DUMPING ON FEDERALISM

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INTRODUCTION

One piece of news clearly has not been well-reported, at least west of the Mississippi. It appears that the demand for troops in Iraq and elsewhere is just too great. Congress has found it necessary to reinstitute the draft. Interestingly, the only people to be drafted are young men and women from Colorado. One legislator was quoted as saying: "Those people out there are just having too much fun, particularly at the university in Boulder. Serving their country will be good for them."

Of course, informed Coloradoans were outraged, wondering if their representatives were asleep at the switch. In fact, they were just out voted. The members of Congress from the other forty-nine states had simply gotten together and agreed that it was better for the members from one state, rather than from every state, to take the inevitable political heat for this move. Conveniently, Colorado seemed to have just the right population of draft-age men and women, and so ganging up on Colorado was, well, in the national interest. Someone had to go, after all.

This story about the draft is as outrageous as it is fanciful. Ganging up like that on one state for no good reason strikes any fair (and modestly informed) observer as fundamentally at war with the premises of our federal system. Yet, it is said that truth is sometimes stranger than fiction, and that is certainly true of the process that led to siting the nation's first high-level nuclear waste repository in Yucca Mountain, Nevada. This is the tale of forty-nine of Nevada's sister states ganging up to make Nevada bear a national burden for no good reason, except that they had the votes.

There are two strands of this tale. The first is the story of the nation coming to grips with the problem of the permanent, safe disposal of high-level nuclear waste. In most respects, this is the saga of the enact-

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ment of the Nuclear Waste Policy Act of 1982 ("NWPA"),[1] and the related evolution of the regulations promulgated by three different agencies. That evolution, and the selection of Yucca Mountain as the site for this repository, generated litigation in the United States Court of Appeals for the District of Columbia Circuit challenging the selection of Yucca Mountain on a variety of grounds, including the constitutional issue we will consider here.

The second strand, by contrast, is as old as the Republic and our federal structure, arising from what the Framers of the Constitution saw as the conundrum of *imperium in imperio*—sovereign power within sovereign power.[2] What the Framers did not lose sight of is the fact that we do not have a unified national government. Our country is a federation of sovereign states whose existence preceded the Union. The existence of these sovereign states is inherent in the Union's structure, and so there is very little direct discussion of state sovereignty in the Constitution. As one of the legal team members representing Nevada, Brian Koukoutchos, aptly put it, "Just as islands need not advertise that they are surrounded by water, because that fact inheres in the very definition of island, so the Constitution should not be expected to dwell on state sovereignty for the simple reason that state sovereignty just is."

At the outset of the NWPA process, neutral criteria were used to determine which state was to be burdened with this waste dump. Logically, those criteria centered on the physical attributes of potential sites, such as geology and hydrology, that determine the ability of any site to isolate highly radioactive waste for generations. But once it was discovered that Yucca Mountain's geologic profile was unsuitable for this purpose, the involved federal agencies rewrote the governing rules to create a new standard that only applies to Yucca Mountain and largely relies on man-made containers to isolate this extraordinarily toxic material. Under such a disposal regime, nothing distinguishes Yucca Mountain, and many sites across the country could serve as home to the nation's nuclear waste dump.

Nevada contends that siting the nation's nuclear waste repository at Yucca Mountain is unconstitutional because it has become a naked act of arbitrary political will that singles out Nevada and invades its sovereignty. The constitutional argument mounted on behalf of Nevada, and offered here, is undeniably novel—there is no existing authority precisely on point. But the argument is also ancient, arising from principles at the root of much of our constitutional jurisprudence.

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1. 42 U.S.C. §§ 10101-10270 (2000).

2. *See* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: *Imperium in Imperio*, 1776-1876, at 1-5 (2000).

The first section of this article will review the nature of the nuclear waste problem and Congress's efforts to establish the first national high-level radioactive waste disposal facility. That section will examine the actions of the Executive Branch departments and agencies to implement Congress's disposal scheme, including the dramatic shift in regulatory standards to ensure that Yucca Mountain would be approved as the repository site.

The second section of the article will identify the principles of federalism that animate the Constitution by examining various precedents in which those principles are manifested. The third section of the article will describe the constitutional argument Nevada mounted against the siting of the nation's nuclear waste dump at Yucca Mountain based on these principles of federalism. The article concludes with a discussion of the D.C. Circuit's adjudication of that argument (among other arguments raised by Nevada) in the series of cases consolidated as *Nuclear Energy Institute, Inc. v. Environmental Protection Agency ("NEI")*.[3]

I. THE NUCLEAR WASTE PROBLEM

The operation of nuclear power plants, research reactors, and military reactors all produce spent fuel. Spent fuel is lethally radioactive; indeed spent fuel is comprised of the most dangerous substances known. For example, if plutonium is ingested through drinking water, it "stays in the body for decades, exposing organs and tissues to radiation, and increasing the risk of cancer."[4] Compounding the danger, spent fuel is an extraordinary hazard not only to those exposed to it, but also, because these materials are "mutagenic," they can pass on biological damage to future generations.[5] The danger posed by these wastes lasts for millennia.[6] The radioactive elements in these wastes have "half-lives" of millions of years.[7] Making the situation even worse, some of these isotopes decay into even more dangerous substances. For example, americium-243 decays, over twenty-thousand years, into the much more dangerous and toxic plutonium-239. "Thus, the toxicity of americium-243 de-

3. 373 F.3d 1251 (D.C. Cir. 2004).

4. U.S. Environmental Protection Agency, *Radiation Information: Plutonium* (2004), *available at* http://www.epa.gov/radiation/radionuclides/plutonium.htm.

5. H.R. Rep. No. 97-785, Pt. 1, at 46 (1982).

6. OFFICE OF CIVILIAN RADIOACTIVE WASTE MGMT., DEP'T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR A GEOLOGIC REPOSITORY FOR THE DISPOSAL OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE AT YUCCA MOUNTAIN, NYE COUNTY, NEVADA, 1-13 (2002) [hereinafter 2002 Final EIS].

7. *See NEI*, 373 F.3d at 1258. A half-life is the time it takes a substance to decay to half of its initial radioactivity level. H.R. Rep. No. 97-785, Pt. 1, at 46.

creases for about 20,000 years, after which it becomes more toxic than it was originally."[8]

This spent fuel and radioactive waste has been produced at 131 sites in thirty-nines States (not including Nevada) at a rate of about 2,000 metric tons per year.[9] Storage of such highly toxic material obviously poses a unique challenge. The logistics of storage are complicated by the fact that, in the process of decay, the wastes produce heat so intense it can boil water out of desert rocks.[10] As a result, spent fuel must be cooled for three to five years in pools at reactor sites before it can even be handled or transported.[11] Initially, it was these pools that served as storage for spent fuel. As they became filled to capacity, however, utilities had to turn to above-ground storage facilities, storing fuel in casks that are continuously monitored and secured by armed guards. The Nuclear Regulatory Commission ("NRC"), which licenses such "dry storage" facilities, has determined they can remain safe for at least 100 years,[12] though the industry has testified that spent fuel "can be stored for centuries safely" at such facilities.[13] Twenty-four dry storage facilities are in operation, with the construction of twenty-one more in the planning stage.[14] Also, under development by utilities is a dry storage facility in Utah that will hold nearly 87 percent of the industry's existing spent fuel.[15]

Another, comparatively short-lived, approach was the notion that spent fuel should be "reprocessed" to extract the reusable uranium and plutonium from it. Reprocessing is important in the history of public efforts to address the disposal of high-level nuclear waste because for years a solution to the problem was postponed because it was assumed spent

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8. H.R. Rep. No. 97-785, Pt. 1, at 46.

9. *See* U.S. NUCLEAR REGULATORY COMMISSION, INFORMATION DIGEST, NUREG 1350 (2003), *available at* http://www.nrc.gov/readingrm/doccollections/nuregs/staff/sr1350/#high_level; Nuclear Energy Institute, *High-Level "Nuclear Waste" Is Really Used Nuclear Fuel* (2004), *available at* http://www.nei.org/doc.aspcatnum=2&catid=62&docid=&format=print.

10. *See* 2002 Final EIS, *supra* note 6, at 2-9 to 2-11.

11. H.R. Rep. No. 97-785, Pt. 1, at 40.

12. Ivan Selin, Chairman, U.S. Nuclear Regulatory Comm'n, Remarks Before the International High-Level Waste Management Conference, at 3 (May 1, 1995) (transcript on file with author).

13. Nuclear Waste Disposal Joint Hearings on S. 637 and S. 1662 Before the S. Comm. on Energy and Natural Res. and the Subcomm. on Nuclear Regulation of the S. Comm. on Env't and Pub. Works, 97th Cong. 358 (1981) (statement of Sherwood Smith, Chairman & CEO, Carolina Power & Light Co., on behalf of the American Nuclear Energy Council, the Edison Electric Institute, and the Utility Nuclear Waste Management Group).

14. Kimberly A. Gruss, Senior Materials Engineer, National Resource Council, U.S. Experience With Dry Cask Storage, A Regulator's Perspective, Presentation at the Dry Spent Fuel Technology Technical Meeting, at 23-24 (June 10-14, 2002) (transcript on file with author).

15. 2002 Final EIS, *supra* note 6 at 1-22.

fuel would be reprocessed. This reprocessing would leave liquid radioactive wastes which would then be "vitrified," or immobilized, into solid glass logs that can be stored safely indefinitely.[16] However, in 1976, the government, for a combination of non-proliferation and economic reasons, ended reprocessing in the United States.[17]

A. The Solution: Geologic Disposal

In 1957, the National Academy of Sciences ("NAS") completed the nation's first comprehensive study of the management and disposal of nuclear waste.[18] "Unlike the disposal of any other type of waste," NAS said, "the hazard related to radioactive waste is so great that no element of doubt should be allowed to exist regarding safety."[19] The best option to meet that standard of certainty, according to NAS, was to bury this waste deep underground in a stable geologic setting that would permanently isolate it from human beings and the rest of the environment. Particularly promising for this task are salt deposits, because "no water can pass through salt" and its "[f]ractures are self-sealing."[20] The bottom line, for NAS, was that we should "return[ ] those wastes to nature in some place where they can be held for very, very long periods of time without jeopardy to our environment or property."[21]

With the endorsement of NAS, "deep geologic isolation" became the cornerstone of every repository program in the world, including what became the U.S. repository program. In 1980, President Jimmy Carter ordered the Department of Energy ("DOE") to prepare a full Environmental Impact Statement ("EIS") recommending an alternative to permanently dispose of high-level nuclear waste.[22] Although DOE's analysis was informed by NAS's endorsement of geologic disposal, DOE evaluated every conceivable method of disposal, including subseabed and ice-sheet disposal, deep-well injection, transmutation, and even disposal in outer space.[23] In the end, the solution proposed by DOE was to dispose of spent fuel in "mined repositories deep within the geologic

16. *See id.* at 1-7.

17. H.R. Rep. No. 97-491, Pt. 1, at 27 (1982).

18. COMM. ON WASTE DISPOSAL, NATIONAL RESEARCH COUNCIL, THE DISPOSAL OF RADIOACTIVE WASTE ON LAND (1957).

19. *Id.* at 3.

20. *Id.* at 4.

21. *Id.* at 18.

22. 2002 Final EIS, *supra* note 6 at 1-9.

23. 1 ASSISTANT SEC'Y FOR NUCLEAR ENERGY, DEP'T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT: MANAGEMENT OF COMMERCIALLY GENERATED RADIOACTIVE WASTE § 1.4 (1980).

formations of the earth,"[24] which would be so effective that "it is extremely improbable that wastes in biologically important concentrations would ever reach the human environment."[25]

The effectiveness of geologic isolation did not mean that man-made, "engineered barriers" were to play no role. DOE explained:

> The multiple barriers that could contain nuclear waste in deep mined repositories fall into two categories (1) geologic or natural barriers and (2) engineered barriers. Geologic barriers are expected to provide isolation of the waste for at least 10,000 years after the waste is emplaced in a repository and probably will provide isolation for millennia thereafter. Engineered barriers are those designed to assure total containment of the waste within the disposal package during an initial period during which most of the intermediate-lived fission products decay. This time period might be as long as 1000 years. . . .[26]

DOE emphasized that "[m]ultiple barriers are intended to act independently to prevent waste migration and enhance isolation."[27] "[T]he engineered components of the multibarrier system would be of greatest importance in the short term and the repository medium and the surrounding geology would be the critical elements over long periods of time."[28] Echoing NAS, DOE concluded, "[t]he host rock with its properties provides the justification for geologic disposal and is the main element in containing the waste within the repository and in isolating the waste from man's environment over the long term."[29] The bottom line for DOE at this time was clear: the geologic setting should be capable of containing wastes to ensure *long-term* safety. That meant isolating this waste for *250,000 to 500,000 years*.[30]

Together, the NAS study and the EIS established the scientific framework for evaluating the suitability of a mined geologic repository. It was this scientific foundation that informed Congress as it considered nuclear waste legislation beginning in 1980, culminating with in enactment of the Nuclear Waste Policy Act ("NWPA") two years later.

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24. *Id.* at § 5.1.

25. *Id.* at § 1.3.4.

26. *Id.* at § 5.1.

27. 3 ASSISTANT SEC'Y FOR NUCLEAR ENERGY, DEP'T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT: MANAGEMENT OF COMMERCIALLY GENERATED RADIOACTIVE WASTE 272 (Oct. 1980) [hereinafter 1980 Final EIS (vol.3)].

28. *Id.* at 281.

29. 2 ASSISTANT SEC'Y FOR NUCLEAR ENERGY, DEP'T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT: MANAGEMENT OF COMMERCIALLY GENERATED RADIOACTIVE WASTE at B.15 (1980).

30. 1980 Final EIS (vol.3), *supra* note 27 at 360-61.

