

# **Yucca Mountain and the Tenth Commandments: Do Supreme Court Vacillations on the Tenth Amendment Provide Nevada with a Constitutional Argument Against the High Level Nuclear Waste Repository?**

**by Stephen E. Adams**

## **I. Introduction**

The federal government plans to excavate more than 100 miles of tunnels deep under the Nevada desert to house some of the deadliest material on earth: thousands of tons of spent nuclear fuel from commercial power plants and other highly radioactive wastes produced by the government.<sup>1</sup> For the past seven years, the state of Nevada has waged a political, legal and scientific battle against federal efforts to study Yucca Mountain for construction of a repository for the nation's high level waste.

Although the Yucca Mountain project has been plagued by delays and missteps, those problems can be traced more readily to the complexities of the program and to management problems within the U.S. Department of Energy ("DOE") than to Nevada's opposition to the program.<sup>2</sup> The state's initial legal challenges to the Yucca Mountain project have for the most part failed, but Nevada is continuing its search for legal vulnerabilities in the program. James Davenport, a special deputy attorney general for Nevada, recently advanced an argument that Congress lacks the power to build a Yucca Mountain repository over Nevada's objections.<sup>3</sup> Davenport relies primarily on the Supreme Court's 1992 holding in *New York v. United States*.<sup>4</sup> In that case, the court ruled that Congress lacked the power to require states to "take title" to low level waste as a penalty for failing to establish in-state or regional disposal sites for the waste.

This article will begin with a review of the federal government's high level waste program and Nevada's opposition to it. After summarizing the most pertinent features of the Supreme Court's Tenth Amendment caselaw, the article will critique Davenport's arguments against the Yucca Mountain project and analyze Nevada's prospects for mounting a successful constitutional challenge. Those prospects, in the end, are very remote. Nevada will not prevail because the Court's evolving federalism doctrine does not protect state law from most forms of federal preemption, nor does it allow a state to regulate federal activities.

## **II. Background**

When Congress passed the Nuclear Waste Policy Act ("NWPA") in 1982, it ordered DOE to begin detailed "characterization" studies by 1985 of three sites, one of which would be selected for the first high level waste repository.<sup>5</sup> Four years later, DOE announced that it would study Yucca Mountain; Deaf Smith, Texas; and Hanford, Wash.<sup>6</sup> But DOE was also supposed to begin studying additional sites in the East and upper Midwest by 1989;<sup>7</sup> to this end, DOE announced twelve potential sites for the second repository in 1986. This list ignited a political firestorm, and DOE promptly suspended all efforts to find a site for the planned

second repository.<sup>8</sup> In 1987, Congress passed amendments to the NWPA that further narrowed the focus of the program: studies would continue at Yucca Mountain, but work at the Texas and Washington sites was halted.<sup>9</sup> Congress not only relieved DOE of its legal obligation to locate a site for the second repository, but took steps to ensure that DOE would not revive that search.<sup>10</sup>

To the casual observer, Yucca Mountain seems like a sensible location for the nuclear waste project. The mountain -- actually a ridge rising to a plateau -- is adjacent to the Nevada Test Site. The mountain is surrounded by sparsely populated desert.<sup>11</sup> The nuclear age and the federal bureaucracy that manages it are well known to southern Nevadans because of the Test Site, and Yucca Mountain itself may offer some advantages over other locations.<sup>12</sup> In fact, Nevada's early response to the Yucca Mountain project was equivocal. The Nevada Legislature moved in 1987 to create an unpopulated county around Yucca Mountain in an apparent scheme to collect larger federal payments on the project.<sup>13</sup> But Congress' decision later that year to cut the site selection process short and single out Yucca Mountain had the effect of hardening opposition to the project in Nevada. Congress' move was widely viewed as a back-room deal by politicians eager to do whatever was necessary to ensure the repository didn't land in their home states. The provision was, in fact, tacked on to a \$30 billion budget reconciliation bill during negotiations between House and Senate conferees.<sup>14</sup> Yucca Mountain was selected, in other words, without the benefit of public notice, congressional hearings or full debate. To this day, the 1987 legislation selecting Yucca Mountain is known locally as the "Screw Nevada Bill," and anger over Nevada's treatment by Congress persists.<sup>15</sup>

At this point, state leaders appear resolutely opposed to the Yucca Mountain project. They have filed numerous suits attacking the program,<sup>16</sup> challenged the technical and managerial work of the DOE, skirmished with project advocates in Congress, and passed a state law banning storage of high level waste.<sup>17</sup> State officials also refused, for a while, to process applications for state and federal environmental permits that DOE needed for digging, drilling, road-building and other activities at Yucca Mountain.<sup>18</sup> Although Nevada's legal challenges have for the most part failed,<sup>19</sup> the state's vigorous opposition to the project is viewed in Washington as one of several major problems confronting the program, and federal officials have blamed the state for slowing progress at Yucca Mountain.<sup>20</sup>

Opposition to the project is not universal in Nevada, even among state institutions. The state's universities have garnered millions of dollars in federal grants to assist DOE with characterization studies at Yucca Mountain, perform social impact studies and even host international nuclear waste symposia.<sup>21</sup> Nevada politicians have openly fretted that DOE is using these grants as part of a strategy to "divide and conquer" Nevada institutions.<sup>22</sup>

The 1987 amendments preserved several provisions in the original 1982 Act designed to give the host state an oversight role in the process leading to a decision whether to build a repository. Specifically, Congress authorized grants to the state for independent testing at Yucca Mountain and for oversight of federal work there.<sup>23</sup> The governor and legislature may "disapprove" of Yucca Mountain's selection if and when the president recommends construction

of a repository there,<sup>24</sup> but Congress can override any state veto by simple majority votes of both houses.<sup>25</sup> Debate and amendments would be limited during consideration of a resolution to override a state veto,<sup>26</sup> ensuring that a filibuster or hostile committee would not block congressional action.

### III. The Court's Changing View of the Tenth Amendment

A constitutional argument against the Yucca Mountain project has obvious appeal for Nevada, since a determined Congress could amend the NWPA and other laws to clear lesser legal obstacles out of the way. And the state must focus in particular on the Tenth Amendment, since only that amendment addresses in general terms the powers of the states within the federal

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system. The amendment, added in 1791, states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>27</sup> The Supreme Court has offered a number of conflicting interpretations of the amendment in the past three decades, expressly overturning recent precedent on two occasions. The Court's most recent opinions, while not claiming to overrule *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>28</sup>

clearly depart from *Garcia's* view that the Tenth Amendment imposes virtually no constraints on Congress' constitutional powers. Because this area of the law is marked by continuing change, any meaningful analysis of the Tenth Amendment's potential impact at Yucca Mountain must include an examination of recent trends in this area.

#### A. From the New Deal to Garcia

From 1937 until 1976, the Supreme Court's Tenth Amendment cases reflected the conventional wisdom of the time: that the amendment imposed no independent limits on Congress' power.<sup>29</sup> If Congress acted within the scope of its constitutional powers -- usually pursuant to its broad powers under the Commerce Clause -- the Tenth Amendment provided state governments no special protection from federal regulation. But beginning with *National League of Cities v. Usery*,<sup>30</sup> the Court entered a period in which a majority perceived the Tenth Amendment as imposing substantive limitations on congressional power. In *National League of Cities*, the court overturned *Maryland v. Wirtz*,<sup>31</sup> holding 5-4 that the Tenth Amendment barred Congress from applying federal minimum wage and overtime laws to state employees working "in areas of traditional government function."<sup>32</sup>

But the court shifted direction again just nine years later. Justice Blackmun, who wrote a concurring opinion in *National League of Cities*, concluded that attempts to define areas of state immunity on the basis of traditional function had failed. In *Garcia*,<sup>33</sup> Blackmun joined the four dissenters from *National League of Cities* to expressly overturn the 1976 landmark case and to disavow any role for the Court in defining federalism-based limitations on Congress' powers:

