SUPREME COURT OF THE UNITED STATES

Nos. 91–543, 91–558 AND 91–563

NEW YORK, PETITIONER
91–543 *v.*
UNITED STATES ET AL.

COUNTY OF ALLEGANY, NEW YORK, PETITIONER
91–558 *v.*
UNITED STATES ET AL.

COUNTY OF CORTLAND, NEW YORK, PETITIONER
91–563 *v.*
UNITED STATES ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 19, 1992]

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today affirms the constitutionality of two facets of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), Pub. L. 99–240, 99 Stat. 1842, 42 U. S. C. §2021b *et seq.* These provisions include the monetary incentives from surcharges collected by States with low-level radioactive waste storage sites and rebated by the Secretary of Energy to States in compliance with the Act's deadlines for achieving regional or in-state disposal, see §§2021e(d)(2)(A) and 2021e(d)(2)(B)(iv), and the "access incentives," which deny access to disposal sites for States that fail to meet certain deadlines for low-level radioactive waste disposal management. §2021e(e)(2). The Court strikes down and severs a third component of the 1985 Act, the "take title" provision, which requires a noncomplying State to take title to or to assume liability for its low-level radioactive waste if it fails to provide for the disposal of such waste by January 1, 1996. §2021e(d)

(2)(C). The Court deems this last provision unconstitutional under principles of federalism. Because I believe the Court has mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision, I can only join Parts III–A and III–B, and I respectfully dissent from the rest of its opinion and the judgment reversing in part the judgment of the Court of Appeals.

My disagreement with the Court's analysis begins at the basic descriptive level of how the legislation at issue in this case came to be enacted. The Court goes some way toward setting out the bare facts, but its omissions cast the statutory context of the take title provision in the wrong light. To read the Court's version of events, see *ante*, at 2–3, one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem. Not so. The Low-Level Radioactive Waste Policy Act of 1980 (1980 Act), Pub. L. 96–573, 94 Stat. 3347, and its amendatory Act of 1985, resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached.

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

"sited" States confronted the undesirable alternatives either of continuing to be the dumping grounds for the entire Nation's low-level waste or of eliminating or reducing in a constitutional manner the amount of waste accepted for disposal.

The imminence of a crisis in low-level radioactive waste management cannot be overstated. In December 1979, the National Governors' Association convened an eight-member task force to coordinate policy proposals on behalf of the States. See Status of Interstate Compacts for the Disposal of Low-Level Radioactive Waste: Hearing before the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 8 (1983). In May 1980, the State Planning Council on Radioactive Waste Management submitted the following unanimous recommendation to President Carter:

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

This recommendation was adopted by the National Governors' Association a few months later. See A Program for Action 6–7; H.R. Rep. No. 99–314, pt. 2, p. 18 (1985). The Governors recognized that the Federal Government could assert its preeminence in achieving a solution to this problem, but requested instead that Congress oversee state-developed regional solutions. Accordingly, the Governors' Task Force urged that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders" and that "the states should pursue a regional approach to

the low-level waste disposal problem." A Program for Action 6.

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

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

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

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

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

These discussions were not merely academic. The

sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act. Thus, as the end of 1985 approached, the sited States viewed the January 1, 1986 deadline established in the 1980 Act as a "drop-dead" date, on which the regional compacts could begin excluding the entry of out-of-region waste. See 131 Cong. Rec. 35203 (1985). Since by this time the three disposal facilities operating in 1980 were still the only such plants accepting low-level radioactive waste, the unsited States perceived a very serious danger if the three existing facilities actually carried out their threat to restrict access to the waste generated solely within their respective compact regions.

A movement thus arose to achieve a compromise between the sited and the unsited States, in which the sited States agreed to continue accepting waste in exchange for the imposition of stronger measures to guarantee compliance with the unsited States' assurances that they would develop alternate disposal facilities. As Representative Derrick explained, the compromise 1985 legislation "gives nonsited States more time to develop disposal sites, but also establishes a very firm timetable and sanctions for failure to live up [to] the agreement." *Id.,* at 35207. Representative Markey added that "[t]his compromise became the basis for our amendments to the Low-Level Radioactive Waste Policy Act of 1980. In the process of drafting such amendments, various concessions have been made by all sides in an effort to arrive at a bill which all parties could accept." *Id.*, at 35205. The bill that in large measure became the 1985 Act "represent[ed] the diligent negotiating undertaken by" the National Governors' Association and "embodied" the "fundamentals of their settlement." *Id.*, at 35204 (statement of Rep. Udall). In sum, the 1985 Act was very much the product of cooperative federalism, in

which the States bargained among themselves to achieve compromises for Congress to sanction.