B. Congress Acts: The Nuclear Waste Policy Act

At the outset, Congress considered approaches to nuclear waste disposal that would dispose of *reprocessed* wastes from spent fuel, not the spent fuel itself.[31] The initial proposal relied primarily on engineered barriers to dispose of vitrified reprocessed wastes.[32] Importantly, DOE opposed the bill on grounds that it was inappropriate to rely primarily on engineered barriers *even for repositories without spent fuel.* In DOE's words,

> Engineered barriers are an essential ingredient in a technically conservative approach to an actual repository, but we do not feel that the existence of such barriers should be used as a basis for a less careful selection of an acceptable geologic media.[33]

As work continued on the Hill, the key committees began to recognize that, given the policy shift away from reprocessing, it was much more likely that the waste to be disposed of was going to be the far more radioactive and dangerous spent fuel itself.[34] The far more dangerous and longer-term risks posed by the disposal of unreprocessed spent fuel meant that some elements of this waste would need "to be isolated for at least 245,000 years."[35] Secure storage for such a phenomenal length of time led away from reliance on any engineered barrier back to the only material that has been around for that long—rock. As the House Commerce Committee put it:

> [T]he ability of any man-made containers to endure for a quarter of a million years is obviated by the fact that the ultimate barrier which prohibits the release of any radioactivity into the biosphere is the geologic media itself. The effectiveness of this method is dependent upon finding a geologic media whose integrity is intact, meaning that it does not have openings which would allow radioactivity to escape into the atmosphere or into the ground water.[36]

The logic governing the choice of a site for a repository was then

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31. *See* H.R. Rep. No. 96-1156, Pt. 1, at 25 (1980).
32. *Id.* at 17-18.
33. *Id.* at 37.
34. *See, e.g.*, S. Rep. No. 96-548, at 11 (1980) (noting the deferral of "commercial reprocessing of spent nuclear fuel for the indefinite future"); H.R. Rep. No. 96-1156, Pt. 2, at 2 (1980) (recognizing that "the option to reprocess spent nuclear fuel is presently foreclosed to the nuclear industry," making it "necessary at this time to do preliminary planning on the basis of geologic disposal of spent fuel").
35. H.R. Rep. No. 96-1156, pt. 3, at 13 (1980).
36. *Id.* at 14.

quite clear. A repository could not just be put anywhere; the site must meet specific requirements. As the House Committee cautioned at the time, "[w]hile it is believed that there are locations within the United States which meet these requirements, it is further believed that the number of such locations is limited."[37]

In this way, reliance on the geology of a repository's site became an essential element of the nation's nuclear waste disposal effort. Finally, in 1982, in the NWPA, the repository program Congress fashioned embodied a

> [c]ommitment to a waste disposal technology relying on primary geologic containment provided by a solid rock formation located deep underground, together with containment by engineered barriers including the form and packaging of the nuclear waste, which will provide safe containment of the waste without reliance on human monitoring and maintenance after an initial period of testing and subsequent closure of the repository.[38]

Selecting a repository site, then, means

> finding a geologic medium whose integrity is intact, meaning that it does not have openings which would allow radioactivity to escape into the atmosphere or into the ground water. The structural integrity of the geologic medium would also have to be stable enough to maintain its integrity during the period of time in which these materials remain radioactive.[39]

The focus on the geology into which a nuclear waste repository will be inserted is evident from the threshold of the NWPA's definitions through the complex process of site selection and repository development established by the statute. Thus, the NWPA defines "repository" as a system to be used for "permanent deep geologic disposal."[40] "Candidate sites" are defined as areas "within a geologic and hydrologic system" that undergo DOE site characterization,[41] which, in turn, means DOE activities "undertaken to establish the geologic condition" of a candidate site.[42] The statute goes on to require DOE to establish guidelines for the selection and recommendation of sites, which "shall specify de-

37. *Id.*
38. H.R. Rep. No. 97-491, Pt. 1, at 30 (1982). *See also* H.R. Rep. No. 97-785, Pt. 1, at 48 (1982).
39. H.R. Rep. No. 97-785, Pt. 1, at 48.
40. 42 U.S.C. § 10101(18) (2000).
41. § 10101(4).
42. § 10101(21).

tailed geologic considerations that shall be primary criteria" for site selection.[43] Moreover, "[s]uch guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to . . . hydrology, geophysics [and] seismic activity. . . ."[44]

A central purpose of the NWPA was to "define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel."[45] Three federal agencies were assigned responsibility for the assessment and potential development of proposed repositories. DOE was to evaluate and recommend potential repository sites, and then build and operate the repositories.[46] The NRC was to determine whether to license the repositories in accordance with statutory and regulatory standards.[47] The Environmental Protection Agency ("EPA") was to set the radiological release standards applicable to repositories.[48]

As originally enacted, the NWPA process for the development of a repository was clearly designed to find a site that met the critical geologic attributes essential to the safe, secure, and long—term disposal of nuclear waste. The Secretary of Energy was assigned the task of evaluating potential candidate sites in accordance with the standards established by the statute, and then nominating to the President at least five sites to be subjected to further research as possible candidates to become the first repository.[49] The Secretary was then to narrow this list and recommend three sites to the President by January 1, 1985, which would then proceed to the detailed site characterization stage.[50] The President, in turn, was to decide whether each recommended site should proceed to site characterization.[51]

Once the sites were fully characterized, the Secretary was to recommend to the President a single site to be developed as a repository.[52] Upon such a recommendation, the President was authorized to designate the site to Congress. The President's site designation was automatically to "take effect" after sixty days unless the state in which the site was lo-

43. § 10132(a).
44. *Id.*
45. § 10131(b)(3).
46. § 10134.
47. §§ 10134(d), 10141(b).
48. § 10141(a).
49. § 10132(b)(1)(A).
50. §§ 10132(b)(1)(B), 10101(21).
51. § 10132(c). The National Waste Policy Act established a similar process (with different timetables) for the characterization of sites for possible selection as a second repository. 42 U.S.C. § 10132(b)(1)(c) (2000).
52. § 10134(a).

cated submitted to Congress a "notice of disapproval."[53] If the state did disapprove, the selection of the site could not become effective unless, during the first ninety days after receipt of the notice, Congress passed a "resolution of repository siting approval" overriding the notice of disapproval, and such resolution became law.[54] The precise text of the resolution was dictated by the NWPA, was not amendable, and was considered by the House and the Senate under severely expedited and abbreviated procedures that limited debate, truncated opportunities for normal legislative deliberation, and omitted many of the usual procedural protections for minority interests.[55]

It is important to underscore the fact that Congress did not assume that the site characterization process would automatically lead to the selection of that site for the repository. Quite the contrary, Congress fully appreciated that the federal government could spend considerable time and resources investigating a particular site, only to conclude that the site was unsuitable. As one House Committee noted:

> The risk that a site which had been considered probably adequate for development could be abandoned after significant commitment had been made to the site is a technically unavoidable aspect of repository development. It is a result of the limit of our ability to know with certainty all the characteristics of a rock formation deep underground until the rock site has actually been excavated and surveyed from the "horizon" or level of the repository.[56]

The DOE, NRC, and EPA published rules intended to discharge their obligations under the NWPA.[57] In its first set of site suitability rules in 1984, DOE paid careful attention to the geologic requirements and the physical qualifying and disqualifying conditions recommended by NAS and the 1980 EIS, and required by the NWPA.[58] The NRC concurred in the draft regulations, but only upon DOE's promise to specify "that engineered barriers cannot constitute a compensating measure for deficiencies" in physical attributes of the site.[59] The EPA also warned DOE not to over-rely on engineered barriers.[60]

DOE's final rules accordingly provided that "engineered barriers shall not be used to compensate for an inadequate site; mask the innate

53. § 10135(b).
54. § 10135(c).
55. § 10135(a), (d), (e).
56. H.R. REP. NO. 97-491, Pt. 1, at 32 (1982).
57. 10 C.F.R. Pt. 960 and 60 (2004), 40 C.F.R. Pt. 191 (2003), respectively.
58. *See* 49 Fed. Reg. 47,714 & 47,718 (Dec. 6, 1984).
59. 49 Fed. Reg. at 47,727.
60. 49 Fed. Reg. at 47,727.

deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared."[61] As the NWPA requires, DOE also specified both qualifying and disqualifying conditions for a site. A key disqualifying condition was that of groundwater travel time, since "[t]he most likely mechanism for the release of radionuclides from a repository to the accessible environment is transport by ground water."[62] Accordingly, DOE specified that surface rainwater trickling through the repository site must take no less than 1,000 years to descend from the repository into the water table and the accessible environment.[63]

C. The Focus on Yucca Mountain

In 1986, complying with the NWPA timeline, the Secretary of Energy recommended and the President approved three sites for detailed site characterization: Yucca Mountain, Nevada; Deaf Smith County, Texas; and Hanford, Washington.[64] However, in 1987, due to rising cost estimates for site characterization at the three sites chosen by DOE, Congress amended the NWPA to provide that Yucca Mountain would be the only site characterized.[65] Significantly, however, in narrowing site characterization to Yucca Mountain, Congress did *not* prejudge the Yucca site's suitability, but instead made clear that "[i]f the Secretary at any time determines the [Yucca Mountain] site to be unsuitable for development as a repository," he was to terminate all activities and notify Congress.[66] Moreover, Congress did nothing to change the physical siting requirements it had enacted in the original NWPA. Although the focus for site characterization was now solely on Yucca Mountain, the statute continued to mandate that the original criteria for evaluating the suitability of a site still governed that process.[67]

As commanded by the 1987 amendments of the NWPA, DOE released a "Site Characterization Plan" that underscored that the 1987 changes did nothing to disturb the standards for evaluating a repository site.[68] Indeed, DOE stressed that repository safety was inextricably

61. 10 C.F.R. § 960.3-1-5(e) (2004).
62. 49 Fed. Reg. at 47,732.
63. 10 C.F.R. § 960.4-2-1(d) (2004).
64. *See* Nevada v. Watkins, 939 F.2d 710, 713 (9th Cir. 1991).
65. *See generally*, Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, tit. V, subtit. A.
66. 42 U.S.C. § 10133(c)(3) (2000).
67. § 10133 (b)(1)(A)(iv).
68. *See* U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Site Characterization Plan: Yucca Mountain Site, Nevada Research and Development Area, Nevada, Vol. I, Pt. A, at I-8-9 (Dec. 1988).

linked to the physical setting, stating that "[g]eologic conditions are intrinsic to the performance of a repository. . . ."[69]

Congress again tinkered with the NWPA in the Energy Policy Act of 1992 ("EnPA") to resolve a long-standing tug-of-war between the NRC and EPA by giving the EPA responsibility to set the primary radiological standards for waste emissions at Yucca Mountain.[70] Again, Congress did nothing in EnPA to alter the NWPA's standards governing the site suitability analysis and the geologic isolation of waste, as DOE subsequently confirmed both in 1994[71] and in 1995.[72]

D. 1996 and Beyond: The Perfect Storm Hits DOE

For more than a decade after enactment of the NWPA, DOE consistently viewed "geologic" isolation as statutorily required and scientifically necessary for the safe, permanent disposal of nuclear waste. It also understood, logically, that the choice of a repository site was a function of its geologic attributes. Then, in 1996, a confluence of events created what was for DOE's bureaucracy, the perfect storm. First, Congress slashed the Yucca Mountain budget for fiscal year 1996 by forty percent,[73] which is by any measure "draconian budget cuts."[74] Second, in *Indiana-Michigan Power Co. v. U.S. Dept. of Energy,*[75] the D.C. Circuit ruled that DOE had an "unconditional obligation" to dispose of utilities' spent fuel by the NWPA's 1998 statutory deadline. In view of DOE's impending breach, the decision presented DOE with potentially crushing financial liability, perhaps up to $56 billion.[76]

Third, and worst of all, ominous results were pouring in from stud-

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69. U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Site Characterization Plan Overview: Yucca Mountain Site, Nevada Research and Development Area, Nevada, at 16 (Dec. 1988).

70. Energy Policy Act of 1992 § 801(a)(1), note to 42 U.S.C. § 10141 (2000).

71. *See* 59 Fed. Reg. 39,766 (Aug. 4, 1994).

72. *See* 60 Fed. Reg. 47,737-39 (Sept. 14, 1995).

73. U.S. Dept. of Energy, Draft Civilian Radioactive Waste Management Program Plan, DOE/RW-0458 Revision 1, at vi (May 1996).

74. Daniel A. Dreyfus, Director, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Program Status and Outlook, Presentation Before the Nuclear Waste Technical Review Board 1996 Winter Meeting, at 1 (Jan. 10, 1996).

75. 88 F.3d 1272, 1275 (D.C. Cir. 1996).

76. Nuclear Energy Inst., DOE To Breach 16-Year Legal Obligation To Manage Used Nuclear Fuel; U.S. Taxpayers Face $56 Billion in Liabilities, at 2 (Jan. 30,1998), *available at* http://www.nei.org/doc.asp?Print=true&DocID=&CatNum=4&CatID=11. *See also* Northern States Power Co. v. U.S. Dept. of Energy, 128 F.3d 754, 759 (D.C. Cir. 1997) (referring to "billions" of dollars of delay-related costs); Alabama Power Co. v. U.S. Dept. of Energy, 307 F.3d 1300, 1302 (11th Cir. 2002) (referring to "tide of litigation arising out of this massive breach").

ies in a five-mile tunnel DOE had bored deep into the Yucca Mountain "unsaturated" zone. It had become apparent that Yucca's geology was incapable of serving as the primary isolation barrier because groundwater flow through the site was far faster than expected. Absent near-perfect performance by man-made barriers, the fast flowing groundwater was likely to carry radioactive particles so quickly that radiological emission standards could never be met. Geologists, for example, discovered chlorine-36 in fractures in the area where the repository was to be constructed.[77] The abundance of this rare isotope meant it had originated from fallout during atmospheric nuclear testing in the 1950s, and suggested that it had migrated from surface rainwater through hundreds of feet of rock in previously unsuspected "fast flow paths."[78] Geologists found pockets of trapped water in what was thought to be the dry, "unsaturated" zone. In some areas, nearly *a million cubic meters* of water were discovered.[79] After further studies, DOE's geologists confirmed that "flow along fast preferential pathways through fractures is a significant and perhaps the dominant flow regime in the unsaturated zone," leading to "travel times of less than 50 years from the land surface to the saturated zone."[80] Far from permanently isolating waste, Yucca Mountain's geology would allow groundwater to carrying radionuclides into the water table far sooner than required to prevent contamination of the human environment.[81]

In 1998, after reviewing DOE's reports to the Nuclear Waste Technical Review Board ("TRB"), which is a board of scientists established by Congress that serves as a technical auditor of DOE's work, Nevada's governor urged DOE to disqualify the Yucca Mountain site.[82] The Secretary's response conceded that DOE's analyses showed that up to 20

77. D.L.Barr, *et al.*, Bureau of Reclamation and U.S. Geological Survey, Geology of the North Ramp: Stations 4+00 to 28+00, Exploratory Studies Facility, Yucca Mountain Project, Yucca Mountain, Nevada, at 125 (1996).

78. *See* J.T. Fabryka-Martin, *et al.*, Summary Report of Chlorine-36 Studies: Systematic Sampling for Chlorine-36 in the Exploratory Studies Facility, Abstract, at i (March 29, 1996).

