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Analysis of Constitutionality

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TO : House Committee on the Judiciary
Attention: Perry Apelbaum

FROM : American Law Division

SUBJECT : Constitutionality of the Punitive Damages Additur Provision in the Senate-Passed Version of H.R. 956, 104th Congress

This memorandum is furnished in response to your request for an analysis of the constitutionality of the punitive damages additur provision in the Senate-passed version of H.R. 956, 104th Congress. The House- and Senate-passed versions of H.R. 956 have different punitive damages caps.[1] The House-passed cap would apply in all civil actions, whereas the Senate-passed cap would apply only in products liability cases. The House-passed cap would be *three* times economic damages or $250,000, whichever is greater; the Senate-passed cap would be *twice* economic *and* noneconomic damages or $250,000, whichever is *greater*, but, if the defendant is an individual whose net worth does not exceed $500,000 or an organization with fewer than 25 full-time employees, the cap would be twice economic and noneconomic damages or $250,000, whichever is *less*. Under the Senate-passed bill, a court could exceed the former cap, but not the latter cap, if it finds the punitive damages award insufficient. If the court awards an "additur" (exceeds the cap), a defendant who objects to it could appeal it or could elect to have a new trial on the issue of punitive damages.

The constitutional question that the additur provision raises is whether it violates the Seventh Amendment's guarantee of the right to a trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." The Seventh Amendment, unlike most of the Bill of Rights, applies only in federal courts (including District of Columbia courts)[2], not in state courts.[8] Products liability suits are suits "at common law," which is state court-made law. Like other suits that arise under state law, products liability suits may be brought in federal court when, and only when, there is diversity of

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[1] The House-passed cap appears in § 201 of its bill; the Senate-passed cap appears in § 107 of its. The Senate-passed bill is published at 141 Cong. Rec. S 6407 (daily ed. May 10, 1995).

[2] Capital Traction v. Hof, 174 U.S. 1, 5 (1899).

[8] Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

citizenship, which means that the plaintiff and the defendant are domiciled in different states; and when the amount in controversy exceeds $50,000, exclusive of interest and costs.[4] H.R. 956, in both its House- and Senate-passed versions, would not change the law with respect to federal jurisdiction of products liability suits. Both bills, including the additur provision of the Senate-passed bill, would apply to suits brought in both state and federal court. Because the Seventh Amendment does not apply in state courts, the Senate-passed bill's giving the court the authority to award an additur would raise no jury trial issue in suits decided in state courts, and would preempt any right under a state constitution or state statute to a jury determination of the amount of punitive damages.[5]

A lawsuit, such as a products liability suit, that arises under state law but is brought in federal court, is known as a "diversity case." The Supreme Court has held that the question whether a right to a jury trial exists in a particular diversity case "is to be determined as a matter of federal law."[6] The Seventh Amendment would clearly apply to products liability suits brought in federal court. This is because products liability suits are suits "at common law," and their value in controversy, when brought in federal court, exceeds $20. They are suits "at common law," even if they arise in a state that has codified its products liability law, because

> By *common law*, [the Framers of the Amendment] meant . . . not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an actions for damages in the ordinary courts of law.[7]

The value in controversy of a products liability suit, when brought in federal court, always exceeds $20 because diversity jurisdiction requires an excess of $50,000 in controversy.

The fact that the Seventh Amendment applies to products liability suits brought in federal court does not mean, however, that every question that arises in a products liability suit must be decided by the jury; the court decides some

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[4] 28 U.S.C. § 1332.

[5] In Southland Corp. v. Keating, 465 U.S. 1 (1984), the Supreme Court has held that § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, preempts conflicting state law. This statute provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable," and thus effectively eliminates the right to a jury trial in some state cases.

[6] Simler v. Conner, 372 U.S. 221, 222 (1963).

[7] Curtis v. Loether, 415 U.S. 189, 193, 194 (1974) (emphasis supplied by the Court).

questions. "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."[8] The question this memorandum will address is whether the parties to a products liability suit have a right under the Seventh Amendment to have a jury determine whether an additur is appropriate, or whether the bill's providing for a judge to make this determination is constitutional.