There is no need to resummarize the essentials of the 1985 legislation, which the Court does *ante*, at 4–6. It does, however, seem critical to emphasize what is accurately described in one *amicus* brief as the assumption by Congress of "the role of arbiter of disputes among the several States." Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as *Amici Curiae* 9. Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

To justify its holding that the take title provision contravenes the Constitution, the Court posits that "[i]n this provision, Congress has crossed the line distinguishing encouragement from coercion." *Ante*, at 27. Without attempting to understand properly the take title provision's place in the interstate bargaining process, the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion. The Court candidly begins with an argument respondents do *not* make: "that the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments." *Ante*, at 28. "Such a forced transfer," it continues, "standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Ibid.* Since this is *not* an argument respondents make, one naturally wonders why the Court builds its analysis that the take title provision is unconstitutional around this opening premise. But having carefully built its straw man, the Court proceeds impressively to knock him down. "As we have seen," the Court teaches,

"the Constitution does not empower Congress to subject state governments to this type of instruction." *Ante*, at 28.

Curiously absent from the Court's analysis is any effort to place the take title provision within the overall context of the legislation. As the discussion in Part I of this opinion suggests, the 1980 and 1985 statutes were enacted against a backdrop of national concern over the availability of additional low-level radioactive waste disposal facilities. Congress could have pre-empted the field by directly regulating the disposal of this waste pursuant to its powers under the Commerce and Spending Clauses, but instead it *unanimously* assented to the States' request for congressional ratification of agreements to which they had acceded. See 131 Cong. Rec. 35252 (1985); *id.,* at 38425. As the floor statements of Members of Congress reveal, see *supra*, at ___, the States wished to take the lead in achieving a solution to this problem and agreed among themselves to the various incentives and penalties implemented by Congress to insure adherence to the various deadlines and goals.[1] The chief executives of the States proposed this approach, and I am unmoved by the Court's vehemence in taking away Congress' authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States' concessions.

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

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

H.R. 1046, H.R. 1083, and H.R. 1267 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess., 197 (1985) (testimony of Charles Guinn) (emphasis added).

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

arrangement—including the take title provision.

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

The State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act. Cf. *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 35–36 (1951), Jackson, J., concurring: "West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact. . . . Estoppel is not often to

be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. *After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant*, West Virginia should be estopped from repudiating her act. . . .” (Emphasis added.)

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

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

Finally, to say, as the Court does, that the incursion on state sovereignty "cannot be ratified by the `consent' of state officials," *ante*, at 34, is flatly

wrong. In a case involving a congressional ratification statute to an interstate compact, the Court upheld a provision that Tennessee and Missouri had waived their immunity from suit. Over their objection, the Court held that "[t]he States who are parties to the compact by accepting it *and acting under it assume the conditions* that Congress under the Constitution attached." *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 281–282 (1959) (emphasis added). In so holding, the Court determined that a State may be found to have waived a fundamental aspect of its sovereignty—the right to be immune from suit—in the formation of an interstate compact even when in subsequent litigation it expressly denied its waiver. I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases. Hard public policy choices sometimes require strong measures, and the Court's holding, while not irremediable, essentially misunderstands that the 1985 take title provision was part of a complex interstate agreement about which New York should not now be permitted to complain.

The Court announces that it has no occasion to revisit such decisions as *Gregory* v. *Ashcroft*, 501 U. S. ___ (1991); *South Carolina* v. *Baker*, 485 U. S. 505 (1988); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985); *EEOC* v. *Wyoming*, 460 U. S. 226 (1983); and *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); see *ante*, at 13, because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *Ibid.* Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is

unpersuasive. I have several difficulties with the Court's analysis in this respect: it builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality.

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

Even were such a distinction to be logically sound, the Court's "anti-commandeering" principle cannot persuasively be read as springing from the two cases cited for the proposition, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288

(1981), and *FERC* v. *Mississippi*, 456 U. S. 742, 761–762 (1982). The Court purports to draw support for its rule against Congress "commandeer[ing]" state legislative processes from a solitary statement in dictum in *Hodel*. See *ante*, at 13: "As an initial matter, Congress may not simply `commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting *Hodel*, *supra*, at 288). That statement was not necessary to the decision in *Hodel*, which involved the question whether the Tenth Amendment interfered with Congress' authority to pre-empt a field of activity that could also be subject to state regulation and not whether a federal statute could dictate certain actions by States; the language about "commandeer[ing]" States was classic dicta. In holding that a federal statute regulating the activities of private coal mine operators was constitutional, the Court observed that "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." 452 U. S., at 292.