With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.<sup>34</sup> . . . Any substantive restraint on the exercise of Commerce Clause powers . . . must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."<sup>35</sup> . . . [T]he political process ensures that laws that unduly burden the States will not be promulgated.<sup>36</sup>

Dissenting were Chief Justice Burger and Justices Powell, Rehnquist and O'Connor. Rehnquist and O'Connor individually predicted that the Court would once again view the Constitution as imposing limits on Congress' power to regulate the states.<sup>37</sup> But the *Garcia* majority of Blackmun, Brennan, White, Marshall, and Stevens formed a coalition on the Court for much of the decade, consistently opposing federalism-based challenges to federal law during the 1980s.<sup>38</sup>

## B. Recent Developments

Retirements from the Court since *Garcia* have again altered the balance of the Court on this issue. Four members of the *Garcia* majority and two *Garcia* dissenters have left the Court, and their replacements have gravitated to the O'Connor and Rehnquist camp. In *Gregory v. Ashcroft*,<sup>39</sup> Justices Scalia, Kennedy and Souter, all relative newcomers to the Court, joined O'Connor and Rehnquist in an opinion that asserted, in dicta, that the Constitution may prohibit Congress from interfering with qualifications for state officeholders.<sup>40</sup> Then in *New York v. United States*,<sup>41</sup> Justice Thomas joined the majority from *Gregory* in holding that the Tenth Amendment prevents Congress from "coercing" states to carry out federal regulatory schemes. Among the three dissenters in *New York* -- White, Blackmun and Stevens -- only Stevens remains on the Court today.

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Thus, at least six members of the current Court view the Tenth Amendment as imposing restraints on Congress' power over the states, while Justice Stevens is the only certain vote to the contrary. Justices Ginsberg and Breyer have not been heard from on this issue. But even if both of the newcomers were to join Stevens in embracing *Garcia*, O'Connor and Rehnquist

appear to have a solid majority for continuing development of a new federalism doctrine. *Garcia* appears to represent a branch of Tenth Amendment law that is destined to be ignored, if not amputated at the trunk, in coming years.

O'Connor's opinion in *New York* reinforces this analysis of the Court's direction. *New York* involved a constitutional challenge to provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>42</sup> Congress passed the Act and amendments to address a severe shortage of disposal sites for low level waste.<sup>43</sup> The legislation provided various incentives for a state to establish its own low level waste facility or enter into a regional compact with other states for a shared site. States that failed to build a facility or participate in a regional compact would: (1) lose their share of payments from a federal escrow fund; (2) face surcharges at, and eventually be locked out of, disposal sites in other states; and (3) be forced to take title to all low level waste generated within the state and assume all liabilities for the waste.<sup>44</sup> The Court upheld the first two of these provisions as valid exercises of Congress' powers under the Spending and Commerce clauses. But it held the "take-title" provision unconstitutional under the Tenth Amendment.

O'Connor distinguished *Wirtz*, *National League of Cities*, *Garcia*, *Gregory* and several other Tenth Amendment cases as irrelevant to the inquiry: "This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."<sup>45</sup> O'Connor's flick-of-the-wrist treatment of the Court's Tenth Amendment precedents is one of the more criticized parts of the opinion. The dissent called it "an insupportable and illogical distinction" that the Court never made in its earlier cases.<sup>46</sup> One commentator described it as the "Achilles heel" of the opinion, warning that "[i]f that distinction collapses, a broad reading of *New York* might wash away not only *Garcia*, but also a significant number of post-New Deal precedents upholding federal regulation against state challenges."<sup>47</sup> By distinguishing most of its earlier cases, however, the Court avoided what would have been its third explicit about-face on the Tenth Amendment in sixteen years. O'Connor and other dissenters in *Garcia* had been highly critical of the majority's lack of respect for stare decisis,<sup>48</sup> so it is hardly surprising they would choose to limit *Garcia* rather than overturn it.

In *New York*, the Court said that federalism questions could be resolved through either of two "mirror image" inquiries. The first seeks to determine whether Congress acted within the scope of a power delegated to it by the Constitution; the second examines whether Congress invaded "the province of state sovereignty reserved by the Tenth Amendment."<sup>49</sup> Restraints on federal power over the states are not derived from the text of the Tenth Amendment itself, the Court conceded.<sup>50</sup> Instead, the limitations apparently are to be discerned from the federal structure of the Constitution itself.<sup>51</sup> The Court distinguished between Congress providing incentives for states to participate in a federal regulatory scheme and "outright coercion" of state governments by Congress. According to the Court, Congress may constitutionally "encourage" states to participate in federal programs by: (1) Conditioning a state's receipt of federal funds on state participation in a federal program. This exercise of the spending power requires some

relationship between the regulatory program and the purpose of the funds.<sup>52</sup> (2) Providing states a choice between regulating according to federal standards or having state law preempted under the Supremacy Clause.<sup>53</sup>

The take-title provision failed this test because states that chose not to regulate according to federal standards -- that is, those that did not open a disposal site or join a regional compact -- were "forced to submit to another federal instruction" and take title to the waste.<sup>54</sup> "Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers," the Court said.<sup>55</sup> Under either of these options, the take-title provision "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."<sup>56</sup> If Congress were permitted to compel states to regulate as Congress wished, federal officials would be less accountable to voters, the Court said in explaining the rationale for the rule.<sup>57</sup>

[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 views of the local electorate in matters not pre-empted by federal regulation.<sup>58</sup>

The rule against congressional coercion of a state's regulatory process is absolute in the sense it applies regardless of the federal interest at stake, the Court said.<sup>59</sup> It distinguished prior cases that weighed the government's interest in regulating, saying they involved laws of general application rather than mandates that targeted only the states. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."<sup>60</sup>

### C. The Guarantee Clause as a New Basis for Federalism

Justice O'Connor's opinions in *Gregory* and *New York* suggest she may be preparing the way for future use of the Guarantee Clause<sup>61</sup> as a new "textual home"<sup>62</sup> for federalism claims. O'Connor first hinted at this use of the Guarantee Clause in her 1982 dissent in *Federal Energy Regulatory Comm'n v. Mississippi*,<sup>63</sup> which sounded many of the same themes as her *New York* opinion. Since then, the leading proponent of using the Guarantee Clause in adjudicating federalism claims has been Professor Deborah Jones Merritt,<sup>64</sup> who was O'Connor's law clerk when the *FERC* opinion was handed down.

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Merritt has suggested five areas in which the Guarantee Clause should protect states from federal interference: (1) State and local elections (the "franchise"); (2) The structure and mechanics of state government;<sup>65</sup> (3) Qualifications for state office; (4) Wages of state employees engaged in lawmaking, adjudication, and enforcement functions; and (5) Use of the states as agents of the nation.<sup>66</sup>

Merritt's model of federalism permits federal regulation of private activity within a state: The guarantee of a republican form of government relates to the process of state government; a republican government is one in which the people control the actions of their leaders and lawmakers. A republican government, however, need not exercise its authority over any particular substantive area.<sup>67</sup>

In *Gregory and New York*, Justice O'Connor cited Merritt's article on five occasions. Furthermore, the rules that O'Connor articulated in regard to congressional coercion of the states closely resemble Merritt's argument against use of the states as agents of the nation. But O'Connor's treatment of New York state's Guarantee Clause argument provided the most interesting parallel to Merritt's work. O'Connor conceded that most claims brought under the Guarantee Clause had been held nonjusticiable under the political question doctrine,<sup>68</sup> but said this was because the Court had taken a "limited holding" from 1849 and "metamorphosed [it] into the sweeping assertion" of nonjusticiability.<sup>69</sup> Citing several cases in which Guarantee Clause claims were adjudicated, O'Connor declared that "[w]e need not resolve this difficult question today."<sup>70</sup> The question did not need to be resolved because the two surviving incentive provisions were consistent with the Guarantee Clause; neither provision "can reasonably be said to deny any State a republican form of government," she said.<sup>71</sup>

O'Connor thereby marked, in *New York*, the path for future use of the Guarantee Clause to decide state federalism claims. Not only did she challenge the prevailing view that Guarantee Clause claims are nonjusticiable, but she demonstrated how the clause could be applied to future federalism claims.