PLAINTIFFS AND DEFENDANTS

Before we address this question, however, it seems worth examining the respective positions of the plaintiff and a defendant vis-a-vis an additur under the bill. The bill, it will be recalled, would allow a defendant to avoid an additur by electing a new trial on the issue of punitive damages, but would not grant the same right to the plaintiff. A plaintiff presumably would not ordinarily complain if a defendant accepts an additur, but, in some cases, the plaintiff might believe he could do better with a new trial on the question of punitive damages. A plaintiff, therefore, might object to the additur provision and wish to challenge it as unconstitutional.

As for the defendant, we start from the premise that a judge may always order a new trial on the issue of punitive damages if he believes that the amount awarded was too low.[9] This being the case, then, even assuming, for the sake of argument, that the additur provision would violate the Seventh Amendment, of what can the defendant complain? He seemingly would be placed in a better position by being permitted to choose an additur over a new trial, given that a new trial could be imposed without his being permitted any choice. Perhaps the defendant could complain, however, that, because of the time and expense a new trial would entail, a judge would be more likely to impose an additur than to order a new trial if imposing an additur were not an option. Therefore, in a case where the judge believed that the amount of punitive damages was on the borderline of insufficiency, he might impose an additur whereas he might not order a new trial unless he could condition it on the defendant's rejection of an additur.

This might not only give the defendant a reason to challenge the constitutionality of the additur provision, it might given the plaintiff a reason to be wary of challenging it. For a plaintiff who challenged it in the hope of getting a new trial instead might succeed in his challenge yet not get a new trial. The bottom line, however, seems to be that either a plaintiff or a defendant might wish to challenge the constitutionality of the additur provision.

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[8] Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

[9] In Dimick v. Schiedt, *supra* note 8, at 487, the Supreme Court noted that "there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate." Punitive damages were not at issue in this case, but that seems immaterial with respect to this point.

SUPREME COURT CASES

The question is whether such a challenge could succeed. We start by mentioning three Supreme Court cases. In *Kennon v. Gilmer*, an 1889 case, the trial court had reduced the jury's award of compensatory damages, "without submitting the case to another jury, or putting the plaintiff to the election of [either a new trial or] remitting part of the verdict before rendering judgment for the rest . . . ."[10] The Supreme Court found this to violate the Seventh Amendment. Note that this case involved compensatory, not punitive damages, and involved a reduction, not an increase, in damages.

In *Dimick v. Schiedt*, a 1935 case, the jury awarded the plaintiff $500 damages for personal injuries resulting from the defendant's negligence.[11] The plaintiff moved for a new trial on the ground that the damages were inadequate, and the trial court gave the defendant a choice: consent to an increase of the damages to $1,500, or the court would grant the plaintiff's motion for a new trial. The defendant consented to the increase, but the plaintiff objected, claiming a Seventh Amendment right to a trial by jury. The Supreme Court ruled for the plaintiff, writing:

> Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.[12]

Note that this case, like *Kennon*, *supra*, involved compensatory, not punitive damages, but, unlike *Kennon*, did involve an increase in damages.

Finally, in *Tull v. United States*, a 1987 case, the Supreme Court held that the Seventh Amendment does not provide a right to a jury determination of the

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[10] 131 U.S. 22, 27-28 (1889).

[11] Dimick, *supra* note 8.

[12] *Id.* at 486.

amount of the civil penalty that may be imposed under the Clean Water Act.[13] The Court wrote:

> The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." . . . ("[T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements"). The assessment of a civil penalty is not one of the "most fundamental elements." Congress' authority to fix the penalty by statute has not been questioned . . . . Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.[14]

The Court added a footnote that may be read as sufficiently broad to encompass the assessment of all damages, not merely civil penalties:

> Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. Instead, the language "defines the kind of cases for which jury trial is preserved, namely 'suits at common law.'"[15]

Tull also raised the question of whether the Seventh Amendment provides a right to a jury determination of liability under the Clean Water Act, as well as of damages. The Court held that it does, and included the following footnote in its discussion of the issue:

> The Government distinguishes this suit from other actions to collect a statutory penalty on the basis that the statutory penalty here is not fixed or readily calculable from a fixed formula [and, the Government was apparently arguing, was therefore more an equitable remedy, for which there is no right to a jury trial, than a legal remedy]. We do not find this distinction significant. The more important characteristic of the remedy of civil penalties is that it exacts punishment -- a kind of remedy available only in courts of law. Thus, the remedy of civil penalties is similar to the remedy of punitive damages, another legal remedy that is not a fixed fine. See, *e.g.*, *Curtis* v. *Loether*, *supra* [415 U.S.], at 189-190 [1974] (defendant entitled to jury trial in an action

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[13] 481 U.S. 412 (1987).

