NATURAL RESOURCES JOURNAL

Volume 36
Issue 1 *Winter 1996*

Winter 1996

The Future of High-Level Nuclear Waste Disposal, State Sovereignty and the Tenth Amendment: Nevada v. Watkins

Sonny Swazo

CASENOTE

The Future of High-Level Nuclear Waste Disposal, State Sovereignty and the Tenth Amendment: Nevada v. Watkins

INTRODUCTION

The federal government's monopoly over America's nuclear energy production began during World War II with the birth of the Atomic Age.[1] During the next thirty years, nuclear waste inventories increased with minor congressional concern.[2] In the early 1970s, the need for federal legislation to address problems surrounding nuclear waste regulation, along with federal efforts to address these problems, became critical.[3] Previous federal efforts had completely failed to address nuclear waste disposal. In 1982, Congress enacted the Nuclear Waste Policy Act (NWPA)[4] to deal with issues of nuclear waste management and disposal, and to set an agenda for the development of two national high-level nuclear waste repositories.[5]

The NWPA is a comprehensive federal statute which governs the disposal of spent fuel[6] produced by the nation's private nuclear power plants and high-level[7] radioactive waste generated by nuclear weapons plants.[8] The NWPA requires the United States Secretary of the Department of Energy (Secretary) to establish guidelines used to site, construct, and operate permanent disposal repositories for the nation's

---

1. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 63 (1978); *see* Act of Aug. 1, 1946, ch. 724, 60 Stat. 755.

2. H.R. REP. NO. 491, 97th Cong., 2d Sess. 28, pt.1, at 26, (1982), *reprinted in* 1982 U.S.C.C.A.N. 3792.

3. H.R. REP. NO. 491, 97th Cong., 2d Sess. 28, pt.1, at 28-29, (1982), *reprinted in* 1982 U.S.C.C.A.N. 3794-3795.

4. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101-10270 (1989)).

5. Jeffrey D. Raeber, Comment, *Federal Nuclear Waste Policy as Defined by the Nuclear Waste Policy Amendments Act of 1987*, 34 ST. LOUIS U. L.J. 111,116(1989).

6. Spent fuel is defined as "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." 42 U.S.C. § 10101(23)(1989).

7. High-level radioactive waste is "the highly radioactive material resulting from the reprocessing of spent nuclear fuel" 42 U.S.C. § 10101 (12)(A).

8. Texas v. United States Dept. of Energy, 754 F.2d 550, 551 (5th Cir. 1985).

high-level nuclear waste.[9] Aware of the profound regional opposition that would make siting a single repository difficult, Congress anticipated that one facility would be located in a western state and the second in a eastern state.[10] Congress provided that two repositories would be opened—one by 1998 and a second by 2003.[11]

In 1987, after the Secretary's efforts to site the first repository became bogged down, Congress amended the NWPA[12] thereby directing the Secretary to conduct exclusive site characterization[13] at one site—Yucca Mountain, Nevada. Nevada officials immediately challenged the federal government's constitutional authority to single out Yucca Mountain in the site selection process. In *Nevada v. Watkins*, the United States Ninth Circuit Court of Appeals held that the 1987 NWPA amendments were enacted in accordance with the United States Constitution.[14] The *Watkins* Court ruled that the 1987 Amendments, which effectively designated Yucca Mountain, Nevada, as the sole site for investigation of possible development of the nation's first and only high-level nuclear waste repository, were a valid exercise of congressional power and they did not violate the Tenth Amendment of the Constitution.[15]

The current interpretation of the Tenth Amendment suggests that states do not have the right to challenge federal legislation on substantive grounds.[16] This interpretation implies that where the political process

---

9. 42 U.S.C. § 10131(b)(1)(1989).

10. Pub. L. No. 97-425, § 114(a)(2)(A), 96 Stat. 2201, 2214(1983) (repealed 1987).

11. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 414 (1992).

12. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) (codified as amended at 42 U.S.C. §§ 10133-10136, 10172, amending 42 U.S.C. §§ 10101-10270 (1989)).

13. The term "site characterization" means
(A) siting research activities with respect to a test and evaluation facility at a candidate site; and
(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.
42 U.S.C. § 10101 (21)(1989).

14. Nevada v. Watkins, 914 F.2d 1545, 1554 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991), *reh'g denied*, 501 U.S. 1225 (1991).

15. *Id.* at 1556-57.

16. *See* South Carolina v. Baker, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits [on congressional power] are structural not substantive-for example, that States must find

should protect a state's interest, the Tenth Amendment creates procedural protections for states when the political process fails. If the 1987 Amendments constituted a failure of the political process, Nevada could have possibly obtained relief under the Tenth Amendment. Nevertheless, the *Watkins* Court's decision authorized the Secretary to continue site characterization at Yucca Mountain.