#### IV. The Davenport Article

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Nevada hopes to build on these federalism developments in a future constitutional challenge to the Yucca Mountain project. The 1993 article by Nevada Special Deputy Attorney General Davenport<sup>72</sup> is informative as an early articulation of constitutional arguments the state might make if Yucca Mountain is formally selected for development of the

repository. Although Davenport's arguments challenge the NWPA's repository siting process generally, Davenport says his attack is focused on two specific provisions in the NWPA: §

10136(b), which permits the state to submit a "notice of disapproval" after the president formally recommends the site, and § 10135(c), which allows Congress to override<sup>73</sup> the state's disapproval by simple majority votes of the House and Senate.<sup>74</sup>

Davenport quotes James Madison to the effect that separation of powers and federalism will together provide "double security" protecting rights of the people.<sup>75</sup> NWPA provisions that provide a mechanism for state disapproval of the repository and for congressional override of the state disapproval are unconstitutional because they prevent the state from checking abuses of federal power, according to Davenport.

That double security exists in the siting and development of federal industrial facilities like a high-level nuclear waste repository only if state and federal governments must both approve their location. Currently, the single security available to Nevada citizens under the NWPA is that security reserved to Congress by the congressional override provision. But that is no security because there is no political accountability between Congress and the citizens of Nevada, save its four representatives.<sup>76</sup>

Citing Merritt, Davenport also argues that the NWPA provisions are damaging the body politic: "The experience is hardly training Nevada citizens in the techniques of democracy, fostering accountability of elected representatives, or enhancing voter confidence in the democratic process."<sup>77</sup>

In forming many of his arguments, Davenport attempts to draw legal and linguistic parallels between the NWPA and the take-title provision struck down in *New York*. For example, he frames the Tenth Amendment issue at Yucca Mountain this way:

Justice O'Connor concludes that "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" The question relevant to the NWPA is whether Congress may commandeer the legislative process of a particular State by directly compelling it to accept a federal industrial program within its borders.<sup>78</sup>

The NWPA is even more coercive than the take-title clause for low level waste, Davenport argues, because the repository-siting provisions target only Nevada.<sup>79</sup> A law directed at a single state raises the greatest potential for "majority tyranny... against under-represented minor constituencies."<sup>80</sup>

Davenport also presents an environmental equity argument, which he anchors to the Court's statement in *New York* that Congress cannot compel states to subsidize private industry. Nevada residents will suffer reduced property values and other costs if nuclear waste is buried at Yucca Mountain, he says.<sup>81</sup> That will effectively force Nevada to subsidize other states' use of nuclear power and subsidize the nuclear industry, much as the take-title provision in *New York* would have created a windfall for waste generators.<sup>82</sup> Davenport is talking not just about



a financial subsidy, but also a subsidy of environmental quality. The NWPA, he says, "commandeers Nevada's environment in order to protect the environment of nuclear power producers and consumers in other states."<sup>83</sup> Davenport finds support for this argument in Chief Justice Rehnquist's dissenting opinions in two landfill cases from 1992.<sup>84</sup>

Davenport deals somewhat indirectly with the issue of federal preemption. He seems to advance two arguments in this area, however. First, he asserts that Nevadans have made a policy decision in choosing not to build nuclear power plants or other facilities that generate high level waste. Congress should not be permitted to override this local preference, because to do so would jeopardize Nevada's unique political and cultural climate.<sup>85</sup> Second, Davenport argues that public health and safety have traditionally been state concerns, placing them among those "local and particular" matters over which state legislatures retain power.<sup>86</sup> The federal government's intrusion at Yucca Mountain is unwarranted because its claim of a national interest in control of interstate nuclear pollution is a mere pretext; according to Davenport, the federal government's chief motive in taking responsibility for nuclear waste disposal is to promote the nuclear power industry.<sup>87</sup>

## V. The Tenth Amendment and Yucca Mountain

The Supreme Court's 1992 holding in *New York* is superficially appealing from Nevada's perspective: the holding struck down part of a federal nuclear waste law because of its coercive effect on state governments. Furthermore, the federal effort to build a repository at Yucca Mountain undoubtedly feels more coercive to Nevada leaders and residents than the take-title provisions of the low level waste program. The Yucca Mountain project is much larger, with far greater health and environmental risks, than a landfill for low level waste.

But upon closer scrutiny, these arguments do not provide Nevada with much constitutional fodder. Nevada's greatest difficulty in using *New York* to its advantage is the

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fundamental difference between the laws governing low level and high level nuclear wastes. The federal government does not own and has not assumed responsibility for disposing of low level waste; instead, it developed a regulatory strategy to prod states into providing disposal facilities for the wastes their residents generate.<sup>88</sup> Under the NWPA, by contrast, the federal government

has agreed to directly assume title to high level waste by January 31, 1998 in return for waste generators' payments into the Nuclear Waste Fund.<sup>89</sup>

This difference is critical. It means, ultimately, that the NWPA does not fit within the narrow scope of protections the Court has carved out in its recent interpretations of the Tenth Amendment. The Court appears poised to expand the scope of federalism safeguards, but Nevada's grievances, compelling as they may be, fall beyond the reach of any federalism theory the Court is likely to embrace.

## A. New York Meets Yucca Mountain

Congress' transgression in *New York* was its attempt to coerce states to legislate and regulate according to a federal scheme. But the NWPA does not command Nevada to legislate or regulate. Congress isn't asking Nevada to find a repository site or dispose of high level waste -- the federal government is doing both itself. The Yucca Mountain project therefore raises issues of preemption and state control of federal activities very different from those posed in New York.

Despite the Court's deep divisions and shifting sentiments regarding the Tenth Amendment, the justices appear to agree that federalism does not limit the federal government's ability to directly regulate private activity in a way that preempts state law. In *New York*, the Court even said that Congress could have directly regulated low level waste disposal without offending the Tenth Amendment.

Regulation of the resulting interstate market in waste disposal is ... well within Congress' authority under the Commerce Clause. Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation.<sup>90</sup>

The dissenters agreed on this point. "Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses..." White wrote.<sup>91</sup> The federal government could go so far as to "strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities," he said.<sup>92</sup> Thus, nine justices believed that the federal government could directly regulate low level waste under the Supremacy Clause. Establishing landfills for that waste is a necessary part of that responsibility, as the dissent expressly acknowledged.

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The arguments for federal preemption in the area of high level waste disposal are even more compelling than those for low level waste, in that high level waste is more lethal and more difficult to handle.<sup>93</sup> The Ninth Circuit has described high level waste disposal as a "pressing national problem"<sup>94</sup> and an "urgent" issue.<sup>95</sup> This is precisely the kind of issue in which courts are loathe to tie the hands of Congress and the executive branch, especially given the real possibility that no state or tribe would voluntarily accept the repository.<sup>96</sup>

Even if the Court turns to the Guarantee Clause as a new textual home for federalism doctrine, preemption will cast a long shadow at Yucca Mountain. In her writing on the Guarantee Clause, Professor Merritt states that the principles of republican government do not give the states an inherent right to regulate private activity:

A government may be republican, with all of its officers accountable to the public, even though it has no power to regulate coal mining, atomic energy, or railroad freight charges. The guarantee clause assures the states the right to maintain autonomous, republican governments. *The supremacy clause, however, denies those governments the power to regulate any fields properly preempted by Congress.*<sup>97</sup>

Thus, even under Merritt's broader view of federalism, Nevada would have to establish that Congress' enumerated powers do not give it authority to regulate nuclear waste. Given the modern scope of congressional powers under Article I and other constitutional provisions, as discussed in greater detail below, that proof simply cannot be made.

