The Low-Level Radioactive Waste Policy Act and the Tenth Amendment: A "Paragon of Legislative Success" or a Failure of Accountability?

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INTRODUCTION

During the last century, government regulation of radioactive waste has evolved from simple neglect to a system of detailed regulations enforced by powerful regulatory agencies. Meanwhile, public reaction to radioactive waste has grown from naive ignorance to intense fear and skepticism of the effectiveness of both the regulations and the agencies. As the regulators' and the public's understanding of the long-term dangers of exposure to radiation increased, so did the demand for effective and comprehensive waste disposal systems. By the late 1970's, the disposal sites that had been used since World War II were found to be either ineffective or at capacity. Therefore, in 1980, Congress created the Low-Level Radioactive Waste Policy Act (LLRWPA)\(^2\) which gave the states responsibility for low-level radioactive waste disposal.\(^3\) This legislation was ultimately unsuccessful in promoting states' responsibility for radioactive wastes generated within their boundaries. As a result, in a second attempt to secure long-term disposal options, Congress passed the Low-Level Radioactive Waste Policy Act Amendments of 1985 (LLRWPA).\(^4\) The Amendments included developmental milestones

2. Pub. L. No. 96-573, § 2, 94 Stat. 3347, 3347 (1980) (codified in scattered sections of 42 U.S.C.). Low-Level Radioactive Waste (LLRW) is radioactive material that (A) is not high-level radioactive waste, spent nuclear fuel, or byproduct material defined under the Atomic Energy Act of 1954 as naturally-occurring or accelerator-produced radioactive materials (NARM), and (B) that the Nuclear Regulatory Commission classifies as LLRW in accordance with (A). 42 U.S.C. § 2021b (9) (1988).


and financial incentives to encourage states to site disposal facilities, as well as sanctions for non-compliance.\(^5\) Many states objected to its harshest measure, the "take title" provision,\(^6\) as a violation of state sovereignty under the Tenth Amendment. Moreover, the process by which this provision was adopted created additional state concerns about the validity of this portion of the Act.

In 1992, in *New York v. United States* the Supreme Court agreed with the states and held that the provision impermissibly intruded on state sovereignty.\(^7\) This decision was the third shift in the Court's Tenth Amendment jurisprudence in fifteen years. The Court rejected its immediately prior doctrine—that the political process adequately protects state sovereignty and that there should be no substantive review of federal intrusions of state sovereignty. The take title provision illustrates impermissible congressional intrusion into state sovereignty. The provision is intrusive not merely because of its content, but also because that content was reached without effective state participation.

This paper traces the early history of radiation and radioactive waste disposal and ultimately focuses on the Low-Level Radioactive Waste Policy Act Amendments of 1985. Part I provides some background on the discovery and early uses of radiation. Part II describes prior methods of radioactive waste disposal and federal efforts to control the uses and disposal of such waste. Part III discusses the 1980 Act and some reasons for its ineffectiveness. Part IV describes the adoption of the 1985 Amendments and the major provisions of the Amendments. Part V explores the Tenth Amendment tensions between the authority of the federal government and the sovereignty of the states in regard to two key provisions of the LLRWPA: the below regulatory concern (BRC) and the take title provisions. Part VI applies public choice, due process of legislation, and republican decision-making theories to the LLRWPA. Finally, Part VII proposes guidelines for the review of federal-state sovereignty claims that include review of both the substance of the regulation and the adoption process.

I

THE DISCOVERY AND EARLY USES OF RADIATION

In 1895, Wilhelm Conrad Rontgen, building upon the discoveries of several colleagues,\(^8\) identified the existence of radioactive emissions at his

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\(^{6}\) Under the take title provision, if a state or group of states (a compact region) is unable to provide for the disposal of the LLRW generated within its jurisdiction by January 1, 1996, the generating state must take title to the waste. See *infra* part III.B.2.


\(^{8}\) Rontgen is often spelled Roentgen in writings and historical documents. Roentgen is
laboratory at the University of Wurzburg in Germany. His discovery sparked nearly immediate scientific and public interest. Within five days the European press began speculating about the future medical uses of the substance, and as early as 1896 X-ray photographs were accepted as courtroom evidence.

Medical uses of radiation developed slowly. Disturbed by seeing skeletal images produced by the "death rays," doctors and scientists did not initially embrace the new technology. By 1917, however, X-rays were commonly used as diagnostic instruments for viewing bone fractures and kidney stones. In the interim, some therapists used X-rays to treat skin cancers, acne, eczema, skin tuberculosis, and excess hair growth on women's faces. Other medical uses of radiation included irradiating enlarged tonsils and women's breasts.

During the first decades after the discovery of radiation, there was little government or other control of its uses. It was widely used for entertainment purposes and in consumer products. Oblivious to its hazards, the public willingly submitted to exposure to both low-level and high-level radiation which far exceeded current regulations. Vaudeville showmen used X-ray demonstrations on volunteers from the audience to fascinate the crowds. Department stores X-rayed customers' feet to determine shoe size. Patent medicines, bottled waters, and prescription drugs containing radiation were sold as cures for rheumatism, hypertension, lagging sexual powers, arthritis, gout, sciatica, and diabetes. In addition, radioactive materials were added to toothpaste to brighten teeth, were incorporated into kitchen faucet devices through which tap water percolated, and were used as an ingredient in chocolate candy. Although the United States Government initiated controls of radiation in consumer

the anglicized spelling of his name and has been the adopted spelling for the unit of radiation dose: roentgen.

9. Michael E. Burns & William H. Briner, Setting the Stage, in LOW-LEVEL RADIOACTIVE WASTE REGULATION: SCIENCE, POLITICS, AND FEAR 1, 2-3 (Michael E. Burns ed., 1988) [hereinafter SCIENCE, POLITICS, AND FEAR]. The word "radioactivity" was proposed by Marie Curie in 1897. Prior to that, the emissions were known as X-rays ("X" for the unknown in algebra), Roentgen's rays or Becquerel's rays. Id. at 3, 41 n.7. For a history of the discoveries and uses of radioactive substances, see id. at 1-45.

10. Id. at 9.

11. In 1896, a University researcher helped a gunshot victim win a suit in a Canadian court against the man who shot him by proving with an X-ray that a bullet was indeed lodged in his leg despite several unsuccessful attempts to locate it with a surgical probe. Id. at 10. The first use of X-ray technology in a U.S. courtroom was in Miller v. Dumon, 64 P. 804 (Wash. 1901), a malpractice case in which an X-ray photograph was used to prove that a physician failed to diagnose leg-bone fracture.

12. Burns & Briner, supra note 9, at 11.

13. Id.


15. Burns & Briner, supra note 9, at 24.

16. Shrader-Frechette, supra note 14, at 32.
products in 1932, as late as 1953, one American company was still advertising a contraceptive jelly containing radium.\textsuperscript{17}

\section*{II  
RADIOACTIVE WASTE DISPOSAL UNTIL 1980}

During the early years of radiation and nuclear energy research, radioactive waste did not receive much attention from scientists, regulators, or the public. For instance, even those few who knew of the Manhattan Project\textsuperscript{18} and the unspecified tons of radioactive waste it generated did not object when the federal government disposed of these wastes by "open burning, shallow land burial, closed incineration, evaporation, pouring wastes into the sewer system, or storing them for later disposal."\textsuperscript{19} Without furor, the Atomic Energy Act (AEA) of 1946 created the Atomic Energy Commission (AEC)\textsuperscript{20} and charged the agency with the development and control of atomic energy uses and was legally responsible for all aspects of radioactive waste disposal.\textsuperscript{21}

Nonetheless, disposal of radioactive materials remained largely unregulated until 1976 when the chemical waste disaster at Love Canal, NY, triggered widespread reassessment of hazardous waste disposal practices.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{17} Burns & Briner, \textit{supra} note 9, at 24.
\item \textsuperscript{18} The discovery of the neutron in 1932 launched research into military uses of radiation and increased government secrecy regarding radiation research and uses in the United States. \textit{Id.} at 19-21. Fission allowed chain reactions to release huge amounts of nuclear energy, and several countries including Germany, France, Japan, the Soviet Union, and the United States began developing atomic weapons prior to World War II. In the United States, this effort, known as the Manhattan Project, began in earnest after the Japanese bombed Pearl Harbor in 1942. \textit{Id.} at 20-21. To promote the technological development of nuclear energy, the federal government built research centers in Tennessee, New Mexico, and Washington state. It placed these centers under strict military control and secrecy. The Manhattan Project detonated the world's first atomic bomb in July, 1945, in a New Mexico desert. One month later, when the project culminated with the dropping of the first atomic weapons on the Japanese cities of Hiroshima and Nagasaki, the world became aware of the potential dangers of radiation. \textit{Id.} at 21-22.
\item \textsuperscript{19} \textit{Id.} at 29.
\item \textsuperscript{20} Atomic Energy Act of 1946, 42 U.S.C. § 2011 (1988). Under the terms of the Energy Reorganization Act of 1974, the Nuclear Regulatory Commission (NRC) replaced the AEC as the licensing and regulatory authority. \textit{Id.} §§ 5801, 5842. The Energy Research and Development Administration (ERDA), which became part of the Department of Energy, took over atomic weapons research and development functions. \textit{Id.} § 5811.
\item \textsuperscript{21} Burns & Briner, \textit{supra} note 9, at 30. However, the AEC failed to devote significant resources either to waste disposal research or to the development of a national radiation waste policy. \textit{Id.} at 29. Underlying the disposal methods adopted by the AEC was the "dilute and disperse" philosophy which advocated minimizing the radiation dose to individuals by diluting and dispersing the radioactive materials. \textit{Id.} at 28-29.
\item \textsuperscript{22} \textit{Id.} at 29.
\end{itemize}
A. Control and Disposal Practices Under the AEC: 1946 - 1959

Shallow land burial, still the most common method of low-level radioactive waste (LLRW) disposal, was the primary method used by the AEC. Major commercial disposal sites were developed in the 1940's and 1950's at Hanford, WA; Idaho Falls, ID; Los Alamos, NM; Oak Ridge, TN; and Savannah River, SC. In keeping with the level of shallow land burial technology existing at that time, liquid and solid radioactive wastes were dumped into unlined trenches, covered with excavated soil, and left to decay. In the 1950's, scientists discovered that radioactive liquid wastes had leached into off-site groundwater and drinking water systems, and that occasional chemical reactions and explosions resulted from improper storage of non-containerized waste mixtures. In 1972, a worker described the disposal procedure for low-level radioactive waste at the Idaho Falls burial site:

The way that they dispose of their radioactive waste is, they take heavy equipment and they go out and they dig a trench. They put the smaller particles in a pasteboard box and the rest of the stuff is dumped directly into the ground.