79. G.S. BODVARSSON & T.M. BANDURRAGA, DEVELOPMENT AND CALIBRATION OF THE THREE-DIMENSIONAL SITE-SCALE UNSATURATED ZONE MODEL OF YUCCA MOUNTAIN, NEVADA, at 265 (1996) (hereinafter "UNSATURATED ZONE MODEL").

80. J. Fairley & E. Sonnenthal, *Preliminary Conceptual Model of Flow Pathways Based on Cl-36 and Other Environmental Isotopes*, in UNSATURATED ZONE MODEL, at 399 (G.S. Bodvarsson & T.M. Bandurraga eds., 1996).

81. John Bartlett, former Director of U.S. Dept. of Energy's Yucca Program, confirmed that U.S. Dept. of Energy's studies showed that "rates of water infiltration into the mountain were on the order of 100 times higher than had been expected; [and] that water flowed very rapidly through fracture pathways in some of the geologic layers." Affidavit of Dr. John W. Bartlett 22 (Jan. 2002) (hereinafter "Bartlett Aff.").

82. Letter from Bob Miller, Governor of the State of Nevada, to Bill Richardson, Secretary of Energy 2 (Dec. 4, 1998) (on file with author).

percent of all water moving through the repository would reach the water table in less than 1,000 years, but concluded that "additional study [was] warranted" before the site could be disqualified.[83] Yet those additional studies presented only more bad news. A 1999 repository "performance assessment" by DOE showed that the geologic setting at Yucca Mountain contributed almost nothing to the repository's total waste isolation capabilities.[84] That is, DOE's model of the repository "system" showed almost total reliance on engineered barriers—barriers yet to be fully designed.[85] Another DOE performance analysis in 2000 told a similarly bleak story: if engineered barriers failed, the natural barriers would permit a dose rate more than 666 times the EPA limit within the 10,000-year compliance period.[86] A 2001 analysis also showed that if engineered barriers failed, the dose at the site boundary was projected to be more than six times the EPA limit at only 1,000 years. By the 3,000-year mark, the expected dose would rise to 67 times the EPA limit.[87]

E. If at First You Don't Succeed . . . Change the Rules

As it became clear that the Yucca Mountain site could not meet the requirements of the NWPA or the regulations three agencies had promulgated pursuant to that statute, DOE adopted a new strategy: change the site suitability rules, but only with respect to Yucca Mountain. Accordingly, DOE began intensively lobbying the NRC and the EPA to change their respective Yucca Mountain rules to focus on "system" performance analysis in which there would be no separate standards for the component parts of that "system."[88] In doing so, the DOE sought to allow the

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83. Letter from Bill Richardson, Secretary of Energy, to Bob Miller, Governor of the State of Nevada (Dec. 18, 1998) (on file with author).

84. Dennis C. Richardson, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Postclosure Defense in Depth in the Design Selection Process, Presentation Before the Nuclear Waste Technical Review Board Panel for the Repository, at 18 (Jan. 25, 1999).

85. *See* Bartlett Aff., *supra* note 82, at ¶ 30. The Department of Energy conceded to the Nuclear Waste Technical Review Board that Yucca's natural barriers would be ineffective to protect against uncertainties in the performance of its engineered barriers, and that "defense-in-depth" could only exist only by stacking one man-made barrier onto another, since geologic factors could make no significant contribution. *See* Dennis C. Richardson, Dept. of Energy Office of Civilian Radioactive Waste Management, Barrier Neutralization Analyses, Presentation to DOE/NRC Technical Exchange: Total System Performance Assessments – Site Recommendation Briefing (Jan. 23, 2001) (hereinafter "*Barrier Neutralization Analyses*").

86. TRW Environmental Safety Systems, Inc., Repository Safety Strategy: Plan to Prepare the Postclosure Safety Case to Support Yucca Mountain Site Recommendation and Licensing Considerations, at E-11 (Jan. 2000).

87. *Barrier Neutralization Analyses, supra* note 85, at 17.

88. *See* Daniel A. Dreyfus, Director, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Status of the Civilian Radioactive Waste Management Program, Presenta-

very thing it had said should not be done in 1984: the masking of the deficiencies of the site through reliance on engineered barriers. DOE clearly abandoned any effort to find the right site, which it now called "a false target."[89] DOE wanted to be sure that the Yucca Mountain site could meet any standard that was established, whether or not the physical attributes of the site effectively isolated radioactive waste. DOE went so far as to caution both NRC and EPA that, in formulating new rules, "[p]romulgating a standard that cannot be implemented may result in the *de facto* rejection of the Yucca Mountain site . . . ."[90]

DOE's maneuver to change the rules for Yucca Mountain entered its penultimate phase in 1999, when it published proposed amendments to its repository guidelines, Part 960, announcing a new Part 963 *applicable only* to Yucca Mountain. Part 960 was to be revised to limit its application only to *other* potential repository sites.[91] The new Part 963 established new "site suitability criteria" for *Yucca alone*, abandoning each of the geologic and hydrologic criteria of the NWPA and all qualifying and disqualifying site features. Instead, Part 963 would require DOE to meet just a single qualifying criterion—that a total system performance assessment of the entire repository "system" would demonstrate compliance with the EPA dose limit for the EPA's regulatory compliance period, and thus the repository could ostensibly get an NRC construction permit.[92]

Having lobbied NRC and EPA for three years to change their rules

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tion Before the U.S. Nuclear Regulatory Comm'n, at 4-6 (Jan. 30, 1996) ("Dreyfus Presentation"); Testimony of Lake Barrett, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Before the U.S. Nuclear Waste Technical Review Board, at 16 (April 30, 1996); Testimony of Stephan J. Brocum, Assist. Manager for Suitability and Licensing, Yucca Mountain Site Characterization Project Office, Before the NRC Advisory Committee on Nuclear Waste, at 332, and supporting power point slides (June 26, 1996); Testimony of Stephan J. Brocum, Assist. Manager for Suitability and Licensing, Yucca Mountain Site Characterization Project Office, Before the Nuclear Waste Technical Review Board, at 42 (Oct. 9, 1996); Stephan J. Brocum, Assist. Manager for Suitability and Licensing, Yucca Mountain Site Characterization Project Office, Program Overview to License Application, Presentation Before the Nuclear Waste Technical Review Board, at 10 (Oct 9-10, 1996); Lake Barrett, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Status of the Civilian Radioactive Waste Management Program, Presentation Before the Nuclear Waste Technical Review Board, at 6 (Oct. 22, 1997).

89. Testimony of Russ Dyer, U.S. Dept. of Energy Office of Civilian Radioactive Waste Management, Before the U.S. Nuclear Waste Technical Review Board, at 152 (April 30, 1996).

90. Dreyfus Presentation, *supra* note 89, at 16. *See also* Stephan J. Brocum, Assist. Manager for Suitability and Licensing, Yucca Mountain Site Characterization Project Office, DOE Perspective on Time Frame of Compliance, Presentation Before the Advisory Committee on Nuclear Waste, at 3-9 (March. 27, 1996).

91. 64 Fed. Reg. 67,054-55 (1999).

92. 64 Fed. Reg. at 67,066-70 (1999).

to a system-based regime that would obscure the distinctive roles of natural and engineered barriers, DOE now blamed the abandonment of Part 960 and the promulgation of Part 963 on the rule changes enacted by those agencies.[93] This was especially ironic given that EPA had earlier objected to DOE's abandonment of Part 960, saying that a "major reason" for the move was DOE's discovery of "significantly faster water flow" than its regulations allowed.[94] According to the EPA, "the waste isolation capability of the natural features of the Yucca Mountain site is at present highly uncertain and largely unassessed."[95] Moreover, the "total-system approach proposed by the DOE could be viewed as masking this uncertainty and the potentially insufficient waste isolation capability of site features if the contributions and uncertainties of the natural and engineered barriers are not individually assessed."[96] The NRC and the EPA had finally relented on changes, largely on the premise that it was solely *DOE*'s statutory role to determine site suitability, not NRC's or EPA's.[97]

DOE's final Part 963 guidelines, applicable only to Yucca Mountain, were published in November 2001 and became effective a month later.[98] By removing from the site selection analysis any independent reliance upon the capabilities of the site's natural barriers to isolate waste, DOE's Yucca Mountain guidelines were "site-specific" only in the narrow sense that they technically applied solely to Yucca Mountain. As a substantive matter, the guidelines rendered the physical characteristics of the Yucca Mountain site irrelevant. At the same time that it adopted new guidelines applicable only to Yucca Mountain, DOE also maintained its earlier site suitability/selection guidelines, which continued to adhere to the NWPA's commitment to primary geologic isolation, for all other potential repository sites. Thus, the federal government established two sets of rules: one dramatically watered-down set for the site in Nevada and one set for sites in any other state.

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93. 64 Fed. Reg. at 67,068-72 (1999); C. Kouts, DOE Office of Civilian Waste Management, *Proposed Yucca Mountain Site Suitability Guidelines, 10 CFR 963*, Presentation to Affected Units of Government Meeting, at 3 (Jan. 27, 2000); 66 Fed. Reg. 57,298-99 (2001).

94. General Comments on the Proposed Amendments to 10 CFR Part 960, at 2, *enclosure to* Letter from E. Ramona Trovata, Director, EPA Office of Radiation and Indoor Air, to April V. Gil, DOE Office of Civilian Radioactive Waste Management (March 17, 1997).

95. *Id.* at 3.

96. *Id.*

97. *See, e.g.*, Transcript, NRC Advisory Committee on Nuclear Waste, 90th Meeting, at 99 (March 20, 1997) (stating that it "is their call to make").

98. 66 Fed. Reg. 57,298 (Nov. 14, 2001).

F. Yucca is Selected

On February 14, 2002, barely two months after Part 963 became effective, the Secretary of Energy issued to President George W. Bush a Site Recommendation for Yucca Mountain, saying the "site is scientifically and technically suitable for development of a repository."[99] One day later, President Bush, in a letter to Congress, approved the recommendation. Sixty days later, Nevada's governor submitted to Congress a formal notice of disapproval of the site designation. Congress then proceeded to pass a Joint Resolution overriding the notice of disapproval, which the President signed on July 23, 2002.[100] With that, DOE was both entitled and required to submit a License Application to NRC within ninety days.[101] DOE failed to do so, although it now insists that it will submit an application in December 2004.

II. THE LITIGATION

Now the second strand of the story: the one that more directly involves constitutional issues. The NWPA provides for review in the courts of appeals of "any final decision or action" of the President, the Secretary of Energy, or the NRC taken under the NWPA.[102] Nevada brought a series of petitions for review in the D.C. Circuit challenging the lawfulness of various acts along the way to the selection of the Yucca Mountain site, including the new regulations of DOE, EPA, and NRC; the Secretary of Energy's decision to recommend the site to the President; DOE's Environmental Impact Statement; and the President's decision to recommend the site to Congress.[103] One of these cases is the subject here: Nevada's constitutional challenge to the Joint Resolution by which Congress overrode Nevada's disapproval of the selection of Yucca Mountain as the repository site.[104] All these cases were consolidated and argued *en masse* before the D.C. Circuit on January 14, 2004.

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99. RECOMMENDATION BY THE SECRETARY OF ENERGY REGARDING THE SUITABILITY OF THE YUCCA MOUNTAIN SITE FOR A REPOSITORY UNDER THE NUCLEAR WASTE POLICY ACT OF 1982, at 45 (Feb. 14, 2002) (hereinafter "SITE SUITABILITY RECOMMENDATION"), *available at* http://www.ocrwm.doe.gov/ymp/sr/sar.pdf.

100. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 (Supp. IV 2004)).

101. *See* 42 U.S.C. § 10134(b) (2000).

102. 42 U.S.C. § 10139(a) (2000).

103. *See NEI*, 373 F.3d at 1261-62.

104. Pub. L. No. 107-200, 116 Stat. 735 (2002).

A. The Constitutional Case: An Overview

Nevada's constitutional challenge to the Joint Resolution rests on a straightforward proposition: the constitutional status of the states as sovereigns entitled to equal dignity and respect requires that Congress exercise its legislative power over the states on the basis of generally applicable, facially neutral criteria and prevents the national government from imposing arbitrary burdens upon particular states. By arbitrarily singling out Nevada to bear the burden of disposing of the nation's nuclear waste (leaving Nevada politically isolated and powerless), the Joint Resolution operates in derogation of Nevada's sovereignty and exceeds the authority granted to the national government under the federal system of government established by the United States Constitution.

Nevada's argument rests on three factual premises. First, that Congress, in the NWPA, adopted the judgment of the scientific community that geologic isolation was critical to the safe, permanent disposal of nuclear waste. Second, that the national government has in fact concluded that Yucca Mountain does not and cannot meet the statutory standard of primary geologic isolation. And, third, that the national government has nevertheless decided to abandon the only neutral standards for safe disposal it had established, forcing Nevada to bear the burden of disposing of this waste.

The difficulty in fashioning this argument was that no constitutional text directly addresses the question at issue. Accordingly we knew that our argument "must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of th[e Supreme] Court."[105] Moreover, a body of Supreme Court decisions over the last ten years or so have spurred significant developments in the law of federalism and reinvigorated the practical implications of state sovereignty. The principles animating these decisions, and not their precise holdings, provided the building blocks for Nevada's argument.

B. The Eleventh Amendment

Much of the recent development of the jurisprudence of federalism has involved the Eleventh Amendment, and so those cases were logically the first body of precedent to which we turned. On a first examination, one would not think the Eleventh Amendment would offer much help. The amendment provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced

105. Printz v. United States, 521 U.S. 898, 905 (1997).

and prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[106] Neither the NWPA, nor our real target, the Joint Resolution, purported to create a cause of action against Nevada or to bring the "judicial power" of the United States to bear against Nevada.

Yet an examination of Eleventh Amendment cases shows a consistent analytical approach that disregards the actual text of the Eleventh Amendment in favor of reliance on principles of sovereignty and on the structure of federalism imbedded in the Constitution. This approach is not a contemporary innovation. For example, in the early part of the last century, the Supreme Court rejected Monaco's effort to sue Mississippi on bonds that the state had issued, holding it to be "manifest[ ]" that

> we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."[107]

The appearance of this method—going "behind the words of the constitutional provisions" to find "postulates which limit and control"—in modern federalism precedents was provoked, oddly enough, by a dispute over Indian gambling in Florida. When the Seminole Indian Tribe sued Florida to compel the state's compliance with the federal Indian Gaming Regulatory Act,[108] the Court used the Eleventh Amendment as the ground for its decision holding that Congress lacks power under Article I to abrogate the states' sovereign immunity from suits commenced or prosecuted in the federal courts. The Court frankly recognized that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts."[109] Nevertheless, the Court continued,

> we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans* v. *Louisiana,* has two parts: first, that each State is a sovereign entity in

106. U.S. CONST. amend. XI.

107. Principality of Monaco v. Mississippi, 292 U.S. 313, 322-323 (1934) (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

108. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

109. *Id.* at 54.