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The result is no different if nuclear waste disposal is viewed as a proprietary activity by the federal government, based on the government's legal ownership of the waste after 1998. In *Mayo v. United*

*States*,<sup>98</sup> the Court held that the federal government could distribute federally owned fertilizer within Florida without paying a state inspection fee that Florida law required before all sales. The Court first discussed the effect of the Supremacy Clause, then stated that "[a] corollary to this principle is that the activities of the Federal Government are free from regulation by any state."<sup>99</sup> The activities of the federal government are presumed to be free of any regulation or tax by the states unless Congress expressly subjects that activity to state regulation, the Court said.<sup>100</sup>

*Arizona v. California*<sup>101</sup> was a case that, like Yucca Mountain, involved a state's assertion of control over a federal public works project. Arizona insisted that the Department of the Interior comply with state law by submitting its construction plans for Boulder Dam to the state engineer for approval. The Court held that the federal government was under no obligation to comply with the state requirement: "The United States may perform its functions without conforming to the police regulations of a state," the Court said.<sup>102</sup>

None of the arguments Davenport advances can overcome the fundamental problem posed by federal preemption. He suggests that protection of public health and safety is a state function. While it is true that *National League of Cities* and its progeny gave special protection to traditional functions of the state and local government, these cases certainly do not stand for the proposition that any state exercise of police powers is beyond the reach of federal law. Such a reading would turn the Supremacy Clause on its head and conflict with well-established principles of congressional powers.<sup>103</sup>

Davenport is probably right when he claims Nevadans are being forced to subsidize the nuclear industry as well as those states that generate nuclear wastes. Even if the subsidy can't be quantified in dollars and balanced against the flow of federal money into the state,<sup>104</sup> it may

well exist in the realm of risk allocation and peace of mind. Nevada would, after all, be forced to live with waste it did not generate and does not want, while other states would rid themselves of the wastes they created and now fear. But any costs, economic or psychological, will fall generally on the residents of Nevada rather than on state government in particular. The Court in *New York* was specifically concerned about the coercive impact of federal actions on state government, even though federalism ultimately serves to preserve individual rights, according to the Court.<sup>105</sup>

O'Connor believes federalism serves two purposes: the protection of individual liberties through dispersion of power<sup>106</sup> and political accountability.<sup>107</sup> Of course, even the staunchest advocates of a reinvigorated federalism do not claim that it guarantees for the states just treatment in Washington. As the Ninth Circuit noted, the Tenth Amendment "does not protect a State from being outvoted in Congress."<sup>108</sup> The Court's concern with political accountability does not help Nevada, either. O'Connor fears that:

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.<sup>109</sup>

But the Yucca Mountain project does not appear to have blurred the lines of political accountability in Nevada. If anything, the controversy has heightened voters' understanding of policy differences between state and federal officials and their respective roles at Yucca Mountain. Nevada opinion polls show that approval ratings for state officials climbed even as residents' opposition to the repository was hardening and their distrust of federal institutions was growing.<sup>110</sup> But Davenport aptly points out that in this case, knowledge is not power. Nevada residents know the federal government is responsible for the Yucca Mountain project, but they are powerless to hold Congress accountable in the manner suggested by O'Connor. Federal officials can run roughshod over a single state and remain "insulated from the electoral ramifications of their decisions," to use O'Connor's language.<sup>111</sup>

## **B. Constitutional Powers Underlying NWP**

Most of the Supreme Court precedent on the Tenth Amendment addresses the constraints federalism imposes on Congress' powers under the Commerce Clause.<sup>112</sup> Consequently, Nevada might argue that different rules should be applied to the Yucca Mountain project because it is premised on a power other than the commerce power. Despite its wide sweep, the Commerce Clause arguably does not give Congress the power to transport nuclear waste that it owns and place that waste in a repository. By its terms, the Commerce Clause gives Congress the power "[t]o regulate commerce . . . among the several states,"<sup>113</sup> and Congress is not *regulating*, in the usual sense, when it exercises proprietary control over its own property. The argument can be made that Congress is exercising its Commerce Clause powers if federal ownership and disposal of nuclear waste is a "necessary and proper"<sup>114</sup> part of regulating nuclear power. But the program seems to fit more comfortably under a combination of other powers.

The Ninth Circuit held that federal studies at Yucca Mountain -- and, implicitly, construction of a repository there -- may be carried out under the Property Clause.<sup>115</sup>

Under this clause, "[t]he power over the public land thus entrusted to Congress is without limitations."<sup>116</sup> . . . Yucca Mountain is federally owned land, subject to Congress' plenary power to regulate its use. Thus, the Property Clause provides a sufficient textual basis for Congress' authority to enact the 1987 NWPA amendments.<sup>117</sup>

The federal government had argued that the Commerce Clause and Common Defense Clause also provided authority for the high level waste program, but the Ninth Circuit did not reach those contentions.<sup>118</sup>

Congress arguably must have exercised powers in addition to the Property Clause when it passed the NWPA. The spending power presumably was used for disbursements from the Nuclear Waste Fund, and Congress' power over federal lands would not readily provide the government with authority to take ownership to high level waste or to transport that waste across the country. But the Property Clause is not limited to congressional powers over federal lands. Much of the high level waste program may fall within the Property Clause's reach precisely because the federal government has agreed to take title to the waste -- that is, to make the waste federal "property."<sup>119</sup> The Property Clause gives Congress "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..."<sup>120</sup> Viewing the NWPA as an exercise of Congress' Property Clause powers is consistent with the Supreme Court's treatment of other proprietary activities of the federal government.<sup>121</sup>

The NWPA might be viewed as an exercise of Congress' Common Defense Clause,<sup>122</sup> as the government has urged. Spent fuel can be reprocessed to recover plutonium for use in building nuclear weapons,<sup>123</sup> and Congress may have considered federal handling and disposal of high level waste an issue of national security. This argument is undermined, however, by the pervasive role of private companies at other points in the fuel cycle, including their possession of large quantities of spent fuel at commercial reactors.

Nevada will probably not, however, be able to exploit the fact that the Yucca Mountain project is based on powers other than the Commerce Clause. Although most of its Tenth Amendment cases have involved Congress' exercise of the commerce power, the Court has demonstrated that it will apply similar if not identical rules to the exercise of other plenary powers. In *New York*, the Court applied similar rules in its review of congressional actions under the Spending and Commerce clauses. In *Gregory*, the Court conducted two analyses of a Tenth Amendment claim, one of which assumed the challenged statute was passed pursuant to Congress' enforcement powers under the Fourteenth Amendment.

Perhaps the most telling discussion was in *National League of Cities*, where the Court borrowed freely from tax immunity cases in defining Tenth Amendment limits on Congress' commerce power.<sup>124</sup> Justice Brennan argued in his dissent that the tax cases should not be

relied upon in deciding the Tenth Amendment's impact on the commerce power; the majority, he complained, "merely tell[s] us which delegated power are limited by state sovereignty and which are not, but neither reason nor precedent distinguishing among these powers is provided."<sup>125</sup>

Justice Rehnquist, writing for the majority, offered a far less thorough cataloguing of the powers than Brennan's statement suggests. Rehnquist merely equated the Tenth Amendment's impact on the tax and commerce powers.<sup>126</sup> He also suggested that the Tenth Amendment would not impose limits on congressional action under the war power.<sup>127</sup> In the aggregate, these cases indicate the Court is likely to apply similar rules in deciding federalism claims brought under the Commerce Clause, Property Clause or other enumerated powers. The Court has described Congress' property powers as plenary,<sup>128</sup> and it seems unlikely that the Tenth Amendment would restrict the property power to a substantially greater degree than the commerce or spending power.

### C. Defective Political Process

For the reasons discussed above, Nevada is not likely to succeed in arguing that the principles of federalism shield it from federal efforts to build the Yucca Mountain project. The state's strongest argument rests not with *New York*, but with a return to *Garcia's* dicta about defective political process.<sup>129</sup> Although the Ninth Circuit rejected this very argument with regard to the 1987 NWSA amendments,<sup>130</sup> it could be raised again in response to future actions by Congress and the executive branch.