Watkins is the first major constitutional test faced by the NWPA and it is likely that Nevada will challenge NWPA again in the future. While this article assumes the constitutionality of the 1987 NWPA Amendments, it examines whether the Tenth Amendment reserves Nevada the right to restrict the nation's high-level nuclear waste from being stored in Nevada should site characterization establish Yucca Mountain suitable for housing the nation's first and only high-level nuclear waste repository.

BACKGROUND

Before 1954, the federal government maintained exclusive authority over the use, control, and ownership of all nuclear technology.[17] To better serve the national interest, Congress enacted the Atomic Energy Act (AEA) of 1954[18] to further private sector nuclear energy development for peaceful purposes under a program of federal regulation and licensing.[19] The AEA created the Atomic Energy Commission (AEC), whose purpose included the supervised construction, ownership, and operation of commercial nuclear reactors.[20] The AEC was given exclusive authority to control materials and facilities involved in the manufacturing of nuclear energy for military and nonmilitary purposes.[21] With the passage of the AEA, federal regulation continued to dominate the nuclear energy field such that "no significant role was contemplated for the States."[22]

In 1959 Congress amended the AEA to increase the state's role in

---

their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.")

17. English v. General Electric Co., 496 U.S. 72, 78 (1990).

18. Atomic Energy Act of 1954, Pub. L. No. 100-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2017 (1988)).

19. *English*, 496 U.S. at 78.

20. *Id.* (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 63 (1978)).

21. *English*, 496 U.S. at 78.

22. *Id.*

the development of nuclear energy and to define the responsibilities "of the States and the [Federal Government] with respect to the regulation of by-product, source, and special nuclear materials."[23] The 1959 amendments authorized the Nuclear Regulatory Commission (NRC) to enter into agreements with state governors to transfer the federal government's regulatory control over certain nuclear materials to the states under limited conditions.[24] Under the AEA amendments, states could regulate certain nuclear materials provided that state regulatory programs were "coordinated and compatible" with NRC regulations.[25]

In 1974 Congress enacted the Energy Reorganization Act (ERA)[26] to further ensure that the hazards associated with nuclear energy production were safely regulated.[27] The ERA transferred the AEC's duty to regulate nuclear materials and license nuclear power plants to the NRC,[28] and the AEC's goal to promote and develop commercial nuclear energy to the Energy Research and Development Administration (ERDA).[29] The NRC and the ERDA were to collaborate in the development of safety standards for high-level nuclear waste regulation.[30] The ERA granted the NRC greater control over the number and range of safety responsibilities involving nuclear energy production.[31]

While the AEC, NRC, and the ERDA were rather successful in encouraging commercial nuclear energy development, they failed to confront the demand for safe disposal of nuclear energy by-products.[32] It became evident that "profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial."[33] Federal policy concerning safe nuclear waste disposal was largely in disarray. Faced with the dangerous accumulation and storage of

---

23. *Id.*, (citing 42 U.S.C. § 2021(a)(1)(1982 ed.)).

24. *English*, 496 U.S. 78.

25. *Id.*, (citing 42 U.S.C. § 2021(a)(1)(1982 ed.)).

26. Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 (1974).

27. *English*, 496 U.S. at 78-79.

28. *Id.* at 2276.

29. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n., 461 U.S. 190, 221 (1983).

30. In 1977, Congress transferred the ERDA's functions to the Department of Energy. 42 U.S.C. § 7151(a) (Supp. IV 1976). Congress gave the Department of Energy the responsibility for "the establishment of temporary and permanent facilities for the storage, management, and ultimate disposal of nuclear wastes." 42 U.S.C. § 7133(a)(8)(c).

31. *English*, 496 U.S. 78.

32. Nevada v. Watkins, 914 F.2d 1545, 1549 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991), *reh'g denied*, 501 U.S. 1225 (1991).

33. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 63, 438 U.S. at 63 (1978); *see* Harold P. Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 MICH. L. REV. 479 (1973).

high-level nuclear waste in on-site containers at commercial nuclear power plants throughout the nation, Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA).[34] With the NWPA, Congress assumed federal responsibility and formulated a comprehensive federal plan designed to locate and establish, by the next century, operation of a permanent repository for commercial spent fuel and high-level nuclear waste.[35]

The NWPA statutory scheme instructs the Secretary to establish general site characterization guidelines for the development of nuclear waste repositories.[36] Under these guidelines, the Secretary is required to nominate to the President five candidate sites suitable for housing the first repository.[37] Before the Secretary commences any site characterization, the DOE is required to prepare draft environmental assessments (EA's)[38] to accompany site nominations. From the five sites nominated, the Secretary is to recommend the three most suitable sites to the President.[39] Each site approved by the President would subsequently undergo further intensive EAs to determine the ideal site for housing the first repository.[40] Following the first five nominations, the NWPA requires the Secretary to nominate five additional sites, including three not previously nominated.[41] From these five additional sites, the Secretary is to recommend to the President three sites deemed suitable for housing the second repository.[42] The NWPA requires that the Secretary site a repository in different geographic regions of the country.[43]

The NWPA authorizes the President, in his discretion, to approve or disapprove each site recommended to him by the Secretary.[44] If the President approves a candidate site, he is required to submit a

---

34. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10241-10270 (1989)); *see* David H. Topol, Note, *Rethinking Who Is Left Holding the Nation's Nuclear Garbage Bag: The Legal and Policy Implications of Nevada v. Watkins*, 1991 UTAH L. REV. 791 (1991).