> our federal system; and second, that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.[110]

Three years later, in *Alden v. Maine*,[111] the Court took the opportunity of a lawsuit by state probation officers against their employer, the state of Maine, for alleged violations of the Fair Labor Standards Act, to stretch the Eleventh Amendment's limitation on the reach of federal judicial power out of the context of federal jurisdiction altogether. Here again, the Court turned to fundamental attributes of sovereignty to hold that Congress cannot make the States liable to private suit even in their own state courts, despite the fact that the text of the Eleventh Amendment restricts only *federal* court jurisdiction.

To the *Alden* Court, the actual parameters of the constitutional text posed no difficulty. "To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*."[112] Rather, the analysis must proceed from "'history and experience, and the established order of things,' rather than 'adhering to the mere letter' of the Eleventh Amendment, in determining the scope of the States' constitutional immunity from suit."[113] The Court justified this approach by pointing out that

> sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. *See, e.g., Idaho* v. *Coeur d' Alene Tribe of Idaho,* 521 U.S. 261, 267-268 (1997) (acknowledging "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"); *Seminole Tribe, supra,* at 55-56; *Pennhurst State School and Hospital* v. *Halderman,* 465 U.S. 89, 98-99 (1984); *Ex parte New York, supra,* at 497. The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by *fundamental postulates implicit in the constitutional design.*[114]

Under the *Alden* Court's reasoning, the Eleventh Amendment was not even necessary to preserve state sovereign immunity. As the Court explained:

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110. *Id.* (citations omitted).
111. 527 U.S. 706 (1999).
112. *Id.* at 730.
113. *Id.* at 727 (citations omitted).
114. *Id.* at 728-29 (emphasis added).

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over suits against nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, "there is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" This *separate and distinct structural principle* is not directly related to the scope of the judicial power established by Article III, but *inheres in the system of federalism established by the Constitution.* In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design.[115]

As the reasoning of these sovereign immunity cases unfolds one sees that, to the Court's mind, they are not so much about immunity as about the sovereignty from which that immunity arises. The Court affirmed this view just two years ago, in *Federal Maritime Commission v. South Carolina State Ports Authority*,[116] noting that the sovereign immunity doctrine's "central purpose is to 'accord the States the respect owed them as' joint sovereigns."[117] The Court emphasized, moreover, that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint."[118] What Madison wrote in 1787 has lost none of its vitality in our constitutional order: the "States thus retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."[119]

The implications of this precedent for our constitutional argument in the Yucca Mountain case are profound. Our system of federalism not only limits *what* Congress may do, but also limits *how* Congress may do it.

> When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations.

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115. *Id.* at 730-31 (emphases added; citations omitted).

116. 535 U.S. 743, 760 (2002) (holding that state sovereign immunity bars the Federal Maritime Commission from "adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984").

117. *Id.* at 765.

118. *Id.* at 751.

119. Alden v. Maine, 527 U.S. 706, 715 (quoting THE FEDERALIST No. 39 (James Madison)); *see also* Federal Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. at 743, 751 (2002) ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government.").

> Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.[120]

It follows that although Congress may establish a national nuclear waste repository, it may not run roughshod over Nevada's sovereign dignity in the process.

C. The "Commandeering" Cases

In *New York* v. *United States*[121] and *Printz* v. *United States*,[122] the Supreme Court held that Congress cannot "commandeer" the states by requiring them to enact federal policies into law or to administer federal laws. *New York v. United States* has interesting parallels with the Yucca Mountain controversy as it arose from the effort of Congress, in the Low-Level Radioactive Waste Policy Amendments Act of 1985, to encourage the states to provide for the disposal of low-level radioactive waste generated within their borders. Congress adopted three devices to provide this "encouragement." Monetary incentives and "access incentives" (that is, barring states that had not taken any action to develop their own disposal facilities from access to out-of-state disposal sites) passed constitutional muster.[123] However, the third device required states that had not provided for disposal of in-state low-level waste to "take title" to that waste or to regulate such waste according to congressional directives. This went too far: "[w]hether one views the take title provision as lying outside Congress's enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution."[124]

In *Printz*, two local law enforcement officers, one from Montana and one from Arizona, objected to "being pressed into federal service" by provisions of the Brady Handgun Violence Protection Act that imposed an obligation on state law enforcement officers to conduct background checks on prospective purchasers of handguns.[125] The Court found these objections to be well-taken and held those provisions to be

120. *Alden*, 527 U.S. at 758.
121. 505 U.S. 144 (1992).
122. 521 U.S. 898 (1997).
123. 505 U.S. at 171-74.
124. *Id.* at 177.
125. 521 U.S. at 905.

unconstitutional. Following its reasoning from *New York v. United States*, the Court concluded that both commands to the states to address particular problems and commands to the states' officers to enforce a federal program "are fundamentally incompatible with our constitutional system of dual sovereignty."[126]

Here again, the precise holdings of these cases are not implicated in the Yucca Mountain matter. The Joint Resolution does not attempt to legislate for Nevada as a state, or to commandeer state instrumentalities or officers to implement federal policies.[127] Yet the rationale for these holdings is relevant, for it is predicated on a vision of the dignity and role of states in a federal system. In *Printz*, for example, the Court explained that its holding was compelled by the fact that "[p]reservation of the States as independent political entities" was "the price of union."[128] Although the Court noted in *New York v. United States* that this "inviolable sovereignty" was "reserved explicitly to the States by the Tenth Amendment,"[129] the Tenth Amendment hardly sets out the contours of that sovereignty in a handy way for adjudicating particular cases, much less explicitly drawing a clear perimeter around the permissible actions of the national government.[130]

On the other hand, the majority in *Printz* admitted, "[b]ecause there is no constitutional text speaking to this precise question, the answer to the [States'] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[131] As a result of that search, the *Printz* Court found the Constitution's system of "dual sovereignty" and the states' "residuary and inviolable sovereignty" to be

> reflected throughout the Constitution's text, *Lane County* v. *Oregon,* 74 U.S. 71 (1869); *Texas* v. *White,* 74 U.S. 700, 725 (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, Article V, which requires the votes of

126. *Id.* at 935.

127. *See, e.g.*, Nevada v. DOE, 133 F.3d 1201, 1207 (9th Cir. 1998) ("Nevada has not been directly compelled to enact or enforce a federal regulatory program. . . . The NWPA itself . . . is implemented entirely by federal government agencies.").

128. 521 U.S. at 919.

129. 505 U.S. at 188.

130. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

131. 521 U.S. at 905.

> 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). 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 "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[132]

In the commandeering cases, then, the Supreme Court turned to the first principles of the federal system, which it derived from reviewing the entire structure set forth in the Constitution, in order to make the "residuary and inviolable sovereignty" of the states something more than an evanescent platitude. As the Court observed, "[s]ome truths are so basic that, like the air around us, they are easily overlooked."[133] Those basic truths form the bedrock of Nevada's constitutional complaint against the siting of the nation's nuclear waste repository at Yucca Mountain.

D. Equal Protection as a Component of State Sovereignty

Respecting Nevada's residual sovereignty is obviously a good thing, but further refinement of that general proposition is needed to establish a specific constitutional objection to the siting of a nuclear waste repository in the state. If there is to be a viable constitutional claim grounded on some affront to Nevada's sovereignty, it logically must involve some notion that Nevada has not been treated with a dignity equal to that of her sister states; that is, that the dump truly has been dumped on Nevada.

Not only does such equality of respect among the states seem logically entailed by their equal stature as sovereigns, several provisions of the Constitution offer cases in point for this equal treatment. The Port Preference Clause, for example, provides that "[n]o Preference shall be given . . . to the Ports of one State over those of another."[134] Similarly, the Uniformity Clause mandates that "Duties, Imposts and Excises shall be Uniform throughout the United States."[135] Obviously, neither the Joint Resolution nor the NWPA has anything to do with ports, duties, imposts or excise taxes. But these provisions arose out of the Framers'

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132. *Id.* at 919.
133. New York v. United States, 505 U.S. 144, 187 (1992).
134. U.S. CONST. art. I, § 9, cl. 6.
135. U.S. CONST. art. I, § 8, cl. 1.

recognition that the broad commerce power delegated to the national government created a risk that the "National Government would use its power over commerce to the disadvantage of particular States."[136]

When the Constitutional Convention's Committee of Detail released its formulation of the Commerce Clause in the August 6, 1787 draft, Delaware delegate John Dickinson noted in the margin, next to the Commerce Clause, "no Preference or Advantage to be given to any persons or place—Laws to be equal."[137] So great was the concern over discriminatory congressional employment of the commerce power that it appears likely that the Constitution would not have made it out of the Philadelphia convention, let alone have been ratified, if these guarantees of equal treatment had not been included. In the words of one delegate, "I do not hazard much in saying, that the present Constitution had never been adopted without those preliminary guards in it."[138] As Justice Story concluded,

> [i]f this provision, as to uniformity of duties, had been omitted, although the power might never have been abused to the injury of the feebler States of the Union, (a presumption which history does not justify us in deeming quite safe or certain) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution.[139]

These widespread concerns led to the adoption of the Port Preference and Uniformity Clauses, both barring the national government from discriminating against any particular state. These limitations "were intended to allay . . . the fear that Congress might discriminate against certain of the States."[140] "The clear and obvious intention of the articles mentioned was that Congress might have no power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another."[141]

Thus the Uniformity and Port Preference Clauses make explicit an equality principle that, out of respect for state sovereignty, must be un-

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136. United States v. Ptasynski, 462 U.S. 74, 81 (1983).

137. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 209 (Max Farrand, ed., rev. ed. 1937) [hereinafter FARRAND RECORDS]. *See also* 2 FARRAND RECORDS 211 (James McHenry); *id.* at 637 n.21, 639-40 (George Mason); 3 FARRAND RECORDS 333 (Alexander Hamilton); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 575-76, 588 (1928).

138. 3 FARRAND RECORDS, *supra* note 137, at 366 (Hugh Williamson).

139. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 479 (1833).

140. WARREN, *supra* note 137, at 588.

141. 3 FARRAND RECORDS, *supra* note 137, at 366 (Hugh Williamson). *See also* 2 FARRAND RECORDS at 417-18 (James Madison); *id.* at 420 (James McHenry).

derstood as implicit in the Commerce Clause insofar as Congress applies the commerce power to the States. Since the Commerce Clause is one root of the national government's power to establish a national nuclear waste repository, this limitation has an important and direct role in Nevada's argument against the Yucca Mountain facility.

Not to be overlooked is the Constitution's ban, for both Congress and the state legislatures, on bills of attainder.[142] The term "bill of attainder" originally applied to legislative enactments decreeing death for named individuals (or designated groups) for high crimes, usually treason. The targets were "attainted" and therefore their property could not be inherited, which usually meant that the crown got the property. Bills of attainder were, accordingly, a popular means for raising revenue as well as getting rid of those whom the state feared. Over time the term came to refer to, and to forbid, all forms of legislative trial and punishment, because legislative trials were seen as violating the separation of powers. Legislatures were not to declare a named individual guilty of a crime, but rather were to enact laws that described criminal offenses in general terms and to leave to the courts the task of applying those general laws in individual cases.[143]

The Bill of Attainder Clause protects only persons, not states, and states lack standing to invoke the clause against the federal government on behalf of their citizens.[144] Therefore, the clause cannot be directly invoked by Nevada in making its case against the Yucca Mountain repository. However, the principle animating the clause does shed light on the constitutional wrong being inflicted on Nevada. After all, the ban on bills of attainder confirms the central importance of *generality* as a safeguard for ensuring just laws.[145] A bill of attainder acts by *naming* those who are targets of legislation, by *specifying* those who are to be singled out for special treatment under a specially enacted law. Proper laws describe *general characteristics* of the subject of legislation and set forth *generally applicable rules* that apply to all those who fit the legislative description.[146] Chief Justice Marshall identified the constitutional vice of a bill of attainder as being a violation of the principle that the legisla-

142. *See* U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1.

143. *See generally* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-4 to 10-6 (2d ed. 1988). Montesquieu located the origins of the bill of attainder in the Roman practice of enacting *privilegia*, or private laws, against specific parties. He noted that "Cicero was for having them abolished, *because the force of a law consists in its being made for the whole community*." MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 12, ch. 19 (1748), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 343 (Philip B. Kurkland & Ralph Lerner, eds., 1987) (emphasis added).

144. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

145. *See* TRIBE, *supra* note 143, at 641.

146. *See id.* at 646.

ture should "prescribe general rules."[147]

Modern cases repeatedly emphasize this core principle: Congress may not impose legal burdens except "by rules of general applicability."[148] Indeed, a law that "designates" the parties who will bear its burdens, instead of "set[ting] forth a generally applicable rule,"[149] cannot properly be dignified with the title of "law." The very definition of a "law" is that it applies generally; it prescribes not a result in one case but "a rule" for all cases.[150] Yet, what is the Joint Resolution, if not an enactment that prescribes a result in only one case? Isn't the Joint Resolution a purported "law" that singles out Nevada for the application of a discriminatory nuclear waste disposal site regulation that will govern only Yucca Mountain and not any other site anywhere in the other forty-nine States?

Interestingly, the Supreme Court's Tenth Amendment jurisprudence also reflects this principle. The Court has held that a state may invoke judicial enforcement of the Tenth Amendment's protection of state sovereignty if it can demonstrate "defects in the national process."[151] The Court's example of such a "defect" involved showing that the state "*was singled out in a way that left it politically isolated and powerless.*"[152] This is clearly a variation on the principle driving the ban on bills of attainder, a principle that now can be seen as part of Tenth Amendment doctrine to trigger judicial intervention to protect state sovereignty. The Tenth Amendment will be discussed further in the next section.