Since *Garcia*, the Court has suggested that the Tenth Amendment might provide a remedy if a state "was singled out in a way that left it politically isolated and powerless."<sup>131</sup> Although *New York* did not boost the political defect doctrine, neither did it undermine it. O'Connor's opinion clearly addresses laws that apply to states collectively, not to laws that single out one state, or, more precisely, the residents of one state. For example, O'Connor wrote that political accountability is achieved when federal officials are required to "suffer the consequences if their decision turns out to be detrimental or unpopular."<sup>132</sup> As discussed previously, this presumes that the decision targets more than a single state; Nevada voters alone cannot make Congress "suffer the consequences."

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*The Court is likely to interpret the NWSA provisions granting Nevada an oversight role, giving the state federal funding, and allowing the state to register its disapproval as evidence the political process did in fact take Nevada's interests into account.*

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If Congress were to act with blatant contempt towards Nevada, perhaps by disregarding a scientific consensus that Yucca Mountain was an unsafe site for the repository, Nevada could make a compelling case for applying the Tenth Amendment "to compensate for possible failings in the national political process."<sup>133</sup> Furthermore, justices confronted with extraordinary circumstances surrounding a unique program could grant Nevada relief without worrying that

it would open the proverbial floodgates to similar claims from other states. Of course, if Congress' actions appear reasonable, this argument will fail. The Court is likely to interpret the NWPA provisions granting Nevada an oversight role, giving the state federal funding, and allowing the state to register its disapproval as evidence the political process did in fact take Nevada's interests into account.<sup>134</sup>

## VI. Conclusion

The Supreme Court's holding in *New York* will be of little help to Nevada in its fight against the Yucca Mountain project. The federal government's powers under the Property and Supremacy clauses are too broad, and the national interest in nuclear waste disposal too obvious, for Nevada to avoid the effects of federal preemption. Depending on the events that unfold in coming years, the state may, however, be able to fashion a credible federalism claim alleging a defect in the political process.

Construction of a repository under Yucca Mountain is nonetheless far from certain. Scientists may discover problems that make Yucca Mountain an unsuitable location for the repository,<sup>135</sup> or may develop a safer or cheaper way to dispose of high level waste.<sup>136</sup> More likely, perhaps, is the prospect the project will collapse from its own size and complexity. High costs, management problems, scientific uncertainties and broken deadlines continue to plague the project,<sup>137</sup> raising the possibility that project advocates will ultimately decide it is infeasible or too expensive to complete.<sup>138</sup> Nevada and other opponents of Yucca Mountain may ultimately win in the political arena.<sup>139</sup> Paradoxically, Nevada might even win the war by continuing to launch losing legal battles. John O'Leary, deputy to former Energy Secretary James R. Schlesinger, was quoted saying a repository cannot be built over determined opposition of the host state.

"When you think of all the things a determined state can do, it's no contest," O'Leary told me, citing by way of example the regulatory authority a state has with respect to its lands, highways, employment codes and the like. The federal courts, he added, would strike down each of the state's blocking actions, but meanwhile years would roll by and in a practical sense DOE's cause would be lost.<sup>140</sup>

In the end, Nevada may find that time and inertia are decisive allies at Yucca Mountain. But if the nation's political, legal and scientific institutions grind through the obstacles toward construction of a repository, the Constitution will not stand in their way.

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## NOTES

1. The proposed repository would hold up to 70,000 tons of spent fuel and 7,000 tons of high level radioactive waste. As of 1993, more than 25,000 metric tons of spent fuel was stored in pools at the nation's 112 civilian nuclear power plants, with an additional 2,000 tons generated every year. Thomas W. Lippman, *Panel Faults Nuclear Waste Repository Program*, Washington Post, March 3, 1993, at A10 (attributing the numbers to the Nuclear Waste Technical Review Board, *Underground Exploration and Testing at Yucca Mountain: A Report to Congress and the Secretary of Energy* (1993)). High level radioactive wastes are defined as highly radioactive wastes other than spent fuel, primarily generated during the reprocessing of nuclear fuel. See 42 U.S.C.A. § 10101(12), (23) (West 1983). These wastes are generally acidic liquids produced by the government's nuclear weapons and research programs; spent fuel from commercial reactors has not been reprocessed in the United States since 1972. See Environmental Radiation Protection Standards for Management and Disposal of Spent Fuel, High-Level and Transuranic Radioactive Wastes, 58 Fed. Reg. 66,398 pmb. (1993) (preamble to final rule amending 40 C.F.R. Part 191). Because spent fuel that is not reprocessed is itself a waste product, "high level waste" will be used in this article to refer to both spent nuclear fuel and high level nuclear waste.
2. See, e.g. General Accounting Office, *Yucca Mountain Project Behind Schedule and Facing Major Scientific Uncertainties*, No. 93-124 (1993) (Attributing continuing delays to technical uncertainties, inadequate funding and poor planning.)
3. James Davenport, *The Federal Structure: Can Congress Commandeer Nevada to Participate in its Federal High Level Waste Disposal Program?*, 12 Va. Envtl.L.J. 539 (1993).
4. 112 S.Ct. 2408 (1992).
5. 42 U.S.C.A. § 10132(b)(1)(B) (West 1983). DOE has already constructed an underground repository: the \$1 billion Waste Isolation Pilot Project in New Mexico. That facility, small by Yucca Mountain standards, will accept only transuranic wastes from the nation's nuclear weapons factories, including plutonium-contaminated trash, clothing, and laboratory equipment. See Thomas W. Lippman, *Hill Gives Go-Ahead to Plutonium Burial Ground in New Mexico*, Washington Post, Oct. 10, 1992, at A6.
6. See Luther J. Carter, Resources for the Future, Inc., *Nuclear Imperatives and the Public Trust* (1987), at 402-08.
7. 42 U.S.C.A § 10132(b)(1)(C) (West 1983) (repealed in 1987).
8. See Carter, *supra* note 6, at 408-12. The Reagan administration's decision in mid-1986 to abandon work on the eastern site may have been driven in part by a fear that the controversial program would hurt Republican hopes for retaining control of the U.S. Senate. Four GOP Senate seats were up in the 1986 election in those states targeted for the second repository. *Id.* at 411.
9. 42 U.S.C.A. § 10172 (West Supp. 1993).
10. Congress specifically banned site-specific studies for a second repository without Congress' approval and ordered a phase-out of all research into the suitability of building a repository in granite. 42 U.S.C.A. § 10172a (West Supp. 1993). The eastern sites were primarily granite formations.
11. The nearest community is Beatty, about 40 miles to the northwest. Las Vegas lies about 100 miles to the southeast.
12. The dry climate and low water table arguably reduce the risk that waste containers will corrode and release radionuclides, while Yucca Mountain's volcanic tuff may provide advantages in design and construction of a repository. See Carter, *supra* note 6, at 422-23.
13. As created by the Legislature, Bullfrog County consisted of 144 square miles of federally owned land; the county had no residents, but the highest property tax rate permitted by the state constitution. Elaine Hiruo, *Nevada Creating High-Tax County at Waste Disposal Candidate Site*, Nuclear Fuel, June 29, 1987, at 8. The new county was subsequently invalidated by a state court. *Nevada Judge Erases Bullfrog County*, Nuclear News, April 1, 1988, at 69. Then-Gov. Richard Bryan signed the bill creating Bullfrog County, but as a U.S. senator has proven to be one of Nevada's staunchest opponents of the repository. See, e.g., *Bryan Puts Hold on Four DOE Nominations*, Nuclear Fuel, Aug. 21, 1989, at 13 (reporting how Bryan blocked confirmation of four senior DOE appointees to force greater federal funding for Nevada's nuclear waste program); Clifford Krauss, *Nevada Senator Plans to Filibuster the Energy Bill*, New York Times, Oct. 4, 1992, at 30 (reporting Bryan's planned filibuster of the 1992 energy bill because of its requirement that the Environmental Protection Agency defer to the National Academy of Sciences in promulgating new health and safety standards for the repository). The attempt to establish Bullfrog



County may have been motivated in part by a desire to usher local officials who were in favor of the repository from center stage. Officials in Nye County, which includes Yucca Mountain, wanted the repository built in Nevada because of the jobs and growth it promised. Carter, *supra* note 6, at 423.

