent.

Justice Stevens, concurring in part and dissenting in part.

Under the Articles of Confederation, the Federal Government had the power to issue commands to the States. See Arts VIII, IX. Because that indirect exercise of federal power proved ineffective, the Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on State sovereignty. Nothing in that history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government.

The notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress," ante, at ——, 120 L Ed 2d, at 150, is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment[1] surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I.[2] Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.

The Constitution gives this Court the power to resolve controversies between the States. Long before Congress enacted pollution-control legislation, this Court crafted a body of "'interstate common law,'" Illinois v City of Milwaukee, 406 US 91, 106, 31 L Ed 2d 712, 92 S Ct 1385 (1972), to govern disputes between States involving interstate waters. See Arkansas v Oklahoma, 503 US ——, ———, 117 L Ed 2d 239, 112 S Ct 1046 (1992). In such contexts, we have not hesitated to direct States to undertake specific actions. For example, we have "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." Colorado v New Mexico, 459 US 176, 185, 74 L Ed 2d 348, 103 S Ct 539 (1982) (citing Wyoming v Colorado, 259 US 419, 66 L Ed 999, 42 S Ct 552 (1922)). Thus, we unquestionably have the power to command an upstate stream that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command.

With respect to the problem presented by the case at hand, if litigation should develop between States that have joined a compact, we would surely have the power to grant relief in the form of specific enforcement of the take title provision.[3] Indeed, even if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. Cf. Illinois v City of Milwaukee. If this Court has such authority, surely Congress has similar authority.

For these reasons, as well as those set forth by Justice White, I respectfully dissent.

1. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. In United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), we explained:

"The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131, III id. 450, 464, 600; IV id. 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908.

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Id., at 124, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430; see also ante, at ———, 120 L Ed 2d, at 137–138.

3. Even if § 2021e(d)(2)(C) is "invalidated" insofar as it applies to the State of New York, it remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect. Congress' consent to the compacts was "granted subject to the provisions of the [Act] . . . and only for so long as the [entities] established in the compact comply with all the provisions of [the] Act." Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub L 100-319, 102 Stat 471. Thus the compacts incorporated the provisions of the Act, including the take title provision. These compacts, the product of voluntary interstate cooperation, unquestionably survive the "invalidation" of § 2021e(d)(2)(C) as it applies to New York. Congress did not "direc[t]" the States to enter into these compacts and the decision of each compacting State to enter into a compact was not influenced by the existence of the take title provision: Whether a State went its own way or joined a compact, it was still subject to the take title provision.

Copy for the Kansas House Committee on Energy and Natural Resources, 3/9/93:

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL AS A TRANSITIONAL REGULATORY PROBLEM-AREA FROM THE OLD TO THE NEW PARADIGMS: CCN v. NRC (1990)

by

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Submitted in partial fulfillment of
the requirements for
POLS 930: LAW AND PUBLIC POLICY
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DRAFT FOR CRITICISM (NOT QUOTATION)

TABLE OF CONTENTS

House E&NR
Attachment 3
3/9/93

EXECUTIVE SUMMARY

This study of the opinion of Nebraska District Court Judge Urbaum in the case of Concerned Citizens of Nebraska v. Nuclear Regulatory Commission (1990) illustrates for a key issue sub-area both how complex the legislative history behind an intractable problem (the disposal of low-level radioactive waste, in this case) can be, and how acrimonious the application of three generations of federalism models (federal or state; multiple choice; and here's the mandate -- you deal with it) can become in the law and in the public-policy process, when the fundamental issue is a generational life-threatening one. But this case study also illustrates how, within the more general area of health-safety and environmental risk regulation, a virtual revolution in law and public policy is brewing over responsibility for, and acceptable solutions to, the environmental consequences of half a century of mounting hazardous-substance risk-sharing. Not the least of the tensions involved in this revolutionary situation is a generational paradigm conflict between those who see much of the law and life as protected by the Commerce Clause, and those who see the future of both their and their children's lives as only protected by the assertion and attainment of fundamental rights under the Ninth Amendment and other newly rediscovered doctrines of the law.

With issues at stake which immediately put the discussion on a life-and-death level, it is only to be expected

that ever-increasingly the arguments and demands being made by threatened citizens will take on a rights-and-duties philosophical hue. For the citizen of the immediate future will be driven to a fuller consciousness of risks and a more militant participation in the law and policy process itself, by the perception of multiple threats to his or her very existence -- as well as to the existence of future generations. So driven, this citizen will be in no mood to take "no" for an answer to demands for equity and life protection put to elected representatives in our state and federal governments. One indication of the effects of these increasingly militant demands is to be found in New York v. United States (1992), in which one version ("take title, damn it!") of the third generation of federalism is rejected by the Supreme Court. But if this case study has any predictive as well as explanatory value, it gives another indication of future trends by strongly hinting -- if not predicting outright -- that in its consideration of the fundamental right to a healthful environment, as well as its analysis of performance standards derived from statutory definitions of low-level radioactive-waste disposal, the case of Concerned Citizens of Nebraska v. Nuclear Regulatory Commission (1990) points to trends in law and public policy which will only increase rather than decrease in salience and significance.

* * * * *

INTRODUCTION

At the dawn of what has come to be called the environmental movement in the United States in the late 1960s and early 1970s, the fundamental federal question in the health-safety and environmental risk area within the overall policy process was: "Is it a federal problem, or is it a state problem?" In the course of the 1970s, however, a second-generation type of federalism developed which essentially offered options: "If you the states will adopt standards at least as tough as, or tougher than, federal ones, then you the states can go ahead and regulate these problems yourselves. But if you do not adopt such standards, then the federal government will do it for you." Yet since the 1980s, a third-generation approach has asserted itself within the federal structure, to wit: "These are your problems, you states; we the federal government do not want to solve them. Here are the mandates; now you states solve them yourselves. We accept no further responsibility for them!" Thus things have obviously gotten a bit touchy (and costly, both financially and politically) in relations between the central government and its member states recently.