Some well-recognized limits on the national government's ability to discriminate among the states are found not in particular clauses of the Constitution, but in the federal (rather than national) structure of the Union. Such limits arise "from the very nature and objects" of the Union itself.[153] One good example of such limits is found in the "equal footing doctrine," which recognizes that the several states entered the Union "equal in power, dignity and authority," and requires that Congress respect each state's "equality in dignity and power with other States."[154]

147. Fletcher v. Peck, 10 U.S. 87, 136 (1810).

148. United States v. Brown, 381 U.S. 437, 461 (1965). *See also id.* at 446 (holding that the legislature must "'prescribe general rules'") (quoting *Fletcher v. Peck*); *id.* at 454-55 (holding that a law is permissible only if "Congress was legislating with respect to general characteristics rather than with respect to a specific group of men").

149. *Id.* at 450.

150. *See* W. Johnson, Note to *Satterlee v. Mathewson*, 2 Pet. 380, n. 416 (1829) (discussing Blackstone), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 351 (Philip B. Kurkland & Ralph Lerner, eds., 1987).

151. South Carolina v. Baker, 485 U.S. 505, 512 (1988).

152. *Id.* at 513 (emphasis added).

153. Coyle v. Smith, 221 U.S. 559, 575 (1911) (citation omitted).

154. *Id.* at 567-68.

The "constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."[155]

Although the equal footing doctrine is usually implicated in cases dealing with the congressional power to admit states to the Union, it has also arisen in the context of the Commerce Power and the Treaty Power.[156] For example, in *United States v. 43 Gallons of Whiskey*, the Court considered an equal footing challenge to a federal law regulating commerce in liquor.[157] The Court rejected the argument that the law discriminated against Minnesota, finding that it legislated in general terms that applied to particular circumstances wherever they existed, rather than to particular states.[158] The Court concluded: "The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike."[159]

The equal footing doctrine thus embodies an anti-discrimination principle that arises from a broader, generally applicable "constitutional mandate that the States be on an equal footing."[160] This does not mean that Congress may not legislate with respect to differing conditions: "Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty."[161] It is this "parity" in "sovereignty" that mandates that States can be treated differently by Congress only insofar as they are *in fact* different. Different treatment of a given state simply because it is the state named by the national government would be arbitrary and an abuse of the national legislative power. Yet that is exactly what Congress did in the Joint Resolution approving the Yucca Mountain site.

E. The Tenth Amendment: The Foundation of the Argument

Although the principles on which Nevada built its constitutional ar-

155. *Id.* at 580.

156. *See, e.g.*, Mayor of New Orleans v. United States, 35 U.S. 662, 736-37 (1836); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 191, 193-94 (1876).

157. 93 U.S. at 191.

158. *Id.* at 194-95, 197.

159. *Id.* at 197.

160. Baker v. Carr, 369 U.S. 186, 226 n.53 (1962).

161. United States v. Texas, 339 U.S. 707, 716 (1950).

gument against the Yucca Mountain Joint Resolution ultimately are derived from the structure of government created by the Constitution, the jurisprudence of the Tenth Amendment provides the most helpful illumination of that structure. The Tenth Amendment simply states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[162]

The Tenth Amendment can strike one as restating the obvious; what is not given to the new national government is not given to the new national government. For that reason, perhaps, for at least a century, America's leading jurists and constitutional thinkers delighted in belittling the Tenth Amendment. It has been dismissed as "redundant," a "constitutional tranquilizer," or an "empty declaration."[163] Chief Justice Stone no doubt thought he was penning the amendment's epitaph when he wrote that it "states but a truism that all is retained which has not been surrendered."[164] Yet "to diminish the Tenth Amendment as merely 'declaratory' is likewise to vitiate the Supremacy Clause and the Necessary and Proper Clause, for each, Hamilton wrote in No. 33 of the *Federalist*, was merely declaratory."[165]

Moreover, unlike either of those two clauses, the Tenth Amendment is something a little different, a bit more special, because it is *a rule of construction*. Indeed, it is one of only two rules of construction in the entire Constitution, the other being the Ninth Amendment. Consistent with the long-standing disregard of the Tenth Amendment, its very status as a rule of construction has sometimes been a basis for derogating it. Justice Story described it as "a mere affirmation of what, upon any reasoning, is a necessary rule of interpreting the Constitution."[166] But to suggest that the Tenth Amendment is *less* worthy of our attention because it is a rule of construction rather than a substantive "rule of law,"[167] is to get things precisely backward. Rules of construction tell us (judges, legislators, and citizens) *how to read the Constitution*. In such rules the Framers step back from the task of erecting a government and turn to face the camera, as it were. They address posterity directly, tell-

162. U.S. CONST. amend. X.

163. *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE 40 (1937); ALPHEUS THOMAS MASON, THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 5, 190 (1967).

164. United States v. Darby, 312 U.S. 100, 124 (1941).

165. RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 81 (1987). *See also* THE FEDERALIST NO. 33, at 204-05 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

166. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833). *See also* Walter Berns, *The Meaning of the Tenth Amendment, in* A NATION OF STATES 126, 131-32 (Robert A.Goldwin ed., 1961).

167. Berns, *supra* note 166, at 131.

ing us that when we sit down to construe the document to decide some controversy we are required to read it in a certain way. The rules of construction are the owner's manual to the Constitution, and few passages in a founding charter could be more important.

As a consequence, despite its scholarly and judicial detractors, the Tenth Amendment has become, over time, much more than a simple reservation to the states of non-delegated powers. As the majority in *South Carolina v. Baker* put it, the Tenth Amendment has come to represent, and to serve as shorthand for, "any implied constitutional limitation on Congress's authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."[168]

In resolving fundamental questions of federalism, the Tenth Amendment requires the Court to consider "the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution."[169] "The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values to which the Constitution—as interpreted over time—gives expression."[170]

It should come as no surprise that the values of federalism have shaped the constitutional text, resulting in constitutional protections for the states as sovereign entities entitled to equal respect and treatment. After all, the independent existence of the states preceded not only the Constitution, but also the Union. Some of the states individually declared independence from Great Britain (and substituted governance by their own elected officials for the sovereignty of the king) even *before* Congress promulgated the Declaration of Independence. Rhode Island declared independence on May 4, 1776 and announced its intention to "promot[e] confederation" with the "other colonies;" Virginia declared independence on May 15, 1776.[171]

Richard Henry Lee's resolution on independence, passed by the Continental Congress on July 2, 1776, asserted the new status of the sev-

168. 485 U.S. 505, 511 n.5 (1988).

169. United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring). *See also* U.S. Term Limits v. Thornton, 514 U.S. 779, 853 (1995) (Thomas, J., dissenting) (Tenth Amendment issues "'depend on a fair construction of the whole [Constitution].'") (quoting McCulloch v. Maryland, 17 U.S. 316, 406 (1819) (alteration in original)).

170. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 586 (1985) (O'Connor, J., dissenting) (quoting Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1055 (1981)).

171. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 102-03 (1940).

eral former colonies as plural "free and independent *States*."[172] Far from declaring independence as a unified national entity, or establishing a sovereign national government for North America, the congressional resolution called for the representatives of the now-independent states to prepare a "plan of confederation" to be "transmitted to the respective Colonies for their consideration."[173] Pursuant to the formal Declaration of Independence signed two days later, the "States of America" by the authority of the "good People of these Colonies" separated themselves from Great Britain by declaring that they were "Free and Independent states," and that "they have full Power" to do all "Acts and Things which Independent States may of right do."[174]

When the Continental Congress made good on Lee's resolution and proposed a form for the national government, the resulting "articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-bay," and so on down the roster, declared that "[e]ach state retains its sovereignty, freedom and independence."[175] On September 13, 1783, the status of the states as individual, independent sovereigns was confirmed by the peace treaty that ended the Revolutionary War. The Treaty of Paris—which is the document that formally recognized the independence of the States—was, like Lee's Resolution, Jefferson's Declaration, and the Articles of Confederation, cast in plural form and filled with references to "the said United States:" "His Brittanic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts Bay," *et al.*, "to be free sovereign and independent States."[176] Article V of the treaty provided that British subjects were to be free to go to "any of the thirteen United States," thereby signifying that Great Britain was treating with thirteen sovereign States rather than with a single unitary nation.[177]

Having recently fought a revolution to free themselves from distant, centralized authority in London, the states were not about to allow themselves to be subsumed in the undifferentiated, common mass of a new and more powerful national government. The states convened in Philadelphia as free, independent, and equal sovereigns. Madison explained that the "equality" of the States is "no less acceptable to the large than to

172. HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 100 (7th ed., 1963) (emphasis added).

173. *Id.*

174. *See* THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776).

175. ARTICLES OF CONFEDERATION art. II (1781).

176. 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909, at 587 (William M. Malloy ed., 1910).

177. *Id.*; *see also* RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 29 (1987).

the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic."[178] Even James Wilson, the second-most influential of the Framers and among the most nationalist in his thinking, insisted that the federal government, "instead of placing the state governments in jeopardy, is founded on their existence. On this principle, its organization depends; it must stand or fall, as the state governments are secured or ruined."[179] Indeed, Madison emphasized that the Constitution's authority would derive from popular consent "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."[180] Madison reassured the state ratifying conventions that "[e]ach State, in ratifying the Constitution, is considered to be a sovereign body, independent of all others."[181]

Once in the Union, however, the states were bound by democratic majority rule under the Constitution's terms. Even the Constitution itself can be amended without the consent of any given state.[182] Consequently, "the Constitution, in all its provisions, looks to *an indestructible Union, composed of indestructible States.*"[183] It is this proposition that sets out the essential dynamic in our federal Union of sovereign states. *Precisely because* the states are not free to secede from the Union and will be bound by democratically enacted supreme federal law—laws which particular states may oppose—there are implicit limits on how much the national government may invade the sovereign prerogatives of

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178. THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961).

179. James Wilson, *Summation and Final Rebuttal, Speech to the Pennsylvania Ratifying Convention, December 11, 1787, reprinted in* 1 THE DEBATE ON THE CONSTITUTION 841 (Bernard Bailyn, ed., 1993).

180. THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961); *see also* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (J. Elliot 2d ed. 1836) (remarks of James Madison at the Virginia convention).

181. THE FEDERALIST NO. 39, at 254 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 40, at 261 (James Madison) (Jacob E. Cooke ed., 1961) (States are "regarded as distinct and independent sovereigns" by "the Constitution proposed").

> The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole. The ratification procedure erected by Article VII makes this point clear. The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only "between the States so ratifying the same." It did not bind the people of North Carolina until they had accepted it.

U.S. Term Limits v. Thornton, 514 U.S. 779, 846 (Thomas, J., dissenting).

182. *See* U.S. CONST. amend. V (describing amendment process).

183. Texas v. White, 74 U.S. 700, 725 (1869) (emphasis added); *see also* New York v. United States, 505 U.S. 144, 162 (1992) (quoting Texas v. White).

the states. That is, because the states are "chained" to the Union, there are limits on how much Congress can yank that chain. Thus "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."[184]

Yet recognizing that the sovereignty of the States is to be protected in our constitutional order is to say nothing about *how* that sovereignty is to be protected. In the mid-1980s the Supreme Court, in Tenth Amendment cases such as *Garcia v. San Antonio Metropolitan Transit Authority*[185] and *South Carolina v. Baker*,[186] appeared to drastically curtail the judiciary's power to protect against encroachments on state sovereignty by the federal government.[187] Following the *Garcia* and *Baker* decisions, the conventional wisdom for some time was that the only real limits on congressional exercise of the Commerce Clause power were: (1) the political check provided by the national political process, with its fifty state delegations of representatives and senators in Congress, and (2) what Justice O'Connor memorably described as Congress's "underdeveloped capacity for self-restraint."[188]

But *Garcia* did *not* hold that the *only* restraint on congressional invasion of state sovereignty was the political process; rather, it held that the political process was the "principal and basic limit."[189] The Court expressly disclaimed any broader ruling, explaining that the case did "not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."[190] At that point *Garcia* cited *Coyle v. Smith*,[191] which had held that irreducible state sovereignty *does* impose some substantive limits on congressional power.

Four of the five Justices who constituted the *Garcia* majority are no longer on the Court. Since that decision seventeen years ago, a narrow but determined majority of the Court has issued a series of decisions

184. Texas v. White, 74 U.S. at 725; New York v. United States, 505 U.S. at 162 (quoting Texas v. White).

185. 469 U.S. 528 (1985).

186. 485 U.S. 505 (1988).

187. In *Garcia*, the Court, in a 5-4 decision, overruled its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and rejected a Tenth Amendment challenge to a federal statute imposing minimum wage and overtime pay standards on State governments. In *Baker*, the Court rejected a Tenth Amendment challenge to a provision of the Internal Revenue Code removing a federal income tax exemption for interest earned on certain types of bonds issued by state and local governments.

188. *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

189. *Id.* at 556.

190. *Id.*

191. 221 U.S. 559 (1911).

championing state sovereignty over the legislative prerogatives of Congress.[192] To whatever extent *Garcia* and *Baker* might be read to rigidly foreclose judicial protection of states' prerogatives within the Constitution's federal structure, they no longer appear to be good law.

Certainly, the notion of a flat ban on judicial enforcement of principles of federalism was always deeply problematic. The horizontal axis of the Constitution—the separation of powers into legislative, judicial, and executive bailiwicks—is amenable to, and entitled to, judicial policing. Why shouldn't the vertical axis—federalism—be as well? Nobody at either end of the political spectrum would insist that the Constitution's structural and textual separation of powers must be enforced exclusively by democratic processes – must, in effect, be treated as a political question off-limits to the judiciary. It is therefore hard to understand why such a rule should govern the equally important structural rules of federalism.

Again, the Tenth Amendment is a rule for construing the Constitution. To whom is that rule addressed, if not to the courts, which are charged with expounding the Constitution?[193] "The States' role in our system of government is a matter of constitutional law, not of legislative grace,"[194] and therefore the boundaries between federal and state sovereignty must be judicially policed, just like the boundaries between the legislative and executive branches. "If federalism so conceived and so carefully cultivated by the Framers of our Constitution 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."[195]

States can no more be relegated to exclusively political safeguards for fundamental states' rights than individuals can be relegated to the political process for the protection of their rights. The fundamental flaw in the *Garcia* majority's reasoning is that its "political process" argument applies equally to individuals as to states, and that reveals its fundamental fallacy. As Justice Powell explained in *Garcia*, "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply pro-

192. *See* Federal Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

193. *Cf.* Marbury v. Madison, 5 U.S. 137, 177 (1803); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

194. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting).

