

JUDICIAL SAFEGUARDS OF FEDERALISM AND THE ENVIRONMENT: YUCCA MOUNTAIN FROM A CONSTITUTIONAL PERSPECTIVE

JOHN C. YOO*
JENNIFER L. KOESTER**

Judicial review of federalism is here to stay. Just under twenty years ago, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹ the Supreme Court adopted a hands-off approach to federalism. Within six short years, the Court began to shift course and reassert its role in determining the proper balance of power between the states and the federal government. Beginning with *Gregory v. Ashcroft*² and continuing with, among others, *New York v. United States*,³ *United States v. Lopez*,⁴ and *Printz v. United States*,⁵ the Court has now left no doubt that it will review questions of the scope of federal and state power and that federalism will not be protected by political structures alone.⁶ But the Court's reinvigoration of judicial review of federalism does not mean that every conflict between state and federal interests presents a meritorious or cognizable claim that warrants judicial review. Instead, some of these conflicts are normative disputes about whether the federal government *should* exercise its power in light of the interests of a state or states.

INTRODUCTION

One area that has frequently invoked federalism policy conflicts has been environmental policy. There has been substantial debate on what role the states and the federal government can and ought to play in regulating the environment.⁷ Debate has arisen with respect to such envi-

* Professor of Law, University of California at Berkeley School of Law (Boalt Hall). A.B., 1989, Harvard College; J.D., 1992, Yale Law School.

** B.A., 1996, University of Colorado at Boulder; J.D., 2000, Yale Law School.

1. 469 U.S. 528 (1985).

2. 501 U.S. 452 (1991).

3. 505 U.S. 144 (1992).

4. 514 U.S. 549 (1995).

5. 521 U.S. 898 (1997).

6. Professor Yoo has argued elsewhere that *Garcia* has been overruled *sub silentio*. See generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

7. See generally, e.g., Ann E. Carlson, *Federalism, Preemption, and Green House Gas*

ronmental issues as public lands policy, the regulation of water and air pollution, and the disposal of nuclear waste.⁸ Among the most contentious, long-sustained debates has been about where to locate nuclear waste dumps.⁹ Over the years, there has been considerable discussion about creating a single nuclear waste repository for the United States. In the Nuclear Waste Policy Act of 1982, Congress instructed the Department of Energy (DOE) to recommend three potential sites to serve as the nation's nuclear waste repository.¹⁰ In 1987, Congress amended that act and directed DOE to study one site: Yucca Mountain, Nevada.¹¹ Almost fifteen years later, DOE concluded that Yucca Mountain was an appropriate site for locating a single waste dump for the nation and the Secretary of Energy recommended that the President approve siting the dump at Yucca Mountain. President George W. Bush did so and submitted that approval to Congress.¹² Over the strenuous objections of the State of Nevada,¹³ Congress agreed with the President's recommendation.¹⁴ The process is now underway to seek licensing from the Nuclear Regulatory Commission for placement of the repository at Yucca Mountain.¹⁵ The

Emissions, 37 U.C. DAVIS L. REV. 281 (2003); Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 J. LAND USE & ENVTL. L.J. 91 (2003); Brooks M. Beard, *The New Environmental Federalism: Can the EPA's Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

8. See generally, e.g., Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995) (public land); Carlson, *supra* note 7 (air pollution); Andrew P. Morriss et al., *The Failure of EPA's Water Quality Reforms: From Environment-Enhancing Competition to Uniformity and Polluter Profits*, 20 UCLA J. ENVTL. L. & POL'Y 25 (2001/2002) (water pollution); Bernard P. Haggerty, "Tru" Cooperative Regulatory Federalism: Radioactive Waste Transportation Safety in the West, 22 J. LAND RESOURCES & ENVTL. L. 41 (2002) (nuclear waste).

9. See generally, e.g., Michael B. Gerard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TULANE L. REV. 1047 (1994).

10. 42 U.S.C. § 10132(b)(1)(B) (2000).

11. Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, tit. V, 101 Stat. 1330 (1987).

12. *Yucca Mountain Statement*, Statement by the Press Secretary (Feb. 15, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020215-11.html> (last visited Apr. 12, 2004).

13. Kenny C. Guinn, Governor of Nevada, *Statement of Reasons Supporting the Governor of Nevada's Notice of Disapproval of the Proposed Yucca Mountain Project* (April 8, 2002), available at <http://www.yuccamountain.org/pdf/govveto0402.pdf> (last visited Apr. 12, 2004); Letter from Kenny C. Guinn, Governor of Nevada, to Spencer Abraham, Secretary of Energy (Jan. 24, 2002), <http://www.state.nv.us/nucwaste/news2002/nn11567.htm> (last visited Apr. 12, 2004).

14. Act of July 23, 2002, Pub. L. No. 107-200, 116 Stat. 735 (2002).

15. Press Release, Department of Energy, *Yucca Mountain Documents Made Available*

State of Nevada and two of its localities sought relief in federal court, contending that the federal government has exceeded its constitutional powers in making that decision.¹⁶ Despite our strong support for the judicial review of federalism, we argue below that the decision to place a nuclear waste dump at Yucca Mountain does not present a federalism claim warranting judicial review.

In Part I of this article, we lay out our argument that judicial review must include review of federalism questions. We begin by describing the political safeguards theory of federalism, which postulates that political safeguards offer sufficient protection of federalism and should be the exclusive protection for federalism. We then discuss why the political safeguards theory is incorrect. Specifically, we contend that the text of the Constitution does not support the exclusion of federalism from judicial review, and that the review of federalism issues is inherent in deciding supremacy conflicts. We also contend that the political safeguards theory is consistent with coordinate branch review. In Part II, we discuss two models of federalism: the political autonomy model and the dual sovereignty model. We explain that each of these models has important impacts on how federalism questions are analyzed by the U.S. Supreme Court. In Part III, using these models, we examine claims that the siting of the nation's nuclear repository at Yucca Mountain violates core constitutional principles of federalism. We conclude that the siting of the repository at Yucca Mountain does not offend the balance of power between the federal government and the states as established by the Constitution. Instead, we find that the issues raised regarding this decision are well within the federal government's enumerated powers. As a result, the question is not whether the federal government has the power to locate the repository at Yucca Mountain, but whether it should, leaving it a question for policymakers not constitutional scholars.