Ocean dumping was approved by the AEC in 1946 and became another popular form of radioactive waste disposal. EPA Deputy Regional Director Paul Keough remarked in response to recent findings of radioactive contamination in parts of Massachusetts Bay: "This was material that was so bad we couldn't find anywhere on land to dump it and so we figured let's dump it in the deepest part of the ocean and don't worry

23. Id. at 30.
24. Id. at 29.
25. Id. at 35. For example, at the Oak Ridge National Laboratory, "[d]ifferent procedures were used for different radionuclides. Alpha emitters were placed in pits and covered first with a foot of earth, then with 18 inches of concrete to prevent accidental future intrusions; after this, additional dirt was added to bring the cover to ground level. Beta- and gamma-emitting wastes were placed in trenches 200 feet long, 10 feet wide, and 15 feet deep. Wastes were dumped in one end of the trench and covered by three or more feet of earth. Extremely radioactive materials were dropped into 15-foot-deep augured holes to minimize the exposure of site personnel. The early disposal sites were relatively small and poorly located without benefit of geologic exploration. Though records were kept of the contents of each trench, many of these records were reportedly destroyed in a fire in 1959." Id.
26. Id. at 36, 38; see infra note 45 and accompanying text.
27. Burns & Briner, supra note 9, at 30. In addition to creating hazardous conditions for the surrounding communities, these facilities exposed workers to extremely dangerous radiation levels. For example, tests conducted at the Oak Ridge National Laboratory disposal site revealed that one pit had a radiation level at its edge of 1000 millirems/hour. (A millirem is a 1000th of a Rem, while a Rem (Roentgen Equivalent Man) is a measure of a radiation dose and its biological impact). Lipshutz, supra note 2, at 13. At that dose rate, a worker could remain at the edge of the pit for only 27 seconds per hour without exceeding the occupational exposure limit of 7.5 millirems/hour. Burns & Briner, supra note 9, at 37. Currently the permissible occupational dose is 3 rems/quarter. 29 C.F.R. § 1910.96 (1992).
28. Lipshutz, supra note 2, at 129.
about it." Between 1946 and 1967, the United States dumped approximately 90,000 radioactive waste containers, generally 55-gallon drums, into the Atlantic and Pacific Oceans and the Gulf of Mexico. It is estimated that more than a quarter of these containers may have ruptured. A Congressional Representative noted that:

From 1946 until the early 1960's, we sealed our radioactive trash in 55-gallon drums, rolled them off the decks of boats, and watched as they slowly sank to the bottom of the sea. Once out of sight, we let the problem of low-level radioactive waste drift quietly out of our minds.

The need for greater disposal capacity became more acute when private entrepreneurs began generating radioactive wastes. In 1954, Congress revamped the AEA to permit the development of non-military applications of atomic energy, such as commercial nuclear power plants and radioisotopes for medicine and research. Chapter 1 of the Atomic Energy Act of 1954 explicitly authorized the AEC to promote the use of radioactive substances in commercial enterprises:

The development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

The inclusion of commercial generators in the radioactive waste stream called for new types of regulatory controls and disposal protocols. In 1962, reacting to industry pressure to open a new waste disposal mar-
ket, the AEC allowed commercial firms to operate radioactive waste disposal sites under federal regulatory programs or equivalent “agreement state” authority.35

B. Control of LLRW Disposal by “Agreement States”: 1959 - 1980

A 1959 amendment to the AEA of 1954 authorized the development of “agreement states.”36 Such states were allowed to regulate their own LLRW disposal programs so long as the programs were at least as stringent as the federal regulations and were reviewed and approved by the AEC. One AEC official opposed the recognition of “agreement states,” incorrectly predicting that, “[i]f states assume jurisdiction of this matter (low-level radioactive waste disposal) each state would want a burial site within its borders.”37 Other agency officials advised federal oversight because they felt that states were not qualified to provide long-term supervision of waste sites and that waste disposal could be managed most efficiently on a regional basis.38

The “agreement state” arrangement did not lead to the proliferation of LLRW disposal sites. In 1962 and 1963, the first privately-operated commercial LLRW disposal sites opened in Beatty, NV, and Maxey Flats, KY.39 Over the next nine years, the states of New York, Washington, Illinois, and South Carolina opened commercial sites.40 However, while in the early 1970’s there were six LLRW disposal sites, by the end of the decade, only three sites remained to serve the nation’s LLRW disposal needs.41 In the mid-1970’s, scientists identified serious problems with the environmental stability of the Kentucky, Illinois, and New York sites. Unstable waste forms, leaking containers, and faulty facility siting, design, and operations all contributed to the problem.42 For example, waste from the West Valley, NY, site led to heightened levels of radioactivity in Lake Erie and Lake Ontario.43 EPA found that plutonium from the Maxey Flats site had leaked into surface soils, monitoring wells, and drainage streams, despite early assurances from the site operator that

35. Burns & Briner, supra note 9, at 39.
36. Id.
38. Burn & Briner, supra note 9, at 39.
42. Id. at 441.
43. LIPSHUTZ, supra note 2, at 124.
such leakage could not occur.\textsuperscript{44} At all of these sites, radioactive wastes migrated off-site into the groundwater.\textsuperscript{45} For example, the radionuclide tritium was detected in domestic well water and cow's milk samples near the Maxey Flats, KY, site prior to its closure. Soil studies at the West Valley, NY, site revealed plutonium contamination 60 feet from the nearest plutonium disposal site; radioactive concentrations in the soil surrounding the site ranged to 1000 times the maximum permissible off-site concentrations allowed by the Nuclear Regulatory Commission.\textsuperscript{46} Although health risk assessments at these sites indicated that the public exposure to radiation was below harmful levels,\textsuperscript{47} the fact that any contamination migrated off-site is indicative of the often poor hydrology or geology at these locations, which were chosen more for their proximity to weapons-production operations than for their environmental suitability.\textsuperscript{48}

\section*{C. The Aftermath of Three Mile Island}

A series of events in 1979 focused new attention on LLRW storage. The March accident at the Three Mile Island nuclear power plant generated large quantities of LLRW, which had to be shipped to the remaining disposal facilities in South Carolina, Nevada, and Washington.\textsuperscript{49} In July, Nevada's governor temporarily closed that state's disposal site after improper waste hauling practices resulted in two accidents involving LLRW haulers.\textsuperscript{50} One truck passed through the gates of the site with its shipment of waste on fire. A second truck, loaded with wastes from a nuclear power plant, arrived with a leaking cargo. In December, after the temporary plant closure, several waste drums were found buried outside the facility's boundary fence. Washington's governor temporarily closed that state's site in October for similar safety violations.\textsuperscript{51}

Not surprisingly, the states with LLRW disposal sites objected to bearing the national burden of LLRW disposal.\textsuperscript{52} After the temporary Nevada and Washington closures, South Carolina took in approximately

\begin{itemize}
\item \textsuperscript{44} Id. at 132.
\item \textsuperscript{45} Radioactive Wastes: Buried Forever, LOW LEVEL WASTE PACKET (Nuclear Info. & Research Serv., Washington, D.C.), 1987, at 1.
\item \textsuperscript{46} Id.
\item \textsuperscript{48} See SHAPIRO, supra note 2, at 129.
\item \textsuperscript{50} H.R. Rep. No. 314, supra note 3, pt. 2, at 17.
\item \textsuperscript{51} Id; see also Contreras, supra note 47, at 512 n.194 (describing defective shipments which led to the temporary closure of the Richland, WA site); SHAPIRO, supra note 2, at 151-158 (discussing a state referendum to prohibit out of state waste and a court decision holding the referendum unconstitutional).
\item \textsuperscript{52} GAO, supra note 49, at 8.
\end{itemize}
eighty percent of the nation's LLRW. In October of 1981, Governor Riley of South Carolina ordered the site to limit by one-half the annual amount of waste that it accepted,\(^{53}\) and the three governors threatened to close their facilities permanently if federal action did not resolve this situation.\(^{54}\)

III

THE LOW-LEVEL RADIOACTIVE WASTE POLICY ACT OF 1980 AND THE 1985 AMENDMENTS

A. The 1980 Act

The states with LLRW disposal sites feared that the federal government would preempt their regulatory powers under the AEA's "agreement state" provisions.\(^{55}\) The Atomic Energy Act of 1954 preempted state authority to regulate the storage and disposal of radioactive wastes.\(^{56}\) By removing a state's ability to close their facilities, the federalization of facilities could force sited states to keep accepting LLRW against local wishes.\(^{57}\) The governors of the agreement states therefore proposed a unique solution to the LLRW disposal problem that Congress agreed to adopt: the formation of interstate compacts and the establishment of regional disposal sites.\(^{58}\)

The interstate compact proposal resulted in the LLRWPA of 1980, passed in the final hours of the 96th Congress.\(^{59}\) The Act promoted state responsibility for the disposal of LLRW, mandated the formation of regional compacts, and assured the three sited states that, if Congress rati-

53. SHAPIRO, supra note 2, at 153, 157.
54. Id. at 154.
55. 42 U.S.C. § 2021(j) (1988). "The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) has become effective, or upon request of the Governor of such State, may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in it under this Act, if the Commission finds that such termination or suspension is required to protect the public health and safety." Id.


fied the compacts, they could exclude waste from outside their regions by January 1, 1986.60 The Act incorporated the following recommendation of the National Governors' Association (NGA):

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 . . . and that the States are authorized to enter into interstate compacts, as necessary, for the purpose of carrying out this responsibility.61

B. The 1985 Amendments

No state or compact region developed a LLRW facility by the January 1986 deadline.62 "[T]he original 1980 act had failed because it lacked 'teeth' to ensure that States would not delay unnecessarily in accepting their disposal responsibilities."63 As long as the nonsited states knew that LLRW disposal sites would be available after 1986, there was little incentive for them to organize and approve compacts.64 Furthermore, the political reality of LLRW compacts was that members of Congress from states without disposal sites constituted a Congressional majority. Those members were unlikely to consent to any compact of sited states that could result in the closure of existing disposal sites.65 The LLRWPA, intended to compel Congress to ratify compacts to expand the availability of disposal sites, actually had the opposite effect.66 It resulted in a political quagmire for Congress and prevented the ratification of any compacts.67

In 1984, Congress began to renegotiate the deadlines set in the LLRWPA of 1980. To forestall a national emergency, Congress passed the LLRPWA of 1985 on the eve of the original deadline. Governor Riley of South Carolina testified in favor of the LLRPWA on behalf of the sited states:

The citizens of our three States feel that they have borne an unfair burden for far too long. . . . [W]e do insist upon fairness and we do insist that the nonsited States and regions step forward to assume the burden of handling their own waste. . . . [W]e are optimistic that the past legislative

60. Id.; Timothy Peckinpaugh, Politics of LLRW Disposal, in SCIENCE, POLITICS, AND FEAR, supra note 9, at 45, 47.
61. Berkovitz, supra note 41, at 443 (quoting the National Governors' Assoc.).
63. Id. at S18,114 (statement of Sen. McClure, referring to comments made by Gov. Gardner of Washington).
64. Peckinpaugh, supra note 60, at 49.
66. Peckinpaugh, supra note 60, at 49.
67. Id.
stalemate can indeed be broken and that we can all avoid a national crisis on low-level nuclear waste disposal. 68