[14] *Id.* at 425-427.

[15] *Id.* at 426 n.9.

> based on a statute authorizing actual and punitive damages of not more than $1,000).[16]

Of the Supreme Court mentioned above, *Dimick* is the only one that involved a court-ordered increase in damages. Therefore, it appears that, if a court is to uphold the additur provision of the Senate-passed H.R. 956, then, unless the Supreme Court overturns *Dimick*,[17] it will have to distinguish it, presumably on the ground that *Dimick* concerned compensatory damages, whereas the bill's additur provision would apply only to punitive damages. The opinion in *Tull* would provide support for a court in distinguishing *Dimick*, along lines such as this: Footnote 9 of *Tull* said that nothing in the Seventh Amendment suggests that the right to a jury trial extends to the remedy phase of a civil trial. Although the remedy phase in *Tull* concerned a civil penalty, not punitive damages, footnote 7 of *Tull* commented that civil penalties are similar to punitive damages. It compared them, however, in the context of the right to a jury trial on the liability issue, not on the damages issue. *Tull*, therefore, is not on point, but would provide support for an argument that *Dimick* would not apply to punitive damages.

FEDERAL COURTS OF APPEALS DECISIONS ON COURT-ORDERED ADDITURS

In 1994, in *Gibeau v. Nellis*, the Second Circuit held that, under 42 U.S.C. § 1983, "the district court had erred in failing to award the plaintiff nominal damages notwithstanding the jury verdict."[18] The court of appeals therefore remanded the case "to the district court for an award of nominal damages in the amount of one dollar . . . ."[19] The court of appeals added:

> In directing the district court to award nominal damages contrary to the jury verdict, we are mindful that a federal court's increase of a jury award would constitute impermis-

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[16] *Id.* at 422 n.7.

[17] *Dimick* was a 5-4 decision, with the dissent writing:

> [T]he Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedures by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the Amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.

293 U.S. at 491.

[18] 18 F.3d 107, 110 (2d Cir. 1994).

[19] *Id.* at 111.

> sible additur where it would violate the Seventh Amendment right to a jury trial. *Dimick v. Schiedt* . . . . However, a remand for an entry of judgment in the instant case would not violate the Seventh Amendment. . . . Because nominal damages are mandatory under these circumstances, our decision does not impermissibly invade the province of the jury.[20]

The Second Circuit cited, by contrast, *Gentile v. County of Suffolk*, in which the plaintiff sought an additur awarding nominal damages, and the Second Circuit held that, because 42 U.S.C. § 1983 did not compel an award of nominal damages in the case (because the plaintiff had recovered actual damages from another defendant), the "plaintiffs' argument 'neglect[ed] the constitutional prohibition of additur under the Seventh Amendment.'"[21]

In 1990, in *Hattaway v. McMillian*, a federal district court found that a jury's compensatory damage award was insufficient, and, pursuant to a Florida statute, offered the defendant the choice between an additur or a new trial on the issue of damages.[22] The plaintiff appealed, and the Eleventh Circuit held this unconstitutional, writing that "the order of an additur by a federal court violates the seventh amendment right to a jury trial in civil cases."[23] The court cited *Dimick v. Schiedt*, *supra*, and *Hawkes v. Ayers*, a court of appeals case that cited *Dimick* and three prior courts of appeals cases.[24]

As these cases all involved additurs to compensatory damages, they appear consistent with *Dimick*, and demonstrate that *Dimick* continues to be followed, but do not otherwise shed light on the constitutionality of an additur to punitive damages.