35. 42 U.S.C § 10131(b)(1982).

36. *Id.* § 10132(a).

37. *Id.* § 10132(b)(1)(a).

38. An environmental assessment is "a detailed assessment of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities . . . that may be [done] to avoid such impacts." 42 U.S.C. § 10132(b)(1)(d).

39. *Id.* § 10132(b)(1)(B).

40. *Id.* § 10133(a).

41. *Id.* § 10132(b).

42. *Id.* § 10132(b)(1)(B).

43. James Davenport, *The Federal Structure: Can Congress Commander Nevada to Participate in its Federal High Level Waste Disposal Program?*, 12 VA. ENVTL. L.J. 539 (1993).

44. 42 U.S.C. § 10132(c) (1982).

recommendation of the site to Congress.[45] If Congress approves the site as suitable for license application, the affected State could then submit a notice of disapproval to Congress.[46] Congress then has ninety days to pass a joint resolution overriding the affected State's notice of disapproval.[47] If Congress fails to override the State's disapproval notice, the NWPA requires the President to submit to Congress another site recommendation.[48] Once Congress selects a site, the Secretary is to submit a license application to the NRC for site development.[49] Repository construction would commence once the NRC approves the license application.[50] With the original NWPA procedures, Congress anticipated that the first national high-level nuclear waste repository would begin operation around 1995.[51]

In 1984, pursuant to the NWPA, the Secretary issued general guidelines for the recommendation of repository sites.[52] Within a week, the Secretary conducted EAs at nine possible sites in six states.[53] The list of possible sites included Yucca Mountain. In 1986, the Secretary nominated Yucca Mountain, along with other candidate sites in four states, for consideration as the first repository.[54] The affected states immediately challenged the Secretary's decision with litigation against the Department of Energy (DOE), asserting numerous violations of NWPA provisions relating to state participation in the decisionmaking process.[55] On May 28, 1986, Nevada officials filed a petition with the Ninth Circuit Court of Appeals, challenging the Secretary's initial site characterization at Yucca Mountain.[56] Nevada officials claimed that the Secretary's site investigations were contrary to law based on the Secretary's failure to establish jurisdiction over Yucca Mountain by state cession or consent, pursuant to the Federal Enclave Clause.[57] The Secretary continued the

45. *Id.* § 10134(a)(2).

46. *Id.* § 10136.

47. *Id.* § 10135.

48. H.R. REP. NO. 491, *supra* note 3, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 3792.

49. *Id.*

50. Nevada v. Herrington, 827 F.2d 1394, 1396-1397 (9th Cir. 1987).

51. H.R. REP. NO. 491, *supra* note 3, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 3792.

52. 10 C.F.R. § 960.3 (1989).

53. The Secretary nominated sites in Louisiana, Mississippi, Nevada, Texas, Utah, and Washington. 49 Fed. Reg. 49540-41 (Dec. 20, 1984).

54. The Secretary nominated Richard Dome, Mississippi, Yucca Mountain, Nevada, Deaf Smith County, Texas, Davis Canyon, Utah, and Hanford, Washington. 51 Fed. Reg. 19,783-84 (June 2, 1986).

55. Mark E. Rosen, Note, *Nevada v. Watkins: Who Gets the Shaft*, 10 VA. ENVTL. L.J. 239, 255-256 (1991).

56. *Watkins*, 914 F.2d at 1550.

57. *Id.* (citing U.S. CONST. art. I, § 8, cl.17 and the applicable NRC Regulation, 10 C.F.R. § 60.121 (1995)).

site selection process nonetheless and subsequently narrowed the list of candidate sites to three potential sites.[58] Yucca Mountain was again listed as a possible site. The Secretary then recommended to President Reagan three sites ideal for housing a high-level nuclear waste repository.[59] President Reagan reviewed and approved the three recommended sites.[60]

The same day President Reagan approved the three recommended sites, the Secretary disclosed that plans for a second repository were delayed indefinitely because of the "uncertainty of when a second repository might be needed."[61] Frustrated with the expense and delay of the siting process, Congress amended the NWPA by way of the Omnibus Budget Reconciliation Act of 1987. The 1987 amendments were passed before the Secretary could begin intense site characterization at the three sites approved by President Reagan.[62] The 1987 amendments directed the Secretary to begin site characterization at Yucca Mountain and to cease investigation at all other potential sites.[63] The future of national nuclear waste disposal was completely aimed at Nevada.