Attempting to avoid a failure similar to that of the LLRWPA, Congress created strong incentives in the amended Act for state and regional compliance. The LLRWPAA of 1985 created developmental milestones for the nonsited states and compacts and imposed substantial penalties for missed milestones. If compact regions or states failed to meet a milestone, the generators of LLRW would pay disposal surcharges into an escrow account. 69 The surcharges would be returned to the region for site development activities, 70 or under certain conditions, returned directly to the generator. 71 If the region or state failed to meet a milestone for more than six months, access to the available disposal sites would be denied. 72 The ultimate power given to the sited states was their authority to exclude all LLRW shipments from outside their compact regions after January 1, 1993. Table A summarizes the amendments' major milestones and incentives. 73

70. Peckinpaugh, supra note 60, at 53.
71. Id.
72. See Michigan Coalition of Radioactive Material Users v. Griepentrog, 945 F.2d 150 (6th Cir. 1991), dismissed for want of jurisdiction, 954 F.2d 1174 (1992), for litigation regarding Michigan's failure to achieve mandatory milestones and subsequent denial of access to LLRW disposal sites.
73. Peckinpaugh, supra note 60, at 53.
<table>
<thead>
<tr>
<th>Deadline</th>
<th>Task to Be Completed</th>
<th>Penalty for Noncompliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/1/86</td>
<td>Join compact or indicate intent to develop own site.</td>
<td>First 6 months: double surcharge. After 6 months: access denied.</td>
</tr>
<tr>
<td>1/1/88</td>
<td>Complete detailed plan for siting of new disposal facility.</td>
<td>First 6 months: double surcharge. Second 6 months: 4 times standard surcharge. After 12 months: access denied.</td>
</tr>
<tr>
<td>1/1/90</td>
<td>File NRC license application for new disposal facility or certify that waste will be taken care of by 1993.</td>
<td>Access denied.</td>
</tr>
<tr>
<td>1/1/92</td>
<td>File license application for disposal facility.</td>
<td>Triple surcharges.</td>
</tr>
<tr>
<td>1/1/93</td>
<td>Provide disposal.</td>
<td>Access denied.</td>
</tr>
<tr>
<td>1/1/96</td>
<td>Provide disposal.</td>
<td>Take title.</td>
</tr>
</tbody>
</table>

In contrast to the “good faith” agreements relied upon by the 1980 Act, the milestones and incentives in the 1985 amendments provide a significant positive coercion. Congress reasonably concluded that such measures were necessary to ensure compliance.75

The states supported the surcharges and milestones as incentives toward compliance. In early hearings on the amendments, the states proposed a framework of “tough but doable” new provisions including the following:

- Continued access to existing sites during an adequate transition period (i.e., until Dec. 31, 1992);
- Stiff, but reasonable, surcharges for disposal by producers of LLRW in states and regions without disposal facilities;
- Specific milestones which would indicate progress achieved in developing new disposal facilities;
- Absolute volume caps at the three existing disposal facilities (designed to encourage generators to minimize wastes); and
- Limitations on further Congressional review of the compact system, thereby assuring states and generators local control.76

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74. Adapted from Peckinpaugh, supra note 60, at 53.
75. CONG. REC., Dec. 19, supra note 62, at S18,108 (statement of Sen. Bradley (NJ)).
76. House Hearings, July 18, 1985, supra note 32, at 194 (testimony of Terry Lash, Director, IL Dep’t of Nuclear Safety; Commissioner, Cent. Midwest Interstate Low-Level Radioactive Waste Compact Comm’n).
The explicit goal of the LLRWPAA was to keep the responsibility for LLRW disposal with the states. The drafters of the legislation believed that the deadlines were reasonable and that compact regions and/or states had sufficient time and resources to develop LLRW disposal sites. States actively lobbied for the bill; in fact, the National Governors' Association provided much of the core language adopted into law by Congress.

Despite the fact that states strongly supported the bill and actively lobbied for its passage, states eventually claimed that they had been "simply ordered by Congress to take part in this activity." Two aspects of the LLRWPAA of 1985 triggered widespread dissent, even from the states that strongly supported its drafting: (1) the deregulation of LLRW considered to be "below regulatory concern," and (2) the 'take title provision added during the final hours of Senate debate. The debate and litigation over these two issues highlight fundamental tensions between the state and federal governments.

1. Below Regulatory Concern

The below regulatory concern (BRC) provision of the LLRWPAA provided the first issue of major controversy between the state and federal governments. Section 10 of the LLRWPAA charged the Nuclear Regulatory Commission (NRC), an agency developed to succeed the AEC, with identifying and exempting from disposal regulations those radioactive wastes deemed BRC. Pursuant to this section, the NRC defines BRC as a level of radiation exposure below which the associated risk to public health will be small and the effort and costs to further reduce risk would not be warranted, given the amount of additional risk reduction to be achieved.

The NRC issued a BRC policy implementation plan in 1986, announcing its intention to declare certain types of radioactive waste as BRC. The agency proposed a rulemaking to allow radioactive waste

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79. Berkovitz, supra note 41, at 443.
82. See supra note 20.
generators to petition the NRC to exempt BRC wastes from LLRW disposal regulations.\textsuperscript{85} Generators could dispose of BRC waste as municipal solid waste rather than sending it to licensed LLRW disposal facilities. Pursuant to the 1986 plan, the NRC issued an initial policy statement on LLRW exemptions in 1988.\textsuperscript{86} This statement suggested that the NRC would exempt as below regulatory concern wastes that would cause exposures a level of 1 to 10 millirem\textsuperscript{87} per year or less.\textsuperscript{88}

In the policy statement, the NRC used a cost-benefit ratio to calculate allowable public exposure to BRC waste. The proposal policy suggested that the following two principles be used to exempt LLRW from regulation:

1. The application or continuation of regulatory controls on the practice does not result in any significant reduction in the dose received by individuals within the critical group [i.e., the group expected to receive the highest exposure] and by the exposed population or

2. The costs of the regulatory controls that could be imposed for dose reduction are not balanced by the commensurate reduction in risk that could be realized.\textsuperscript{89}

The agency weighed the dollars saved by not regulating BRC wastes against the health effects of additional radiation exposure.\textsuperscript{90} At the 10 to 100 millirem per year exposure level, the NRC did not expect any measurable adverse impact on the public health.\textsuperscript{91} It noted that the public already engaged in voluntary exposure to LLRW through daily activities.\textsuperscript{92} Slight additional exposures would not pose significant additional

\textsuperscript{85} Id.
\textsuperscript{87} For a definition of rem and millirem, see supra note 27.
\textsuperscript{91} See Nuclear Regulatory Comm'n, Below Regulatory Concern (NUREG/BR-0157), at 12, 14 (undated) [hereinafter BRC] (emphasis added).
\textsuperscript{92} For example, living in Denver, CO, rather than Washington, DC, increases exposure to radiation by 70 mrems/year; living in a brick rather than a wood home increases exposure
risk. The EPA estimated that the nuclear and medical industries could save up to $620 million annually by exempting BRC from the LLRW stream. 93

The BRC policy statement became effective in 1990 and provided agency guidance for deciding whether to exempt the following activities from LLRW disposal requirements:

- the unrestricted public use of lands and structures containing residual radioactivity;
- the distribution of consumer products containing small amounts of radioactive material;
- the disposal of very low-level radioactive waste at other than licensed disposal sites; and
- the recycling of slightly contaminated equipment and materials. 94

Through this policy statement, the NRC appeared to preempt local land use and solid waste management authority by requiring the acceptance of BRC waste at solid waste landfills under the jurisdiction of state, county, and city governments. The NRC declared that it considered the BRC policy a matter of "compatibility" with states. 95 The NRC expected the states, if they attempted to regulate in this field, to establish criteria identical to the NRC's. 96 The statement also prohibited states from continuing to regulate practices that the NRC decided to deregulate, 97 and allowed the recycling of nuclear reactor parts into consumer products. 98

A flood of resistance issued from state and local governments, as well as from environmental and consumer advocates. State and local officials decried the policy statement as the discretionary use of agency preemptive authority beyond that delegated by Congress. 99 As one state agency official testified:

[A]s a state solid waste policy maker, I am concerned about NRC pre-emption of state authority to manage its wastes under the Resource Conservation and Recovery Act (RCRA), federal regulations and our own

by 10 mrems/year; and a round-trip cross country flight increases exposure by five mrems/year. The average annual exposure is estimated to be 300 mrems. Id. at 10.

93. Foutes, supra note 90, at 10.
96. Id.
98. BRC, supra note 91, at 1.
State solid waste statutes and regulations. To not allow states the right to make more stringent demands on the waste streams entering landfills would be a clear repudiation of precedents allowing states to regulate so-called problem wastes.100

The states worried that their existing problems in siting and regulating landfills would be intolerably exacerbated if the landfills were forced to accept deregulated radioactive wastes. Governor Wilson of California stated,

[P]ublic concern and opposition to the siting and building of landfills would surely be heightened as a result of the new BRC policy. This policy is clearly not sensitive to the problems of state and local officials who must deal daily with the complications of the waste disposal issue.101

The agency was forced to defend itself in litigation102 and against legislative attempts to limit its authority over BRC waste disposal.103 In addition, extensive press coverage exacerbated the harsh public and local elected officials' attitudes towards the BRC policy.104 In 1991, under extreme pressure, the agency imposed a moratorium on all attempts to implement the policy and simultaneously convened a process to provide final advice to the Commission addressing the interests of the disparate interest groups.105

2. The Take Title Provision

The take title provision of the LLRWPA is the second issue of major tension between states and the federal government. It specifies that if a compact region or state is unable to provide for the disposal of the LLRW generated within its jurisdiction by January 1, 1996, the generating state shall:


102. Public Citizen v. NRC, 940 F.2d 679 (D.C. Cir. 1991) (holding that the BRC issue was not ripe for review, and that the policy statement did not immediately require an environmental impact statement).

103. H.R. 645, 102d Cong., 1st Sess. 20 (1991) (proposing "[t]o amend the Atomic Energy Act of 1954 to authorize the states to regulate the disposal of LLRW for which the NRC does not require disposal in a licensed facility.").


The take title provision was offered as an amendment by Senator Thurmond of South Carolina during the final vote on the LLRWPAA. The bill, as it passed the House, did not include the take title provision. The legislative history of H.R. 1083, the LLRWPAA bill considered by the House, reveals that the only recorded discussion of a take title provision is in testimony presented by the NRC at hearings before the House Committee on Energy and Commerce in July, 1985. The following testimony was neither questioned nor discussed by the committee members:

[I]n the view of the NRC staff, there may still be room for an alternative penalty to denial of access for missing milestones. Specifically, we hope Congress can develop an alternative that would enable non-sited states and compact regions to avoid the potential risks to public health and safety posed by a loss of access to existing disposal capacity. . . . A possible alternative to the loss of disposal site access would be a commitment, backed by legally-enforceable contracts with waste generators, that the state will take title to the waste . . . .