14. Cass Peterson, *Hill Conferees Target Nevada for Nuclear Dump*, Washington Post, Dec. 18, 1987, at A10. See also Mark E. Rosen, *Nevada v. Watkins: Who gets the Shaft?*, 10 Va. Envtl.L.J. 239, 250-55 (1991).

15. Doug J. Swanson, *Cost, Frustrations Soar as Nuclear Project Lags*, Dallas Morning News, May 23, 1993, at 1A.

16. Nevada has brought seven actions before the Ninth Circuit Court of Appeals under 42 U.S.C.A. § 10139(a) (West 1983), which gives U.S. Courts of Appeal original jurisdiction over suits by the host state. The resulting opinions are *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529 (9th Cir. 1985) (holding that Nevada was entitled to federal funds for its studies at Yucca Mountain); *Nevada v. Herrington*, 827 F.2d 1394 (9th Cir. 1987) (upholding DOE's decision to prohibit Nevada and other states from spending federal funds for judicial challenges to the NWPAs); *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied* 111 S.Ct. 1105 (1991) (upholding 1987 amendments against constitutional and procedural challenges); *County of Esmeralda v. United States Department of Energy*, 925 F.2d 1216 (9th Cir. 1991) (holding that DOE erred in refusing to designate certain counties as being affected by the Yucca Mountain project); *Nevada v. Watkins*, 939 F.2d 710 (9th Cir. 1991) (holding that DOE's promulgation of guidelines for disposal of nuclear waste was preliminary agency action not subject to court review); *Nevada v. Watkins*, 943 F.2d 1080 (9th Cir. 1991) (holding that Nevada's challenge to the Yucca Mountain environmental assessment was rendered moot by 1987 amendments to NWPAs); *Nevada v. United States Department of Energy*, 993 F.2d 1442 (9th Cir. 1993) (holding that DOE, not Nevada, is to calculate the "payments equal to taxes" to Nevada under the NWPAs). Other cases related to the Yucca Mountain project have been brought in other courts and on appeal to the Ninth Circuit. The published cases include *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) (upholding Bureau of Land Management's decision to grant DOE an easement for Yucca Mountain studies), *cert. denied*, 111 S.Ct. 2052 (1991); *TRW Environmental Safety Systems, Inc. v. United States*, 18 Cl.Ct. 33 (1989) (permanently enjoining DOE from awarding a \$1 billion management contract at Yucca Mountain to Bechtel National Inc. because of conflict of interest violations by an agency official); *Nevada v. O'Leary*, 151 F.R.D. 655 (D. Nev. 1993) (denying Nevada's request to depose 29 scientists under FRCP 27). Nevada's lawyers have identified six other actions the state may bring in the future to challenge anticipated actions by DOE, the Nuclear Regulatory Commission and the Environmental Protection Agency relative to Yucca Mountain. *Id.* at 657 n.1.

17. Assembly Bill 222, Nev.Rev.Stat. § 459.910(1) (1989) (preempted by the 1987 amendments to the NWPAs, according to *Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990)).

18. Nevada eventually issued three permits -- air quality, underground injection and water appropriations permits -- that DOE said it needed for immediate work at the mountain. See *Nuclear Energy Brief*, Inside Energy, May 20, 1991, at 7; *DOE Gets Water Permit, Can Begin at Yucca Mtn.*, Nuclear News, April 1992, at 91. Nevada issued those permits under political and legal pressure from DOE. The agency sued the state and Nevada District Court Judge Howard McKibben ordered Nevada to begin processing the permit applications. *United States v. Nevada*, No. 90-065 (D.Nev. 1990). In addition, Senate Energy and Natural Resources Committee Chairman J. Bennett Johnston threatened legislation to strip Nevada of authority to issue permits for the project. See Lira Behrens, *Johnston Poised to Pre-empt Nevada's Authority at Yucca Mountain*, Inside Energy, March 25, 1991, at 3. Nevada's control over permits at Yucca Mountain may well reemerge as a contentious issue, however, since Nevada has authority to issue a number of other permits that DOE will need to study and construct a repository. See Elaine Hiruo, *Permits, Water, Funds Crucial to Pace of DOE Work at Yucca Mt.*, Nuclear Fuel, July 22, 1991, at 3 (reporting that eleven of the eighteen state and federal permits that DOE believes it will need for studies at Yucca Mountain must be issued by the state). A list of the permits required under the Safe Drinking Water Act, Clean Air Act, Clean Water Act and other laws are appended to Rosen, *supra* note 14, at 301-306.

19. See cases cited *supra* note 16.

20. See, e.g., Behrens, *supra* note 18 (quoting DOE official as saying Nevada's refusal to issue permits delayed limited characterization work by a year).

21. DOE has awarded at least five grants or grant extensions to the University of Nevada, Reno (UNR) and University of Nevada, Las Vegas (UNLV) without competitive bidding. See 54 Fed. Reg. 30,791 (1989) (announcing a \$4.3-million grant to UNLV to develop a quality assurance program at Yucca Mountain, study nuclear waste packaging and transportation, assess socioeconomic impacts of a repository, and host annual scientific symposia on nuclear waste); 54 Fed. Reg. 38,551 (1989) (announcing a \$1.6-million grant to UNR for geologic and socioeconomic studies); 54 Fed. Reg. 52,981 (1989) (announcing an \$8.7-million grant to UNLV to develop a

computerized records system for licensing of the repository); 55 Fed. Reg. 45,631 (1990) (announcing a \$1.2-million grant to UNR "to educate students of all ages to be more scientifically literate in order to make rational decisions about energy and mineral resource development . . ."); 56 Fed. Reg. 49,180 (1991) (announcing an increase to \$4.4 million in FY 1991 funding of UNR and UNLV programs).

22. Steve Adams, *UNLV Center of Nuke Flap*, Las Vegas Review-Journal, Aug. 12, 1989, at 1A.

23. 42 U.S.C.A. § 10136(c)(1) (West Supp. 1993). The size of these annual grants has been a point of contention between Nevada's congressional delegation and congressional supporters of Yucca Mountain, particularly Sen. Johnston. See, e.g., *Bryan Puts Hold on Four DOE Nominations*, NuclearFuel, Aug. 21, 1989, at 13; Dave Airozo, *Provision in Funding Bill Aims to Discipline Nevada Oversight*, NuclearFuel, Nov. 8, 1993, at 7. The NWPA also provides for a "benefits agreement" with the host state to include annual payments of up to \$20 million a year until the repository is filled to capacity. 42 U.S.C.A. §§ 10173, 10173a (West 1993).

24. 42 U.S.C.A. § 10136(b)(2) (West 1983); See *Nevada v. Watkins*, 914 F.2d 1545, 1559 (9th Cir. 1990) (holding that Nevada cannot exercise its disapproval of Yucca Mountain until the president recommends the site to Congress).

25. 42 U.S.C.A. § 10135(c) (West 1983).

26. 42 U.S.C.A. § 10135(d), (e) (West 1983).

27. U.S. Const. Amend. X.

28. 105 S.Ct. 1005 (1985) (5-4 decision).

29. See, e.g., *United States v. Darby*, 61 S.Ct. 451, 462 (1941) ("The amendment states but a truism that all is retained [by the states] which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment...."). See also Laurence H. Tribe, *American Constitutional Law* § 5-20 at 378 (2d ed. 1988).

30. 96 S.Ct. 2465 (1976) overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985).

31. 88 S.Ct. 2017 (1968), overruled by *National League of Cities*, 96 S.Ct. 2465.

32. 96 S.Ct. at 2474.

33. 105 S.Ct. 1005.

34. *Id.* at 1017.

35. *Id.* at 1019 (quoting *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S.Ct. 1054, 1060 (1983)).

36. *Id.* at 1020.