The next question is: "What is going on here, and where will it lead?" To get some clues, we might look back at federal court cases in this general issue-area of health-safety and environmental risks over the last ten years or so and see what we find. Since the 1981 case of Hodel v. Virginia Surface

Mining & Reclamation Association, 101 S Ct 2352 (1981), the U.S. Supreme Court has been attempting to refine "a program of cooperative federalism" in this area of risk-sharing, according to Justice O'Connor in New York v. United States, 120 L Ed 2d 120 (1992) (at 145). That is to say, again according to Justice O'Connor,

> where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation (Ibid.).

However, this is not really a great set of choices for the states, and not even as good a deal as they were offered in the 1970s, despite Justice O'Connor's further propaganda to the effect that the Clean Water Act "anticipates a partnership between the States and the Federal Government animated by a shared objective" (quoting Arkansas v. Oklahoma, 112 S Ct 1046 (1992), at Ibid.; emphasis added). For the problem was, starting with the Hodel case in 1981, that the states resisted "cooperating" in this "shared objective," and hence Congress was forced to act, often in preemptive or, more complexly, "partially preemptive" ways [see Pacific Gas & Electric v. Energy Resources Commission, 461 US 190 (1983)].

One clear example of this growing state resistance, and consequently forced Congressional action, occurred in the issue sub-area of low-level radioactive-waste disposal regulation during the five-year period from 1980 to 1985. Following the enactment of the federal Low-Level Radioactive Waste Policy Act

(LLRWPA) in 1980 -- legislation extensively based on a conference report on the same subject by the National Governors' Association earlier that year -- the several states proceeded nevertheless to drag their collective feet on meeting any of the deadlines mandated in this pathbreaking 1980 federal legislation. As a consequence, a crisis developed in the ensuing five years over the proper disposal of an ever-increasing volume of low-level radioactive waste nationwide, and Congress was once again moved to act, this time employing more Draconian mandates along the lines of the third-generation model of federalism described above. Thus came into being the even more controversial federal Low-Level Radioactive Policy Act Amendments (LLRWPAA) of 1985, which are the subject both of this case study and of the New York v. United States case already cited. The NY v. US case, coincidentally, began its journey through the federal system at the District Court level just one month (January 1990) before CCN v. NRC began its similar journey, with not one Judge supporting Plaintiffs' Complaint in NY v. US until it reached the U.S. Supreme Court.

But amidst all these competing and redefined models of federalism, U.S. District Court judges are now attempting to straddle another and simultaneous cleavage, between an old Constitutional paradigm based on the Commerce Clause and two centuries of scientific-technological policy expertise, and a new legal order based on health-safety and environmental risks and their evaluation by, among others, newly-empowered local

citizen-participants in the policy process. Moreover, an additional dimension, which has more recently been added back into the citizen risk-assessment and participation side of this cleavage, is the classical normative consideration of rights and duties. This renewed normative emphasis on rights and duties has come about at least in part in contradistinction to what are perceived as overly technological and authoritarian versions of risk-assessment, which place citizen participation and evaluation in a distinctly inferior relationship with so-called experts, thereby bringing the overly scientific values and stratified social hierarchies of the old paradigm back into the new paradigm by way of these modern back doors.

What kinds of additional bridges our federal judges attempt to build to span this multifaceted cleavage -- of what many have characterized as opposing generational environmental paradigms -- will go a long way toward indicating both the direction and the pace of the law and public-policy changes now perceived as constituting a "revolution" by at least one leading scholar in this issue-area (O'Brien 1987). In the case of low-level radioactive waste disposal as a specific example of an especially controversial issue sub-area within this growing revolutionary movement, the hordes -- as well as aggrieved lone individuals -- are just now reaching the gates of the legal citadel to claim their stated rights, and exercise their perceived duties, in the give and take of the contemporary policy process. Indeed, it is here -- in the law and policy area of

commercial nuclear power and the handling (or mishandling) of its enormous and enormously dangerous waste of all kinds -- that the cutting-edge issues of (1) federalism under the Commerce Clause, (2) paradigm conflict in health-safety and environmental risks, and (3) alternative new directions for law and public policy, are all coming most rapidly to the forefront for consideration, reflection, and resolution. Meanwhile, some old and new legal markers have already been laid down by a District Court Judge in Nebraska, faced with the innovative arguments of Lead Counsel for a group calling itself Concerned Citizens of Nebraska.

OVERVIEW OF THE CASE

Concerned Citizens of Nebraska v. NRC (1990) is a U.S. District Court case of particular significance in the commercial nuclear-waste legal and policy battles of the last decade, not so much for any pathbreaking mechanisms devised by the Judge in the case, but rather for the classic presentations of conflicting old and new paradigms offered respectively by the Judge and by the Lead Counsel for the Plaintiffs, all in the context of an evolving system of federalism. The essence of this emerging paradigm conflict is the clash between issues perceived in traditional economic terms under the Commerce Clause and other long-standing "business-as-usual" legal and policy concepts -- even when innovative concepts of federalism are introduced -- and issues perceived in what amounts to revolutionarily new ecological and rights-and-duties terms under the Ninth Amendment

and other newly-formulated concepts of health-safety and environmental risk **regulation**, well beyond the statutory confines of NEPA (the National Environmental Policy Act of 1969). More specifically, when the 1980 federal Low-Level Radioactive Waste Policy Act (LLRWPA) was amended by the 1985 federal Low-Level Radioactive Waste **Policy** Act Amendments (LLRWPAA), a statutory standard for facilities engaged in the disposal of low-level nuclear waste was specified; namely, "permanent isolation." Yet a comparison of the District Court Judge's opinion in CCN v. NRC and the Complaint as well as Brief presented by Lead Counsel for CCN reveals two distinctly different universes of value and belief under the same U.S. Constitution. Is the disconnect between these two perspectives what is really going on in this case, or does Judge Urbaum actually see the thrusts of Plaintiffs' arguments, and even tend to agree with some of them, but also see other problems ahead in law and policy as well, if he affirms Plaintiffs' Complaint on all or even most of its Counts?