I. JUDICIAL REVIEW OF FEDERALISM

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court adopted the political safeguards theory of federalism.¹⁷ In so doing, the Court drew upon the theory advanced by Professor Herbert Wechsler in 1954 and further propounded by Professor Jesse M.

for Licensing Proceeding (June 30, 2004), available at http://www.energy.gov/engine/content.do?PUBLIC_ID=16120&BT_CODE=PR_PRESSRELEASES&TT_CODE=PRESSRELEASE (last visited July 14, 2004).

16. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1261 (D.C. Cir. 2004). The D.C. Circuit flatly rejected Nevada's constitutional claims. *Id.* at 1306–07.

17. 469 U.S. 528, 550–55 (1985).

Choper.¹⁸ In his now classic article *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, Wechsler argued that “the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception.”¹⁹ In support of his thesis, Wechsler pointed to the political safeguards, i.e., the various ways in which the Constitution provides representation of the states in the national government and a role for them in that government. He noted that the Constitution apportions representatives to states and that it provides that the President is selected by electors from each state.²⁰ Indeed, with respect to Congress, Wechsler wrote, “It is remarkable that it should function thus as well as it does, given its intrinsic sensitivity to any insular opinion that is dominant in a substantial number of the states.”²¹ Wechsler further pointed to state control of voter qualifications and elections, including the state power to establish congressional districts as demonstrating the Constitution’s provision of political safeguards.²² Wechsler placed little reliance on the intent of the Framers, though he did point to a letter James Madison wrote well after the ratification of the Constitution as supporting his thesis and to another statement by Madison in *The Federalist Papers*.²³ Based on these structural safeguards and two statements by Madison, Wechsler concluded rather summarily that “it is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism.”²⁴ Wechsler did not delineate any role for the courts in federalism matters.

Jesse Choper later expanded on Wechsler’s theory, adding greater substance to the broad contours that Wechsler had sketched.²⁵ Choper contended that the political branches of the national government bore the duty of protecting federalism.²⁶ Moving beyond the formal constitutional mechanisms upon which Wechsler relied, Choper claimed that the

18. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) [hereinafter *Scope of National Power*].

19. Wechsler, *supra* note 18, at 546.

20. *Id.* at 546, 557.

21. *Id.* at 547.

22. *Id.* at 549, 552-57.

23. *Id.* at 558.

24. *Id.* at 560.

25. See generally CHOPER, *supra* note 18; *Scope of National Power*, *supra* note 18.

26. CHOPER, *supra* note 18, at 175.

states controlled the national government's composition and that members of Congress were often individuals who had served in state government.²⁷ He pointed to other informal mechanisms for ensuring the protection of the states at the national level, such as groups that lobby on behalf of states.²⁸ Whereas Wechsler had not delineated the role of the federal courts in federalism questions, Choper argued that they should have no role. Instead, political safeguards were to be the exclusive safeguards of federalism.²⁹ Choper's argument for the exclusivity of the political safeguards stemmed in large part from his contention that the Supreme Court's finite institutional capital ought to be reserved for when it was truly needed: the protection of individual rights.³⁰ The Court could afford to withdraw from federalism questions because the political safeguards had in practice been successful in protecting federalism. Individual rights did not have such a luxury.³¹ Moreover, according to Choper, the justiciability of such issues proved difficult under *National League of Cities v. Usery*.³²

More recently, Professor Larry D. Kramer has further updated Wechsler's political safeguards theory.³³ He took issue with Wechsler's reliance on formal structures, arguing that it is instead informal structures of the American political system that provide the political safeguards for our federal system.³⁴ Kramer contended that Wechsler's thesis conflates the preservation of local interests with the preservation of local institutions and that in fact the structures to which Wechsler points do little to preserve state institutions.³⁵ In the end, the real champions of federalism—though accidentally so, claimed Kramer—are the political parties.³⁶ So if, as Kramer would have it, federalism is protected merely by happy accident, what role is there for judicial review? Like Wechsler and Choper before him, Professor Kramer asserted that there is no role for the judicial review of federalism.³⁷ Kramer, however, went beyond

27. *Id.* at 180–81.

28. *Id.*

29. *Id.* at 175.

30. *Id.* at chs. 2–3.

31. *Id.* at 169.

32. 426 U.S. 833 (1976); Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 578 (1994).

33. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

34. *Id.* at 219.

35. *Id.* at 228–30.

36. *Id.* at 278–84.

37. *Id.* at 234–35.

this assertion and claimed that there is no such role because the Constitution does not require judicial review of any kind.³⁸

Although Choper and Kramer have given more substance to Wechsler's classic piece, the political safeguards theory continues to rest largely on the supposition that political safeguards—whether formal or informal—offer sufficient protection of our federalism and that because these political safeguards are effective, courts need not or should not exert judicial power over federalism cases. The political safeguards theory is at bottom a functional theory of judicial review that suffers from serious defects.

First and foremost, the political safeguards theory fails to provide a satisfactory textual account for excluding federalism questions from judicial review. In our view, such an account would be difficult to provide. The Constitution's text offers no basis for excluding federalism from judicial review. Article III, section 1, simply states: "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." Section 2 of Article III amplifies section 1. It tells us that this judicial power is vested in the Supreme Court and the inferior courts to be established by Congress. That judicial power extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."³⁹ The language of section 2 provides for broad judicial authority over constitutional questions. There is no basis for reading an exception into this grant of authority. Indeed, none of the accounts of the political safeguards theory addressed here attempts to supply such a basis.

The Constitution contemplates judicial review. The Supremacy Clause contemplates conflicts between the Constitution and state law. It provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁴⁰ In short, state law—whether constitutional or statutory—must give way to federal law. But most important, the Constitution issues this directive to judges. By requiring judges to be "bound" by federal law, including the Constitution in the face of conflicting state law, the Constitution not only contemplates that such conflicts will arise but also that judges will be called upon to review such conflicts. Such con-

38. *Id.*

39. U.S. CONST. art. III, § 2, cl. 1.

40. U.S. CONST. art. VI, § 2.

flicts arise between federal statute and state law. Other conflicts might be between state law and the Constitution.