The take title provision was discussed in Senate hearings and in responses to post-hearing questions. One week prior to the final vote, however, the provision still lacked support from either the Senate Committee on Energy and Natural Resources (considering S. 1517) or the Senate Environment and Public Works Committee (considering S. 1578). Despite this negative response, Senator Thurmond, having gar...
nered last minute support from the chairs of both committees, resurrected the amendment during the full Senate’s final vote on December 19, 1985.114

Thus, the take title provision was not carefully discussed in nor adopted by the House and Senate committees, the principal public forums in which the states participate. The final amendment, a last minute deal between federal legislators to which the states could not object, imposed significant additional penalties and liabilities on the states.115

The Senate viewed the take title provision as a punitive measure. The legislative record is replete with discussion of the need to strongly penalize the states that failed to meet developmental milestones in siting new disposal facilities.116 As Senator Johnston emphasized in his remarks in support of the amendment: “It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that.”117 Without additional incentives, the Senate feared that states would again fail to site LLRW disposal facilities. As another Senator stated presciently: “We don’t want this whole issue to resurface again in another few years.”118

Supporters of the amendment also argued that it did not impose penalties on states or compact regions for their failure to site new facilities. Rather, states would assume the risk of penalties in return for the benefits provided by the LLRWPAA.119 Once a compact region sited a facility, it could exclude from the facility any waste generated outside the region.120

Most states, on the other hand, interpreted the take title provision as an attempt by the federal government to regulate them directly, in violation of the Tenth Amendment. “If the combination of the commerce clause and the tenth amendment mean anything, it is that Congress’s power to regulate commerce does not include the power to regulate states in this fashion. . . . The commerce clause simply does not authorize Congress to aim punitive measures at the states in order to enforce federal commands.”121

114. Id. at S18,106, S18,116.
115. Sen. Thurmond outlined most of the amendment in a “Dear Colleague” letter circulated to the majority members of his committee one week prior to the final vote. CONG. REC., Dec. 19, supra note 62, at S18,106; Peckinpaugh, supra note 60, at S4-55.
118. Id. at S18,107 (statement of Sen. Hollings (SC)).
119. Id.
120. Peckinpaugh, supra note 60, at 48.
121. Amicus Brief of the Council of State Governments for Petitioner, New York v.
As a result, after unsuccessfully attempting to site a LLRW disposal facility in two rural counties, the state of New York challenged the LLRWPA under the Tenth Amendment. The Second Circuit ruled that the LLRWPA did not impermissibly impinge upon state sovereignty. It declared that the LLRWPA of 1980 “and its 1985 amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics.”

The United States Supreme Court granted certiorari to address whether Congress could compel the states to implement federal policy governing the disposal of LLRW, and whether Congress could impose title liability on states that fail to implement this federal mandate. New York v. United States was decided in June, 1992. The Court accepted the state's Tenth Amendment argument. When the Court announced its decision overturning the LLRWPA's take title provision, it heralded yet another shift in its Tenth Amendment doctrine. With New York, the Court offers a new approach to alleviating the tensions between federal and state governments by applying a “political accountability” test. The next section discusses this test, evaluating the New York decision in the context of evolving Tenth Amendment doctrine.

IV
TENTH AMENDMENT ANALYSIS OF THE LLRWPA
OF 1985

There is inherent tension between federal and state sovereignty under the Constitution. On the one hand, the Commerce Clause, the Spending Clause, and the Supremacy Clause provide the federal government with expansive powers over the states. On the other hand, the Tenth Amendment prohibits congressional action that treats states in a manner inconsistent with their constitutionally recognized independent status.
During the past two decades, the U.S. Supreme Court has wrestled with the proper scope of the Tenth Amendment in the federalist system by devising, amending, and partially or totally discarding several judicial tests for determining the proper scope of the Tenth Amendment. The traditional functions test offered the hope of a detailed rule for identifying substantive intrusions into state sovereignty but quickly proved confusing and vague. The Court replaced the traditional functions test with near total reliance on the political process to protect state sovereignty. This reliance did not satisfy the Court's states rights advocates, who, when presented with vociferous state objections to federal legislation, quickly crafted a new rule. The resulting political accountability test returns to a substantive check on congressional power, but without the precision (falsely) promised by the traditional functions test. As discussed in Parts V and VI below, the history of the LLRWPAA suggests both that the Court was right to reject total reliance on political accountability and that the Court should recognize that state participation in the adoption process tempers intrusions on state sovereignty.

A. The Traditional Functions Test

The New Deal era interpretation of the Tenth Amendment gave the federal government near-plenary powers over states. In 1976, the Supreme Court briefly departed from this analysis in Rehnquist's majority opinion in National League of Cities v. Usery. This decision limited congressional powers under the Commerce Clause.

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Justice Rehnquist outlined what became the confusing and incoherent doctrine known as the traditional governmental functions test. He

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131. "[Our task] 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.' New York, 112 S.Ct. at 2418 (1992) (quoting United States v. Butler, 297 U.S. 1, 63 (1936)).


135. For a critique of this test, see Zoe Baird, State Empowerment after Garcia, 18 URB. LAW. 491, 507 (1986).
formed a three part test for determining when federal legislation regulating commerce exceeds the independent limitations imposed by the Tenth Amendment. He concluded that a congressional enactment violated the Tenth Amendment if it regulated the "States as States," addressed "matters that are 'attribute[s] of state sovereignty,'" or "directly displac[ed] the States' freedom to structure integral operations in areas of traditional governmental functions."  

The opinion attempted to clarify which state "functions [were] essential to [a] separate and independent existence," so that Congress would not abrogate the states' otherwise plenary authority over them. However, the opinion offered no framework for identifying essential state functions. Instead it offered a "concededly incomplete" list of areas under state control, including fire and police protection, sanitation, public health, and parks and recreation. Rehnquist did, however, note two conditions that would clearly violate the Tenth Amendment: 1) forcing states to relinquish to the federal government control over important governmental activities by increasing the costs of compliance with federal mandates and 2) displacing state policies regarding the manner in which states structure delivery of the governmental services their citizens require.

Under the traditional functions test, the LLRWPA of 1985 would most likely be found unconstitutional. The Act fails the test in two ways. First, it undermines state sovereignty in matters that are indisputably state matters. The below regulatory concern provision directly infringes on traditional state land use and solid waste authority. Second, the LLRWPA substantially increases certain costs borne by the states. It puts states in a proverbial Catch-22: compliance with the LLRWPA imposes serious economic burdens on the states, yet failure to comply forces them to assume huge liability through the take title provision. Thus, anticipating negative legal and economic consequences regardless of their ability to comply with the LLRWPA, states have begun re-

137. *Id.* at 845-46 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)). "[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized." *Lane County*, 74 U.S. at 76.
139. *Id.* (citing *National League of Cities*, 426 U.S. at 851).
141. "Historically, state and local government have been responsible for solid waste disposal. . . . The BRC policy will erode state and local jurisdiction in this arena. Where states have clear authority over solid waste, we believe that they should have the authority to set standards, so long as they are not weaker than the federal requirements." *House Hearings, Sept. 12, 1991*, *supra* note 100, at 10 (testimony of R. David Myers; Deputy Secretary for Public Liaison, PA Dep't of Envtl. Resources). H.R. 645 would give states authority to regulate disposal of LLRW that the NRC decides to deregulate under its BRC policy. It also would rescind the NRC's 1990 BRC policy statement. Tousley Memorandum, *supra* note 97.
structuring their activities to buffer against the results. For example, the State of Connecticut felt compelled to enact a series of laws to implement the federal mandates, spent more than $6 million administering its early LLRWPAA responsibilities, and prepared to sue its own citizens in the event of civil disobedience against the federal imposition. ¹⁴²

States argued that LLRWPAA impermissibly allows Congress to use them as its agents to implement national policy. ¹⁴³ Such coercion of state finances and policy-making was deemed unconstitutional in National League of Cities:

This Congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs. . . . [The requirement] appears likely to have coerced the States to structure [certain activities] in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation. ¹⁴⁴

Commentators have found the traditional functions test unworkable, incoherent, ¹⁴⁵ and ambiguous. ¹⁴⁶ Citing its lack of clarity in defining traditional state functions, critics of the test have demanded a more precise test that would allow them to determine definitively whether federal legislation improperly infringes upon state functions. ¹⁴⁷

B. Garcia and Reliance on Procedural Safeguards

A series of Supreme Court decisions quickly limited the traditional functions test ¹⁴⁸ and the Supreme Court expressly overruled National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority. ¹⁴⁹ Justice Blackmun, the author of the majority opinion, attempted to avoid the type of haphazard results caused by the traditional functions test. He argued that the Framers of the Constitution intended that the


¹⁴³. See supra note 80 and accompanying text.


¹⁴⁶. Palumbo, supra note 133, at 604.

¹⁴⁷. Id. at 604-05 n.25.

¹⁴⁸. See Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc., 452 U.S. 264, 286-93 (1981) ("Nothing in National League of Cities suggests that the Tenth Amendment shields the states from pre-emptive federal regulation of private activities affecting interstate commerce.") (emphasis in original); Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 758-69 (1982) (holding that the constitutionality of a federal regulation does not hinge on whether the regulation encourages states to assume a regulatory role); Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 236-41 (1983) (upholding federal regulation that does not entirely override a "state's discretion to achieve its goals in the way it thinks best," but merely tests the state's program "against a reasonable federal standard"). Id. at 240.

fundamental limit on the Commerce Clause be one of process rather than result.\textsuperscript{150} Thus, Blackmun concluded that, "[s]tate sovereign interests ... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."\textsuperscript{151} He also reasoned that the traditional functions test provided a difficult, if not impossible, organizing principle for making necessary constitutional distinctions between congressional actions which do and do not violate the Tenth Amendment.\textsuperscript{152} He provided a litany of examples:

Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority are functions protected under \textit{National League of Cities}. At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility and provision of in-house domestic services for the aged and handicapped, are \textit{not} entitled to immunity.\textsuperscript{153}

Blackmun's procedural safeguards derive from the direct elections of the executive and legislative branches of the federal government. The framers, he argued, saw these elections as "at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument of preserving that residuary sovereignty."\textsuperscript{154} Other commentators note that the interaction among special interest groups and lobbies, the executive and administrative agencies, and the pertinent legislative committees creates a "government as whirlpool."\textsuperscript{155} This interaction produces enormous political clout and opportunity for state and local interests vis-a-vis the federal government.\textsuperscript{156} Summarized simply, the procedural safeguard analysis suggests that because Congress and the President are elected by state constituents, states' rights are adequately protected.\textsuperscript{157} Further, the states' institutional and policy inter-

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.} at 552 ("[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in the discrete limitations on the objects of federal authority.").
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} \textit{Id.} at 548-49.
  \item \textsuperscript{153} \textit{Id.} at 533-39 (citations omitted) (emphasis in the original).
  \item \textsuperscript{154} \textit{Id.} at 551-52 (quoting \textit{THE FEDERALIST} No. 62, at 408 (James Madison) (B. Wright ed., 1961)).
  \item \textsuperscript{155} JESSE H. CHOPER, \textit{JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT} 24 (1980). \textit{But see Baird, supra note 135, at 509 (suggesting limits of the national political process and arguing that the federal judiciary should protect the constitutive activities of states as separate sources of power).}
  \item \textsuperscript{156} CHOPER, \textit{supra} note 155, at 176.
  \item \textsuperscript{157} The Court has never articulated a procedural safeguards \textit{test per se}. "Although \textit{Garcia} left open the possibility that some extraordinary defects in the national political process would entitle the states to invoke the dormant commerce clause, nothing more has ever been decided in this area." (\textit{Id.} at 552).\textsuperscript{155}
\end{itemize}
ests are protected in the legislative process by the electoral and lobbying processes leading to the enactment of legislation.