THE FUNDAMENTAL RIGHT TO A HEALTHFUL ENVIRONMENT

The factual basis of Count One of CCN's Complaint -- that Plaintiffs have been denied their fundamental right to a healthful environment -- begins with a quotation from the Defendant NRC's own 1975 Reactor Safety Study:

> Exposure to even low levels of radiation, in addition to the natural background radiation that exists, is generally believed to increase the likelihood of certain diseases and

> increase certain genetic defects (U.S. District Court of Nebraska, Plaintiffs' Complaint, p. 10, para. 19; U.S. 8th Circuit Court of Appeals, Appellants' Reply Brief, p. 6).

The NRC has subsequently taken the further position, through its twofold classificatory scheme, that low levels of radiation are nevertheless permissible, as a "low-level" performance standard, from shallow-burial facilities after a 500-year period (in which certain "low-level" radionuclides will still be emitting radiation), despite (or perhaps <u>because of</u>) the inability of such facilities to guarantee the containment of such radiation after this period. Indeed, some elements in the low-level waste will still be emitting radiation after even the 10,000-year period mandated in the high-level performance standards, as will some elements in the high-level waste (Eye 1992, 10).

But these violations of the claimed fundamental right to a safe and healthful environment are not nearly as egregious, said CCN in its Complaint, as the NRC's violation of the very statutory mandate controlling its own issuance of performance standards; namely, the provision in the U.S. Congress' 1985 LLRWPAA that calls for a standard of "<u>permanent</u> isolation" for <u>all</u> such waste. In claiming the violation of a fundamental right to a healthful environment, therefore, Plaintiffs are saying that the NRC is also violating a Congressional statute aimed at <u>protecting</u> that right. Congress' specification of a "<u>permanent</u> isolation" standard even for so-called "low-level" radioactive waste [at 42 USC 2021b(7)] has not been conformed to by the NRC in its subsequent promulgation of an inadequate NRC performance

standard for low-level radioactive waste facilities (at 10 CFR 61.41), says Concerned Citizens of Nebraska [U.S. District Court for Nebraska, Complaint (February 1990), p. 24, para. 65].

It should also be noted here that the Nebraska Department of Environmental Control followed suit with the adoption of its own performance standards (at Title 194, Ch. 4, Sec. .001 and .002) for low-level radioactive waste-disposal facilities within the state, mandating only that facilities should attempt to achieve a so-called "zero release objective." This phrase was then left undefined in both Nebraska law and in Nebraska regulations, however, leaving the "clear inference ... that permanent isolation and final disposition is not the enforceable legal standard that Defendant NDEC has adopted," according to Concerned Citizens of Nebraska in its Complaint (at page 24, para. 66; emphasis in original).

The fundamental-right argument is stated very basically in Count One of the Plaintiffs' February 21, 1990, Complaint for Declaratory Judgment and Injunctive Relief to the U.S. District Court for the District of Nebraska:

> The non-natural radioactive contamination of the environment permitted by Defendant NRC [U.S. Nuclear Regulatory Commission] and Defendant NDEC [Nebraska Department of Environmental Control] regulations is, in effect, a government-authorized violation of basic rights. The Ninth Amendment limits the authority of the government and its agents by protecting rights granted by natural law. Plaintiffs allege that they, and those similarly situated, have the natural right to be free of the non-natural radioactive contamination which will [by NRC's own admission] originate from the proposed facility (Complaint, p. 21, para. 55).

In the face of the fact that current NRC and NDEC regulations permit some radiation releases in violation of both the "permanent isolation" definition of the LLRWPAA of 1985 and the "final disposition" definition of the Central Interstate Low-Level Radioactive Waste Compact Commission (CILLRWCC) itself, Plaintiffs' Complaint requested a declaratory judgment finding and concluding that the non-natural radiation to be emitted from the proposed facility "will interfere with natural liberty rights secured by the Ninth Amendment of the Constitution of the United States" (Ibid., para. 57). Plaintiffs also requested injunctive relief to preclude Defendants from proceeding with the proposed facility unless and until "it can be demonstrated with strict proof that the facility can achieve compliance with the applicable standards" of the LLRWPAA of 1985 and the CILLRWCC regulations (Ibid.).

District Court Judge Urbaum's response to this argument and request began with a consideration of Defendant NRC's Motion to Dismiss on four grounds: (1) CCN lacks standing, (2) the claimed injuries are too remote or speculative, (3) the claimed injuries are not caused by the actions challenged, and (4) even a favorable decision would not redress the claimed injuries. Lumping these together for purposes of simplicity here, the bottom line for Judge Urbaum came from Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, at 74 (1978), which validated CCN's "showing of injury in fact for the purpose of establishing standing":

> The Supreme Court has recognized that the emission of non-natural radiation into a person's environment could be "a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions..." (CCN v. NRC, 2-3).

Thus the case begins with the recognition on the part of the District Court Judge of at least a "generalized concern about exposure to radiation," as well as "the apprehension flowing from the uncertainty about the ... consequences of even small emissions." Given this dual recognition by the Judge, what soon follows is -- on the face of it -- puzzling at best.

Judge Urbaum's next problem is disposing of Defendant NRC's, builder U.S. Ecology's, and the Central Interstate Compact Commission's joint challenge to his jurisdiction in the case, they all claiming an exclusive right of judicial review by a Court of Appeals, and then only after an NRC hearing. But the Judge immediately notes that while an independent jurisdictional basis for this suit does not exist under the Administrative Procedures Act, his Court does have jurisdiction over Constitutional claims, and CCN's claims are indeed largely Constitutional ones, being "substantially similar" to several such claims raised by the appellee in, again, Duke Power Co. v. Carolina Environmental Study Group (at 68-72, as cited in CCN v. NRC, 3-4).