37. *Id.* at 1033, 1037.

38. *The Supreme Court, 1991 Term -- Leading Cases*, 106 Harv.L.Rev. 163, 174 n.11 (1992).

39. 111 S.Ct. 2395 (1991).

40. *Id.* at 2402-2403. The Court avoided the constitutional issue by ruling that Congress failed to clearly state that the Federal Age Discrimination in Employment Act applied to state judges. Missouri, therefore, could force state judges to retire at age 70. White and Stevens concurred in the result, but dissented from the constitutional discussion. Blackmun and Marshall dissented.

41. 112 S.Ct. 2408 (1992).

42. 42 U.S.C. §§ 2021b-2021d.

43. Two of the three land disposal sites in the United States were temporarily shut down in 1979, and governors of the states with disposal sites announced plans to permanently close or drastically curtail operations of the facilities. 112 S.Ct. at 2415.

44. *Id.* at 2416.

45. *Id.* at 2420.

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

47. *Leading Cases, supra* note 38, at 182 (footnote omitted).

48. Justice Powell's dissenting opinion in *Garcia* accused the majority of "weakening the application of stare decisis," 105 S.Ct. at 1022, by ignoring recent decisions of the Court, *id.* at 1021. "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of multiple precedents that we witness in these cases." *Id.* at 1022 (footnote omitted).

49. 112 S.Ct. at 2417.

50. *Id.* at 2418.

51. See *Leading Cases*, *supra* note 38, at 178-79 (criticizing O'Connor for failing to base the holding on the Necessary and Proper Clause or other constitutional text). But see *Tribe*, *supra* note 29, at 381 (noting with apparent approval that federalism derives its content in part from the "tacit postulates" of the Constitution) (quoting *Nevada v. Hall*, 99 S.Ct. 1182, 1194 (1979) (Rehnquist, J., dissenting)).
52. 112 S.Ct. at 2423.
53. *Id.* at 2424 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 101 S.Ct. 2352, 2366 (1981)). The Court said many federal statutes, including the Clean Water Act, Occupational Safety and Health Act, and Resource Conservation and Recovery Act, fall into this category of "cooperative federalism." *Id.*
54. *Id.* at 2428.
55. *Id.*
56. *Id.* The Court said the take-title provision appeared to be unique. "No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 2429.
57. *Id.* at 2424.
58. *Id.*
59. *Id.* at 2429. The Court cited no authority for this statement.
60. *Id.*
61. U.S. Const. art. IV, § 4. The Guarantee Clause states: "The United States shall guarantee to every State in this Union a Republican Form of Government."
62. See *Tribe*, *supra* note 29, § 5-23 at 398.
63. 102 S.Ct. 2126, 2153 (O'Connor, J., dissenting) (stating that "federalism enhances the opportunity of all citizens to participate in representative government"). See *Tribe*, *supra* note 29, § 5-23 at 398 (commenting that O'Connor "may have hit upon an important link between the tacit postulate of state sovereignty and the textual guarantee of republican government").
64. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col.L.Rev. 1 (Jan. 88).
65. Merritt believes that conditions placed on a state's use of federal funds may be so coercive as to be unconstitutional. *Id.* at 49-50.
66. *Id.* at 37-70.
67. *Id.* at 59.
68. 112 S.Ct. at 2432.
69. *Id.* at 2433.
70. *Id.*
71. *Id.*
72. Davenport, *supra* note 3.
73. Some have suggested the override provision is unconstitutional under *Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764 (1983). See Pamela Goldberg, *Nuclear Waste Policy Act of 1982: Does Immigration & Naturalization Service v. Chadha Veto the Congressional Override?*, 21 Tulsa L.J. 694 (1986); Davenport, *supra* note 3, at 558-560. This article will not examine the issue. Even if the provision is held to violate the Presentment Clause or separation of powers doctrine, Congress could cure the defect by amending the NWPA.
74. By focusing his argument on these two statutes, Davenport is navigating around the holding in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990) *cert. denied* 111 S.Ct. 1105 (1991). The Ninth Circuit rejected Nevada's claims that by singling out Yucca Mountain, the 1987 amendments violated the Tenth Amendment, the Federal Enclave Clause, the Equal-Footing Doctrine, the Port Preference Clause, the Guarantee Clause and the Privileges and Immunities Clause, inter alia. The court also rejected Nevada's argument that Assembly Bill 222, see *supra* note 17, constituted a valid notice of disapproval under § 10136(b); the state must wait until the President formally recommends the site before the state exercises its right to disapprove of the project, the court said. 914 F.2d at 1559. Thus, a number of Nevada's constitutional challenges to the NWPA and its 1987 amendments are res judicata. Nevada attempted to withdraw its constitutional claims shortly before oral argument in the case, perhaps out of a desire to preserve the issues for the district court suit filed by former Energy Secretary James Watkins. *Id.* at 1551-1552. However, no formal motion was submitted to the court, and the court resolved the constitutional issues in the federal government's favor. *Id.* at 1552.
75. Davenport, *supra* note 3, at 544.

76. *Id.* at 553.
77. *Id.* at 555.
78. *Id.* at 561 (quoting *New York*, 112 S.Ct. at 2420) (footnote omitted).
79. *Id.* at 562. Davenport argues that this distinction is a logical extension of *New York's* sharp line-drawing between laws that apply to states and private parties alike, on the one hand, and those that target only the states, on the other.
80. Davenport, *supra* note 3, at 562.
81. *Id.* at 567-68.
82. *Id.* at 568.
83. *Id.*
84. *Id.* at 566-67. Davenport quotes from *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S.Ct. 2019, 2029 (1992) (Rehnquist, C.J., dissenting) (expressing support for a Michigan law that "simply incorporates the commonsense notion that those responsible for a problem should be responsible for its solution to the degree they are responsible for the problem, but not further") and from *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009 (1992) (Rehnquist, C.J., dissenting).
85. Davenport, *supra* note 3, at 555.
86. *Id.* (quoting *The Federalist* No. 10, at 83 (James Madison)).
87. *Id.* at 555-558.
88. *New York*, 112 S.Ct. at 2435-2438 (White, J., dissenting).
89. 42 U.S.C.A. § 10222(a)(1), (a)(5) (West 1983). DOE officials have insisted for years that they could construct a monitored retrievable storage (MRS) facility by 1998 for temporary storage of the waste until a repository is built. But officials have failed to locate a site for the MRS, leading the G.A.O. to conclude in 1993 that "it is now almost certain that DOE will not have an MRS facility available by then." G.A.O., *supra* note 2, at 46. Nuclear waste generators have threatened to sue the government for breach of contract if the transfer of waste does not begin in 1998. *Id.*
90. 112 S.Ct. at 2420 (citations omitted). As for the balance between state and federal powers generally, the Court noted:
- As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted. We have observed that the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between State and Federal Power.
- Id.* at 2419 (citations omitted).
91. *Id.* at 2438 (White, J., dissenting).
92. *Id.* at 2445 (White, J., dissenting).
93. Low level waste – which includes such items as medical fluids, contaminated protective gear and construction materials – may remain hazardous for hundreds of years. *Id.* at 2414. Components of high level waste, by contrast, are on balance far more lethal and will remain so far beyond the 10,000-year containment standard for the planned repository. See, e.g., William Poole, *Gambling With Tomorrow*, *Sierra*, Sept. 1992, at 50 (noting that plutonium will remain toxic for "hundreds of thousands of years"); Environmental Radiation Protection Standards, *supra* note 1 (stating in the preamble that high level waste will remain radioactive for "many thousands of years"). High level waste releases enough radiation to keep rock in the repository above boiling temperature for 10,000 years, which will slow corrosion of the waste containers but could destabilize the repository rock. See G.A.O., *supra* note 2, at 41-42. In a worst-case scenario, a release of the repository's entire contents into the atmosphere would produce fallout equivalent to a full-scale nuclear war. Krauss, *supra* note 13.
94. *Nevada v. Watkins*, 914 F.2d at 1549.
95. *Nevada v. Watkins*, 939 F.2d at 716.
96. The nuclear waste negotiator has worked several years without success to find a host for the monitored retrievable storage facility where high level waste would be stored temporarily. See G.A.O., *supra* note 2, at 46.
97. Merritt, *supra* note 64, at 56 (footnotes deleted, emphasis added).
98. 63 S.Ct. 1137 (1943).
99. *Id.* at 1139.
100. *Id.* at 1141.