In 1988, the Secretary issued his final site characterization plan which included continued site characterization at Yucca Mountain.[64] Pursuant to Nevada law, the Secretary submitted applicable environmental applications to conduct further site characterization at Yucca Mountain to various Nevada state agencies.[65] In 1989, while the applications were pending, the Nevada legislature, pursuant to the NWPA,[66] passed two joint resolutions which opposed the placement of any high-level nuclear waste repository in Nevada without the approval of the Nevada Legislature.[67] On April 19, 1989, both resolutions were transmitted to the President and both Houses of Congress.[68] Congress failed to respond to Nevada's transmittal.[69] In addition, Nevada Governor Bob Miller signed into law on July 6, 1989, Assembly Bill 222

---

58. The Secretary narrowed the list of candidate sites to Yucca Mountain, Nevada, Deaf Smith County, Texas and Hanford, Washington. 51 Fed. Reg. 19,783-84 (June 2, 1986).

59. Natural Resources Defense Council, Inc. v. E.P.A., 824 F.2d 1258, 1262 (1st Cir. 1987).

60. Nevada v. Herrington, 827 F.2d 1394, 1397 (9th Cir. 1987).

61. Charles H. Montage, *Federal Nuclear Waste Disposal Policy*, 27 NAT. RESOURCES J. 309, 398 (1987).

62. *See* Samuel J. Light, *Public Lands*, 21 ENVTL. L. 1207, 1209 (1991).

63. Nevada v. Watkins, 943 F.2d 1080, 1083 (9th Cir. 1991).

64. Nevada v. Watkins, 914 F.2d 1545, 1550 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991), *reh'g denied*, 501 U.S. 1225 (1991).

65. *Id.*

66. 42 U.S.C. § 10135(b) (1982).

67. *Watkins*, 914 F.2d at 1550-1551.

68. *Id.* at 1551.

69. *Id.*

which provides that "[i]t is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada."[70] With the passage of its joint resolutions and Assembly Bill 222, Nevada made its unyielding opposition to the placement of any high-level nuclear waste repository within Nevada clear to the federal government.

On November 1, 1989, the Nevada State Attorney General issued an opinion concluding that Nevada had submitted a valid disapproval notice pursuant to NWPA guidelines when both of Nevada's Joint Resolutions were delivered to Congress.[71] The opinion further concluded that congressional inaction approved Nevada's disapproval notice.[72] The Nevada Attorney General then advised the Governor that, based on Nevada's actions, the Secretary's permit applications should not be issued because they were moot.[73] Governor Miller sent the Secretary a letter dated November 14, 1989, which declared that Yucca Mountain site characterization should cease because geologic information concluded that Yucca Mountain was unfit for a repository and the Nevada Legislature and Governor had effectively vetoed the selection of the Yucca Mountain site.[74]

On November 29, 1989, the Secretary advised Congress that Yucca Mountain site characterization should continue as planned.[75] In December 1989, however, Nevada administrative agencies informed the Secretary that his environmental applications were being denied based on the actions of the Nevada Legislature and the Nevada Attorney General's opinion letter which stated that "these applications are now moot because the Yucca Mountain Repository is prohibited."[76]

Unable to reach an agreement with the Secretary, Nevada officials filed a second, separate petition on January 5, 1990 requesting review of the Secretary's actions with the Ninth Circuit Court of Appeals.[77] Nevada disputed the Secretary's failure to halt further site characterization at Yucca Mountain, insisting that state officials submitted a valid disapproval notice and that current information disqualified the site.[78] On February 2, 1990, the Ninth Circuit Court of Appeals granted Nevada's petition to review the Secretary's authority to nominate Yucca Mountain and Nevada's petition to review the Secretary's authority to

70. NEV. REV. STAT. § 459.910 (1989).
71. *Watkins*, 914 F.2d at 1551.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

continue site characterization at Yucca Mountain consolidated.[79]

While Nevada's petitions raised several issues, Nevada's primary objection was that Congress did not have the constitutional authority to amend the NWPA in 1987, and even if it did, the Tenth Amendment limited Congress' authority to designate Yucca Mountain.[80] The *Watkins* Court found, however, that the Property Clause[81] provided Congress with the constitutional authority to enact the 1987 amendments.[82] Since Yucca Mountain is federally owned land, the Court concluded that Congress had plenary power under the Property Clause to regulate the land's use.[83] Therefore, the court held that the amendments were a valid exercise of congressional power under the Property Clause.