195. *Id.* at 581 (O'Connor, J., dissenting).

tected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights."[196]

The notion that the Bill of Rights was about *individual* rights—a notion clearly animating the *Garcia* majority—while perhaps a function of the Court's focus on individual rights in the last half of the twentieth century, is profoundly ahistorical. The Tenth Amendment was, if anything, the *most important* part of the Bill of Rights with respect to the vital, practical issue of securing ratification of the Constitution. Eight of the original eleven States that ratified the Constitution[197] did so only after proposing amendments, and every one of those States included some version of what ultimately became the Tenth Amendment.[198] Indeed, the Tenth Amendment was the *only* amendment proposed by every single state ratifying convention that offered amendments.[199] The leading proponents of a bill of rights consistently "linked the project to an express reservation of states' rights."[200] Surely the states (and their people) are just as entitled to judicial enforcement of the Tenth Amendment as individuals are to the protections of the Fourth Amendment.

Notwithstanding the flaws in *Garcia's* reasoning, outright reversal of that decision is not necessary to forge a constitutional argument for Nevada on Tenth Amendment grounds. Again, *Garcia* did not purport to define every limit imposed by the structure of the Constitution on federal action affecting the states. As the Court acknowledged three years later in *South Carolina v. Baker*, "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."[201] Note well the scope and seriousness of the opening left by the Court: defects in the political process do not merely render congressional legislation *subject to judicial challenge* under the Tenth Amendment, they "render congressional regulation of state activities *invalid* under the Tenth Amendment."[202]

The *Baker* Court declined to "attempt any definitive articulation" of such political "defects," but it did establish two categories. A state might

196. *Id.* at 565 n.8 (Powell, J., dissenting).

197. North Carolina did not ratify the Constitution until November 21, 1789 – after the Bill of Rights had been approved by Congress and forwarded to the States on September 25, 1789. Rhode Island did not ratify the Constitution until May 29, 1790.

198. *Garcia*, 469 U.S. at 569 (Powell, J., dissenting).

199. AKHIL REED AMAR, THE BILL OF RIGHTS 123 (1998); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 163 (1957).

200. AMAR, *supra* note 199, at 126-27 (1998) (discussing statements of, *inter alia*, George Mason, Luther Martin, Thomas Tredwell, and James Madison).

201. 485 U.S. 505, 512 (1988).

202. *Id.* (emphasis added).

allege (1) that "it was deprived of any right to participate in the national political process" or (2) that "it was singled out in a way that left it politically isolated and powerless."[203] To be sure, every effort to invoke this defective-process exception to *Garcia*—and there have been at least a dozen of them—has failed. Yet, on closer inspection, it is fair to say those efforts failed because they misconceived the specific Tenth Amendment argument left open by the Court in *Baker*. Most of these cases focused on the first category of process defect mentioned by the Court—the deprivation of a state's right to participate in the national political process—and did not even allege the second category—being singled out and politically isolated.[204] Several states have tried to invoke the first exception identified in *Baker* by arguing that they were deprived of political participation because their representatives or senators were not present during the congressional debates or committee meetings on the challenged legislation. These arguments failed because in each case all the usual legislative rules had been followed. A state has no entitlement to have its delegates appointed to a given committee of Congress, and principles of federalism are not implicated simply because a state gets out-voted, much less because a state's senators or representatives fail to show up and participate in a given committee meeting or floor debate.[205]

Baker's second category, however, may comfortably apply to the predicament in which Nevada finds herself after passage of the Joint Resolution. Although the *Baker* Court did not explicitly elaborate on what it had in mind when it spoke of the political isolation of a state (in large measure because South Carolina did not invoke it), in both *Baker* and *Garcia* the Court gave us a great deal of information to help determine the contours of this category.

In touting the adequacy of the political process to protect states' rights, *Garcia* relied first and foremost on the theories of James Madison, who "explained that the Federal Government 'will partake sufficiently of

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203. *Id.* at 512-13.

204. Printz v. United States, 521 U.S. 898 (1997); Adams v. Dep't of Juvenile Justice, 143 F.3d 61, 65 (2d Cir. 1998); Reich v. New York, 3 F.3d 581, 589 (2d Cir. 1993); Nevada v. Skinner, 884 F.2d 445, 452-54 (9th Cir. 1989); Int'l Ass'n of Firefighters v. West Adams County Fire Prot. Dist., 877 F.2d 814, 821 & n.9 (10th Cir. 1989). *See* New Jersey v. United States, 91 F.3d 463, 469 (3d Cir. 1996); Mack v. United States, 66 F.3d 1025, 1033 n.10 (9th Cir. 1995), *rev'd on other grounds sub nom.*; Schmitt v. Kansas, 844 F. Supp. 1449, 1455 (D. Kan. 1994); Delaware v. Cavazos, 723 F. Supp. 234, 245 (D. Del. 1989), *aff'd*, 919 F.2d 137 (3d Cir. 1990).

205. *See* EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990); Nevada v. Watkins, 914 F.2d 1545, 1556-57 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991); Nevada v. Burford, 708 F. Supp. 289, 300-01 (D. Nev. 1989), *aff'd*, 918 F.2d 854 (9th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991).

the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.'"[206] But the rest of that *Federalist* paper reveals that Madison's analysis was expressly predicated on the premise that the national legislature had to act by generally applicable laws, rather than by laws applicable to, and burdening, only one named, isolated state:

> But ambitious encroachments of the Federal Government, on the authority of the State governments, would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.[207]

Only if "an unwarrantable measure of the Federal Government" applied and was unpopular in multiple "states" would "the means of opposition to it" be "powerful and at hand."[208] Madison explained that federal measures encroaching on state governments would be defeated politically because they "would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter."[209]

With this foundation in *Garcia, Baker* elegantly conveys a great deal by citing Justice Stone's famous footnote four from *United States v. Carolene Products Co.*[210] The Carolene Products Company had challenged the constitutionality of a federal statute that prohibited the shipment of compounds of milk and other fats in interstate commerce. This was an obscure subject matter, to be sure, but the equal protection claim advanced by Carolene Products generated, in footnote four, a statement from the Court of perhaps the single most important element of equal protection doctrine. Specifically, a statute directed at "discrete and insular minorities" tends to limit "the operation of those political processes ordinarily to be relied upon" to ensure the equal protection of the laws.[211] When a law is written so as to apply to and burden only members of some political minority, whether defined by religious, ethnic, or other classification, the majoritarian political process is, by its very nature, unreliable at fending off such legislative oppression, for the simple

206. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. at 551 (1985) (quoting THE FEDERALIST No. 46, at 319 (James Madison) (Jacob E. Cooke ed., 1961)).

207. THE FEDERALIST No. 46, at 320 (James Madison) (Jacob E. Cooke ed., 1961).

208. *Id.* at 319.

209. *Id.* at 320.

210. 304 U.S. 144, 152 n.4 (1938); *see South Carolina v. Baker*, 485 U.S. 505, 513 (1988).

211. *Carolene Products Co.*, 304 U.S. at 152 n.4.

reason that the majority is often quite happy to enact a law vexing a minority so long as that law does not apply to the majority. Hence the virtue of laws of general application and the Constitution's condemnation of bills of attainder. As Hamilton explained, a legislator is induced to enact just laws by "the necessity of being bound himself and his posterity by the laws to which he gives his assent."[212]

We thus see emerging from *Garcia* and *Baker* a rule that makes the national political process the primary bulwark of states' rights *only if* the national legislature enacts laws of general application that treat the states equally. This understanding of the "politically isolated" exception is further confirmed by examination of the antecedents on which *Carolene Products* relied. The *Carolene Products* footnote was, of course, discussing racial or religious minorities and dealing with individual rights to equal treatment under the law, but the authority it cited was *McCulloch* v. *Maryland*[213] and *South Carolina* v. *Barnwell Brothers*.[214] Since neither *McCulloch* nor *Barnwell Brothers* involved discrimination against religious or racial minorities, the *Carolene Products* Court clearly understood that the legal principle it was bringing to bear in footnote four was more fundamental and far larger than only the interests of those minorities.

McCulloch involved a tax imposed by Maryland on a federal instrumentality. Chief Justice Marshall reasoned that the "only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."[215] But this political safeguard broke down because the burden of Maryland's tax fell ultimately on all the states of the Union and thereby on their citizens, while only Maryland's citizens were represented in the Maryland legislature.[216]

Barnwell involved a state regulation banning trucks over a certain size from the state's highways. The political process did not self-correct because the burden of the regulation fell mostly on trucking companies from outside of the state. The Court reasoned that the political process is an unreliable safeguard for rights when the challenged law's "burden falls principally upon those" who are not represented in the legislature that enacted the law, or when the law does not "affect[] adversely some interests" who have political power within the state and who supported

212. THE FEDERALIST No. 35, at 221 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
213. 17 U.S. 316, 428 (1819).
214. 303 U.S. 177, 184 n.2 (1938).
215. *McCulloch*, 17 U.S. at 428.
216. *Id.*

the law.[217]

South Carolina v. Baker itself helps to illuminate the problem of political breakdown by showing the contrasting situation. *Baker*, like *McCulloch*, was a case involving intergovernmental tax immunity, only this time it was a federal tax on a state. The Court noted that state immunity from federal taxation "arises from the constitutional structure and a concern for protecting state sovereignty."[218] As in *McCulloch*, the Court explained that the principal safeguard against abuse of this taxing power is the political process: the states, which all send delegations to Congress, will not oppressively tax themselves.[219] But as we have seen, that mechanism works only if the tax law in question does not weaken the political restraints by discriminating against a particular state. Thus, in *Baker*, the Supreme Court hinted that the federal tax *would be unconstitutional* if "Congress . . . imposed a tax that applied exclusively to South Carolina."[220] The tax at issue in *Baker* did not discriminate against South Carolina, nor even against States as distinguished from other taxpayers. Therefore, there was no need for federal judicial intervention.

But the vice that was absent in *Baker* is present in the context of the siting of the nation's nuclear waste dump in Nevada through the enactment of the Joint Resolution. The Joint Resolution applies by name to Nevada, and it subjects Nevada, and Nevada alone, to a unique set of criteria for licensing a high-level nuclear waste repository. A state can negotiate with other states in the Union when the issue is what general standards, rules, and criteria to apply in deciding where to dump nuclear waste, because all states have an interest in fair and workable rules, given that they are all at risk of being stuck with the waste. But when rules and standards of general application have been summarily dispensed with and one site has been arbitrarily chosen, then the state where that site is located loses its natural allies in the national political process and has, indeed, been "singled out in a way that le[aves] it politically isolated and powerless."[221]

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217. *Barnwell Bros.*, 303 U.S. at 184 n.2.

218. *South Carolina v. Baker*, 485 U.S. 505, 518 n.11 (1988).

219. *Id.* at 512-13; Helvering v. Gerhardt, 304 U.S. 405, 416 (1938).

220. *Baker*, 485 U.S. at 516; *see id.* at 525-26 n.15 ("The nondiscrimination principle at the heart of modern intergovernmental tax immunity case law does not leave States unprotected from excessive federal taxation—it merely recognizes that the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion.").

221. *Id.* at 513.

F. The Property Clause: Carte Blanche to the National Government?

As we unveil the edifice of protections for state sovereignty fashioned by our Constitution's federalist structure, it is important not to lose sight of the counterbalancing protections for the national government's sovereign choices in that same structure. Foremost among those protections that are relevant here is the Property Clause.

Yucca Mountain is federal property. Indeed, it has allegedly been owned by the federal government since Nevada was a mere territory. The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[222] Yet, congressional power to "make all needful Rules and Regulations respecting" federal property within a state does not strip the state of concurrent jurisdiction. It merely gives Congress a measure of jurisdiction over the same lands—jurisdiction that, pursuant to the Supremacy Clause, trumps any conflicting state regulation:

> [W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[223]

Nevada remains free to regulate Yucca Mountain (for example, by the state's criminal statutes or laws of trespass), but only insofar as the

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222. U.S. CONST. art. IV, § 3, cl. 2.

223. Kleppe v. New Mexico, 426 U.S. 529, 542-43 (1976)(citations omitted). *See also* James v. Dravo Contracting Co., 302 U.S. 134, 141-42 (1937) ("[I]t is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands 'remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.'") (quoting Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930); Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917) ("True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them."); Nevada v. Watkins, 914 F.2d 1545, 1554 (9th Cir. 1990).

regulations do not conflict with the federal government's chosen use for the property—namely, as a nuclear waste dump. The Property Clause confers on Congress something like a police power over federal property.[224] Indeed, the Property Clause comes complete with its own textual analog of the Necessary and Proper Clause,[225] insofar as Congress is empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[226] Thus, the clause, "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands,"[227] and "while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."[228]

That being said, nothing about this deference to congressional policy judgments places the Property Clause power beyond other constitutional curbs on government power. While *Kleppe v. New Mexico* recognized that "Congress exercises the powers both of a proprietor and of a legislature over the public domain,"[229] in our constitutional regime neither proprietors nor legislatures have absolute power (even regarding subjects appropriately within their purview). Moreover, *Kleppe* does not suggest that the Property Clause conveyed such absolute power to Congress.[230] Exercises of the power delegated by the Property Clause, just like exercises of the commerce power, must still be compatible with the principles of federalism embodied in the Constitution. As *Ashwander v. Tennessee Valley Authority,*[231] explains: "The [Property Clause] is silent

224. *See* Camfield v. United States, 167 U.S. 518, 525 (1897) ("The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."); *Utah Power & Light*, 243 U.S. 389, 405 ("And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power."); *Kleppe*, 426 U.S. at 540 ("Congress exercises the powers both of a proprietor and of a legislature over the public domain."); United States v. San Francisco, 310 U.S. 16, 29 (1940) ("[T]he power over the public land thus entrusted to Congress is without limitations"); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987) (same); *Watkins*, 914 F.2d at 1553 ("Yucca Mountain is federally owned land, subject to Congress' plenary power to regulate its use.").

225. *See* U.S. CONST. art. I, § 8, cl. 18.

226. U.S. CONST. art. IV, § 3, cl. 2.

227. *Kleppe*, 426 U.S. at 539.

228. *Id.* at 536.

229. *Id.* at 540.

230. *Id.* at 537-38.

231. 297 U.S. 288, 338 (1936). *See also Watkins*, 914 F.2d at 1553-54 ("The powers granted to Congress to legislate in specific areas 'are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.'") (quoting Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

as to the method of disposing of property belonging to the United States. That method, of course, . . . must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States."[232]

Indeed, *Kleppe's* link of Property Clause power to the Supremacy Clause confirms the existence of such constitutional limits. "The Supremacy Clause . . . makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution];' so the Supremacy Clause merely brings us back to the question" whether the challenged laws "violate state sovereignty and are thus not in accord with the Constitution."[233] Thus, the Property Clause, though it undeniably gives the national government broad discretion over federal land, does not give the national government a pass on other constitutional constraints on its power.