Moreover, determinations regarding the proper scope of federal and state power are inherent in deciding supremacy conflicts. The national government is one of enumerated powers, with all remaining powers reserved to the states. In determining whether federal law preempts state law, the federal government must first have the power to enact the law. If the federal government has the power to enact a law, that power is therefore not reserved to the states. Deciding questions of federal power is thus impossible to do without saying something about the powers left to the states. As Justice Sandra Day O'Connor wrote for the majority in *New York v. United States*, in which the Supreme Court addressed Congress's statutory scheme for state disposal of radioactive waste:

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.⁴¹

Accordingly, by concluding that a federal law preempts a state law, a court is either tacitly or expressly making a determination about the scope of federal power. None of the proponents of the political safeguards theory has provided a satisfactory account of the Supremacy Clause. Nor have they propounded an account of why courts should be permitted to address conflicts between state and federal law, which inherently involve determinations about the balance of power between the federal and state governments, if questions of federalism are to be non-justiciable.

As a general matter, the political safeguards theory also fails to account for judicial review of other constitutional disputes. The rationale underpinning the political safeguards theory ought to apply with equal force to any other structural constitutional claim. Indeed, it could be just as easily applied to individual rights. As Justice Lewis Powell wrote in his dissent in *Garcia*, "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed

41. 505 U.S. 144, 159 (1992).

by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle.⁴² The logical extension of the political safeguards theory would undermine the very aim that Choper seeks to achieve by removing judicial review of individual rights as well as judicial review of federalism.

Protection of individual liberty would be undermined not just by the logical extension of the political safeguards theory to individual rights, but also by the very removal of judicial review of federalism. The political safeguards theory neatly divides the Constitution between structure and individual rights. In so doing, the theory presumes that federalism bears little upon individual liberty. But the Constitution cannot be so neatly divided. The structures that the Constitution establishes are not ends unto themselves but are in service of individual liberty. As the Supreme Court wrote in *Gregory v. Ashcroft* of federalism's role in protecting liberty:

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.⁴³

Ultimately, there is little reason to believe that the political process should be the *exclusive* safeguard of federalism.⁴⁴ Even if one accepts that in practice political safeguards—whether Wechsler's formal safeguards or Kramer's informal safeguards—can be an effective mechanism through which to protect federalism, this supposition does not compel the conclusion that the political process is the sole means of protecting the structure of federalism. As discussed above, this functional argument is not compelled or even suggested by the Constitution's text. A functional argument so afloat from text is methodologically unsound in interpreting a written constitution. After all, if the way things actually operate permits us to brush past the text, a written constitution becomes virtually superfluous.

42. 469 U.S. at 565 n.8 (Powell, J., dissenting).

43. 501 U.S. at 458.

44. For an extensive discussion of the original understanding of judicial review and its support for the review of federalism questions, see Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1489–1520 (2001).

II. MODELS OF FEDERALISM

The argument that judicial review applies equally with respect to federalism issues would not be complete without adumbrating the models of federalism that either have or should guide that judicial review. In the Court's revival of judicial review of federalism post-*Garcia*, a clear theory of federalism has not emerged. Instead, at various times the Court has drawn on two models of federalism: political autonomy and dual sovereignty. These models of federalism are distinct and may have differing implications for the methodology employed and perhaps, in certain instances, even the outcomes that might occur in any given case in which federalism is subject to judicial review. At the outset, it is important to note that these two models are not necessarily contradictory or incompatible. Analysis under either model respects the central purpose of the structural Constitution: federalism ensures a balance of power between the federal government and the states and in so doing protects the liberty of the people of the several states.

A. The Political Autonomy Model

The first of these two models, the political autonomy model, focuses on the political independence of the states. This model acknowledges that the states are independent entities that have powers and authorities that exist without reference to federal power. Thus, judicial review employing this theory is not necessarily concerned with whether the powers at issue are reserved to the states after analyzing the limits of federal power. Instead, following this theory, the Court operates under the view that it can identify key attributes of that autonomy. This model harkens back, of course, to the *National League of Cities* analysis rejected in *Garcia*. In so doing, this model of federalism guts the heart of the political safeguards theory of federalism because it recognizes that there are instances in which the national government will sacrifice the political autonomy of the states. This theory does not turn on state preference, thus permitting states to sacrifice their autonomy for momentary interests. Instead, the question is whether federal action intrudes upon a state's political autonomy. For example, while the Kramer incarnation of the political safeguards theory would tell us that because a national governors' association or a political party supports a piece of legislation state interests have been adequately protected, the political autonomy model of federalism would look to whether a key attribute of state sovereignty had been infringed upon, without reference to momentary state consent or support.

New York v. United States and *Printz v. United States* each illustrate this model of federalism. In *New York v. United States*, the State of New York challenged three provisions of the Low-Level Radioactive Waste Policy Act, which together formed an incentive structure that escalated in severity in order to encourage state compliance with the act's regulatory scheme.⁴⁵ First, New York challenged the act's provision of monetary incentives.⁴⁶ Under the act, states that complied with the regulatory scheme's "series of milestones" for waste disposal received grants from the federal government.⁴⁷ Second, New York challenged the act's access incentives, which permitted "state and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines."⁴⁸ Third, New York challenged the act's take-title provision, under which states must either take title to the waste or regulate it in compliance with the act.⁴⁹ In contesting these provisions, the State of New York did not assert that Congress lacked the authority to regulate the disposal of radioactive waste; it challenged the *way* in which Congress elected to regulate it. The Court found the first two sets of incentives to be permissible means of encouraging state compliance with a federal regulatory scheme. It found the third, the take-title provision, to be unconstitutional.