After finding that the amendments were a valid exercise of congressional power, the Court analyzed Nevada's Tenth Amendment argument. Relying on current Tenth Amendment analysis, Nevada officials based their Tenth Amendment argument on the procedurally defective process.[84] Nevada claimed that the 1987 amendments were the exact procedural defect envisioned by the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[85] Nevada maintained that their Tenth Amendment right to participate in the national political process was violated because Nevada was not represented in the House and Senate Conference Committee on the Omnibus Budget Reconciliation Act of 1987 when the committee ratified the 1987 NWPA amendments.[86]

Moreover, Nevada officials argued that the political process failed to protect Nevada's autonomy because in the absence of Nevada officials, powerful politicians from other candidate states enacted new NWPA legislation by attaching an appropriations bill to the 1987 Omnibus Budget Reconciliation Act without bicameralism or presentment.[87] Nevada officials claimed that as a result of the 1987 amendments, Nevada was singled out in a manner that left it politically isolated and powerless, and that this was a total departure from "acceptable [federalism] principles envisioned by the framers."[88]

The *Watkins* Court, however, found that Nevada could not point

---

79. *Id.*

80. *Id.* at 1552, 1556.

81. U.S. CONST. art. IV, § 3, cl. 2.

82. *Watkins*, 914 F.2d at 1552-53.

83. *Id.* at 1552.

84. *Id.* at 1556.

85. Petitioner's Opening Brief at 43 Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (No. 82-1913, 82-1951) (1985) [hereinafter *Petitioner's Opening Brief*].

86. *Id.* at 40.

87. *Watkins*, 914 F.2d at 1557.

88. Petitioner's Opening Brief at 39.

to any political process defect in the enactment of the 1987 NWPA amendments.[89] Relying on *Garcia* and recent Tenth Amendment caselaw, the *Watkins* Court concluded that Nevada's lack of political strength resulted from the "Great Compromise" of the Constitutional Convention of 1787 in which each state was guaranteed equal representation in the Senate and proportionate representation in the House of Representatives.[90]

In addition, the *Watkins* Court found that Nevada's claim that its lack of representation on the Conference Committee created a defect in the political process was groundless since the Conference Committee membership was established pursuant to Article I, section 5, clause 2, of the United States Constitution which gives the House authority to determine the rules of its proceedings.[91] Thus, committee membership is not a justiciable issue.[92] As a result, the *Watkins* Court stated that this was not a political process defect contemplated by recent caselaw.[93]

Finally, the *Watkins* Court found it difficult to accept Nevada's Tenth Amendment claim that the 1987 amendments comprised a failing in the political process since the NWPA contained a provision allowing Nevada to register its disapproval of a repository siting decision.[94] As a result, the *Watkins* Court held that Congress acted within its enumerated constitutional powers and that the Tenth Amendment did not prohibit Congress from enacting the 1987 NWPA amendments which designated Yucca Mountain as the sole repository site.[95]

The Tenth Amendment

Under the Constitution, states have the inherent police power to protect the health, safety, and general welfare of their citizens.[96] A state may act pursuant to this power so long as it does not violate a specific constitutional provision. On the other hand, the federal government is

---

89. *Watkins*, 914 F.2d at 1556.

90. *Id.* at 1556-1557.

91. *Id.* at 1557 (citing Vander Jagt v. O'Neill, 699 F.2d 1166, 1172 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983)) (committee membership is a power allocated to each House of Congress pursuant to U.S. CONST. art. I, § 5, cl. 2) .

92. *Watkins*, 914 F.2d at 1557.

93. *Id.* (citing EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990)) ("In any event, the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

94. *Watkins*, 914 F.2d at 1557.

95. *Id.*

96. Lyle D. Griffin, Comment, *A Glimmer of Hope for State Sovereignty: The Supreme Court Limits Federal Regulation of Radioactive Waste Disposal*, 23 CUMB. L. REV. 655, 659 (1992).

one of limited, enumerated powers.[97] To be legitimate, federal governmental action must be within one of the enumerated powers and must not be limited by the Constitution.[98] The heart of federalism exists in various constitutional grants of authority to, and limitations on, both federal and state governments.

One constitutional limitation on the federal government is the Tenth Amendment. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[99] The Tenth Amendment stands for the legal axiom of state sovereignty and the common constitutional limit on federal power in the interest of federalism. It is under this maxim that courts have balanced state rights under the Tenth Amendment and the federal government's authority to act pursuant to its enumerated constitutional powers.