III. FORMULATING AN ARGUMENT

In light of this dynamic of federalism permeating the constitutional structure of our government, certain basic principles are evident from which Nevada built its constitutional arguments:

- Federalism analysis draws on the entire Constitution.
- Protection of state sovereignty lies at the core of our federal structure.
- The Constitution mandates equal treatment for the sovereign states.
- Congress may not single out a state for adverse treatment, but must legislate by generally applicable, neutral criteria.

The original NWPA repository standard put all fifty states in the same situation: they were *all* potential candidates to host the nation's radioactive waste. A *single* set of *neutral*, scientifically based standards was developed to govern evaluation and certification of nuclear waste

232. 297 U.S. 288, 338 (1936). *See also Watkins*, 914 F.2d at 1553-54 ("The powers granted to Congress to legislate in specific areas 'are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.'") (quoting Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

233. *Printz*, 521 U.S. at 924-25 (quoting U.S. CONST. art. VI, cl. 2). *See also* Alden v. Maine, 527 U.S. 706, 731 (1999); Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 766-68 (2002).

repositories *everywhere* in the United States. The core of those standards was deep geologic isolation. Under this regime, some states were more at risk of getting the repository due to variations in local geology, hydrology, and other variables relevant to the NWPA's standards. But any resulting differential impact among the states of these "facially neutral" criteria was attributable to the "accident of geo[logy], not any deliberate discrimination against" any state.

All this vanished when DOE discovered that Yucca Mountain was not suitable under NWPA standards. Yucca geology could contribute virtually nothing to the repository system's waste isolation capabilities. DOE reacted to this discovery by simply rewriting the rules. These new standards for engineered containment of waste apply *exclusively* to Nevada's Yucca Mountain. The Joint Resolution's approval of a repository applies, by name, only to "Yucca Mountain, Nevada." This maneuver grossly discriminates against Nevada. The rules requiring deep, permanent geologic isolation remain in effect to govern the development of any repository that might be proposed in any other state. But in Nevada, a repository can now be built, despite the failure to meet that standard, by virtually exclusive reliance on man-made containers. Thus, forty-nine states get "permanent deep geologic disposal" while Nevada gets metal drums and wishful thinking.

It would be hard to invent a clearer example of a *Baker* defect in the political process. A state can negotiate and politick with other states when the issue before Congress is what general standards to apply in deciding where to bury nuclear waste because all states have an interest in fair, reasonable, and workable rules given that they are all at risk of being stuck with an unpopular burden. But when rules of general application have been abandoned, and the question is simply a yea or nay on whether to put waste in one designated site arbitrarily chosen and announced in advance, then the state where that site is located loses its natural allies in the national political process and has, indeed, been "singled out in a way that le[aves] it politically isolated and powerless."[234]

Perhaps the sovereign state of Nevada would have to accept the nuclear waste repository if, after application of reasonable, agreed-upon, generally applicable criteria, it turned out that Nevada was the best place for the nation to put it—just as Virginia and Maryland in the eighteenth and nineteenth centuries had to tolerate, in the national interest, the erection of coastal forts necessary to protect the approaches to the Chesa-

234. The truncated legislative procedures specially enacted for the joint resolution even foreclose the use of those mechanisms that a minority can normally employ to have its concerns addressed in congressional deliberations: extended consideration in committee, filibuster, and amendments.

peake Bay and the nation's capital. But Nevada should not have to tolerate an imposition that resembles not so much national legislation as a group mugging. Thus, here the failure of the usual political check on violations of state sovereignty is linked to the nature of the violation of state sovereignty itself.

Nevada's argument does not generate a constitutional claim whenever legislation affects only one state: that happens routinely, *e.g.*, when Congress passes legislation respecting a particular national park within the borders of one state, or respecting oil leases off a particular state's coast, or respecting some other unique problem affecting only one state. But such legislation operates in accord with general standards and criteria apart from the fact that the legislation's impact will happen to focus within a particular state: *i.e.*, a given national park has special needs, or Alaskan oil drilling in the tundra presents special problems, *etc.* The case is different when legislation singles out one state, by name, to bear a unique burden on behalf of all of the states, not because that state is best situated to bear that burden, in accord with some set of generally applicable criteria, but only because the rest of the states, acting through the national government, have cynically concluded "better him than me" and have arbitrarily imposed the invasive burden on that lone state as a unapologetic act of naked political will.

The geology of Yucca Mountain will contribute virtually *nothing* to containing radioactivity; virtually *everything* now depends on man-made barriers. A waste containment system built entirely on engineered barriers can be put literally anywhere. Therefore, there is no longer any basis for preferring Nevada to New York, California, or Virginia. Indeed, Yucca Mountain is only ninety miles from Las Vegas, the fastest- growing city in the United States.

This argument does not make light of the problem posed by the long-term, safe disposal of radioactive waste. However, it is precisely in such circumstances, when the urgency of addressing such a public problem seems most acute, that the wisdom of our Constitution must inject a certain humility and restraint into public policy. As the Supreme Court put it, "The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse."[235]

235. *New York v. United States*, 505 U.S. at 187-88.

A. The Argument Is Tested: The D.C. Circuit Proceedings

On January 14, 2004, a panel of the D.C. Circuit heard oral argument on the thirteen consolidated cases involving the Yucca Mountain facility.[236] Nevada's constitutional case against the Joint Resolution was among them. The court's questions concerning the constitutional argument evidenced considerable skepticism on the part of the panel, essentially focusing on the scope of the national government's prerogatives over federal land under the Property Clause. The sticking point for the panel was what one judge called Nevada's creating "this equality argument out of the standard rational basis test."[237] The thrust of the panel's objection was not that the national government had unlimited discretion under the Property Clause, but simply that

> [i]t's their property, and so if they're required to show that it's a rational regulation, it seems to me the more reasonable argument is they have to show that it's rational as to this piece of property, not as to all other pieces of property, not as to all other pieces of property that they could have regulated similarly, and they chose only to regulate this one.[238]

Elaborating on this point, two questions posed by Judge Tatel illuminated the key issue:

> Where do you draw the line between, as you said, nuclear waste depository sites and major prisons and all other uses of federal property?
>
> . . .
>
> So your principle, then, really is that Congress cannot rationally use its own property in a particular state without making sure that that particular use is neutrally, based on neutral principles, justifiable in terms of all other property?[239]

Unfortunately, these exchanges with the panel suggested that the panel misconceived the thrust of the argument. The respect that must be accorded to the sovereignty of a state does not create some rigid requirement that the national government must undertake a comparative

236. The panel consisted of Judges Edwards, Tatel, and Henderson.

237. Transcript of Oral Argument, Nuclear Energy Inst. v. United States Environmental Protection Agency, No. 01-1258, *et al.*, at 120 (Jan. 14, 2004) (Judge Tatel).

238. *Id.* at 122 (Judge Edwards).

239. *Id.* at 164 (Judge Tatel).

analysis among all federal property in every other state whenever it wants to do something on its property in one state. What the sovereignty of a state entails depends on the particular circumstances.

This can be understood by examining Judge Tatel's hypothetical, the siting of a prison versus the siting of a nuclear waste repository. At first blush, there seems to be a nice symmetry here: a penitentiary imprisons dangerous criminals while the repository imprisons toxic waste. But that is not true. With wholesale abandonment of geologic isolation (and the inevitable failure of the man-made containers holding the waste), the long-term disposal of waste at the repository at Yucca Mountain now relies, not on imprisoning the waste, but on its slow dilution through the surrounding Nevada countryside as it *by design* seeps out of the repository itself.[240]

In other words, the Yucca Mountain nuclear waste repository is now designed to rely on the territory outside the repository to do its job. That is the burden that Nevada is being forced to bear with the Yucca Mountain facility, a highly dangerous burden that surely implicates the state's sovereign responsibility for the health, safety, and welfare of its residents. How the national government uses its property, when that use is a high-level nuclear waste septic field crossing into state territory and sited above state water, inherently implicates the sovereign concerns of a state. Why a particular state should bear this risk on behalf of the whole nation, as opposed to other sites in other states, *is* inherently part of any rational basis for *this particular use* of federal property. That is, Judge Tatel was quite right in sensing that there is not a stark line to be drawn between Nevada's argument, sounding in equal protection notions, and rational basis concerns.

In short, there are really two steps in the proper analysis here. First, is the site, in the words of Judge Tatel, "geographically suitable"?[241] Second, if the site does belong in the group of sites that are geographically suitable, why choose this site as opposed to other suitable sites?[242]

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240. As EPA acknowledged, "during the post-closure period, the ground water will transport radionuclides released from the repository to the surrounding area." EPA, *Radiological Pathways Through the Biosphere*, in Background Information Document for 40 C.F.R. 197, at 8-1 (June 2001).

241. Judge Tatel suggested that the rational basis for a lawful use of federal land need only be a determination that "Yucca Mountain was geographically suitable." Transcript of Oral Argument at 162, *Nuclear Energy Inst* (No. 01-1258). Even if that were sufficient, the determination rests on a question of fact, not of policy. The question, then, would be whether it is true as a factual, scientific matter that the Yucca geography is "suitable." Surely Congress's say-so in the joint resolution cannot definitively resolve the question.

242. To be sure, the rational basis for selecting an otherwise suitable site from among others could rest on a variety of concerns, including the comparative cost of constructing a facility there, the relative accessibility of the site to reliable avenues of transportation, and so on.

Correspondingly, we normally do not think of the security of a prison as being achieved by letting the inmates run through the countryside. The risk of an escape from a federal prison is relatively remote, and in any event a hypothetical escapee would be trying to get as far away from that site as possible. Thus, it is fair to say that the siting of a prison on federal property does not, without more, implicate the state's sovereign responsibility for the health, safety, and welfare of its residents to a degree anywhere near the level of a nuclear waste dump. As a result, the sovereign concerns of the state could be fully respected if the siting of the prison were otherwise rational, that is, if the obvious concerns for the security of nearby residents were fully addressed by the location, design, and operation of the prison.[243]

B. The Case Decided?

The D.C. Circuit handed down its decision in the Yucca Mountain cases on July 9, 2004. As was expected from the tenor of the Court's questions during oral argument, it ruled against Nevada's constitutional argument. The decision was disappointing not simply because Nevada lost, but because the Court's reasoning was surprisingly superficial, utterly failing to come to grips with the substance of the arguments Nevada had offered.

To the D.C. Circuit panel, "the plenary nature of Congress's Property Clause authority [and] the considerable deference that we accord to Congress's judgment in exercising that authority" determined the outcome.[244] Given the broad scope of the Property Clause power as the Court understood it, the Court's only role was limited to "determining whether there is a rational relationship between Congress's stated end and its chosen means."[245] Here, the Court summarily concluded that the "Administration had adequately demonstrated that the Yucca site was likely to be suitable for development" as the much-needed national radioactive waste dump.[246] The Court could not go farther "to examine the strength of the evidence upon which Congress based its judg-

243. Yet in a particular case the facts could be different enough to require more even in the siting of a prison. If, for example, the federal government decided to put all its most dangerous, clever inmates, all convicted of horrible crimes, in one new super-secure facility, it may be that a location in one State makes much more sense than a location in another in terms of minimizing the risks to the surrounding population, and that such a comparative analysis of different sites would be required to respect the sovereign concerns of the involved States for the safety of their residents.

244. *NEI*, 373 F.3d at 1308.

245. *Id.* at 1304.

246. *Id.*

ment."[247] Consequently, the Joint Resolution was an appropriate exercise of Congress's authority under the Property Clause.

The D.C. Circuit did acknowledge that it was required to go somewhat farther to examine "whether the Resolution violates some other provision of the Constitution."[248] In launching that examination, the Court recapitulated what it called Nevada's "equal treatment" claim, and even noted that Nevada's argument "is not based upon any specific provision of the Constitution, but rather on principles of federalism ostensibly inherent in the Constitution as a whole."[249] Notwithstanding this apparent recognition of the premises of Nevada's constitutional case, the Court then proceeded to analyze the state's argument in terms confined to the specific facts and circumstances of each case that Nevada had offered as a manifestation of the "dual sovereignty" that shapes and informs the Constitution.[250] With that method, it was easy for the panel to conclude that Nevada's argument "has no textual basis in the Constitution."[251]

This opinion is flawed on many levels. Most alarmingly, it is at war with the proposition that principles of federalism *are* inherent in the Constitution, and the opinion treats the Property Clause as an unbounded reservoir of federal power.

The Court's Property Clause analysis most obviously ignores the Supreme Court's admonition that exercises of Property Clause power "must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States."[252] Nowhere in the opinion is there the slightest recognition that Nevada may have some appropriate concern about the impact of a highly radioactive waste dump on its citizens and its environment, especially since, as the Court itself acknowledged, radiation even at lower doses "can have devastating health effects, including increased cancer risks and serious birth defects such as mental retardation, eye malformations, and small brain or head size."[253] To be sure, the Court acknowledged that the whole point of a genuine "geologic" nuclear waste repository was "to isolate this waste for . . . epochal years."[254] That is, "the disposal system's 'natural barriers,' *i.e.,* the characteristics of the rock formations under Yucca Mountain, are intended to protect the waste

247. *Id.*
248. *Id.* at 1305.
249. *Id.*
250. *See id.* at 1304-09.
251. *Id.* at 1308.
252. Ashwander v. Tenn. Valley Auth., 297 U.S. at 338.
253. *NEI*, 373 F.3d at 1258.
254. *Id.* at 1261.

from water infiltration and to dilute radiation releases expected to occur from leakage of the engineered barriers or from their failure thousands of years from now."[255] The suitability of the Yucca Mountain site for a radioactive waste dump accordingly rests on this foundation: the "Energy Department expects that this surrounding rock will both limit water from seeping into the waste packages and delay radioactive particles from migrating into the human environment."[256]

Put in the most practical terms, Nevada's fundamental complaint against the Yucca Mountain facility is that its "rock formations" will not do what DOE "expects" they will do; they will not provide sufficient isolation of the radioactive waste to be dumped there to protect the health and environment of Nevadans. Nevada's status as a sovereign state surely gives it a legitimate responsibility to protect the health and environment of its citizens from such danger, a responsibility that the structure of dual sovereignty established by the Constitution respects and accommodates far more than the D.C. Circuit's decision would allow.