The states' success in demanding and receiving hundreds of billions of dollars in federal grants, as well as exemptions from a wide variety of federally mandated obligations, is cited as proof of the effectiveness of these procedural safeguards. Given this apparent effectiveness, the Garcia court implied that if states desire to preserve any aspect of their sovereignty within the federal system, they must look to the national political process, and not the courts, for protection.

In keeping with the procedural safeguards analysis, many states participated in developing LLRWPAA and lobbied for its passage. The National Governors' Association prepared extensive suggestions for language that was inserted into the Act. As Congressmember Dingell observed:

I am encouraged by the progress which has been made under the auspices of the National Governors' Association. . . .

Flexibility and the spirit of compromise has characterized . . . these negotiations. . . . I understand that those States which do not now have disposal sites [are] willing[] to support a legislative compromise which submits them to a tight new timetable with serious consequences for failure to meet the milestones established.

Members of Congress believed that the LLRWPAA provided a rare and valuable array of benefits to both the sited states and the states that formed interstate compacts. The sited states (Washington, Nevada, South Carolina) could reject shipments of LLRW from states outside their compact regions after January 1, 1993. The nonsited states benefitted in two ways. First, they did not have to immediately curtail activities that generate LLRW. Second, once their compact region

might render Congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation. Nor do we attempt any definitive articulation here." South Carolina v. Baker, 485 U.S. 505, 512 (1988).

158. Garcia, 469 U.S. at 552-53.
160. See supra section III.B. Many states supported the final LLRWPAA provisions. For example, a representative of the Texas Low-Level Radioactive Waste Disposal Authority testified,

"The State of Texas has in the past and will continue in the future to work aggressively towards a solution of the low-level radioactive waste disposal issue. We have committed the time and resources to this solution, but it will take the cooperation of the federal government and all of the states to . . . achieve a timely resolution of the national waste problem." House Hearings, July 18, 1985, supra note 32, at 235 (testimony of Thomas W. Blackburn III).
162. Id.
opened its disposal facilities, they too could block the importation of interstate LLRW. Many commentators considered these unusual benefits to outweigh any newly imposed burdens, and that these benefits validate states' ability to safeguard their interests through effective lobbying. One such commentator optimistically concluded:

When the LLRWPAA is viewed as a whole, and with its legislative history, it is clear that the political process resulted in legislation that provided substantial economic and political benefits for the various interests of the states, both sited and unsited. . . . That the political development of the LLRWPAA provided such effective safeguards to state sovereignty strongly suggests that the Act withstands constitutional scrutiny.

The LLRWPAA's supporters maintained that the states volunteered their services in an exercise of cooperative federalism to find adequate waste disposal sites. Thus, the procedural safeguards test as envisioned in *Garcia* most likely would uphold the constitutionality of the LLRWPAA since "[t]he political process ensures that laws that unduly burden the States will not be promulgated." The elaborate politicking that proceeded the ultimate passage of the LLRWPAA suggests that the states used the political process to protect their interests, thus eliciting the comment from the Second Circuit that the LLRWPA and its 1985 Amendments were "paragons of legislative success."

However, the cooperative enthusiasm with which the states apparently embraced the LLRWPAA did not extend to the critical take title provision which was not developed through an accountable political process. To claim that the Act as a whole withstands judicial scrutiny because most of it was negotiated in an open political process defies logic

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164. Berkovitz, supra note 41, at 448-59.
165. See, e.g., id. at 474.
166. Id. at 475 (emphasis added).
167. Id. at 474.
168. See supra note 157.

Through asserting their own self-interest by temporarily closing sites and forcing volume reductions, the three states with operating dumps eventually convinced other states, the generators, and the Congress that a lasting solution to the problem of opening new sites was needed . . . and that states could develop the competence to do the job. The fact that the generators include hospitals and research institutions (generating 25 percent of the volume in 1978), industry (24 percent) as well as commercial power reactors (43 percent), and that these generators maintained a united front in their aggressive lobbying was a contributing factor in persuading other state governments to focus on the issue. The specter of a possible curtailment of essential and popular services proved to be a powerful incentive to responsible action. But an essential ingredient was the federal government allowing states to generate their own appropriate role and, thereby, to develop a promising solution to a national problem.

Id.
171. See supra part III.B.2.
where, as here, the very provisions that were included without the participation of the states are the most intrusive into state sovereignty.

Furthermore, while some authorities find the procedural “whirlpool” sufficient to pass constitutional muster, other commentators claim that the haphazard procedural process by which the LLRWPAA was passed did not provide an adequate forum to protect state sovereignty. The last minute addition of the take title provision and the eleventh hour passage of the LLRWPAA precluded full public debate of the provision. The two House reports on the bill failed to clarify uncertainties or resolve ambiguities in the legislation. The lack of any Senate report is also a notable omission to the public debate, especially since the tougher milestones and the take title provision were Senate amendments.

The concept of political free-for-alls as the only protective mechanism for state sovereignty is troubling. Rushed legislative processes cannot guarantee full protection of state sovereignty. Justice Powell’s dissent in Garcia, specifically rejects the political safeguards arguments of the majority. He claims that the Garcia majority merely pays “lip-service to the role of the States... [as] it fails to recognize the broad, yet specific areas of sovereignty that the Framers intended the States to retain.”

C. New York v. United States: The “Political Accountability” Test

The reliance on procedural safeguards, like the traditional functions test, was short lived. Departing from previous Tenth Amendment analyses which focused on traditional state powers or trust in the political process to protect state interests, New York specifically considered the effect of the take title provision on the states. The New York decision emphasized that Congress cannot interfere with the accountability between state elected officials and their constituents. “Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in mat-

172. See Choper, supra note 155, at 24.
173. Cf. Peckinpaugh, supra note 60, at 56 (describing the haphazard Congressional process).
175. Id.
176. “Members of Congress are elected from the various states, but once in office they are Members of the Federal Government.” Garcia, 469 U.S. at 564-65 (Powell J., dissenting). “One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle.” Id. at 565 n.8. “Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States’ interest against federal encroachment.” Id. at 565.
177. Id. at 574.
ters not pre-empted by federal regulation."

Residents of the state should retain the ultimate authority regarding state compliance with federally imposed mandates. Congress may employ the states as agents only to the extent that political accountability is maintained. If there is no political check on a particular exercise of national legislative authority, Congress should not intrude upon state sovereignty.

Professor La Pierre of Washington University, whose analysis influenced the New York decision, suggests that there should be two political checks on Congress' power to employ the states as its agents in implementing national law and that legislation avoiding these checks should be suspect. The first political check is the impact of nationally determined policy on private activity. Individual groups, associations, and corporations directly affected by a national policy hold their congressional representatives accountable by assigning them credit or blame for their decisions. The second political check is the need for financial and executive resources to administer and enforce national policy. If the national electorate is forced to fund supposedly national priorities, then Congress will be held accountable. "If no burden is placed on the national electorate to furnish financial and administrative resources to execute congressional policies, they are deprived of a significant means of holding Congress answerable for national policies."

Congress' use of the states as its agents to implement national policy significantly affects state sovereignty. The states must allocate legislative, executive, judicial, and financial resources to effectuate national policies and to satisfy national political demands. Such allocations are made at the expense of implementing state policies and fulfilling the demands of state political communities. To the extent that the federal policies conflict with the demands placed on the state by its electorate, state sovereignty is impeded.

New York reconceived the Tenth Amendment in light of traditional commerce, spending, and supremacy powers analysis, and added a political accountability analysis to the process. If Congress bears full political and fiscal responsibility for utilizing these powers, legislation will survive judicial review. If instead, Congress "commandee[rs] the leg-

180. La Pierre, supra note 178, at 642.
181. *Id.* at 643-44.
182. See *id.* at 657-58.
183. *Id.* at 645.
184. *Id.* at 657.
186. *Id.* at 2427-28 (upholding the first two set of incentives, since states have a choice as
isile processes of the States by directly compelling them to enact and enforce a federal regulatory program," Congress is encroaching on state sovereignty in violation of the Tenth Amendment. 187

In the context of the LLRWPAA, the milestone, surcharge, and regional compact incentives survived judicial scrutiny because they employed affirmative grants of Article I powers to Congress and maintained state sovereignty under the Tenth Amendment. 188 Conversely, the Supreme Court found the take title provision to be an unconstitutional means of coercing state action because it provided states with no viable option: states could either accept transfers of radioactive wastes directly from generators, or implement national legislation.

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 unconstitutional regulatory techniques is no choice at all. 189

The following sections analyze New York’s political accountability test and its applications to the take title provision and the BRC provisions. The next section discusses traditional federal preemption policies and compares federal regulation of two programs, the Clean Air Act (CAA) and the Public Utilities Regulatory Policies Act (PURPA), to federal regulation of LLRWPAA. While the BRC provisions were not part of the New York case, they pose a useful juxtaposition to the take title provision.