101. 51 S.Ct. 522 (1931).
102. *Id.* at 526.
103. *See, e.g., Federal Energy Regulatory Comm'n v. Mississippi*, 102 S.Ct. at 2141 (1982); *Arizona v. California*, 51 S.Ct. at 526.
104. Financial costs to the state of Nevada are at least partially compensated by payments from the Nuclear Waste Fund. *See supra* note 23 and accompanying text.
105. 112 S.Ct. 2408, 2424.
106. *Id.* at 2431.
107. *Id.* at 2424.
108. *Nevada v. Watkins*, 914 F.2d at 1556.
109. 112 S.Ct. at 2424.
110. *See* Paul Slovic et al., *Perceived Risk, Trust, and the Politics of Nuclear Waste*, 254 *Science* 1603 (1991). Between 1989 and 1991, the number of Nevadans who said they would vote against the repository rose from sixty-nine to eighty percent. During the same period, polls showed "strong increases" in public trust of the governor and Legislature, with declining trust in DOE and the Nuclear Regulatory Commission during the period. *Id.*
111. Political accountability is achieved in one respect with the Yucca Mountain project: voters' knowledge that Congress is responsible for the project appears to be protecting state officials from voter anger that might otherwise be misdirected at state officials. *See supra* note 110.
112. U.S. Const. art. I, § 8, cl. 3. The Court's major Tenth Amendment cases since 1976 have involved challenges to Congress' exercise of its power to regulate interstate commerce. *See National League of Cities v. Usery*, 96 S.Ct. 2465 (1976); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 101 S.Ct. 2352 (1981); *United Transp. Union v. Long Island R.R. Co.*, 102 S.Ct. 1349 (1982); *Federal Energy Regulatory Comm'n v. Mississippi*, 102 S.Ct. 2126 (1982); *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S.Ct. 1054 (1983); *Garcia v. San Antonio Metro. Transit Auth.*, 105 S.Ct. 1005 (1985). The two most recent cases, while primarily concerned with the Commerce Clause, also included Tenth Amendment analyses of other congressional powers. *See Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991) (Fourteenth Amendment enforcement powers); *New York v. United States*, 112 S.Ct. 2408 (1992) (spending power).
113. U.S. Const. art. I, § 8, cl. 3 (emphasis added).
114. U.S. Const. art. I, § 8, cl. 18.
115. U.S. Const. art. IV, § 3, cl. 2. The clause states: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."
116. *Nevada v. Watkins*, 914 F.2d at 1552 (quoting *California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419, 1425 (1987); *Kleppe v. New Mexico*, 96 S.Ct. 2285, 2291 (1976); *United States v. San Francisco*, 60 S.Ct. 749, 756 (1940)), *cert. denied* 111 S.Ct. 1105 (1991).
117. 914 F.2d at 1553.
118. *Id.* at 1552.
119. 42 U.S.C.A. § 10222(a)(5).
120. U.S. Const. art. IV, § 3, cl. 2. Davenport argues against such an interpretation on the grounds that placement of waste in a repository is not "disposal" because the government will retain permanent title to the waste after it is sealed in the repository. Davenport, *supra* note 3, at 563 n.103. But the clause also grants Congress the power to "make all needful Rules and Regulations respecting" government property; this language could provide authority for the NWPA even if "disposal" does not include placement of waste in the repository.
121. *See, e.g., Ashwander v. Tennessee Valley Auth.*, 56 S.Ct. 466, 475 (1936) (holding that the Property Clause authorized construction of a hydroelectric plant and transmission lines, since water stored behind a federal dam contained mechanical energy that the government could convert to electricity and sell).
122. U.S. Const. art. I, § 8, cl. 1.
123. Carter, *supra* note 6, at 392-95.
124. 96 S.Ct. at 2470 n.14.
125. *Id.* at 2483 n.11 (Brennan, J., dissenting) (citations and cross-references omitted).
126. *Id.* at 2470 n.14 (stating that Brennan's distinction between the effect of state sovereignty on the commerce power and the power to tax "escapes us").
127. *Id.* at 2476 n.18.

128. In *Kleppe v. New Mexico*, 96 S.Ct. 2285, 2290 (1976) (citations omitted), the Court said that "determinations under the Property Clause are entrusted primarily to the judgment of Congress" — language written the same year as *National League of Cities*, but which echoes *Garcia*.
129. Although *New York* calls *Garcia* into question, the present Court might well be more comfortable using *Garcia*'s dicta about defective political process to invalidate a federal law than the *Garcia* majority would itself have been. But the defective political process "doctrine" was unfurled in *Garcia* as a safety net to the Court's rule that the political process adequately protects state interests. The unanswerable question, then, is whether this exception to the rule will outlive the rule itself.
130. *Nevada v. Watkins*, 914 F.2d at 1556-57.
131. *South Carolina v. Baker*, 108 S.Ct. 1355, 1361 (1988).
132. 112 S.Ct. at 2424.
133. *Garcia*, 105 S.Ct. at 1019 (quoting *EEOC v. Wyoming*, 103 S.Ct. 1054, 1060 (1983)). Such a scenario is not impossible. More than \$3.4 billion has already been spent on the high level waste program, see Swanson, *supra* note 15, and common sense suggests that as costs climb even higher, pressures will mount on Congress to show something for the money. Officials may be tempted to ignore or downplay serious defects found late in the characterization process.
134. See *supra* notes 23, 24 and accompanying text.
135. G.A.O., *supra* note 2, at 40-44 (summarizing Nuclear Waste Technical Review Board's concerns about heat within the repository and potential hazards from a geologic fault under the mountain).
136. See, e.g. Daniel Gibson, *Seeking a Solution to "The Ultimate Pollution"*, Los Angeles Times, Dec. 2, 1991, at B3 (reporting that scientists at Los Alamos National Laboratory are studying a transmutation process that could neutralize high level wastes).
137. See G.A.O., *supra* note 2 (predicting that a repository won't be available until 2015, at the earliest).
138. Utility companies that are financing the project through a one mill per kilowatt-hour fee on nuclear power, 42 U.S.C.A. § 10222(a), have complained that DOE has largely wasted the more than \$3 billion spent to date. See, e.g., Matthew L. Wald, *Florida Pressuring U.S. Over Nuclear Waste*, New York Times, Oct. 20, 1992, at D15. Meanwhile, Senate Energy and Natural Resources Committee Chairman J. Bennett Johnston's planned retirement in 1996 will deprive the utilities of their most powerful and resolute ally in Congress on nuclear waste issues.
139. Although some environmental advocacy groups have joined Nevada in opposing the project, Nevada officials have not had great success winning support from other states or generating public concern outside Nevada. California residents and politicians have for the most part been uninvolved, despite the repository's proximity — 14 miles across the state line — and its potential impact on the state. See, e.g., *County of Esmeralda v. United States Dep't of Energy*, 925 F.2d at 1220 (holding that California's Inyo County was entitled to designation of an "affected unit" of local government because contaminated groundwater might flow from Yucca Mountain into the county); Poole, *supra* note 93 (stating that contaminated groundwater could flow into California's Death Valley and migrate through hot springs to the valley floor).
140. Carter, *supra* note 6, at 185 (discussing the Waste Isolation Pilot Plant in New Mexico) (footnote omitted). Adm. James Watkins, President Bush's energy secretary, viewed DOE's confrontation with Nevada as "the most potentially intractable issue I have in the entire department." Steve Adams, *Nuclear Waste Fight Heats Up*, Las Vegas Review-Journal, March 3, 1990, at 1A.