The utter lack of respect for state sovereignty in the D.C. Circuit's opinion is evident from the fact that these judges did not find their notion of a near-absolute federal power in the Property Clause in any way jarring to their constitutional sensibilities. To this panel, such a power is "merely the natural and constitutionally unobjectionable result of the Supremacy Clause."[257] Yet this breezy observation is merely an exercise in circular reasoning. As discussed above, a federal law not made "in pursuance" of the Constitution – that is, a law that violates state sovereignty – does not become the "law of the land" under the Supremacy Clause.[258] The D.C. Circuit did not even consider the implications of Nevada's status as a sovereign state—and the legitimate public interests it has a duty to vindicate—in its application of the Property Clause to Nevada's case. Thus, while a simple reference to the Supremacy Clause may mark the beginning of the constitutional analysis needed to adjudicate Nevada's claim, it certainly does not—indeed, cannot—mark its conclusion.

The failure of the panel to address the bounds state sovereignty may place on the Supremacy Clause lies at the heart of their flawed reliance on *Kleppe* to reach their result. As the last major pronouncement of the Supreme Court on the Property Clause, *Kleppe* was bound to loom large in this case. But in fairness to the *Kleppe* Court—and to fairly appreciate what *Kleppe* may or may not mean—it must be remembered that the *Kleppe* plaintiffs claimed that Congress had no power whatsoever to pro-

255. *Id.*
256. *Id.*
257. *Id.* at 1306.
258. *See supra* note 233.

tect wild horses on federal lands unless those horses were moving in interstate commerce or were damaging federal land.[259] It was in rejecting these severe qualifications on the scope of the Property Clause power that *Kleppe* held that this federal power is "without limitations,"[260] and "necessarily overrides conflicting state laws."[261] *Kleppe* involved no claim that some other constitutional principle constrained how the government protected these horses; its focus was solely on whether the government had the power to enact such protections at all.[262]

While deferring to Congress in making "needful" rules for federal property, *Kleppe* does not suggest that such rules are beyond judicial scrutiny, but that the "courts must eventually pass on them."[263] The D.C. Circuit correctly noted that the courts are not to "reweigh the evidence" animating Congress's action.[264] Yet that proposition cannot justify the panel's rejection of Nevada's far more fundamental constitutional claim, which sought no such "reweighing" of closely competing evidence. Rather, Nevada claimed that Congress had *no* basis by which to choose Yucca Mountain, from among all other possible locations, for the nation's radioactive waste repository. Most strikingly, there is not even a rational basis to conclude that the Yucca Mountain site is suitable for such a repository, irrespective of whether it is a rational location from among all the other possible sites.

Of course, although the D.C. Circuit was willing to broadly defer to the judgment of Congress in siting a nuclear waste dump at Yucca Mountain, the panel did conclude that there "is a rational relationship between Congress's stated purpose . . . and its decision to approve the Yucca site."[265] Yet it is impossible to see how the panel's fairly cursory conclusion that the Joint Resolution had a rational basis could be correct, given the panel's decisions with respect to other issues in the Yucca Mountain cases.

The D.C. Circuit rested its "rational basis" conclusion on the fact that a "primary purpose" of the NWPA was that a nuclear waste repository "'provide a reasonable assurance that the public and the environment will be protected from the hazards posed by' such wastes."[266] The

259. 426 U.S. at 532-33.
260. *Id.* at 539.
261. *Id.* at 543.
262. As the *Kleppe* Court noted, the exercise of the Property Clause power "merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals." *Id.* at 545.
263. *Id.* at 536.
264. *NEI*, 373 F.3d at 1304 (quoting *Kleppe*, 426 U.S. at 541 n.10).
265. *Id.*
266. *Id.* (quoting 42 U.S.C. § 10131(b)(1)).

Court observed that the relevant Senate committee report had concluded "that the Administration had adequately demonstrated that the Yucca site was likely to be suitable for development" of such a repository.[267] Although in its Property Clause analysis the panel stopped there, earlier in this opinion it had concluded that the "Administration" had used the *incorrect* standard in concluding that the "public and the environment" would be protected from the hazards of radioactive wastes at the Yucca Mountain site.

The key issue, obviously, in determining whether a repository site will work to safely dispose of radioactive wastes is whether it will in fact "isolate" those wastes for the time needed.[268] The question then becomes what amount of time is needed for such isolation. Put another way, the question is how far into the future must we measure the amount of radioactivity inevitably leaking from a repository in order to say with reasonable confidence that that site can safely isolate radioactive wastes. For Yucca Mountain, the EPA adopted a rule that would measure the radiation leaking from the repository 10,000 years after nuclear waste was dumped there.[269]

However, in authorizing EPA to promulgate health and safety standards for the Yucca Mountain repository, Congress, in the Energy Policy Act of 1992, required that EPA's standards be "based upon and consistent with the findings and recommendations of the National Academy of Sciences."[270] As the D.C. Circuit itself emphasized, NAS "expressly rejected 10,000 years as a proper benchmark."[271] NAS rejected the 10,000-year standard quite logically on the ground that the measurement of escaping radiation should "be conducted for the time when the greatest risk occurs."[272] According to NAS, "at least some potentially important exposures might not occur until after several hundred thousand years,"[273] with "the highest critical group risk . . . calculated to occur . . . on the order of [one million] years."[274] In short, the EPA did not even come close to promulgating a safety standard "consistent with" NAS's recommendation—the standard commanded by Congress based on its judgment of what would make a safe repository site. As the D.C. Circuit

267. *Id.*

268. *See id.* at 1261.

269. *Id.* at 1262; Protection of Environment, 40 C.F.R. § 197.20 (2004).

270. *Id.* at 1267 (quoting Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2921 (1992) (codified at 42 U.S.C. § 10141(2000)).

271. *Id.* at 1271.

272. *Id.* at 1270 (quoting Committee on Technical Bases for Yucca Mountain Standards, Nat'l Research Council, *Technical Bases for Yucca Mountain Standards* 6-7 (1995) ("NAS Report")).

273. *Id.*

274. *Id.* at 1271 (quoting NAS Report at 67).

put it, the agency "unabashedly rejected NAS's findings."[275] But the law did not give EPA that option:

> It was Congress that required EPA to rely on NAS's expert scientific judgment, and given the serious risks nuclear waste disposal poses for the health and welfare of the American people, it is up to Congress—not EPA and not this court—to authorize departures from the prevailing statutory scheme.[276]

Thus, the Court vacated EPA's rule (and the parts of an NRC rule that incorporated the EPA 10,000-year standard).[277]

By finding that the safety standard set by EPA did not conform to the safety standard Congress wanted the agency to establish, the D.C. Circuit dealt a profound blow to the choice of the Yucca Mountain site. EPA's 10,000-year standard ultimately infected the entire process of selecting Yucca Mountain. In recommending to the President that Yucca Mountain become the repository site, the Secretary of DOE set out three "decision criteria" that led him to recommend the Yucca Mountain site.[278] The very first was the EPA standard the D.C. Circuit concluded was unlawful: "is Yucca Mountain a scientifically and technically suitable site for a repository, *i.e.*, a site that promises a reasonable expectation of public health and safety for disposal of spent nuclear fuel and high-level radioactive waste for the next 10,000 years?"[279] As the D.C Circuit noted, the Secretary of Energy's recommendation was the core of the "Administration's case for selecting the Yucca site" that it made to Congress,[280] specifically including the Administration's reliance on the 10,000-year standard.[281] In short, Congress's decision to approve the Yucca Mountain site, which the Court said was rationally related to Congress's purpose of providing for "the safe disposal of radioactive waste,"[282] essentially rested on a measure of that safety that the Court simultaneously declared to be unlawful. The panel's conclusion that the choice of the Yucca Mountain site had a rational basis simply cannot stand in the face of its rejection of the EPA health and safety standard on which that choice was based.

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275. *Id.* at 1270.
276. *Id.* at 1273.
277. *Id.* at 1315.
278. *See* SITE SUITABILITY RECOMMENDATION, at 8.
279. *Id.* at 8-9. *See also id.* at 10 ("The EPA and NRC adopted . . . standards so as to assure . . . that after the repository is sealed, radiation doses to those in the vicinity would be at safe levels for 10,000 years.").
280. *NEI*, 373 F.3d at 1310.
281. S. REP. NO. 107-159, at 8 (2002).
282. *NEI*, 373 F.3d at 1304.

Having concluded, wrongly, that the exercise of the Property Clause power in the Joint Resolution met minimal levels of rationality, the Court then turned to the potential constraints on that power posed by other provisions of the Constitution embodied in what it called Nevada's "equal treatment" claim.[283] The Court rejected that claim, pronouncing in sweeping terms that "[w]e find it beyond serious dispute that Nevada's proposed 'equal treatment' requirement cannot reasonably be inferred from the provisions and doctrines upon which Nevada purports to rely."[284]

Quite disappointingly, the panel did not analyze Nevada's constitutional argument in the manner in which that conclusion implies. The precedents Nevada cited were simply cases in point of the application of the federalism principles embedded in the structure of the Constitution. Rather than address Nevada's argument in terms of the constitutional first principles on which it rested, the panel focused on the specific holdings or circumstances of the cases Nevada cited to reach the grand conclusion that (surprise!) Nevada's case did fit within the four corners of those cases.[285] The panel's treatment of *South Carolina v. Baker* and the Tenth Amendment illustrates their method.

The Court equated "state interests of the kind protected by the Tenth Amendment" with the "congressional regulation of state activities" simply because such congressional activity was what was at issue in *South Carolina v. Baker*.[286] Yet the Tenth Amendment does not impose a specific rule that applies only to certain kinds of federal action. Rather, it "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[287] This "constitutional policy" of respecting "our system of dual sovereignty" [288] is the whole point of the Constitution; its solicitude for balancing the interests of those dual sovereigns is not so limited as to be triggered only by certain federal activities.

So thoroughgoing is this constitutional policy that even in reviewing regulations of purely private behavior courts must ensure that the "federal balance" is not "contradict[ed]."[289] The vigilance of the courts to maintain the "federal balance" has not been limited to circumstances where there is regulation of the states as states, but has been manifested

283. *Id.* at 1305.
284. *Id.* at 1308.
285. *Id.* at 1305-09.
286. *Id.* at 1305.
287. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).
288. *Printz*, 521 U.S. at 923 n.13.
289. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

"through judicial exposition of doctrines such as abstention, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of preemption, and many of the rules governing . . . habeas jurisprudence."[290] The governing principles of federalism always inform judicial review, and so are expressed in such varied ways because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or other level of Government has tipped the scales too far."[291] Clearly, *South Carolina v. Baker* cannot be understood as rigidly setting out the metes and bounds of either the Tenth Amendment or the federal balance of dual sovereigns that is the hallmark of the Constitution.[292]

The failure of the D.C. Circuit to address seriously Nevada's constitutional argument is also apparent from the absence of any discussion in the opinion of critically important primary sources from the framing of the Constitution, such as *The Federalist* or the records of the ratification of the Constitution. One cannot come away from this opinion without the distinct impression that this panel was fundamentally antagonistic to the classic notions of federalism that animated the Framers. Consider the Court's admission that it could not see "how the constraints demanded by Nevada's claim would be consistent with the plenary nature of Congress's Property Clause authority,"[293] or its statement that the "substantive constraint on legislation and the judicial role implicit in Nevada's 'equal treatment' requirement are, in our view, totally at odds with the broad interpretation given to Congress's Property Clause powers."[294] To both these statements the obvious rejoinder is, "Maybe so, but perhaps you have inflated the Property Clause far beyond its proper scope. The genius of the Constitution, after all, is that each constitutional power or right is hemmed in by competing powers and rights."[295]

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290. *Id.* at 578.

291. *Id.*

292. The D.C. Circuit also tried to distinguish the defects in the "political process" discussed in *South Carolina v. Baker* from what it considered to be Nevada's "substantive" objections to the Joint Resolution. *See NEI*, 373 F.3d at 1306. Since Nevada's constitutional complaint arises from the lack of neutral criteria in selecting Nevada, from among all other possible sites, to be the home of the nation's radioactive waste dump, the panel's distinction between process and substance seems arbitrary at best.

293. *Id.* at 1308.

294. *Id.*

295. To further buttress the conclusion that Nevada's constitutional argument is beyond serious consideration, the D.C. Circuit suggests that respect for the sovereignty of a state could encumber many uses of federal property – the siting of a military installation, a prison, a dam, a conservation area, and so on. *Id.* But using neutral criteria by which to choose the location of any of these facilities is hardly as burdensome as the Court suggests. Natural features often clearly dictate the locations of a dam, a conservation area, or even a fort. Indeed, irrespective

CONCLUSION

Nevada's constitutional challenge to the Yucca Mountain repository certainly made no headway in the D.C. Circuit, but it remains to be seen whether the constitutional principles championed by Nevada truly lost any ground either. At bottom, the D.C. Circuit's dismissive treatment of Nevada's argument recognizes no sovereign interest of the states that could in any way circumscribe the scope of the federal government's Property Clause power. The Court thus advanced an understanding of the Property Clause that has no principled limit grounded in the federal structure of the Constitution, suggesting that the federal government has an unfettered choice to do what it will with federal property irrespective of any competing sovereign interest of the states. Nowhere did the Court even acknowledge the authority of the states as "sovereign entities"[296] that is the "presupposition of our constitutional structure."[297]

Although Nevada's case is in many respects unique, it exemplifies a profound tension between a broad view of federal power over federal land (with an impact far beyond the federal domain) that is drawn from the Supreme Court's Property Clause precedents, and elementary principles of federalism that are at the foundation of the Constitution's structure and have been given prominence in the Court's cases over recent years. As of this writing, whether the Court will have the opportunity to address this tension in the context of Nevada's case remains to be seen. Ironically, though the D.C. Circuit rejected Nevada's complaint when articulated in constitutional terms, the panel's opinion in many respects gave Nevada the relief it needed by its rejection of the EPA's 10,000-year standard. In rejecting that standard, the D.C. Circuit rejected a health and safety standard crafted only for the Yucca Mountain site, and commanded EPA to return to what Congress had mandated: a neutral health and safety standard, applicable to any possible repository site, recommended by the scientific community. If the EPA faithfully complies, the Yucca Mountain site may in the end be judged by the neutral, rational criteria that Nevada has claimed was its right.

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of concerns for state sovereignty, the use of such criteria is simply an attribute of responsible decision-making. If one were constructing a maximum security prison for the most hardened federal convicts, for example, Alcatraz is a more logical location than Central Park.

296. *Alden*, 527 U.S. at 758.

297. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991). *See also* THE FEDERALIST No. 40 at 261 (James Madison) (Jacob E. Cooke ed. 1961) (States are "regarded as distinct and independent sovereigns" by "the Constitution proposed").