The Court reasoned that neither of the options in the take-title provision would be constitutional if it stood alone.⁵⁰ Requiring the states to take title to the waste "would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents," which would "'commandeer' state governments into the service of federal regulatory purposes."⁵¹ The other option presented to the states was no less tenable, because were it to stand alone it would be a "simple command to state governments to implement legislation enacted by Congress."⁵² Because Congress lacked the power to enact either of these options standing alone, it exceeded its authority when it offered a choice between them.⁵³

45. 505 U.S. at 173.

46. *Id.* at 172.

47. *Id.* at 173.

48. *Id.*

49. *Id.* at 174.

50. *Id.* at 175.

51. *Id.*

52. *Id.* at 176.

53. *Id.*

At the outset of the opinion, the Court made clear that certain attributes of the sovereignty of states are reserved to the states.⁵⁴ This reservation of attributes limits the power of the federal government. And, as sovereign entities, states are autonomous. They are not, as the Court explained, “mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.”⁵⁵ The Court reasoned that because the states are separate, independent entities, it is necessary to ensure that they remain accountable to their citizens. If the federal government were permitted to command the states to regulate, the accountability of federal and state officials would be reduced. According to the Court, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”⁵⁶ The fundamental nature of the states cannot be surrendered by state support for a given provision or even by the express consent of state officials.⁵⁷ Thus, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”⁵⁸ The Court derived this understanding of the Constitution from the history of the nation’s founding. The Court examined the choice the Framers made to permit the federal government to legislate directly upon the people rather than upon the states, as had been the case under the Articles of Confederation. Because of this clear choice made at the founding, the Court explained, “[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”⁵⁹

In *Printz*, the Court considered whether, among other things, Congress could compel state executive officials to administer a federal regulatory scheme.⁶⁰ Under the Brady Act, regulated firearms dealers forwarded applications for the purchase of guns to local law enforcement officers.⁶¹ Those officers were tasked with completing the background check on applicants within five days and informing the dealers whether

54. *Id.* at 156.

55. *Id.* at 188.

56. *Id.* at 169.

57. *Id.* at 181–82.

58. *Id.* at 162.

59. *Id.* at 166.

60. 521 U.S. at 904.

61. *Id.* at 904.

there was reason to believe that the sale to the applicant would be a violation of federal law.⁶² The majority began its analysis from the supposition that “there is no constitutional text speaking to th[e] precise question” of whether the federal government can compel state officials to administer a federal program.⁶³ Instead, the Court looked to “historical understanding and practice, . . . the structure of the Constitution, and in the jurisprudence of th[e] Court.”⁶⁴ The Court found no support for such a scheme in either historical understanding or practice. Turning to the Constitution’s structure, the Court explained, just as it had in *New York*, that the Framers had explicitly rejected a system in which the national government regulated the people through the states, a system with which they had had much experience under the Articles of Confederation. Instead, the Framers proposed a system in which the national government would possess the power to directly regulate the people, not the states. In describing the nature of the system, the Court emphasized the political autonomy of the states and the federal government that was created. It stated:

The great innovation of this design was that “our citizens would have two political capacities, one state and one federal each protected from incursion by the other—a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privacy, its own set of mutual rights and obligations to the people who sustained it and are governed by it.”⁶⁵

As it had in *New York*, the Court emphasized the distinct and independent nature of the states as entities. This nature serves the interest of liberty of the people, and the Constitution establishes a balance between the states and the federal government. Acknowledging the import of that balance, the court reasoned that permitting the federal government to “impress into its service—and at no cost to itself—the police officers of the 50 States” would “augment[]” the power of the federal government “immeasurably.”⁶⁶

The majority also swiftly dismissed the dissent’s contention that the legislation was permissible under the Necessary and Proper Clause⁶⁷ as

62. *Id.* at 904–05.

63. *Id.* at 905.

64. *Id.*

65. *Id.* at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

66. *Id.* at 922.

67. U.S. CONST. art. I, § 8, cl. 18.

necessary to effectuate a regulatory scheme that could be enacted pursuant to the Commerce Clause.⁶⁸ The majority reasoned that the Necessary and Proper Clause itself undermines this argument because the Constitution does not provide the federal government with the power to regulate states and, consequently, the provision was in no sense proper.⁶⁹

As demonstrated above, the Supreme Court's analysis of the federalism questions at issue in these cases is built on the very structure of federalism. The fundamental starting point for its analysis is the understanding that the Framers explicitly rejected a system in which the national government would regulate the states directly, choosing instead a system in which the national government regulates the people directly. Within that system, the states are autonomous entities and their fundamental nature cannot be surrendered by state officials or intruded upon by the federal government.⁷⁰

B. The Dual Sovereignty Model

The second model of federalism—the dual sovereignty model—emphasizes that the federal government has only those powers expressly given to it by the Constitution while all other powers are reserved to the states or the people.⁷¹ This model questions whether the Constitution supplies the federal government with the power to engage in a certain action. The Tenth Amendment's express statement of what is already implicit in the structure of our government functions as an express rule of construction in this model. Thus, if the Constitution does not supply the federal government with the authority to engage in a given activity, then the authority to engage in that activity is reserved to the states or the people.

We note that in characterizing *New York* and *Printz* as employing the political autonomy theory of federalism we are not suggesting that the Court discarded or rejected the dual sovereignty model of federalism in these cases. Instead, our characterization is intended to be descriptive of the analysis employed: the Court focused on state political autonomy per se, and its analysis was not contingent on an initial analysis of the scope of federal power to discern what powers have been left to the

68. U.S. CONST. art. I, § 8, cl. 3.

69. *Printz*, 521 U.S. at 923-24.

70. See also *McCannell v. Fed. Election Comm'n*, 540 U.S. 619, 685 (2003) ("In examining congressional enactments for infirmity under the Tenth Amendment, [the Supreme] Court has focused its attention on laws that commandeer the States and state officials in carrying out federal regulatory schemes.")

71. U.S. CONST. amend. X.

states. Indeed, the Court in both *New York* and *Printz* readily acknowledged the dual sovereignty model. Of this, the Court stated in *Printz*: “Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment’s assertion 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.”⁷² We note however, as Professor Yoo has written elsewhere, that there is some indication that the majority of the Court “favors a methodology that emphasizes the inherent autonomy of the States.”⁷³ With these two models of federalism in mind, we turn to the question of whether there are federalism issues warranting judicial review in the circumstances surrounding Yucca Mountain.