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[20] *Id.*

[21] *Id.*, *citing* Gentile v. County of Suffolk, 926 F.2d 142, 155 (2d Cir. 1991). In Earl v. Bouchard Transportation Co., Inc., 917 F.2d 1320, 1331 (2d Cir. 1990), the Second Circuit wrote: "It has been clear, at least since *Dimick v. Schiedt* [citation omitted], that while a remittitur is permissible, an additur is not. . . . To this day, the Court has not questioned the asymmetric treatment by federal courts of the doctrines of remittitur and additur, despite vigorous criticism of the rule." (citations omitted)

[22] 903 F.2d 1440, 1450 (11th Cir. 1990).

[23] *Id.* at 1451.

[24] 537 F.2d 836, 837 (5th Cir. 1976). Citing *Hattaway* and *Dimick*, the Eleventh Circuit subsequently wrote: "The federal court's long standing policy against additur, as an intrusion on the jury's domain and violation of the Seventh Amendment, also stands in the way of Walker's request for one dollar in nominal damages where the jury awarded none." Walker v. Anderson Electrical Connectors, 944 F.2d 841, 845 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 1043 (1993). The Eighth Circuit, citing *Dimick*, agreed "that additur is generally impermissible in federal actions because it violates the seventh amendment right to a jury trial." Hicks v. Brown Group, Inc., 902 F.2d 630, 652 (8th Cir. 1990), *cert. denied*, 114 S.Ct. 1642 (1994).

FEDERAL COURTS OF APPEALS DECISIONS ON COURT-ORDERED REDUCTIONS OF PUNITIVE DAMAGES AWARDS

In 1989, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, the Fourth Circuit, citing footnotes 7 and 9 of *Tull, supra*, wrote: "[w]e hold that the seventh amendment does not require that the amount of punitive damages be assessed by a jury."[25] Despite this statement, the issue before the court was only "whether the seventh amendment precludes a court from *reducing* [emphasis added] the amount of punitive damages awarded by a jury without remanding for a new trial."[26] Therefore, with respect to an additur provision, this holding apparently must be viewed only as dictum. In any event, the en banc Fourth Circuit, in *Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.*, in 1991, unanimously overruled *Shamblin's Ready Mix, Inc.* with respect to a court's power to *reduce* an award of punitive damages without offering the plaintiff the opportunity for a new trial ("a new trial *nisi* remittitur").[27]

In *Defender Industries, Inc.*, the en banc court wrote:

> The *Tull* decision cannot stand for the proposition that a plaintiff bringing a state common-law cause of action does not have a right to a jury determination of the amount of punitive damages. Rather, the *Tull* Court reasoned that the seventh amendment does not require that a jury determine the remedy in a civil trial unless such a determination is "necessary to preserve the 'substance of the common-law right of trial by jury.'"

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[25] 873 F.2d 736, 742 (4th Cir. 1989).

[26] *Id.* at 740. The Fourth Circuit in this case noted:

> Courts of appeals in the First, Sixth, Seventh, and Eighth Circuits have reduced the amount of punitive damages without remanding for a new trial. In three of these cases, juries had awarded excessive punitive damages. *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir.1987) . . . ; *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267, 1279 (7th Cir.1984) . . . ; *Guzman v. Western State Bank*, 540 F.2d 948, 954 (8th Cir.1976). . . . In the fourth case, the appellate court reduced a judgment for punitive damages entered by a district court after a bench trial. *See Shimman v. Frank*, 625 F.2d 80, 102, 104 (6th Cir.1980). . . . Although the appellate courts in three cases reduced awards made by a jury, none of the opinions discusses the seventh amendment.

The Fourth Circuit added:

> In a subsequent case the Seventh Circuit, without mentioning *Bell*, held that the seventh amendment did not permit a district court to reduce a jury verdict for punitive damages. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir.1984). We decline to follow *McKinnon*. It was decided before *Tull v. United States*, 481 U.S. 412 . . . , which we deem to be contrary to *McKinnon*.

873 F.2d at 740 n.2.

[27] 938 F.2d 502, 507 (4th Cir. 1991) (en banc), *cert. denied*, 113 S. Ct. 3038 (1993).