Judge Urbaum then moves to his central argument about CCN's Ninth Amendment claim, citing Judge Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, at 492 (1965),

that the Ninth Amendment is "surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement" (Ibid., 493; CCN v. NRC, 7). This begins to look promising for CCN's claim until, almost immediately, Judge Urbaum says that in order to

> find, under the Ninth Amendment, a fundamental right to a healthful environment, specifically one free from non-natural radiation, I would not only have to ignore case law finding there to be no fundamental right to be free from other potentially hazardous substances, i.e., tobacco smoke, Agent Orange defoliant, see Gasper v. Louisiana Stadium and Exposition District, 418 F Supp 716 (E D La 1976), and In re "Agent Orange" Product Liability Litigation, 475 F Supp 928 (E D NY 1979), but I would also have to ignore the traditions and collective conscience of the general public who determine what is and what is not ranked as fundamental. . . . [CCN v. NRC, 7].

This is not all Judge Urbaum has to say on the subject, to say the least, but there are at a minimum four arguments bunched together here at the beginning of this segment, each of which really should be addressed separately before getting on to his other arguments.

As to the first, equating the inhalation of smoke in the New Orleans Superdome with the lifelong absorption of non-natural radiation from a nuclear waste dump, the analogy is a "stretch" at best. As to the second, equating the multiple injury claims under Agent Orange with the claims to potential lifelong exposure to non-natural radiation, the physical analogy is closer, and the final legal judgment may indeed have been similar. That is to say, Judge Urbaum had no more desire to let the nuclear-waste genie out of the waste-facility bottle here than Judge Weinstein had a desire to let a defoliant and

pesticide injury-claims avalanche loose on the American chemical industry in 1986 -- as well as on the already financially-strapped American government at that time.

As to the third, the "traditions" of the general public, it is again a "stretch" to maintain that the public's regard for a substance which has only been in existence since World War Two constitutes a "tradition." And even if this is granted, that "tradition" would have to be characterized as outright opposition to the further construction of commercial nuclear facilities since 1976, as well as consistent NIMBY (Not In My Back Yard) opposition to the construction of any new radioactive-waste storage facilities for high or low-level waste. Finally, as to the fourth argument, the "collective conscience of the general public" is an entity long known by experts in the social sciences to be very difficult to measure, unless Judge Urbaum has some new inside track on mass-morals measurement. At best, this entity might be recast as representing the Constitution itself (Judge Oliver Wendell Holmes once called the U.S. Constitution "a brooding omnipresence in the sky"), along with its interpretation through two centuries of Supreme Court opinions. But if this is indeed what Judge Urbaum had in mind here, we are back to Griswold v. Connecticut, In re Agent Orange, and other cases cited for the usual type of legal precedents, and this argument then turns out to be circular. Furthermore, there was no factual record on which to base these last two arguments by Judge Urbaum, and as a Judge with expertise in the procedural

ways of the law, he of all people in the case should have known better than to take this line of argument.

But the Judge is not finished by a long shot on the question of a fundamental right to a healthful environment. For no sooner has he finished making the above four arguments than he presents the blockbuster pair of them all:

> I need look only to (1) the history of industrialization in the United States to find a continual and systematic pollution, to one degree or another, of the environment, and (2) continuing government responses to that pollution through regulation and discipline of the polluters. The clear pattern that has emerged is that the people and their government have chosen to allow a regulated degree of environmental pollution. A constitutional right to a healthful environment is not, at this point, ranked as fundamental (Ibid.).

Reworded, the arguments here appear to be that (1) there has always been industrial pollution, so what's the big deal now, and (2) to attempt to regulate pollutants is to sanction the existence of at least trace amounts of them, lest you have nothing left to regulate! An immediate set of counter-arguments might be: (1) that might does not make right, in politics or in pollution, and nuclear might makes categorically worse wrong; along with (2), that from the stated definitions of low-level radioactive-waste disposal have been derived the twin zero-emission standards of "permanent isolation" (from the LLRWPAA of 1985) and "final disposition" (from the rules of the CILLRWCC), not the allowance for some self-justifying but fatally threatening radioactive remnants to be granted zapping status in the U.S. environment to afflict its denizens and citizens for the next 10,000 years and more.

3-16

As a coda to all the arguments he has presented against the very concept of a fundamental right to a healthful environment, Judge Urbaum concludes his response to CCN's First Count with the time-honored quotation from Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-558 (1978):

> Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts, under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment (CCN v. NRC, 7).

While this is all very laudable at one level -- a "reasonable review process" and "only a limited role" for courts -- it is sheer fantasy at another level, as if the federal courts were not involved in the resolution of "fundamental policy questions" at all times **in the tripartite separation-of-powers** governmental structure of the **U.S. policy process**.

Indeed, as David O'Brien pointed out repeatedly in **his book** What Process Is Due? Courts and Science-Policy Disputes (1987), it was in Vermont Yankee that the U.S. Supreme Court "finally brought the debate between Bazelon and Leventhal to an end" (p. 160) over the positions, respectively, of prescribing detailed agency record-keeping procedures, versus "hard-look" supervising of agency decision-making. But this resolution of the classic debate was not, as Judge Urbaum's favored quotation would lead the unwary reader to believe, in favor of Judge Bazelon's stand-offish position, in which Judges were viewed as

not possessing sufficient expertise to supervise agency decision-making unless the record in the case provided it to them. It was, rather ironically (in that Judge Rehnquist for the Supreme Court charged Bazelon with "Monday-morning quarterbacking"), in favor of the "hard-look" (i.e. more quarterbacking) approach of Leventhal. Yet this was an outcome which led O'Brien to observe that in the end Vermont Yankee "sanctioned heightened scrutiny [by the courts] of the basis for [agency-made] regulations" (O'Brien 1987, 163; emphasis added), an activity in which Judge Urbaum appears to have had neither a personal nor a professional interest to participate.