III. YUCCA MOUNTAIN: A VIABLE FEDERALISM CLAIM?

Currently, nuclear waste is stored in 131 facilities in thirty-nine states.⁷⁴ Since the late 1970s, efforts have been underway to establish a single nuclear waste repository for the nation. Initially, Congress directed the Secretary of Energy to recommend to the President three potential sites to serve as a single nuclear waste repository.⁷⁵ In 1987, Congress directed the Department of Energy to examine only Yucca

72. *Printz*, 521 U.S. at 919 (quoting U.S. CONST. amend. X). The Tenth Amendment was not, of course, the only provision of the Constitution that the Court looked to as demonstrating this system of dual sovereigns. The Court explained:

Although the States surrendered many of their powers to the new Federal Government, they retained “a residuary and inviolable sovereignty,” The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution’s text, *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101 (1869); *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2; and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Art. V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, “which presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights,” *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938).

Id. at 918-19.

73. Yoo, *supra* note 6, at 1355.

74. Petitioner’s Opening Brief at 2, *Nevada v. United States*, (D.C. Cir. 2003) (No. 03-1009), available at <http://www.state.nv.us/nucwaste/policy.htm> (last visited July 13, 2004).

75. 42 U.S.C. § 10132(b)(1)(A) (2000).

Mountain, Nevada.⁷⁶ In 2002, some fifteen years after that directive, the Secretary of Energy recommended to the President that Yucca Mountain be designated as the site of that single national repository for nuclear waste.⁷⁷ President George W. Bush approved that recommendation and submitted it to Congress. The Governor of the State of Nevada submitted a notice of disapproval.⁷⁸ Pursuant to 42 U.S.C. § 10135, Congress approved the siting of a nuclear repository at Yucca Mountain.⁷⁹ Once Yucca Mountain receives a license from the Nuclear Regulatory Commission, the project will go forward.⁸⁰

The protection of the environment is generally thought to provide a public good. The public undoubtedly benefits from an environment that does not pose a health risk of one sort or another. The decision to create a single nuclear waste repository at Yucca Mountain would provide a public good by establishing a single waste repository for the nation's nuclear waste rather than having it dispersed among thirty-nine different states. It centralizes that waste, offers a location away from densely populated areas, and provides distinct security advantages. The benefits from selecting a single site will accrue to a large number of people. This environmental policy choice, however, differs in key respects from common environmental regulatory schemes.

The more typical environmental regulation ostensibly benefits a large number of people. No one person benefits any more than any other. For example, it can generally be said that we all derive roughly the same benefit from clean air or water. Though there may be negative externalities associated with environmental regulations, they are likely to be borne diffusely. For example, if the negative externality of an environmental regulatory scheme is to increase the costs of the operation of certain businesses, those businesses may be able to transfer some or all of those costs to the consumers of their products. This ability to transfer

76. Nuclear Waste Policy Amendments Act of 1987, Pub. L. 100-203, Title V, 101 Stat. 1330 (1987).

77. Press Release, Department of Energy, *Secretary Abraham Recommends Yucca Mountain Site to President Bush Citing "Sound Science" and "Compelling National Interests"* (Feb. 14, 2002), http://www.energy.gov/engine/content.do?PUBLIC_ID=12962&BT_CODE=PR_PRESSRELEASES&TT_CODE=PRESSRELEASE [hereinafter *Secretary Abraham*].

78. Letter from Kenny C. Guinn, Governor of Nevada, to Hon. Robert C. Byrd, President *Pro Tempore*, U.S. Senate, Official Notice of Disapproval of the Yucca Mountain Site (Apr. 8, 2002), <http://www.state.nv.us/nucwaste/news2002/nm11652.pdf>.

79. The resolution stated: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted by the Governor of the State of Nevada on April 8, 2002." H.J. Res. of July 23, 2002, Pub. L. No. 107-200, 116 Stat. 735 codified at 42 U.S.C.A. § 10135 (2002).

80. 42 U.S.C. § 10134 (2002).

those costs obviously limits the impact of those negative externalities on those businesses. Transferring costs not only limits the impact on those businesses but further distributes the negative externality. Moreover, even in circumstances in which the impact of the negative externalities may be more concentrated, individuals bearing them are not excluded from the benefit. For example, if a business owner faces increased costs owing to an air pollution regulatory scheme, he nonetheless would benefit from the clean air that the regulation might provide. Additionally, because everyone stands to benefit equally, no one person has an incentive to pursue such protections. The enactment of such protections frequently presents a collective action problem.

In contrast to the run-of-the-mill environmental regulation, the kind of diffuse benefits discussed above can only be achieved by consolidating the waste into a single location. As noted above, there are currently 131 such sites in thirty-nine states. The 161 million people located in and around those 131 sites all are exposed to the various risks that are associated with a nuclear waste repository.⁸¹ Moreover, additional national security negative externalities are created by the storage of nuclear waste at so many different sites. These sites present potential targets of opportunity for terrorist attacks. Such attacks could cause dire results. Selecting a single site for disposing of nuclear waste is designed to limit the number of persons that are exposed to the potential negative externalities associated with the long-term storage of nuclear waste. The question then becomes where that site should be located.

Storing all the nation's nuclear waste at a single site also presents a classic not-in-my-backyard dilemma played out on the national level. Virtually everyone recognizes the benefits to be derived from having a single site for disposing of nuclear waste. Unlike the typical environmental regulation circumstance described above in which those suffering some of the negative externalities will nonetheless stand to receive the same benefits from the regulatory scheme, those limited number of individuals still bearing the potential negative externalities of having a nuclear waste repository site located near them will not receive the benefits that the rest of the nation will receive by virtue of storing nuclear waste in a single site. To be sure, to the extent that the risk of attack itself is reduced, it could be argued that even those living in close proximity to a repository benefit from that risk reduction. Nonetheless, those persons residing near the site bear the remaining risk alone. It is hard to imagine any state or locality that would welcome a nuclear waste dump. It is,

81. *Secretary Abraham, supra* note 77.

therefore, hardly a shock that the State of Nevada and various local entities in Nevada have strenuously objected to placing that repository at Yucca Mountain. And it is clear that the circumstances of Yucca Mountain pit the interest of the State of Nevada against the federal government.