V

POLITICAL ACCOUNTABILITY AND THE LLRWPAA

Rather than being "a paragon of legislative success," 190 the take title provision represents an attempt by Congress to opt out of an extremely difficult political and economic situation and impose it on the states. The federal government promoted nuclear research and power through federal policies and preempted regulation of most of the field. 191 Congress

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187. Id. at 2425 (quoting Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc., 452 U.S. 264, 288 (1981)).
188. New York, 112 S. Ct. at 2427.
189. Id.
190. See text accompanying supra note 170.
191. See Lipschutz, supra note 2, at 113-14. "From generation through disposal, the federal government retains exclusive authority to determine how low-level wastes should be regulated. Nothing in the [LLRWPAA] confers upon a state any new authority to regulate the generation, treatment, management, transportation or disposal of low-level radioactive waste in a manner inconsistent with NRC or Department of Transportation regulations. Nor does it grant states the power to regulate, for public health and safety or for environmental hazards, those materials already regulated by the NRC. More generally, except as expressly provided
then placed responsibility for the most politically vexing aspect of nuclear policy---waste disposal---on the states. As previously discussed, states lobbied for much of this responsibility. However, Congress went beyond the openly negotiated agreements by instituting non-negotiated political and economic penalties.192

The LLRWPA is truly unique in the annals of American jurisprudence.193 Under the take title provision, the crux of the constitutional debate, states unable to adhere to federally imposed timetables for political, technical, or economic reasons were forced to assume potentially extraordinary fiscal liability. Such a punitive measure left federal elected officials out of the public and media scrutiny and forced onto states the political and financial risks that accompany efforts to site waste disposal facilities. The New York court found this shift in political accountability unconstitutional.194

Nonetheless, disposal of LLRW is a substantial national problem. Given the difficulty of siting disposal facilities, it seems likely that a draconian national approach is needed. And it is plausible that, in a spirit of shared sacrifice, the states would conclude that the onerous take title provision is an appropriate incentive, particularly in view of the alternative consequence—no access to long-term disposal facilities. In that case, a single dissenting state should not be able to overturn a national consensus. But as we have seen, the reality is that Congress adopted the take title provision without consulting the states’ other representatives. The states did settle on a regime of shared sacrifice, but that regime did not include the take title provision. This Part first demonstrates that the take title provision is indeed different from previous exercises of federal power. It then examines the legislative process that produced the LLRWPA with the aid of three modern theories of legislation. The following part argues that the Court can and should consider whether the states consented to intrusions into their sovereignty.

A. Federal Preemption of State Sovereignty

Congressional commerce, spending, and supremacy powers frequently preempt state authority under certain regulatory schemes. However, the LLRWPA differs from federal regulatory programs that control state action pursuant to Article I powers. Under the LLRWPA, the states have no discretion to disobey the federal mandates. Other statutes based on the Article I powers, such as the Clean Air Act (CAA) and the Public Utilities Regulatory Policies Act in the Act, nothing therein diminishes or impairs the applicability of any federal law or the jurisdiction of any federal agency.” Berkovitz, supra note 41, at 450-51.

192. Amicus Brief of Counsel of State Governments for Petitioner, supra note 121.
193. Greenhouse, supra note 80, at A15.
194. See supra note 189 and accompanying text.
(PURPA), allow states to either develop their own programs, according to federal guidelines, or accept federal programs delineated by Congress. If the states fail to comply with either of these alternatives, the federal government must implement the program. State sovereignty is protected since the states choose whether and how to participate in the federal scheme.

I. Federalism and the Commerce Clause

Under the commerce powers, Congress has broad authority to regulate any activity which substantially affects interstate commerce. Congress is thus able to ensure the free transportation and trade of goods throughout the United States. States may not circumscribe or resist this seemingly plenary power by attempting to implement regulations which impede interstate trade. Where Congress possesses power to act, and where there is a need for uniformity of regulation, Congress may establish certain minimum standards for state participation in the regulatory process. In addition, Congress may bar the states from participating in certain other functions where their participation interferes with the goal of national uniformity.

PURPA, for example, encourages states to accept federal mandates by requiring them to consider federal rate setting guidelines for enhancing energy efficiency. However, unlike the take title provision, "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." If states do not wish to consider the federal energy conservation guidelines, they can relinquish regulatory control to the federal government.

Under PURPA, states retain at least some choice over whether to be involved in the federally funded program. Although the extraordinary limitations on states' discretion has caused significant judicial unrest, at least nominal choice is available.

195. See, e.g., Federal Energy Regulatory Commission v. Mississippi [FERC], 456 U.S. 742, 759-71 (1981) (Through PURPA, "Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards.") (emphasis in original).

196. Id. at 765.

197. "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." Wickard v. Filburn, 317 U.S. 111, 125 (1942).


200. Id. at 765.

201. Although PURPA was found to be constitutional, O'Connor's dissent in FERC shows that the majority opinion failed to resolve the issue of whether the federal government can command a state to act in furtherance of federal goals. O'Connor applied the traditional functions tests to PURPA and found under each test that the federal government was controlling the states as states. "While the statute's ultimate aim may be the regulation of private
The siting of LLRW disposal facilities exemplifies a scenario common in environmental regulation: a lack of state regulatory activity in areas delegated to state control. To address the states' failure to act, Congress enacted the LLRWPAA provisions which set milestones and allowed states to exclude LLRW from outside their compact region. The New York court endorsed this attempt, finding it well within Congress' regulatory powers.

But the states' incentives under the take title provision differ from those found in other environmental programs promulgated under the commerce powers. For example, no financial penalties are imposed on states that fail to comply with the CAA. Instead, the federal government, via the Environmental Protection Agency, asserts federal implementation authority over the state. In contrast, if states fail to comply with the milestones in the take title provision of the LLRWPAA, the federal government does not merely preempt the field. Rather, the states remain responsible for LLRW disposal and are subject to significant financial penalties until they achieve compliance.

Thus, the take title provision contravenes the political accountability test articulated in New York, first suggested by La Pierre. The provision imposes the financial and administrative costs of enforcing national policies on the states rather than on the federal electorate. These burdens did not withstand judicial scrutiny because they severely limited state sovereignty.

2. Federalism and the Spending Clause

The take title provision also differs from environmental programs enacted under the often coercive federal spending powers. Legislation enacted pursuant to the spending power often resembles a contract be-
between the states and the federal government. In return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress' power thus depends upon the states knowingly and voluntarily accepting the terms of the contract.\textsuperscript{206} For example, in \textit{South Dakota v. Dole} the state refused federal highway construction funds which were contingent on the state's adoption of a federally set minimum drinking age.\textsuperscript{207}

In contrast, the take title provision denies the states any discretion. The provision completely restricts state sovereignty by imposing enormous liability on states for their failure to meet federally imposed deadlines. States are automatically sanctioned for failing to comply. The provision lacks even the pretense of "choice" found in spending powers cases.\textsuperscript{208} Further, while programs under the spending power provide states with the opportunity to forego a benefit, the take title provision of LLRWPAA imposes a sanction upon states that fail to comply.

\textbf{B. Political Process and State Sovereignty}

Analyzing the mechanisms or strategies used to pass a complex and controversial piece of legislation, such as the LLRWPAA, clarifies the roles of federalism and political accountability in the legislative process. Apart from judicially articulated tests, political theories can be the basis of legislative analysis. In this section, the LLRWPAA will be analyzed from public choice, due process, and republicanism perspectives.

\textbf{1. Public Choice Analysis}

In its most basic construction, public choice theory is the economic study of nonmarket decision making.\textsuperscript{209} Humans are seen as egoistic and rational utility maximizers seeking to promote and further their personal goals. Public choice theory assumes that people will act in their own rational self-interests. Hence, democracy, government by the majoritarian choices of autonomous agents, is the preferred form of government under the public choice theory.

Under this analysis, the legislative process resembles dealmaking—a negotiated transaction among self-interested parties. It is not a collaborative elaboration of the principles of good government or public policy

\textsuperscript{207} 483 U.S. 203, 205 (1987).
\textsuperscript{208} See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (upholding the constitutionality of the spending power as a way for Congress to "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives"); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (describing the spending power as an inducement); Oklahoma v. Civil Service Comm'n., 330 U.S. 127, 142-44 (1947) (allowing U.S. to threaten to end highway funds if State did not remove its Highways Secretary).
\textsuperscript{209} DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979).
as much as a political battlefield geared toward the expedient accommodation of special interest pressures.\textsuperscript{210}

Under public choice analysis, the personal motivations of elected officials vis-a-vis the interest groups they represent are the key analytical dynamic. The primary goals of elected officials are to secure re-election and to maintain or enhance their personal power in the legislature. They frequently overlook the long-term ramifications of any specific legislative action.\textsuperscript{211} Special interest groups exploit this desire by attempting to influence legislators through lobbying, contributing to legislators' campaign funds, leveraging voter preference, and the like. A public choice account of the role of special interest groups in the legislative process explains:

In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. . . . Payment takes the forms of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.\textsuperscript{212}

\section{Public Choice Analysis and the LLRWPAA}

The LLRWPAA fits neatly within the public choice model of legislative behavior on at least three levels. First, the state special interest groups were the prime developers and negotiators of the language of the LLRWPAA that gives the states responsibility for LLRW disposal.\textsuperscript{213} These special interest groups included the National Governors' Association, the State Planning Council on Radioactive Waste Management, and the National Conference of State Legislatures. Federal legislators relinquished control over certain aspects of LLRW management in direct response to pressure from these groups.\textsuperscript{214} The states sought assurances that there would be no further federal preemption of their "agreement state" status and powers. They endeavored to acquire administrative certainty by lobbying for protective language.

\textsuperscript{210} \textit{William N. Eskridge \& Philip P. Frickey, Legislation: Statutes and the Creation of Public Policy} 324 (1988).


\textsuperscript{213} \textit{See Berkovitz, supra note 41, at 443 (claiming states were responsible for LLRW policy creation)}.

\textsuperscript{214} \textit{See Brief for Respondent, New York v. U.S., 112 S. Ct. 2408 (1992), (Nos. 91-543, 91-558, 91-563). "The states, in the interest of federalism, preferred that they be in charge of the low-level waste disposal problem, since siting waste disposal facilities involved land use and public health issues traditionally decided at the state and local level of government. Congress agreed to defer to the states [sic] wishes." Id.
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 non-defense 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.215

Second, the individuals pushing for the development of the LLRWPAA were elected officials such as state governors and legislators who had their own constituencies to please. The Governors of sited states, for example, sought to ensure the timely closure of existing facilities to assuage public clamoring for action. Their constituents believed it was unfair that they be required to provide disposal facilities for all forty-seven of the nonsited states. In the State of Washington, for example, citizens approved an initiative which proposed to close the Richland disposal site to disposal of interstate waste. While this initiative was declared unconstitutional,216 it nonetheless demonstrates the public’s antagonism towards having their state serve as a dumping ground for interstate radioactive wastes. Hence, the Governors of Washington, Nevada, and South Carolina were motivated both by the demands of their constituencies to limit acceptance of interstate wastes and by the pressures of state interest groups to expand state authority.

The forty-seven nonsited states also sought to avoid federal preemption of siting decisions. They feared that under federal control, they too would become federal dumping grounds. The Act’s compact system allowed states to circumvent the dormant commerce clause requirement that state borders remain open for the transportation and disposal of LLRW.217 Hence, by forming compact regions, states were assured that they would never be forced to accept interstate waste.218 Further, this provision allowed governors to take credit for fending off federal threats to preempt the states’ limited “agreement state” powers.

The third way in which the passage of the LLRWPAA fits within the public choice model of legislative behavior is that the federal legislators—also self-interested actors—delegated the ultimate siting of disposal facilities to local officials219 and thus avoided the greatest political risks.