DISPOSAL DEFINITIONS AS PERFORMANCE STANDARDS

The fundamental problem with the current performance standards for low-level radioactive-waste disposal was succinctly stated by Robert Eye, General Counsel to the Kansas Department of Health and Environment, in his address to the 14th Annual U.S. Department of Energy Low-Level Radioactive Waste Management Conference in Phoenix, Arizona, on November 18, 1992:

> That is, many of the radionuclides in low-level radioactive waste have hazardous durations comparable to those radionuclides found in high-level wastes. Yet, distinctly different regulatory schemes are currently in place for the two classes of waste (Eye 1992, 7).

This situation immediately raises the prospect of a challenge to such twofold classificatory schemes under the Equal Protection Clause of the Constitution.

As to the high-level radioactive-waste disposal rule and its challenge,

> Essentially, the Nuclear Regulatory Commission has adopted a position which assumes that once sealed, a high-level repository, utilizing a deep geologic concept, would not allow a radiation release to the biosphere for at least 10,000 years (Ibid., 8).

This NRC rule was soon challenged by industry but ultimately affirmed by the U.S. Supreme Court in Baltimore Gas and Electric Co. v. NRDC, 462 US 87 (1983). In this important decision, the Court had little difficulty letting stand the zero-release rule for high-level repositories, despite substantial uncertainties in other areas of the overall radioactive-waste disposal situation.

Yet for low-level radioactive-waste repositories, the federal court system has yet to resolve the dual-classification issue. Indeed, both the U.S. District Court in Nebraska and the U.S. Eighth Circuit Court of Appeals rejected the Equal-Protection argument made by Robert Eye in his Phoenix address (and in CCN v. NRC, where he was Lead Counsel for CCN in the District Court case). Both Courts repaired, instead, to the twofold classification scheme of the NRC as a "rational basis" for not requiring substantially similar management of substantially similar radionuclides in both levels of radioactive-waste disposal:

> Neither opinion addressed the differential treatment which results due to the fact that a high-level facility will be required to isolate long-lived radionuclides for at least 10,000 years, while long-lived radionuclides in low-level radioactive waste facilities are subject to drastically less stringent isolation requirements (Eye 1992, 9).

According to a long series of studies over the last twenty years, however, there is serious scientific doubt about this "rational basis" for the NRC's creation of a twofold set of differing duration standards, as opposed to uniform volume standards. "Die slowly from proximity to a little, or die quickly from proximity to a lot, but die early you most probably will," say all the volume-doubting scientific studies to date (Boyce 1990; Marwich 1990; Stewart, Kneale, and Mancuso, 1976; Stewart and Kneale, 1993). The law and policy analyst is thereby left wondering what else is going on here in Nebraska to produce such a legal and political result, since the unanimous rejection of an even better-engineered low-level facility in the Martinsville, Illinois, area recently by the Illinois Low-Level Radioactive Waste Siting Commission (each of whose three members was initially inclined to approve the facility) cited failure to isolate long-lived radionuclides for sufficient duration as one of its primary reasons for rejection of the facility (ILLRWSC 1992; Eye 1992, 10).

Getting into Judge Urbaum's reasoning in the case at hand, however, it is to be noted that the Judge next makes short work of CCN's Count Two, a Tenth-Amendment challenge to the "take-title" provisions of the LLRWPAA of 1985. Citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), he finds that "it is a state, and not CCN or any other private body, that must challenge a statute that allegedly violates a state's rights (CCN v. NRC, 8). This is very much in keeping

with the U.S. Supreme Court's June 1992 decision in New York v. United States, 120 U.S. 120 (1992), in which the "take-title" provision of the 1985 LLRWPAA was finally ruled unconstitutional, as a result of the State of New York's challenge to it. As Judge Urbaum also notes, the State of Nebraska had until 1990 fully "embraced" the original LLRWPA of 1980, the NGA Conference Report of 1985, the LLRWPAA of 1985, and the Central Interstate Compact's creation in 1986. Ironically, however, it later joined with the State of New York in its case against the LLRWPAA of 1985 when the U.S. Supreme Court finally agreed to hear this case on appeal in its 1992 term.

Taking up CCN's Third, Fourth, and Eighth Counts as a group, Judge Urbaum moved quickly to a comparison of existing statutory definitions of "disposal" of low-level radioactive waste in terms of their constituting mandated performance standards. Noting first that the LLRWPA of 1980 defined disposal simply as "isolation," he then goes into a bit of legislative history. It was the 1979 "temporary or partial shut-down" of all three national low-level radioactive-waste disposal sites at Hanford, Washington, Beatty, Nevada, and Barnwell, South Carolina, that triggered a National Governors' Association conference and recommendation to Congress in the course of 1980. This, in turn, led to a last-minute, "emergency" legislative initiative by Congress just before midnight on Christmas Eve 1980 that did not work out quite the way Congress wanted it to, in that Congressional leaders tried to ram the initiative through

inconspicuously before the holidays and thus quietly onto the backs of the states who were thereby mandated to meet certain action deadlines. When the states woke up after the holidays, saw what had happened to their own proposals, resisted Congress, and dallied, Congress finally responded again, this time with the even more demanding alternatives mandated in the LLRWPAA of 1985.

Yet this is where the real trouble began, both about the LLRWPAA's "take-title" provision and about its new definition of "disposal" as "permanent isolation." It is also at this point that Judge Urbaum begins to display confusion in his written opinion (intentional or unintentional) about the real intent of Congress in both the LLRWPA of 1980 and the LLRWPAA of 1985. For he cites "six instances" in which the latter statute gives the states either "responsibility for" or "control over" or "both responsibility and control over" an aspect of the disposal site within its borders, all with Congress' clear "intent of making states responsible for disposing of their own low-level radioactive waste" (CCN v. NRC, 11-12).