Should judicial review be available for claims arising out of this conflict between Nevada and the federal government? The political safeguards theory would, of course, tell us that any conflict arising out of Yucca Mountain should not be subject to judicial review. In support of that, the political safeguards would point to all of the formal mechanisms enacted by Congress to take account of the State of Nevada's views and interests. Specifically, the Secretary of Energy was required to "hold public hearings in the vicinity of the Yucca Mountain site, for the purpose of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of the site."⁸² If the Secretary decided to recommend Yucca Mountain as the nuclear waste site to the President, the statute required the Secretary to notify the Governor and the legislature of the State of Nevada thirty days in advance of his transmittal of his recommendation to the President.⁸³ Moreover, that recommendation must include "the views and comments of the Governor and legislature of any State."⁸⁴ Only after receiving this recommendation can the President submit his approval of the site to Congress.⁸⁵ Additionally, once the President submitted his approval to Congress, the statute permitted the Governor or the legislature of the state in which the site is located to submit "a notice of disapproval."⁸⁶ Though the outcome proved undesirable to Nevada, the political safeguards theory would say this situation demonstrates that states are very much represented in the national legislature. After all, Congress enacted legislation codifying mechanisms for ensuring that Nevada's views would be considered. Thus, Yucca Mountain is a situation that proponents of this version of judicial review like Wechsler, Choper, and Kramer would argue demonstrates that political safeguards adequately protect federalism.

For those of us who are proponents of the judicial review of federalism, the various formal mechanisms adopted by Congress to take into account the views of the State of Nevada matter little. The question for our

82. 42 U.S.C. § 10134(a)(1) (2002).

83. *Id.*

84. *Id.* at § 10134(a)(1)(F).

85. *Id.* at § 10134(a)(3)(A).

86. 42 U.S.C. § 10136(b)(1) (2002).

purposes is whether the decision to locate a single nuclear waste repository for the nation at Yucca Mountain violates the constitutional principles of federalism. We employ the two models of federalism discussed above—the political autonomy model and the dual sovereignty model—to analyze whether this decision violates the Constitution. We conclude that when analyzed through either of these models the federal government’s decision to site a nuclear waste repository at Yucca Mountain does not violate the Constitution.

As discussed above, the political autonomy model of federalism views states as autonomous, independent entities. They have fundamental attributes that exist without first having to examine the powers that the Constitution expressly delegates to the federal government. Under this model, Congress cannot legislate in such a way as to impress state officials into the service of the federal government or command a state to regulate in any given way. It is difficult to contend that locating the nuclear waste repository on the federal land at Yucca Mountain undermines Nevada’s political autonomy. In no way has Nevada’s ability to govern itself been obscured. A brief comparison with *New York* and *Printz* swiftly demonstrates that Nevada’s ability has not been so obscured.

In *New York*, Congress had usurped a state’s legislative process through the take-title provision. That provision commanded the states to regulate in a manner determined by the federal government.⁸⁷ In *Printz*, the federal government directed state officials to carry out a federal regulatory program. As the Court carefully explained in *New York*, Congress cannot regulate states qua states. Does the location of a nuclear repository for the entire nation at Yucca Mountain compel the state government of Nevada in any way? No. The federal government has not attempted to compel the state legislature to enact legislation implementing a federal regulatory scheme. The federal government has not treated the State of Nevada as a mere field office or administrative agency. Furthermore, the federal government’s approval of the placement of the repository at Yucca Mountain does not require any action by state officials. The federal government has not attempted to require state officials to be responsible for managing the repository, providing its security, or administering regulations for the repository for any period of time.⁸⁸ It has not delegated to state officials any ministerial task regarding the Yucca Mountain site. Congress has also provided for various forms of financial

87. *New York*, 505 U.S. at 176–77.

88. *Printz*, 521 U.S. at 904. “From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme.” *Id.*

assistance to the state and local governments affected by the siting of the nuclear waste facility at Yucca Mountain.⁸⁹ Thus, it has not asked the State of Nevada to absorb the financial cost of Yucca Mountain, but has instead minimized the financial costs to the state.⁹⁰

Indeed, in its latest challenge to siting of the nuclear waste repository at Yucca Mountain, Nevada has not even contended that the federal government has attempted to directly regulate the state or its officers.⁹¹ Instead, the federal government bears the entirety of the responsibility for the construction, management, maintenance, and regulation of the Yucca Mountain site. Because responsibility for the project rests squarely with the federal government, there is little risk that the political accountability of either the federal government or the State of Nevada would be undermined. Simply put, the actions taken by the federal government do not interfere in Nevada's relationship with its citizens. Those actions are consistent with the fundamental choice made by the Framers that the federal government would have the power to directly regulate the people, not the states. Consequently, when we view Yucca Mountain through the lens of the political autonomy model of federalism, the State of Nevada appears to have no constitutional claim.

A review of Yucca Mountain through the dual sovereignty model of federalism likewise demonstrates that there has not been a violation of the Constitution. As discussed above, the dual sovereignty model re-

89. 42 U.S.C. § 10136(c). For example, the statute provides that “[t]he Secretary shall make grants to the State of Nevada and any affected unit of local government for purposes of enabling such State or affected unit of local government—to review activities taken under this part with respect to Yucca Mountain site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of a repository on such state, or affected unit of local government and its residents.” 42 U.S.C. § 10136(c)(1)(B)(i). The statute expressly states that “[s]uch assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.” *Id.*

90. See *Printz*, 521 U.S. at 929–30 (internal citations omitted):

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

91. Petitioner's Opening Brief, *supra* note 74; Petitioner's Reply Brief, *Nevada v. United States*, (D.C. Cir. 2003) (No. 03-1009), available at <http://www.state.nv.us/nucwaste/policy.htm> (last visited July 13, 2004).

quires that the balance of power between the federal government and the states be viewed first through the lens of the powers expressly delegated to the federal government by the Constitution. If the actions undertaken fall within the scope of an express grant of power to the federal government, they do not fall within the powers reserved to the states. There are three substantive areas within which the decision to place a single nuclear repository at Yucca Mountain could be thought to fall: national security, the Commerce Clause,⁹² and public land. We address each in turn.