From the time that the Constitution was first ratified, there has been much debate on the role of the Tenth Amendment in state and federal governmental relations. Early courts effectively avoided Tenth Amendment controversy by allowing the federal government to regulate private sector activity through the Commerce Clause[100] and not state activity in itself.[101] From 1936 to 1976, courts construed the Tenth Amendment as void of any specific or enforceable guarantee that might limit federal power.[102] It was in this sense that the Tenth Amendment was considered a "[t]ruism that all is retained which has not been surrendered."[103]

In 1968, the Court again analyzed the state sovereignty issue and the Tenth Amendment in *Maryland v. Wirtz*.[104] Even though the Court upheld expansion of federal regulation of the wages of state and municipal wage earners, a significant dissent in support of state sovereignty and the Tenth Amendment surfaced. Justice Douglas, in his dissent which was joined by Justice Stewart, asserted that "what is done here [is] nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."[105] The echoes of Douglas' dissent

---

97. THE FEDERALIST NO. 45, at 313 (James Madison); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405. (1819).

98. McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 405.

99. U.S. CONST. amend. X.

100. U.S. CONST. art. I, § 8, cl. 3.

101. GERALD GUNTHER, CONSTITUTIONAL LAW 157 (12th ed. 1991).

102. William A. Hazeltine, NEW YORK V. UNITED STATES: A NEW RESTRICTION ON CONGRESSIONAL POWER VIS-A-VIS THE STATES, 55 OHIO ST. L.J. 237, 242 (1994).

103. U.S. v. Darby, 312 U.S. 100, 124 (1941).

104. 392 U.S. 183 (1968) (Douglas & Stevens, JJ. dissenting).

105. *Id.* at 201.

would arise eight years later.

In 1976, the Court finally established principles of state sovereignty when it defined a new Tenth Amendment rule in *National League of Cities v. Usery*.[106] In *National League of Cities*, the Court, in a five to four decision, effectively overruled *Wirtz* and held that the Tenth Amendment barred the application of the federal minimum wage and overtime pay standards of the Fair Labor Standards Act (FLSA) to state government employees.[107] The majority opinion determined that the federal government had the power to regulate the minimum wage and overtime pay standards of employees because the wage standards clearly affected interstate commerce.[108] The Court found, however, that the Tenth Amendment invalidated the application of FLSA to state and local government employees because FLSA displaced a state's power over traditional local governmental functions and threatened their independent existence.[109]

Throughout the late 1970s and early 1980s, there was a sizable amount of confusion concerning application of the Tenth Amendment. From 1976 to 1985 the court regularly rejected challenges based on *National League of Cities* and applied various Tenth Amendment tests: (1) whether state interests outweighed federal interest; (2) whether the federal statute regulated purely private activity; and (3) whether the federal statute regulated states as states, whether it dealt with matters that were indisputably attributes of state autonomy, and whether the required state compliance with federal law would directly impair the structural integrity of states in areas of traditional government functions.[110] It was during this time that the boundary of federal control of state and local government activity appeared less certain.

In 1985, the Court again reduced the significance of the Tenth Amendment when it decided *Garcia v. San Antonio Metropolitan Transit*

---

106. 426 U.S. 833 (1976).

107. *Id.* at 855.

108. *Id.* at 836, *citing* Darby v. United States, 312 U.S. 100, 115 (1941).

109. *Id.* at 852.

110. *See* Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) (Tenth Amendment did not prevent federal statute from regulating the operation of coal mines); E.E.O.C. v. Wyoming, 460 U.S. 226 (1983) (Tenth Amendment did not prevent Age Discrimination in Employment Act from applying to state employees); United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982) (state-owned railroad must comply with Railway Labor Act mediation and cooling off procedures because application of federal law to state-owned business does not impair state ability "to structure integral operations in areas of traditional functions"); F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) (Tenth Amendment did not prevent the Public Utility Regulatory Policies Act from requiring state utilities commissions to consider certain standards and approaches in setting policies and requiring state commissions to enforce federal standards), *reh'g denied*, 458 U.S. 1131 (1982).

Authority.[111] In *Garcia*, the Court overruled *National League of Cities* and held that the Tenth Amendment did not prohibit federal regulation of wages and hours of employees of a municipal transit system.[112] In its opinion, the Court stated that "state sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[113] After *Garcia*, the only remaining state sovereignty limit on federal power is one of process and not one of result. Any substantive limit on the national power must find its justification in the procedural nature of the Constitution and it must be designed to compensate for possible failings in the national political process.

Today, the Supreme Court will not employ the Tenth Amendment to invalidate the application of federal law to state and local governments. States must now convince Congress instead of the Court that they should not be subject to federal regulation when such regulation would impair their authority to function as states. *Garcia* and other recent cases indicate that the Court might invalidate a federal statute if an extraordinary defect existed in the national political process sufficient to impair the integrity of the states. The Court, however, has yet to address the precise nature of such a defect. When the issue arises, which Tenth Amendment principle will Nevada face and will it be sufficient to protect Nevada?