The Court also claims support for its rule from our decision in *FERC*, and quotes a passage from that case in which we stated that ```this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.''' *Ante*, at 14 (quoting 456 U. S., at 761–762). In so reciting, the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning. In full, the passage reads: "*While* this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA* v. *Brown*, 431 U. S. 99 (1977), *there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions*." *Ibid.* (citing *Fry* v. *United States*, 421

U. S. 542 (1975) (emphasis added).[2] The phrase highlighted by the Court merely means that we have not had the occasion to address whether Congress may "command" the States to enact a certain law, and as I have argued in Parts I and II of this opinion, this case does not raise that issue. Moreover, it should go without saying that the *absence* of any on-point precedent from this Court has no bearing on the question whether Congress has properly exercised its constitutional authority under Article I. Silence by this Court on a subject is not authority for anything.

The Court can scarcely rest on a distinction between federal laws of general applicability and those ostensibly directed solely at the activities of States, therefore, when the decisions from which it derives the rule not only made no such distinction, but validated federal statutes that constricted state sovereignty in ways greater than or similar to the take title provision at issue in this case. As *Fry*, *Hodel*, and *FERC* make clear, our precedents prior to *Garcia* upheld provisions in federal statutes that directed States to undertake certain actions. "[I]t cannot be constitutionally determinative that the

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

federal regulation is likely to move the States to act in a given way," we stated in *FERC*, "or even to `coerc[e] the States' into assuming a regulatory role by affecting their `freedom to make decisions in areas of "integral governmental functions."'" 456 U. S., at 766. I thus am unconvinced that either *Hodel* or *FERC* supports the rule announced by the Court.

And if those cases do stand for the proposition that in certain circumstances Congress may not dictate that the States take specific actions, it would seem appropriate to apply the test stated in *FERC* for determining those circumstances. The crucial threshold inquiry in that case was whether the subject matter was pre-emptible by Congress. See 456 U. S., at 765. "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement *in a pre-emptible field*—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." *Id.*, at 771 (emphasis added). The *FERC* Court went on to explain that if Congress is legislating in a pre-emptible field—as the Court concedes it was doing here, see *ante*, at 25–26--the proper test before our decision in *Garcia* was to assess whether the alleged intrusions on state sovereignty "do not threaten the States' `separate and independent existence,' *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869); *Coyle* v. *Oklahoma*, 221 U. S. 559, 580 (1911), and do not impair the ability of the States `to function effectively in a federal system.' *Fry* v. *United States*, 421 U. S., at 547, n. 7; *National League of Cities* v. *Usery*, 426 U. S., at 852." *FERC*, *supra*, at 765–766. On neither score does the take title provision raise constitutional problems. It certainly does not threaten New York's independent existence nor impair its ability to function effectively in the system, all the more so since the provision was enacted pursuant to compromises reached among

state leaders and then ratified by Congress.

It is clear, therefore, that even under the precedents selectively chosen by the Court, its analysis of the take title provision's constitutionality in this case falls far short of being persuasive. I would also submit, in this connection, that the Court's attempt to carve out a doctrinal distinction for statutes that purport solely to regulate State activities is especially unpersuasive after *Garcia*. It is true that in that case we considered whether a federal statute of general applicability—the Fair Labor Standards Act—applied to state transportation entities but our most recent statements have explained the appropriate analysis in a more general manner. Just last Term, for instance, JUSTICE O'CONNOR wrote for the Court that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system)." *Gregory* v. *Ashcroft*, 501 U. S. ___, ___ (1991) (slip op., at 10). Indeed, her opinion went on to state that "this Court in *Garcia* has left primarily to the *political process* the protection of the States against intrusive exercises of Congress' Commerce Clause powers." *Ibid.* (emphasis added).

Rather than seek guidance from *FERC* and *Hodel*, therefore, the more appropriate analysis should flow from *Garcia*, even if this case does not involve a congressional law generally applicable to both States and private parties. In *Garcia*, we stated the proper inquiry: "[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the `States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in

the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a `sacred province of state autonomy.'" 469 U. S., at 554 (quoting *EEOC* v. *Wyoming*, 460 U. S., at 236). Where it addresses this aspect of respondents' argument, see *ante*, at 33–35, the Court tacitly concedes that a failing of the political process cannot be shown in this case because it refuses to rebut the unassailable arguments that the States were well able to look after themselves in the legislative process that culminated in the 1985 Act's passage. Indeed, New York acknowledges that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." Pet. for Cert. in No. 91–543, p. 7. The Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights.

Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste, and Congress has acceded to the wishes of the States by permitting local decisionmaking rather than imposing a solution from Washington. New York itself participated and supported passage of this legislation at both the gubernatorial and federal representative levels, and then enacted state laws specifically to comply with the deadlines and timetables agreed upon by the States in the 1985 Act. For me, the Court's civics lecture has a decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem.[3]

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[3]With selective quotations from the era in which the

Though I disagree with the Court's conclusion that the take title provision is unconstitutional, I do not read its opinion to preclude Congress from adopting a similar measure through its powers under the Spending or Commerce Clauses. The Court makes clear that its objection is to the alleged "commandeer[ing]" quality of the take title provision.

Constitution was adopted, the majority attempts to bolster its holding that the take title provision is tantamount to federal "commandeering" of the States. In view of the many Tenth Amendment cases decided over the past two decades in which resort to the kind of historical analysis generated in the majority opinion was not deemed necessary, I do not read the majority's many invocations of history to be anything other than elaborate window-dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 56–59 (1927); H. Hyman, A More Perfect Union: The Impact of the Civil War and

See *ante*, at 27. As its discussion of the surcharge and rebate incentives reveals, see *ante*, at 23–24, the spending power offers a means of enacting a take title provision under the Court's standards. Congress could, in other words, condition the payment of funds on the State's willingness to take title if it has not already provided a waste disposal facility. Under the scheme upheld in this case, for example, monies

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Reconstruction on the Constitution (1973); Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1 (1950); Wiecek, The Reconstruction of Federal Judicial Power, 1863–1875, 13 Am. J. Legal Hist. 333 (1969); Scheiber, State Law and "Industrial Policy" in American Development, 1790–1987, 75 Calif. L. Rev. 415 (1987); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L. J. 453 (1989). While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress' powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature's authority than may have existed in the late 18th-century.

Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congressional statutes that impose clear directives on state officials, including those enacted pursuant to the Extradition Clause, see, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U. S. 219, 227–228 (1987), the post-Civil War Amendments, see, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 319–320, 334–335 (1966), as well as congressional statutes that require state courts to hear certain actions, see, *e.g.*, *Testa* v. *Katt*, 330 U. S.

collected in the surcharge provision might be withheld or disbursed depending on a State's willingness to take title to or otherwise accept responsibility for the low-level radioactive waste generated in state after the statutory deadline for establishing its own waste disposal facility has passed. See *ante*, at 24; *South Dakota* v. *Dole*, 483 U. S. 203, 208–209 (1987); *Massachusetts* v. *United States*, 435 U. S. 444, 461 (1978).

Similarly, should a State fail to establish a waste disposal facility by the appointed deadline (under the statute as presently drafted, January 1, 1996, §2021e(d)(2)(C)), Congress has the power pursuant to the Commerce Clause to regulate directly the producers of the waste. See *ante*, at 25–26. Thus, as I read it, Congress could amend the statute to say that if a State fails to meet the January 1, 1996 deadline for achieving a means of waste disposal, and has not taken title to the waste, no low-level radioactive waste may be shipped out of the State of New York. See, *e.g.*, *Hodel*, 452 U. S., at 288. As the legislative history of the 1980 and 1985 Acts indicates, faced with the choice of federal pre-emptive regulation and self-regulation pursuant to interstate agreement with congressional consent and ratification, the States decisively chose the latter. This background suggests that the threat of federal pre-emption may suffice to induce States to accept responsibility for failing to meet critical time deadlines for solving their low-level radioactive waste disposal problems, especially if that federal intervention also would strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities. And of course, should Congress amend the statute to meet the Court's objection and a State refuse to act, the National Legislature will have ensured at least a

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386, 392–394 (1947).

federal solution to the waste management problem.

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

The ultimate irony of the decision today is that in its formalistically rigid obeisance to "federalism," the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems. This legislation was a classic example of Congress acting as arbiter among the States in their attempts to accept responsibility for managing a problem of grave import. The States urged the National Legislature not to impose from Washington a solution to the country's low-level radioactive waste management problems. Instead, they sought a reasonable level of local and regional autonomy consistent with Art. I, §10, cl. 3, of the Constitution. By invalidating the measure designed to ensure compliance for recalcitrant States, such as New York, the Court upsets the delicate compromise achieved

among the States and forces Congress to erect several additional formalistic hurdles to clear before achieving exactly the same objective. Because the Court's justifications for undertaking this step are unpersuasive to me, I respectfully dissent.