As touched upon earlier in this section, the safe disposal of nuclear waste is not just an environmental issue. The disposal of this waste in a single repository is also a matter of national security. Having nuclear waste located at over a hundred different sites throughout the United States provides over a hundred different targets of opportunity for terrorist attack. To be sure, the nation's nuclear waste cannot be consolidated immediately at Yucca Mountain. Consequently, the national security benefits from placing the nuclear waste facility at Yucca Mountain will not be seen immediately. For this reason, the State of Nevada has suggested that the national security rationale for siting the facility at Yucca Mountain is at best spurious.⁹³ The immediacy of the effect does not, however, diminish the fact that upon completion of Yucca Mountain, the nation will derive a national security benefit from having the nation's nuclear waste stored at a single facility. In the war against al Qaeda and its affiliates and supporters, taking steps to ensure that the nuclear waste could not be used by our foes is surely prudent.

The Constitution commits the authority for matters of the nation's security to the federal government. It vests in the President the entirety of the executive power and provides that "the President shall serve as the Commander in Chief of the Army and the Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."⁹⁴ Article I gives Congress the power "[t]o declare war,"⁹⁵ "[t]o raise and support Armies,"⁹⁶ and "[t]o provide and maintain a Navy."⁹⁷ Indeed, in his statement notifying Congress of his approval of the Yucca Mountain site, President Bush stated that placing the waste re-

92. U.S. CONST. art. I, § 8, cl. 3.

93. Letter from Kenny C. Guinn, Governor of the State of Nevada, to Spencer E. Abraham, Secretary of Energy (Jan. 24, 2002), <http://www.state.nv.us/nucwaste/news/2002/nn11567.htm>.

94. U.S. CONST. art. II, § 1, cl. 1.

95. U.S. CONST. art. I, § 8, cl. 11.

96. U.S. CONST. art. I, § 8, cl. 12.

97. U.S. CONST. art. I, § 8, cl. 13.

pository at Yucca Mountain would benefit the nation's security.⁹⁸ By contrast, the Constitution expressly precludes the states from entering into treaties and from "keep[ing] troops, or Ships of War in time of Peace" without the consent of Congress.⁹⁹ The Constitution further forbids the states from "engag[ing] in War" without congressional consent "unless actually invaded, or in such imminent Danger as will not admit of delay."¹⁰⁰ Because of the authority the Constitution commits to the federal government for the nation's security, it is difficult to argue that where the federal government determines that a single nuclear waste dump, rather than numerous nuclear waste dumps, is in the nation's national security interests and that locating the dump on federal land in Nevada serves that interest, the federal government lacks the power to act.

Under the Commerce Clause, the Constitution also provides Congress with the power "[t]o regulate Commerce among the several States."¹⁰¹ The Court has held that Congress's Commerce Clause powers extend to those activities substantially affecting interstate commerce.¹⁰² The waste to be stored at Yucca Mountain is waste from the generation of electricity through nuclear power. Electricity's generation and the waste it creates no doubt has substantial effects on interstate commerce. It is impossible to imagine day-to-day operations in today's economy that occur without the extensive use of electricity. Indeed, the Supreme Court has noted that "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home, and every commercial or manufacturing facility."¹⁰³ The use of nuclear power to generate electricity entails obvious externalities that require key policy decisions, such as where to store the waste that such usage creates.¹⁰⁴ Even in *New York v. United States*, the petitioners did not dispute Congress's power to legislate regarding nuclear waste disposal. Instead, they contended solely that Congress could not do so through the means it had selected.¹⁰⁵ The *New York* Court's description of the issues arising from the handling of nuclear waste sug-

98. *Yucca Mountain Statement*, *supra* note 12. "Currently, nuclear materials are stored in 131 above-ground facilities in 39 states, and 161 million Americans live within 75 miles of these sites. One central site provides more protection for this material than do the existing 131 sites Forty percent of our Navy's fleet depends on nuclear power." *Id.*

99. U.S. CONST. art. I, § 10, cl. 3.

100. *Id.*

101. U.S. CONST. art. I, § 8, cl. 3.

102. *Lopez*, 514 U.S. at 559.

103. *FERC v. Mississippi*, 456 U.S. 742, 757 (1982).

104. *Cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

105. *New York*, 505 U.S. at 159-60.

gests it would have easily agreed that Congress had the power to regulate its handling. According to the Court, “[w]e live in a world full of low-level radioactive waste. . . . Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years.”¹⁰⁶ The disposal of nuclear waste is clearly within Congress’s power to regulate interstate commerce. And for the reasons explained above, it is clearly rational for Congress to conclude that the disposal and storage of nuclear waste ought to be done at a single site.

There is one additional and important power of the federal government that permits it to enact legislation providing for the storage of nuclear waste at Yucca Mountain. Yucca Mountain sits on federal land. The Constitution commits to Congress authority over lands owned by the federal government. The Property Clause gives to Congress the plenary authority to make all needful regulations concerning federal property.¹⁰⁷ It states, “The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belong to the United States.”¹⁰⁸ The Supreme Court has “repeatedly observed” that “[t]he power over the public land thus entrusted to Congress is without limitations.”¹⁰⁹ This is true even of federal lands located within states.¹¹⁰ The Property Clause contains within its text no limitation on Congress’s power over its authority to regulate public lands other than that those regulations it enacts be “needful” rules “respecting the public lands.”¹¹¹ In interpreting the Property Clause, the Court has concluded that it is for Congress to determine what is needful.¹¹² Moreover, in legislating pursuant to the Property Clause, Congress has the power to preempt conflicting state law.¹¹³ Because Congress has plenary power over federal land, if it determines that the placement of a nuclear waste

106. *Id.* at 149–50.