> Over one hundred years ago the Supreme Court held that the seventh amendment guarantees a jury determination of the amount of tort damages. *Kennon v. Gilmer*, 131 U.S. 22 (1889). Moreover, the Supreme Court decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989), and *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991), decided after *Shamblin's*, emphasize the fundamental character of a jury assessment of the amount of punitive damages. . . . In *Haslip*, the Court reiterated the fundamental and historical role of the jury in the assessment of punitive damages. . . . An assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury. Therefore, we hold that the seventh amendment guarantees the right to a jury determination of the amount of punitive damages, and overrule *Shamblin's Ready Mix, Inc. v. Eaton Corp.*[28]

The court in *Defender Industries* noted that the Seventh and Tenth Circuits had also "considered whether a district court may reduce the amount of punitive damages awarded by a jury and enter judgment in that amount without providing a plaintiff an opportunity to accept a remittitur or receive a new trial [and] have concluded that the right to a jury determination of the amount of punitive damages is guaranteed by the seventh amendment."[29] These cases were *McKinnon v. City of Berwyn*,[30] and *O'Gilvie v. International Playtex, Inc.*,[31] neither of which discusses the Seventh Amendment issue in depth.

In 1993, in *Morgan v. Woessner*,[32] the Ninth Circuit wrote:

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[28] *Id.* at 506-507 (citations omitted or edited). In neither *Browning-Ferris* nor *Haslip* did the Supreme Court address the Seventh Amendment issue. In *Browning-Ferris*, the Court held that punitive damages, no matter how high, do not violate the clause of the Eighth Amendment that prohibits "excessive fines," as this clause does not apply in suits between private parties. In *Haslip*, the Court found that application of Alabama's criteria for judicial review of punitive damages awards does not violate due process because it "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." 499 U.S. at 22.

[29] *Id.* at 507.

[30] McKinnon, *supra* note 26, 750 F.2d at 1392 ("A federal judge can set aside a jury verdict as excessive, but he can fix the proper level of damages only if the plaintiff is entitled to a particular amount of damages as a matter of law . . . .")

[31] 821 F.2d 1438, 1447 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) ("Playtex is correct that in an ordinary remittitur case, the plaintiff must be offered a choice between a new trial and accepting a remittitur to avoid a serious problem under the Seventh Amendment, which reserves to the jury the determination of damages.")

[32] 997 F.2d 1244, 1258 (9th Cir. 1993), *cert. dismissed*, Searle v. Morgan, 114 S. Ct. 671 (1994).

> The Seventh Amendment's guarantee to a trial may jury may require a court reviewing an award of punitive damages to give a plaintiff the option of a new trial on punitive damages if it finds an award grossly excessive and otherwise would order a remittitur. The Supreme Court, it appears, has never given its blessing to an appellate court reducing an award without affording the plaintiff an opportunity to retry that issue. *See Browning-Ferris Industries*, 492 U.S. at 279 n. 25, 109 S.Ct. at 2922 n.25.
>
> Several circuits, however, have reduced the amount of punitive damages awarded without giving the plaintiff a choice of a new trial on that issue.[33] However, none of these cases considered the Seventh Amendment, and we do not think it wise to follow this course of action.
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> Two cases already have held that a remittitur without the option of a new trial is a violation of the Seventh Amendment.[34]

The cases discussed in this section disagree as to whether a court may, without offering the plaintiff a new trial, *reduce* the amount of punitive damages a jury awards, although the two that considered the question at the greatest length -- *Defender Industries* and *Morgan v. Woessner* -- concluded that a court may *not* do so. We have found no case that has ruled on the question of whether a court may *increase* the amount of punitive damages a jury awards; the latter, of course, is the question raised by the additur provision of the Senate-passed H.R. 956. But even cases that uphold the power of a court to *reduce* punitive damages without offering the plaintiff a new trial appear to provide only limited support for the proposition that a court may increase punitive damages. This is for the reason suggested above by the Supreme Court in *Dimick*: the amount that remains after a court reduces a jury award was assessed by a jury, whereas an amount added by a court was not.[35]

FEDERAL STATUTES AUTHORIZING COURTS TO ASSESS PUNITIVE DAMAGES

In *Swofford v. B & W., Inc.*, the Fifth Circuit held that the Patent Act, 35 U.S.C. § 284, "which gives the trial judge discretion to increase the damages up to three times the amount found by the jury or assessed by the trial judge, does

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[33] Citing Douglas v. Metro Rental Services, Inc., 827 F.2d 252, 257 (7th Cir. 1987), as well as all the cases cited in the first quotation in note 26, *supra*.