The siting of new facilities has proven difficult, if not impossible, to achieve.220 In California, for example, state and local officials are the

218. See Berkovitz, supra note 41, at 474.
219. See New York, 112 S. Ct. at 2424 (discussing cooperative federalism).
220. GAO, supra note 49, at 20. “In April 1990 public opposition and protests in New York led to an incident involving personal injury. As a result, the governor suspended plans to conduct preliminary investigative work at candidate sites and obtained legislation changing
objects of negative publicity and public ire as a result of the siting of an LLRW disposal site in Ward Valley, California.\(^{221}\) Local interest groups will most likely challenge the siting of the facility if and when the State Department of Health Services approves the proponents' application to begin construction.\(^{222}\) Meanwhile, despite having voted in favor of the LLRWPA, California's congressional representatives remain safe from any local controversy and free from public attack as the federal milestones are achieved and the siting decision moves towards finalization.

In explanatory dicta, the *New York* Court specifically rejected such non-accountability as a matter of principle.\(^{223}\) The court recognized that the federal government could preempt state power under the Supremacy Clause but discouraged federal compulsion where it would act to protect federal officials from answering to public objection.

> [W]here 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 view of the local electorate in matters not pre-empted by federal regulation.\(^{224}\)

Based on this principle, the court rejected the take title provision. "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."\(^{225}\)

**b. Public Choice Analysis and Below Regulatory Concern**

Like the take title provision of LLRWPA, the BRC provision can be analyzed from a public choice perspective. Congress is able to take credit for passing the legislation desired by special interest constituents...
while delegating difficult policy decisions, such as the deregulation of certain radioactive materials to executive agency rulemaking procedures. Hence, federal legislators are once again able to benefit from regulatory advances while remaining insulated from public criticism. In this instance political accountability is shifted to the NRC.

The issuance of the BRC Policy Statement engendered extensive response. A wide range of interest groups objected to the NRC's interpretation of the BRC provisions in the LLRWPAA. These groups made their objections known and felt by the agency. The initial BRC Policy Statement was attacked not only by state representatives, but also by national environmental organizations such as the Natural Resources Defense Council, the Sierra Club, Public Citizen, Greenpeace, and the Nuclear Information and Resource Service; by industry and trade groups, including the nuclear power industry in response to the negative press coverage of its activities; by medical associations such as the American Medical Association, the American Public Health Association, the Society of Nuclear Medicine, and the American College of Nuclear Physicians; by labor organizations; by private citizens; and eventually even by the Environmental Protection Agency and members of Congress themselves. The attacks occurred in hearings held before congressional committees and the NRC, in state houses, and in the media.

The massive opposition resulted in a moratorium on implementation of the Policy Statement and on any further rulemaking. Eventually, the Energy Policy Act of 1992, signed by President Bush in October of 1992 explicitly removed the BRC provisions from the NRC's statutory mandates. Throughout this process, the NRC was the target of tre-


227. Other reasons for delegation include lack of full information by Congressmembers, lack of agreement on desired policy outcomes by either the legislators or constituency groups, and the belief by constituents that greater success in reaching desired outcomes can be achieved at the agency level of policy making. Id.


229. Id.


231. Maine, Minnesota, Iowa, Vermont, Pennsylvania, West Virginia, Connecticut, Oregon, Illinois, and Wisconsin passed state legislation requiring LLRW to be disposed in only licensed disposal facilities in an attempt to bar unregulated dumping of radioactive waste in local landfills. Tousley Memorandum, supra note 97, at 4.

232. Interview with Francis Cameron, NRC, Nov. 24, 1992.

mendous opposition to the BRC rulemaking. Although congressional legislators had enacted the BRC provisions as part of the LLRWPAA, they were insulated from the negative publicity. Instead, Congress was in the enviable position of appearing to clean up after the NRC by rescinding the BRC provisions and by subsequently watchdogging the "errant" agency. The controversy surrounding the BRC provisions illustrates the effectiveness of special interest groups in shaping Congressional action. It further demonstrates how Congress, or other elected officials, are able to utilize the political process to protect themselves from negative publicity.234

2. Due Process of Legislation Analysis

Due process of legislation analysis provides a very different theoretical paradigm for viewing congressional accountability as it relates to state sovereignty.235 Rather than focusing on legislators' strategic self-interest or on special interest groups' attempts to influence legislators, due process analysis instead focuses on whether public values rationally influence the legislative process. "A rational policy must be one that is designed to move events toward some goal." While some of the elements of a rational policy may require a factual base, "the decision on the goal is plainly a value judgment . . . ."236 Due process analysis requires clarity regarding the value judgments that shape legislation. It requires that legislators identify a preferred goal, and a proposed plan of action. "Rational lawmaking . . . would oblige this collective body [of legislators] to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose."237

a. Due Process of Legislation Analysis and LLRWPAA

The federal-state consensus that surrounded the vast majority of the LLRWPAA disposal facility provisions attests to the near success of the Act under a due process analysis. Apart from the controversy surrounding the take title provisions, the Act's passage is an excellent example of cooperative federalism.238 The legislative process accounted for the vari-

234. See John P. Dwyer, The Pathology of Symbolic Legislation, 17 ECOLOGY L.Q. 233 (1990) (describing congressional proclivity to sidestep difficult policy choices by passing impractical laws that appear to satisfy the "public's urgent desire[s]").
235. Hans A. Linde, Due Process of Lawmaking, 55 NEB. L. REV., 197, 199 (1976). The due process analysis of legislation addresses "[t]he judicial formula that a law is invalid by virtue of the fifth or fourteenth amendment unless it is a rational means toward some legislative end." Id.
236. Id. at 223.
237. Id. at 223.
238. See Berkovitz, supra note 41, at 439.
ous needs and priorities of both the federal and state actors. The procedural safeguards test, discussed in the Tenth Amendment analysis above, fits within this due process context. Congress articulated clear goals regarding the need for new LLRW disposal sites. State and federal representatives reached a consensus on the need to relieve the sited states of the national waste disposal burden. Furthermore, the lawmakers integrated a thorough analysis of the lack of future safe disposal sites into the policy debate and eventually into the legislation itself. Finally, all major players in the debate shared the belief that the state-controlled compact system and rigorous milestones for disposal facility siting were the best means of achieving the desired goals. All of these actions created a comprehensive and rational system for handling the radioactive waste disposal dilemma by accommodating the goals and perspectives of all the major players, both state and federal.

The inclusion of the take title provision does not reflect the cooperative federalism exemplified by the rest of the disposal facility siting provisions. There were no shared goals or beliefs among federal and state actors surrounding this provision. Congress sought to use punitive measures to force the states to meet siting milestones. States had only agreed to the progressive milestones. Congress did not participate in any additional problem analysis that pointed to the need for more aggressive incentives. Nor did it conduct any fact finding that supported the belief that such a punitive provision would better achieve the desired goal. In enacting the take title provision, Congress seems to have purposefully prevented the affected parties from fully participating in the legislative process and cannot be said to have adequately protected state sovereignty or democratic principles. While Congress is not required to promote state interests over federal policy goals, if it attempts to limit state powers granted under the Tenth Amendment, it must use accountable mechanisms. "It is not enough that the 'end be legitimate;' the means to that end chosen by Congress must not contravene the spirit of the Constitution."

b. Due Process of Legislation Analysis and BRC

The BRC provisions offer an opportunity to analyze due process requirements within an agency delegation context. In 1985, the state lob-

239. See supra part IV.B.
240. For example, during the public hearing on the LLRWPAA, the House never examined the oral testimony from the NRC staff proposing the take title arrangement. Furthermore, the Senate added the uniquely punitive take title measures directly against States' interests on the last day of the 99th Congress after already rejecting the provision at the committee level, when the states could have asserted their sovereign interests. See supra notes 109-15 and accompanying text.
buying organizations negotiated with Congressmembers over the BRC provisions. Unlike the take title provisions, no last minute amendments were made to the BRC provisions before they were passed.

The NRC became immersed in political and procedural debates as soon as it issued the BRC Policy Statement in 1990. Initially, the NRC had attempted to circumvent rulemaking by having the policy statement, written by agency staff, serve as a guidance document. The agency sought to avoid public oversight or debate as to the value or merits of the policy. After the overwhelming failure of this essentially non-democratic process to implement the law, the NRC declared a moratorium on further rulemaking and conducted extensive interviews with the interested and affected parties to ascertain what had gone wrong. The agency found that, while there were certainly critiques of the content of the BRC Policy Statement, the greatest dissatisfaction was with the process by which it was developed. The initial decision making process excluded the affected parties and did not adequately represent their values or interests. In response, opposition groups employed traditional political tactics to influence agency behavior and effectively stopped the administration of the BRC provisions. Public hearings, media coverage, legal and legislative attempts to require (and then derail) rulemaking, and grassroots public opposition ensured that state and public interests would be accounted for in the BRC implementation plan.

Congressional rescission of NRC's mandate to conduct BRC rulemaking means that the legislation cannot be implemented in the anticipated time-frame. It does not mean that due process has failed per se, but that the political process came somewhat later than it ideally would. Highly controversial issues, such as radioactive waste disposal, require extensive public debate before any resolution can be reached. A political process should safeguard not only state sovereignty, but also democracy in its purest forms. Involving affected parties in the process by which controversial policy issues are decided builds public trust, accentuates agency credibility and promotes sound public policy. While each piece of legislation does not require the extensive process that ultimately surrounded the BRC provisions, due process analysis suggests that legislation which deeply affects public values (such as radioactive waste disposal) or traditional delegation of authority (such as state and local

244. See, e.g., Nuclear Regulatory Comm'n, NRC Declares Moratorium on BRC Implementation; Initiates Consensus-Building Process 1 (July 1, 1991) (press release) (NRC No. 91-69) (emphasizing the need for the participation of all affected parties).
government sovereignty over land use regulations) must be openly forged in a structured and accountable fashion.

3. Republicanism and the LLRWPA

Republicanism, a pre-Revolutionary War concept of town-hall meetings and community-based decision-making is based upon two central ideals: civic virtue and the general good. Civic virtue is defined as "the willingness of citizens to subordinate their private interests to the general good." Republicanism favors a highly participatory form of politics, directly involving citizens in the dialogue and discussion surrounding the selection of the values that ought to control public and private life.

Republicanism is not a naive notion that a romanticized happy ending to social problems is the inherent result of public discourse. Proponents acknowledge that, as predicted by public choice theory, self interest alone often drives action. They recognize that disputes between actors whose strong self-interests conflict are not likely to be resolved by general appeals to civic virtue. Thus, self-interested community opposition to a disposal facility is generally countered by equally self-interested industrial interests inspired by millions of dollars of capital investment and potential contracts. The opportunity for severe clash rather than for subordination of interests towards an undefined common good is apparent. And since a LLRW disposal facility either will or will not be built, one party will win, while others will lose.