107. U.S. CONST. art. IV, § 3, cl. 2.

108. *Id.*

109. *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976), quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

110. *Kleppe*, 426 U.S. at 540 (“[a]nd even over public land within the States, [t]he general government doubtless has a power over its own property analogous to the police power of the several States.”) (quoting *Camfield v. United States*, 167 U.S. 518, 525 (1897)).

111. U.S. CONST. art. IV, § 3.

112. *Id.* at 539; *Alabama v. Texas*, 347 U.S. 272, 273 (1954).

113. *Cal. Coastal Comm’n*, 480 U.S. at 580–81.

repository on that land is appropriate, the claim that Congress lacks the power to do so is difficult to make.¹¹⁴

Because Congress could enact legislation providing for the storage of nuclear waste at Yucca Mountain through its powers to provide for the nation's security and regulate interstate commerce, or through its plenary power over federal land, the dual sovereignty model of federalism tells us that Congress's decision does not violate the Constitution. Thus, viewed through either the political autonomy model or the dual sovereignty model, the decision to locate a single facility for the disposal and long-term storage of nuclear waste at Yucca Mountain does not present any violation of the Constitution.

What, then, of Nevada's contention that the Constitution does not permit Congress to ask a single state, for the benefit of the nation as a whole, to bear alone such a burden as Yucca Mountain? This claim, of course, is premised on the assumption that no other state is burdened by placing the nuclear waste repository in Yucca Mountain. It is doubtful that all the states through which the nuclear waste will have to travel see it that way. In fact, the Governor of Nevada himself argued in his notice to Congress of his disapproval of the siting at Yucca Mountain that the transportation of the nuclear waste posed a risk to the states through which it would have to travel.¹¹⁵ Whatever the extent of the risk that the transport of that waste may be, these states are most certainly burdened with it.¹¹⁶

Assuming, however, that Nevada alone bears the burdens of storing the nation's nuclear waste at Yucca Mountain, is it unconstitutional for the federal government to require a single state to bear such a burden in order to benefit every other state? The nuclear waste repository at Yucca Mountain is not the only imaginable instance where a single state might be asked to shoulder a burden for the rest of the nation. Take, for in-

114. In fact, Nevada expressly disclaimed its authority over public lands within it as a condition of receiving statehood. As part of the Nevada Statehood Act of March 21, 1864, ch. 36, 13 Stat. 30, 31 § 4, Congress required Nevada to "forever disclaim all right and title to the unappropriated lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States" in order to enter the Union.

115. Guinn, *supra* note 13, at 7.

116. For example, concerns about the transit of waste through Colorado have been part of the reason for the opposition to establishing the repository at Yucca Mountain by some members of the Colorado congressional delegation. *Campbell Says He'll Probably Run for Third U.S. Senate Term*, AP NEWSWIRE, Nov. 15, 2002 (noting that Campbell had voted against the Yucca Mountain "because he feared trucks carrying radioactive waste to the site might veer off mountain highways in Colorado"); Mike Soraghan et al., *N-Waste May Pass Through the State*, DENVER POST, Feb. 19, 2002, at B4 (describing Rep. Diana DeGette as "flatly opposed" to storing nuclear waste at Yucca Mountain and noting that DeGette had "expressed concerns about radioactive waste traveling on I-70").

stance, nuclear weapons testing, an example already familiar to the State of Nevada. The testing of nuclear weapons accrues to the benefit of the entire nation because each state derives a benefit from the increase in national security that having such a weapons program provides for the nation. But it would not make sense to conduct such testing in each of the fifty states. The testing of nuclear weapons carries obvious negative externalities. It makes sense to attempt to limit as far as possible the number of people that might be exposed to the various risks that attend such testing. The only way to do this is to limit the number places in which the weapons are tested.

Another example might be the location of nuclear forces. States containing U.S. military installations may be asked to bear the risks associated with locating nuclear weaponry there. If the federal government deemed it in the nation's security interest to locate all those forces with nuclear capabilities at a single military installation in the United States, would it lack the power to do so? Not only would this limit the federal government's ability to determine how to use its own land, such as the federal land on which the military installations are located, but it would also limit its capacity to make decisions for the security of the nation, decisions for which the Constitution commits the authority to the national government.

There are circumstances wholly apart from those involving nuclear energy in which the national government might determine that a single state must be burdened for the benefit of the entire nation. For example, if an outbreak of a fatal and contagious disease were to occur in a single state, in order to limit the extent to which the rest of the nation might be exposed to that disease the federal government might quarantine that state. To be sure, the citizens of that state would face the plight of the disease, while the rest of the nation would not. But it would make little sense to permit the disease to spread across the nation solely so that the quarantined state would not bear the burdens of the disease by itself.

Moreover, if it is true that Nevada cannot be asked to shoulder the burden of nuclear waste storage for the nation, then it must also be true that Congress cannot ask any other single state to shoulder it. In effect, the federal government could not provide for the storage of nuclear waste at one site. It would have to disperse the waste throughout the United States, despite the need to create a single waste repository. Such a result is clearly contrary to interests of the nation and, consequently, is untenable.

CONCLUSION

Although judicial review must include federalism, not every instance in which federal and state interests are pitted against one another demands judicial review. The decision to locate a national nuclear waste repository at Yucca Mountain does not raise federalism concerns. The State of Nevada does not want to be the state that bears all of the risks for the nation while receiving few of the benefits that accrue to the rest of the nation from such a policy. The federal government, on the other hand, has a clear interest in establishing a single waste repository for the nation. But the way these interests have clashed does not intrude upon the balance of power between the federal government and the states as created by the Constitution. The federal government has not attempted to directly regulate the State of Nevada or its officers or otherwise interfere in the state's ability to govern its citizens. In locating the nuclear waste repository at Yucca Mountain, the federal government can draw upon several express grants of authority: its authority over matters of national security, its authority to regulate interstate commerce, and its authority to regulate federal land. While the clash of these interests may raise policy questions, it does not violate the Constitution.

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