[34] Citing *McKinnon*, *supra* note 30, and *Defender Industries*, *supra* note 27.

[35] *See* text accompanying note 12, *supra*.

not deny the plaintiffs any constitutional right to a jury trial."[36] This case is probably the most on point, with respect to the bill's additur provision, of any discussed in this memorandum. However, its precedential value should not be overrated, as it is more than 30 years old and preceded several relevant Supreme Court cases.

There are also federal statutes that require a court to assess in the first instance the amount of punitive damages, and this seems no different in principle from an additur, as, with respect to both an original assessment and an additur, a jury plays no part. These statutes include the Petroleum Marketing Practices Act,[37] the Fair Credit Reporting Act,[38] and the Equal Credit Opportunity Act.[39] In *Thompson v. Kerr-McGee Refining Corp.*, the Tenth Circuit addressed the question of the right to a jury trial for *actual* damages under the Petroleum Marketing Practices Act.[40] No court decision has been found

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[36] 336 F.2d 406, 413 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). In Curtis v. Loether, *supra* note 7, 415 U.S. 189, 196 n.12 (1974), the Supreme Court cited this case, but for a different proposition.

[37] 16 U.S.C. § 2805(d)(2) ("The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by the jury.") Note that this provision makes the question of *whether* to award punitive damages, not merely the amount of any such award, a matter for the court; this appears to be unconstitutional, in light of the Supreme Court's decisions in *Tull* and in *Curtis v. Loether*, which were handed down after enactment of the statute. *See* text accompanying note 16, *supra*. In *Shamblin's Ready Mix, Inc.*, *supra* note 25, 873 F.2d at 740, the Fourth Circuit, citing *Tull*, wrote: "[T]here can be no doubt that the seventh amendment guarantees a jury trial on the issue of the defendant's *liability* [emphasis added] for punitive damages."

[38] 15 U.S.C. § 1681n(2) ("Any consumer reporting agency or use of information which willfully fails to comply . . . is liable . . . in an amount equal to the sum of -- (2) such amount of punitive damages as the court may allow . . . .")

[39] 15 U.S.C. § 1691e(b) ("Any creditor . . . who fails to comply . . . shall be liable . . . for punitive damages . . . . In determining the amount of such damages in any action, the court shall consider . . . .")

[40] 660 F.2d 1380, 1386 (10th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982). The court quoted the following from the Supreme Court's decision in *Curtis v. Loether*, *supra* note 7:

> The Seventh Amendment [right to jury trial] does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. . . .

415 U.S. at 194. (It will be recalled that the statute at issue in *Curtis v. Loether* provided for actual *and* punitive damages.) The court in *Thompson* continued:

> A suit for money damages is unmistakably an action at law triable to a jury. Congress did not limit the right to trial by jury if the claimant sought actual damages. If Congress had intended to limit the right, it could have drafted a section similar to 15 U.S.C. § 2805(d)(2). . . .

This is the provision, quoted in footnote 37, *supra*, that gives to the court the question of whether to award punitive damages and the amount of any such award. The court in *Thompson* seems to overlook that, if Congress had drafted a section similar to 15 U.S.C. § 2805(d)(2), it would have been unconstitutional, according to the holding of *Curtis v. Loether* that it had just quoted.

addressing the constitutionality of the punitive damages provisions of the Fair Credit Reporting Act or the Equal Credit Opportunity Act.

CONCLUSION

The question whether the Seventh Amendment permits a judge to increase a punitive damages award made by a jury is unsettled, with apparently no cases precisely on point. There are cases on the question of whether the Seventh Amendment permits a judge to reduce a punitive damages award made by a jury, but these cases reach opposing conclusions. In any case, even those that uphold the power of a court to reduce punitive damages without offering the plaintiff an opportunity for a new trial provide only limited support for the proposition that a court may increase punitive damages. This is for the reason suggested by the Supreme Court in *Dimick v. Schiedt*: the amount that remains after a court reduces a jury award was assessed by a jury, whereas an amount added by a court was not.