To meet modern individualistic concerns, advocates of republicanism insist that "practical reason" be incorporated into the debates. Practical reason theory asserts that through the process of dialogue, the exploration and articulation of values in social discourse, social choices can be justified despite enduring conflicts of vision between contentious groups or individuals. This communitarian notion values process more than outcome.

Practical reason theory is distinct from public choice theories, such as Arrow's Impossibility Theorem, which conclude that democratic col-

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247. Id. (quoting GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (1986)).
248. Id. at 19.
249. See id. at 17-24.
252. Michelman, supra note 246, at 23.
lective decision-making processes cannot be both fair and rational. Arrow posits that rational self-interest will necessarily lead to the manipulation of systems, institutions, or voting schemes to achieve a desired outcome.²⁵³ Fairness *per se* is part of the calculus. Fairness is employed to the extent that it can end the repeated cycle of decisions challenged by the losing parties who attempt to regain control over unfair outcomes. Fairness loses its meaning as a democratic ideal and becomes an efficient strategy in the throws of political decision making.

Unlike public choice theories, republicanism values deliberative processes and expresses virtues that many believe permeate (or at least should permeate) modern constitutional law. Cass Sunstein has suggested that a bias against legislative "naked preferences"—legislation that distributes "opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"—is at the root of a diverse set of constitutional prohibitions.²⁵⁴

In many ways, republicanism and due process of legislation share a common theme: the necessity of taking into account the diverse community values that shape public decision-making. Therefore, the provisions in the LLRWPA which call for the siting of facilities must incorporate opportunities for the full expression of community values in order to meet constitutional standards. Indeed, many of the regional compacts have incorporated public participation into the siting work plan.²⁵⁵

Thus, the final constitutional problem with the take title provision is that it negates the essence of democratic participation in environmental decision-making. If states and regional compacts expand democratic debate on facility siting, thus delaying facility siting, they are slapped with huge liabilities. If they rigidly adhere to the federal milestones without allowing public debate, they suffer extraordinary political pressure from the local citizenry to open the process for more deliberation. The take title provision thus puts states in an untenable position.


²⁵⁵ Yet, as the GAO report explains:

[Public participation] programs have contributed to the time needed to complete steps in facility development. Public opposition has also affected the time taken to move through the process, especially during the site-selection phase. Some opposition efforts have also resulted in legal actions that have slowed or stopped the process.

VI
A PROPOSED SOLUTION

The federal government could redeem the take title provision by re-enacting it, and perhaps redrafting it, with the state participation that the Constitution requires. More generally, the following principles should be incorporated into the legislative process and judicial review to protect states’ sovereignty and republican ideals.

First, it should become axiomatic that there are potential Tenth Amendment violations whenever the federal government overrides state interests without state participation in the legislative decision. Conversely, state participation tends to immunize exercises of congressional power from Tenth Amendment review. For example, since states cooperated in developing the incentive milestone and surcharge provisions, those provisions did not violate the Tenth Amendment although they burden the states. Neither unanimous agreement among all fifty states nor complete consensus between the state and federal governments is required. However, last minute changes to proposed legislation (i.e., after final committee debate) that directly affect states’ sovereignty do not constitute cooperative federalism and would presumptively violate the Tenth Amendment. Thus, the fact that the take title provision, which was rejected at the committee meeting, was nonetheless attached to the final bill would suggest that the Tenth Amendment had been violated and would trigger further inquiry.

Second, legislators adding, without deliberation, last minute changes to legislation, could “cure” potential Tenth Amendment problems by giving states an opportunity to respond to the additions. For example, if federal legislation required an agency to implement a program through notice and comment rulemaking or through adjudication, there would generally be no constitutional violations. The states would have an opportunity at the agency level to shape the program with which they will ultimately have to comply.

Similarly, where federal legislation results in the use of federal spending powers to coerce state behavior, apparent Tenth Amendment violations are balanced by the contractual nature of the interaction. State sovereignty is protected through the choice, however nominal, to accept or to reject the contract. Essentially, states affirmatively agree to limit their own sovereignty. Republican values encourage such compromise since the ultimate goal under republicanism is the furtherance of the common good.

Third, unnegotiated legislation that simply imposes a program on the states without intermediary administrative procedures or contractual

256. This is not to say that these provisions would have been unconstitutional had the states not participated in their drafting.
agreements, would not survive Constitutional scrutiny, and would, effectively, be remanded either to Congress for open debate or to an agency for rulemaking. The take title provision fits into this category because states did not have an opportunity to protect their sovereignty. The loss of state sovereignty indicates a concomitant loss of public sovereignty because of limits placed on public participation in government decision making. As described above, states would be unable to guarantee broad public participation and successfully achieve the milestones.

These guidelines would neither overwhelm the legislative process nor deluge the courts with litigation. Rather, the legislative process would either involve federal-state cooperation on each legislative issue that would affect states' Tenth Amendment rights or incorporate an administrative or contractual mechanism by which states could further negotiate to protect their interests. Congress would maintain its power to pass laws that, to varying degrees, coerce the states, but the process would foster accountability and states would have residual but important opportunities to exert sovereignty.

The LLRWPAA as a whole attests to the practicality of these principles. The states actively negotiated very stringent surcharges and other penalties for failure to achieve regulatory milestones. They accepted these provisions to ensure the success of the facility siting goals of the LLRWPAA of 1985. Since the states failed to site new facilities under the LLRWPA of 1980, the surcharges and penalties in the 1985 Act were considered difficult but appropriate next steps. The states negotiated limitations on their own power in order to further the mutual goal of safe disposal of LLRW.

CONCLUSION

Democratic ideals are protected when legislation which addresses a particularly volatile issue is required to withstand constitutional and political scrutiny. The LLRWPAA addresses the acutely pragmatic questions of how and where to site LLRW disposal facilities. The questions arise in a context of passionate debate among communities, policy makers, industrial representatives, ethnic organizations, and others.

257. Justice O'Connor takes an even more restrictive view in New York v. U.S., 112 S. Ct. 2408, 2431-32 (1992). She states that federalism principles prohibit the states from consenting to "departures from the constitutional plan." Id. at 2431. "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." Id. at 2432. O'Connor's concern that both the federal and state legislatures will be tempted to use the federal structure for their "personal interests" seems unwarranted in light of the extensive media attention given radioactive waste policy decisions. The stronger point of New York is that one level of government, the federal, should not unilaterally adopt coercive legislation at the expense of the less powerful, and often subordinate, state governments. See also id. at 2440-41 (White, J., dissenting) ("Finally, to say, as the Court does that the incursion on state sovereignty 'cannot be ratified by the "consent" of state officials' is flatly wrong.")
It is an unusual community that welcomes a disposal facility. Rarely is there sufficient consensus among industry, government, and community members to site facilities in a particular location. Public opposition to all types of waste disposal sites is common. Hence, enacting and implementing the LLRWPAA posed special problems in achieving consensus and reaching a shared understanding of the common good. For example, the phrase, "Not In My Backyard" (NIMBY), which has become almost cliche, refers to citizen activists resisting the siting of facilities in their neighborhoods. The term is rooted in the profound sense of justice and fairness to which the citizens of a democratic society feel they are entitled. Controversial environmental legislation requires broad vision to achieve a desired outcome. The public participation requirements written into most siting legislation promote, at least theoretically, the inclusion of community values and interests in environmental decision making. Thus, these provisions are an attempt to ensure better decisions with broader community acceptance.

But public participation programs have been frustrating both to members of the public attempting to shape agency behavior, and to agency staff implementing the regulations. The public feels that environmental decision making too often ignores or negates meaningful public involvement. Lois Gibbs, a grassroots leader during the Love Canal, NY, disaster and currently director of the Citizen's Clearing House for Hazardous Waste, echoes the concerns of many members of the public:

[ Citizens] become concerned because none of the people in charge seem to care. The public officials and policymakers seem more interested in keeping people calm and in minimizing the nature of the problem than in doing something about it. The corporations and the hazardous waste handlers only seem to care about profits. Both the industry and the government policymakers seem to react by fighting "dirty," even though these concerned citizens almost always start out being very polite.

In addition, the environmental justice movement has documented the disproportionate impact of facility siting and environmental pollution on poor persons of color. The EPA recently acknowledged this phe-


259. The author of this Comment has conducted risk communication/public participation workshops during the past decade for several governmental agencies including the University of California/EPA State Pesticide Official Training Program; U.S. EPA, Regions III and IX; California State Dept. of Health Services; California EPA; several local county environmental health departments; and community activists. During these workshops, regulatory staff and the community freely explore and critique their experiences participating in environmental decision making programs.


261. UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-
nomemon\textsuperscript{262} and is working with states to implement "environmental eq-
yuity" programs.\textsuperscript{263} Issues of social and economic justice, environmental
racism, and equal protection from exposure to toxic chemicals are now
widely debated among grassroots activists and policy makers whenever
facility siting is considered.

Regulatory agency staff responsible for implementing local waste
disposal regulations recount few truly satisfying experiences regarding
their sometimes laudable and sometimes feeble attempts to involve mem-
bers of the public in participatory decisionmaking.\textsuperscript{264} Most staff have
little control over the regulatory policies they implement, and become
fearful of the public that rightfully demands political accountability for
proposed government actions affecting their communities.

Community and agency staff frustration is exacerbated by the cogni-
tive dissonance with which we as a technological society are forced to
live. We reap the benefits of radioactive materials, such as cancer treat-
ment protocols and thousands of other medical research breakthroughs.
We also employ electricity from nuclear power, electricity which would
otherwise be generated through the burning of fossil fuels or hydroelec-
tric dams (both of which are rightfully opposed by environmental activ-
ists). Yet, the disposal of the wastes from these benefits remains an
enigma.

A society which relies upon radioactive material necessarily must
address the unpleasant topic of disposal. As this discussion indicates, the
task must be accomplished in an era of great social division and political
debate over the severity of the underlying hazard and must accommodate
the Constitution, community values, and public participation. Without a
thorough adherence to republican traditions, controversial environmen-
tal regulations will either fail to achieve their goals or will achieve them
at the expense of democracy.

\begin{verse}
ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987);
ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY
(1991); A Special Investigation, Unequal Protection: The Racial Divide in Environmental Law,
\end{verse}

262. "The physical environment of America's minorities — Hispanics, Native Americans,
Asians, African Americans, the poor of any color — has in one way or another been left out of
the environmental cleanup of the past two decades. Black children, as a whole, have more lead
in their blood than do white children. Blacks are decidedly overrepresented in air-pollution
nonattainment areas. The environment of migrant farm workers, particularly in their expo-
sure to hazardous pesticides, has not been well protected, to say the least. People of color are
much more likely to have hazardous waste sites in their backyards than are whites." John
Heritage, From the Editor, EPA J., Mar./Apr. 1992, at inside cover.

263. Interview with Christine Arnesen, M.P.H, Health Education Consultant, Occupa-
tional and Environmental Health Hazard Assessment, California Environmental Protection

264. See supra note 259 and accompanying text.