ANALYSIS

Recent Tenth Amendment interpretation has been tumultuous. Contemporary scholars agree that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states."[114] Scholars, such as Professor Herbert Weschler, argue that if the Supreme Court is authorized to examine the limits of federal legislative power, they would sit as a national policy making body, thus overriding the balanced political process since each Justice would employ their individual views of the federal system.[115] It is, therefore, difficult for the judiciary to use the Tenth Amendment to validly circumscribe Congress' constitutional power.[116]

---

111. 469 U.S. 528 (1985).

112. *Id.* at 545.

113. *Id.* at 552.

114. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559, (1954).

115. *Id.*

116. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 23-24 (1959).

According to Professor Weschler, Congress is better suited to balance the national interests and determine the freedom of local government and the laws they might pass in the federal system.[117] Additionally, Congress is the most capable governmental entity to resolve disputes between various parts of the nation.[118] Through Congress' political structure, states can protect themselves against arbitrary acts by the federal government through their independent influence.[119] This is similar to the reasoning employed by the Garcia majority. In *Garcia*, the majority declared that the structural layout of the government ensured states protection from overreaching by the national government.[120] The Court stated that the Framers sought to protect the states by providing them a role in the selection of both the federal executive and legislative branches.[121] Through this "federal system in which special restraints inhered principally in the workings of the national government itself, rather than in discrete limitations on the objects of federal authority," states would find their protection.[122] Because of this procedural structure, the Court felt that intrusions on state autonomy would simply not occur.[123] Therefore, the Court concluded that it should not use the Tenth Amendment to circumscribe Congress' power absent a defect in the political process.[124]

This political process theory deeply troubled the dissenters in *Garcia*. According to the Garcia dissent, the "[s]tate's role in our system of government is a matter of constitutional law, not of legislative grace."[125] Because of the majority's reasoning, the dissent claimed that federal officials, invoking the Commerce Clause, would be the judges of the limits of their own power—a result inconsistent with federalism principles.[126] This result, the dissent argued, reduced the Tenth Amendment to meaningless rhetoric whenever Congress acts pursuant to the Commerce Clause.[127] According to the dissent, irrespective of the political process, "the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized."[128] As Justice Powell stated,

117. Wechsler, *supra* note 115, at 547-548.
118. *Id.*
119. *Id.*
120. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550-51 (1985).
121. *Id.* at 551.
122. *Id.* at 552.
123. *Id.* at 556.
124. *Id.* at 552.
125. *Id.* at 567.
126. *Id.*
127. *Id.* at 560.
128. *Id.* at 568.

"contemporaneous writings and the debates at the ratifying conventions make clear, the State's ratification of the Constitution was predicated on this [Tenth Amendment protection] understanding of federalism."[129]

Furthermore, as the dissent noted, the majority radically departed from long-settled constitutional values and ignored the role of judicial review in the federal system of government.[130] As Justice O'Connor stated "[i]f federalism so conceived and so cultivated by the Framers . . . is to remain meaningful, this court cannot abdicate its constitutional responsibility to oversee the federal government's compliance with its duty to respect the legitimate interests of the States."[131] Additionally, Justice Powell declared that "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."[132] According to dissent, the majority's view of federalism appeared "to relegate states to precisely the trivial role that the opponents of the Constitution feared they would occupy."[133]

The role states were to have under the federal structure was to be significant and respected by the federal government. Although the Federalists maintained that the federal government would "have only the powers expressly delegated to it . . . and that all other powers would be reserved to the states," opponents of the Constitution were, nonetheless, suspicious and feared that the national government would expand and eventually usurp the role of states.[134] Accordingly, the Tenth Amendment was added to put the obvious beyond conjecture.[135] As Charles Jarvis told the delegates at the Massachusetts Convention, "[b]y positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, or to the refinements of implication, but is an explicit reservation of every right and privilege which is nearest and most agreeable to the people."[136] The Tenth Amendment was designed to put such fears to rest and this purpose was not to be defeated by labeling it a truism.[137]

---

129. *Id.*
130. *Id.* at 561.
131. *Id.* at 581.
132. *Id.* at 570.
133. *Id.* at 575.
134. RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 79 (1987).
135. *Id.*
136. *Id.* at 80.
137. *Id*

WATKINS AND THE POLITICAL PROCESS OF THE NWPA

The original NWPA of 1982 resulted from a political process involving tremendous political and regional compromise, as well as an agreement not to name any specific repository site.[138] This compromise stemmed from the fact that if a state was selected, that state's legislator could restrict the state from being sited pursuant to the NWPA if his constituents decided against a repository.[139] Because of this understanding, the NWPA gathered sufficient congressional support to become federal law.[140] When the DOE began the selection process, however, it became less objective and more political. Congressional members from certain states hurried to get their states removed from the Secretary's list.[141] As a result, Congress reconsidered the NWPA in 1987.