Now on the face of it, this all sounds like "responsible" and "reasonable" risk-sharing, along the lines of one version of the new model of "cooperative federalism" enunciated by the U.S. Supreme Court in 1981 in the Hodel case. But what is really at issue here? As Hugh Kaufmann of the U.S. EPA's Office of Hazardous Substances has repeatedly pointed out, what we really have here is just a "shell game" by which the U.S. Congress has attempted to foist responsibility for (through

"take-title" to) all this dangerous and troublesome waste -- "their own ... waste" -- on the states, with the alternative dangled before the states of membership in an unrepresentative, undemocratic, and therefore probably unconstitutional Compact system, one actually designed to get the problem out of Congress' hair once and for all (Russell 1990, 20).

Always to be kept in mind here is the fact that the vast, unanticipated volume of so-far untreatable radioactive waste is, in the final analysis, an unfortunate byproduct of Congress' very own earlier policies. For it was the U.S. Congress which, in the first place, chose this uncertain energy path, professing the greatest of faith in the God-given abilities of American scientists eventually to master, apparently through unrelenting worship of the lesser god Technos, the as-yet-unsolved problem of radioactive-waste disposal. But it was also the U.S. Congress, in the second place, which then immediately encouraged private industry's participation in this uncertain choice of energy path on a massive scale. Moreover, it was the U.S. Congress which compounded its investment here by then choosing to subsidize this program with long-term, cheap uranium fuel, and to protect it with tight liability restrictions on any injury claims made against the U.S. commercial nuclear-power industry (through enactment of the Price-Anderson Act). This was no small, experimental, alternative-energy pilot project, but a central policy decision by Congress at the core of U.S. energy policy, costing U.S. taxpayers billions and billions

of dollars over the years to encourage private industry to take and then stay on this costly path of commercial nuclear power development. And it is this extremely checkered -- and often secret -- history which is only weakly reflected in the quotation chosen by Judge Urbaum above from the Vermont Yankee case, and which lies behind the growing state resistance to Congressional "federalism" programs and statutes in this issue-area.

Nevertheless, Judge Urbaum plows on through his examination of the relevant federal and state statutes and regulations, and concludes that "the concentrations of radiation allowed to be released under NDEC rules are identical to those allowable under NRC rules"; therefore, there is no violation of the Supremacy Clause as charged by CCN, since the Judge chooses a different interpretation of the "permanent isolation" statutory standard in the 1985 LLRWPAA than CCN has chosen:

> CCN's complaint, in so far as it equates the "no release" of radiation objective to the "permanent isolation" or "isolation and final disposition" language, is in error. Congress, the State of Nebraska, the NDEC, and USE [U.S. Ecology, the hired waste contractor: How did they get in here, dictating their own standards to follow?] have never required such a standard and recognize that, given the technology to date, that standard is impossible to meet. CCN's reliance on form over substance in its definitions and interpretations of the language involved here is misplaced (CCN v. NRC, 15).

And with that blast, Judge Urbaum was done with CCN's best arguments, and dismissed Counts Three, Four, and Eight. At this point, the cleavage between the old and the new paradigms of both federalism and environmental risk-sharing had become yawningly wide, with no hope in sight for their immediate bridging.

THE ELEMENT OF TIME

CCN's Fifth and Sixth Counts had to do with so-called "mixed" wastes and Nebraska's 1988 legislation allowing them also to be disposed of in the proposed facility. CCN claimed a violation of RCRA (the Resource Conservation and Recovery Act) in its Complaint, but Judge Urbaum found the Nebraska statute in conformity with all federal regulations, and therefore not denying Plaintiffs equal protection under the Fifth and Fourteenth Amendments. As to CCN's Seventh Count, we are once more drawn back into the claim that the LLRWPAA of 1985, when implemented by NRC and NDEC regulations as performance standards, created a classification system for low-level radioactive waste that is

> arbitrary and capricious to the extent that it requires disposal of some long-lived radionuclides in near-surface facilities and other similar or equivalent long-lived radionuclides in deep geologic repositories. ... CCN seeks substantially similar disposal regulations for substantially similar radionuclides. While this request appears reasonable on its face, I must look beyond appearances and examine whether there was any rational basis for the NRC and NDEC to differentiate between radioactive wastes (CCN v. NRC, 17; emphases added).

With the terms of the test of the NRC's and the NDEC's actions thus set up both by Judge Urbaum's opinion and by CCN's Complaint as, respectively, between the skimpiest thread of rationality ("any rational basis") and a strong hint of irrationality ("arbitrary and capricious"), it is but a straw man that Judge Urbaum has to find in order to rule in favor of the existence of rationality and against CCN's position. Here the Judge is back

to taking a minimalist (i.e pro-Bazelon) position on the degree to which he should supervise agency decision-making, versus the maximalist "hard-look" (i.e. pro-Leventhal) position being urged on him by CCN as to the prima facie unreasonableness of such a dual classification system for "substantially similar" exposure to extremely hazardous radionuclides.

But Judge Urbaum would have none of CCN's "duration" standards as a more reasonable test of risk and hazard than the "concentration" standards of the NRC (at 10 CFR 61.55 [1990]), which he found sufficiently "rational reasons" to rule in favor of the NRC as having

> chosen this classification system not by arbitrary and capricious action, but by scientific reasoning that I am not ready to overturn absent a clear showing of error (CCN v. NRC, 18; emphasis added).

What the text of Judge Urbaum's opinion, and all the other court papers on the case at the time, do not show is that the Judge had stoutly resisted the attempt by Lead Counsel for CCN to take the case to trial, both in order to introduce through the discovery process additional evidence showing such "error," and to allow Dr. Marvin Resnikoff -- one of the leading nuclear-physics authorities in the United States on the duration of radionuclide emissions --to complete the writeup of his most recent work on just this subject, in time for inclusion in the record of the case.

