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 STEVENS, concurring in part and dissenting in part.

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

The notion that Congress does not have the power to issue "a simple command to state governments to imple-

ment legislation enacted by Congress," *ante*, at 28, is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment[1] surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I.[2] Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no

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

[2]In *United States* v. *Darby*, 312 U. S. 100 (1941), we explained:

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

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Id.*, at 124; see also *ante*, at 8–9.

doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes.

The Constitution gives this Court the power to resolve controversies between the States. Long before Congress enacted pollution-control legislation, this Court crafted a body of "`interstate common law,'" *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 106 (1972), to govern disputes between States involving interstate waters. See *Arkansas* v. *Oklahoma*, 503 U. S. __, __-__ (1992) (slip op., at 5–6). In such contexts, we have not hesitated to direct States to undertake specific actions. For example, we have "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Colorado* v. *New Mexico*, 459 U. S. 176, 185 (1982) (citing *Wyoming* v. *Colorado*, 259 U. S. 419 (1922)). Thus, we unquestionably have the power to command an upstate stream that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command.

With respect to the problem presented by the case at hand, if litigation should develop between States that have joined a compact, we would surely have the power to grant relief in the form of specific enforcement of the take title provision.[3] Indeed, even

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[3]Even if § 2021e(d)(2)(C) is "invalidated" insofar as it applies to the State of New York, it remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect. Congress' consent to the compacts was "granted subject to the provisions of the [Act] . . . and

if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. Cf. *Illinois* v. *City of Milwaukee*. If this Court has such authority, surely Congress has similar authority.

For these reasons, as well as those set forth by JUSTICE WHITE, I respectfully dissent.

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only for so long as the [entities] established in the compact comply with all the provisions of [the] Act." Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub.L. 100–319, 102 Stat. 471. Thus the compacts incorporated the provisions of the Act, including the take title provision. These compacts, the product of voluntary interstate cooperation, unquestionably survive the "invalidation" of § 2021e(d)(2)(C) as it applies to New York. Congress did not "direc[t]" the States to enter into these compacts and the decision of each compacting State to enter into a compact was not influenced by the existence of the take title provision: Whether a State went its own way or joined a compact, it was still subject to the take title provision.