The political process which lead to the 1987 NWPA Amendments was unlike that of the original Act. The political process was partial and benefited the other two prime candidate sites—Texas and Washington.[142] Because of their political strength, both Texas and Washington were able to unfairly influence federal legislation by removing their respective sites, thus 'sticking it' to Nevada. The Nevada delegation, on the other hand, was not strong enough to avoid the 1987 amendments. Moreover, Nevada was unable to prevent the amendments since the Conference Committee, and not Congress, amended the NWPA.[143] When the Conference Committee met behind closed doors to reconcile differences between underlying NWPA amendments, Nevada was the only selected candidate state excluded.[144] Through this political process, many concerned states, including those with candidate sites, were able to direct the nation's nuclear waste storage problems to Nevada.

Even though the *Watkins* Tenth Amendment issue focused on the manner in which the NWPA was amended, *Watkins* illustrates the problems with the political process rationale that the Tenth Amendment secures more than a state's right to participate through its elected officials in the federal political process. Rather, as the Garcia dissenters indicate:

---

138. Topol, *supra* note 35, at 797.

139. *Id.*

140. *Id.*

141. *Id.* at 798.

142. Texas congressional members totaled twenty-nine, and included House Speaker Jim Wright and Senate Finance Committee Chairman Lloyd Bentsen. United States Vice-President George Bush was also from Texas. Washington congressional members totaled ten, and included Majority Leader Thomas Foley. Topol, *supra* note 35, at 800-801.

143. *Watkins*, 914 F.2d at 1557.

144. Petitioner's Opening Brief at 42-43.

> [T]he harm to the states that results from Federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U.S. at 846-851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. ante, at 546. Rather by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the Constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.[145]

Under current Tenth Amendment analysis, the political process does not protect Nevada. Rather, it limits Nevada's sovereignty as a State, to restrict the long term storage of high-level nuclear waste produced in forty-nine other states. Granted, Nevada has a direct influence on Congress through its two senators and two representatives, as well as an independent influence on the executive branch. That influence, however, is limited. Nevada's political influence is not enough to effect the federal government's decision to site a repository at Yucca Mountain. Absent the Tenth Amendment, Nevada does not have the power to prohibit the federal government from overreaching and placing a high-level nuclear waste dump at Yucca Mountain. Indeed, under the amended NWPA, Congress is the judge of the limits of its power.

Furthermore, the claim of the *Watkins* Court that the Tenth Amendment analysis does not apply since the disapproval provision protects Nevada's interests is a farce. While the NWPA provides Nevada with a provision whereby it could register its disapproval of a repository siting decision, it does not provide Nevada with the exact rights guaranteed by the Tenth Amendment. Clearly, Nevada's sovereignty is not dependent on a provision which can be easily overridden by a joint resolution of Congress. Also, Nevada's lack of political strength, which the *Watkins* Court premised on the "Great Compromise of 1787", does not mean that the other states, acting through the federal government, can force Nevada to accept a national repository against its will. The Tenth Amendment makes it clear that, irrespective of the NWPA's state disapproval provision and the "Great Compromise of 1787", the federal government must respect the legitimate interests of the states. Indeed, Nevada has a legitimate interest to protect the health, safety, and general welfare of its citizens, from the permanent storage of the nation's high-level nuclear waste within its borders that cannot be compromised by the federal government.

If the federal government is permitted to site a high-level nuclear

---

145. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572 (1985).

waste repository in Nevada without Nevada's approval, such an action would clearly violate Tenth Amendment and federalism principles. In *South Carolina v. Baker*,[146] the Supreme Court suggested that Tenth Amendment judicial review would be available to a state if there was a defect in the political process. This defect, procedural or not, would be evident if the federal government sites a repository at Yucca Mountain over Nevada's objection. Therefore, under *Baker*, Tenth Amendment judicial review should be available to Nevada in order to maintain and protect Nevada's sovereignty interest from the federal government's intent to site a repository at Yucca Mountain. The political process cannot do this.

CONCLUSION

Nevada v. Watkins illustrates the federalism problems faced by the federal government in trying to site the nation's only high-level nuclear waste repository within a single state. Prior to Congress' 1987 NWPA amendments which completely redirected the nation's entire high-level nuclear waste toward Yucca Mountain, Nevada, no state had been willing to accept a national repository. With the 1987 amendments, though, Nevada has been left to bear the burden of a program avoided by all states. States which do not want a repository and states with large amounts of high-level nuclear waste will benefit from the NWPA's amendment at the sole expense of Nevada. If the federal government sites a repository in Nevada against Nevada's approval, then Nevada would be forced to undertake a repository only for federal interests. The Tenth Amendment preserves Nevada's state sovereignty interest within the federal system and guarantees Nevada the right to restrict the federal government from requiring Nevada to house a repository. As Justice O'Connor stated, "[The] true 'essence' of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme."[147]

Sonny Swazo

146. 485 U.S. 505, 512 (1988).

147. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 581 (1985).