As it turned out, he was able to finish it in time for inclusion as an Affidavit in the Circuit Court of Appeals case in

1992. But by then the terms of the argument had already been set by Judge Urbaum's opinion at the agenda-setting District Court level. Moreover, Lead Counsel for CCN had had to withdraw from the case before it reached the Court of Appeals level, because of a conflict of interest that would otherwise have developed relative to a new position he had accepted as General Counsel for the Department of Health and Environment in Kansas. Kansas is a fellow member-state (along with Nebraska, Oklahoma, Arkansas, and Louisiana) in the Central Interstate Low-Level Radioactive Waste Compact, about whose first-ever disposal facility this case was principally concerned. This set of late-blooming developments is a good example of how time can play a significant factor in such scientific and technological cases, particularly when the "march" of scientific knowledge is slightly out of step with the demands of a case being heard by a particular judge at a particular point in time. But as Judge Urbaum made perfectly clear, he was not prepared to overturn at that time, "absent a clear showing of error" at that time.

This element of time is actually a theme which runs throughout this case. For the denial of "fundamental" status by Judge Urbaum to the right to a healthful environment is also repeatedly cast in conditional terms here: it has not yet risen to this status, as it had not yet in the Agent Orange decision by Judge Weinstein, and as it had not yet even earlier in Gasper v. Louisiana Stadium and Exposition District, 418 F Supp 716 (E D La 1976). Perhaps this is the deeper meaning of Judge Urbaum's

concluding remark in the fundamental-rights section that "a constitutional right to a healthful environment is not, at this point, ranked as fundamental" (CCN v. NRC, p. 7; emphasis added): the "collective conscience of the general public" that he cites (Ibid.) may just not yet have evolved to the point where it had put enough sufficiently farseeing executives, legislators, and judges in the three branches of the federal government to that date (through the power of the ballot box, presumably) to sustain such a verdict on the status of the new federal relationship and the environment. And that is always the judge's prerogative and ally when it comes to the element of time: that science, knowledge, the state of politics, and all "the facts" are frozen in a snapshot-like moment of time in a decision, with second-guessing constituting a whole new snapshot in another moment of future time, knowledge, and the political state of the policy process.

POLITICAL CONSIDERATIONS IN SCIENCE & TECHNOLOGY CASES

This last observation in the previous section then gets us to the heart of Judge Urbaum's unstated as well as explicit political considerations in his own decisionmaking in this case. CCN's Ninth Count charged that the failure of the member states of the Central Interstate Low-Level Radioactive Waste Compact to ratify the LLRWPAA of 1985 voided the Compact and its Commission. This Count was largely an attempt by Lead Counsel for CCN to point to the unrepresentative, undemocratic, and potentially

unconstitutional nature both of the Compact system itself and of the way in which Congress appeared to go about attempting to shove this system down the throats of the states [a position later upheld as unconstitutional in part by the U.S. Supreme Court in New York v. United States (1992)]. But Judge Urbaum would countenance none of this kind of argument, agreeing both initially (in Sec. C, p. 4 of CCN v. NRC) and later (on p. 18) with the position of U.S. Ecology [How did this private firm get in here again, ruling as an authority on its own regulated activities?] and with the [self-preserving] position of the Compact Commission that CCN's Count Nine raised "political questions" that the District Court lacked authority to adjudicate.

For this position the Judge first cited Baker v. Carr, 396 U.S. 186 (1962), and then as "the most persuasive authority against CCN's argument" the Report of the U.S. House of Representatives' Committee on Interior and Insular Affairs entitled Granting the Consent of the Congress to the Central Interstate Low-Level Radioactive Waste Compact (1985). Essentially, the Judge felt himself caught in a major political controversy, one whose parameters outlined to him

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; ... [quoting Baker v. Carr (1962) at 217; from CCN v NRC (1990) at 5].

In other words, it was one thing to take even a "hard look" at agency decision-making on the formulation of performance

standards, and quite another to take on the destruction of a whole system Congress had devised -- rightly or wrongly -- for attempting to handle one of the most intractable problems of science and technology policy of the post-World War Two era.

Moving on to the tangentially related Tenth Count by CCN, Judge Urbaum finds no merit in the CCN claim that the NRC and NDEC have violated the LLRWPAA of 1985 and the NLLRWDA of 1986 by failing to adopt regulations excluding from the proposed site military-related waste from the Sequoyah Fuels nuclear-reactor fuel-production plant in Oklahoma. The Judge determines that the relevant law to be looked to is state law, that Nebraska has passed such a prohibiting law in 1989, and that the rest of the Compact must rely on a "good-faith performance" by Oklahoma not to mix military and nonmilitary waste when it ships it to the new facility in Nebraska. Considering that the NRC has also granted itself the power to reclassify waste in a "national emergency" in such a manner that almost anything could potentially be sent to the new facility, it is no wonder that CCN and its members were more than a little concerned about the "good faith" of Oklahoma, and the ultimate intentions of the NRC, given that the proposed facility in Nebraska might soon become -- if constructed -- the only such facility in the whole United States, should the owners and operators of the Barnwell, South Carolina, facility choose to close that one down at last. Stating that "CCN has shown me no facts or reasons to believe that Oklahoma will not abide by the provisions of the compact," Judge Urbaum

plays the innocent here and really does not come to grips in his opinion with the realities of disagreement, noncooperation, and outright deception which have become the norm rather than the exception among the states and the federal government since 1979 in the field of low-level radioactive waste disposal (see Appendix A, page 31, below).

CONCLUSIONS

There are two very different but highly interrelated things going on in this case, and our ability to understand them simultaneously by means of a case study gives an important perspective on the work of the courts, as well as on the evolution of the law, in our society. For CCN's Lead Counsel and his staff, the purpose of the case was to put non-natural radiation on trial in Nebraska, a purpose shared and supported by many people both in Nebraska and nationwide in the environmental movement. This purpose was basically detected and immediately thwarted by Judge Urbaum even before he began writing his opinion. Since this was a Motion to Dismiss, the law required the Court to take the facts as alleged by Plaintiffs to be true. But, from the outset, Judge Urbaum did not even do this, preferring to challenge the facts in his Motion to Dismiss opinion without allowing the case to go to trial (and thus precluding a discovery process which certainly would have established further facts), or even to go to a hearing (where all factual matters would be up for challenge and proof). By then

going on to deny "fundamental" status at the very start of his opinion to CCN's claim of a fundamental right to a healthful environment, the Judge set up the grounds for existing federal and state performance standards to need to pass only the weakest of rationality tests (rather than the much stronger tests needed to be met under "fundamental-rights" status), thereby undermining the rest of CCN's case.

As an immediate judicial strategy, this approach met the challenge of the environmental-activist positions clearly intended in the arguments of CCN, at least through another legal round in the Circuit Court of Appeals two years later [CCN v. NRC, 970 F 2d 421 (8th Cir 1992)]. Here Judge Urbaum's decisions to dismiss various Counts in CCN's Complaint were all affirmed, and his finding of jurisdiction even to consider CCN's statutory challenges to certain NRC regulations was, moreover, reversed. But this may not be the last we hear of this case, for the U.S. Supreme Court has laid down some formidable new markers on the constitutionality of at least the take-title provisions of the LLRWPAA of 1985, and the Compact system as a whole is coming under increasing challenge, noncooperation, and criticism as a classic example of a failed federalism in all its incarnations. No new low-level radioactive waste facilities are being opened, or even begun to be constructed, and the only existing one still open -- in Barnwell, South Carolina -- is now charging ten times what it used to to receive any additional low-level radioactive waste from the other states (see the Page One article by Robert

Reinhold in The New York Times of December 28, 1992, entitled "States, Failing to Cooperate, Head for Crisis Over Low-Level Nuclear Waste" included as Appendix A below).

This case study has illustrated for a key issue sub-area both how complex the legislative history behind an intractable problem can be, and how acrimonious the application of three generations of federalism models can become in the law and in the public-policy process, when the fundamental issue is a life-threatening one. But this case study has also illustrated how within the more general area of health-safety and environmental risk regulation a virtual revolution in law and public policy is brewing over responsibility for, and acceptable solutions to, the environmental consequences of half a century of mounting hazardous-substance risk-sharing. With issues at stake which immediately put the discussion on a life-and-death level, it is only to be expected that ever-increasingly the arguments and demands being made by threatened citizens will take on a rights-and-duties philosophical hue. For the citizen of the immediate future will be driven to a fuller consciousness of risks and a more militant participation in the law and policy process itself, by the perception of multiple threats to his or her very existence -- as well as to the existence of future generations. So driven, this citizen will be in no mood to take "no" for an answer to demands for equity and life protection put to elected representatives in our state and federal governments.

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Subpart D—Technical Requirements for Land Disposal Facilities

§ 61.50 Disposal site suitability requirements for land disposal.

(a) Disposal site suitability for near-surface disposal.

(1) The purpose of this section is to specify the minimum characteristics a disposal site must have to be acceptable for use as a near-surface disposal facility. The primary emphasis in disposal site suitability is given to isolation of wastes, a matter having long-term impacts, and to disposal site features that ensure that the long-term performance objectives of subpart C of this part are met, as opposed to short-term convenience or benefits.

(2) The disposal site shall be capable of being characterized, modeled, analyzed and monitored.

(3) Within the region or state where the facility is to be located, a disposal site should be selected so that projected population growth and future developments are not likely to affect the ability of the disposal facility to meet the performance objectives of subpart C of this part.

(4) Areas must be avoided having known natural resources which, if exploited, would result in failure to meet the performance objectives of subpart C of this part.

(5) The disposal site must be generally well drained and free of areas of flooding or frequent ponding. Waste disposal shall not take place in a 100-year flood plain, coastal high-hazard area or wetland, as defined in Executive Order 11988, "Floodplain Management Guidelines."

(6) Upstream drainage areas must be minimized to decrease the amount of runoff which could erode or inundate waste disposal units.

(7) The disposal site must provide sufficient depth to the water table that ground water intrusion, perennial or otherwise, into the waste will not occur. The Commission will consider an exception to this requirement to allow disposal below the water table if it can be conclusively shown that disposal site characteristics will result in molecular diffusion being the predominant means of radionuclide movement and the rate of movement will result in the performance objectives of subpart C of this part being met. In no case will waste disposal be permitted in the zone of fluctuation of the water table.

(8) The hydrogeologic unit used for disposal shall not discharge ground water to the surface within the disposal site.

(9) Areas must be avoided where tectonic processes such as faulting, folding, seismic activity, or vulcanism may occur with such frequency and extent to significantly affect the ability of the disposal site to meet the performance objectives of subpart C of this part, or may preclude defensible modeling and prediction of long-term impacts.

(10) Areas must be avoided where surface geologic processes such as mass wasting, erosion, slumping, landsliding, or weathering occur with such frequency and extent to significantly affect the ability of the disposal site to meet the performance objectives of subpart C of this part, or may preclude defensible modeling and prediction of long-term impacts.

(11) The disposal site must not be located where nearby facilities or activities could adversely impact the ability of the site to meet the performance objectives of subpart C of this part or significantly mask the environmental monitoring program.

(b) Disposal site suitability requirements for land disposal other than near-surface (reserved).

§ 61.51 Disposal site design for land disposal.

(a) Disposal site design for near-surface disposal.

(1) Site design features must be directed toward long-term isolation and avoidance of the need for continuing active maintenance after site closure.

(2) The disposal site design and operation must be compatible with the disposal site closure and stabilization plan and lead to disposal site closure that provides reasonable assurance that the performance objectives of subpart C of this part will be met.

(3) The disposal site must be designed to complement and improve, where appropriate, the ability of the

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Attachment 4
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appropriate authority of the state of Nebraska issues a license or permit for the operation of a low-level radioactive waste disposal facility in the state of Nebraska which is accessible to the members of the central interstate low-level radioactive waste compact, and its publication in the statute book.

which is at a site that meets the criteria of 10 CFR 61.50 (a)(5) and all other applicable criteria and

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