To argue that the Seventh Amendment *does* provide the right to a jury determination of the amount of punitive damages (and that the additur provision of the Senate-passed H.R. 956 therefore is *un*constitutional), one might cite the following:

- In 1936, in *Dimick v. Schiedt*, the Supreme Court held that a court violated a plaintiff's Seventh Amendment right to a jury trial by giving the defendant a choice whether to accept an increase of an award of *compensatory* damages or face a new trial. This holding continues to be followed.

- A unanimous en banc Fourth Circuit decision in 1991 (*Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.*) and other federal courts of appeals cases, held that a court lacks the power to reduce an award of punitive damages without offering the plaintiff the opportunity for a new trial.

- The Supreme Court, in *Browning-Ferris* (1989) and in *Haslip* (1991), which concerned, respectively, Eighth Amendment and Fourteenth Amendment issues raised by punitive damages awards, emphasized, in the words of the Fourth Circuit in *Defender Industries*, "the fundamental character of a jury assessment of the amount of punitive damages."

Furthermore, as discussed in note 37, *supra*, 15 U.S.C. § 2805(d)(2) itself is apparently unconstitutional, to the extent it denies the right to a jury trial on the question of *whether* to award punitive damages. Nevertheless, the court in *Thompson* then added:

> Absent the limitation of the above section, which is in derogation of the common law, the issue of exemplary damages also would be triable to a jury.

This statement could be quoted in support of the proposition that there is no right to a jury trial on the issue of the *amount* of punitive damages. However, it could also be quoted in support of the apparently incorrect proposition that there is no right to a jury trial on the issue of *whether* to award punitive damages. This arguably reduces the authority of this case to support the former proposition.

To argue that the Seventh Amendment does *not* provide a right to a jury determination of the amount of punitive damages (and that the additur provision of the Senate-passed H.R. 956 therefore is *constitutional*), one might cite the following:

- In 1987, in *Tull v. United States*, the Supreme Court held that the Seventh Amendment does not provide a right to a jury determination of the amount of the civil penalty that may be imposed under the Clean Water Act. It added: "Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial," and "the remedy of civil penalties is similar to the remedy of punitive damages."

- Some federal courts of appeals cases have held that a court may reduce the amount of punitive damages without offering the plaintiff an opportunity for a new trial.

- A provision of the Patent Act, upheld in 1964 by a federal court of appeals, gives the trial judge the discretion to increase the amount of damages found by the jury. At least three federal statutes provide for judicial assessment of the amount of punitive damages in the first instance, and this seems no different in principle from an additur, as, with respect to both, a jury plays no role.

In conclusion, because there are arguments of apparently comparable weight on both sides of the question, it seems impossible to predict whether the additur provision of the Senate-passed H.R. 956 will be found constitutional.

Henry Cohen
Legislative Attorney

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1983

SOUTHLAND CORP. ET AL. *v.* KEATING ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 82–500. Argued October 4, 1983—Decided January 23, 1984

Appellant Southland Corp. (hereafter appellant) is the owner and franchisor of 7–Eleven convenience stores. Appellees are 7–Eleven franchisees. Each franchise agreement between appellant and appellees contains a clause requiring arbitration of any controversy or claim arising out of or relating to the agreement or breach thereof. Several of the appellees filed individual actions against appellant in California Superior Court, alleging fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law. These actions were consolidated with a subsequent class action filed by another appellee making substantially the same claims. Appellant moved to compel arbitration of the claims pursuant to the contract. The Superior Court granted the motion as to all claims except those based on the Franchise Investment Law, and did not pass on appellees' request for class certification. The California Court of Appeal reversed the trial court's refusal to compel arbitration of the claims under the Franchise Investment Law, construing the arbitration clause to require arbitration of such claims and holding that the Franchise Investment Law did not invalidate arbitration agreements and that if it rendered such agreements involving commerce unenforceable, it would conflict with § 2 of the United States Arbitration Act, which provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contract." The court also directed the trial court to conduct class-certification proceedings. The California Supreme Court reversed the ruling that claims asserted under the Franchise Investment Law are arbitrable, interpreting § 31512 of that Law—which renders void any provision purporting to bind a franchisee to waive compliance with any provision of that Law—to require judicial consideration of claims brought under that statute and holding that the statute did not contravene the federal Act. The court remanded the case to the trial court for consideration of appellees' request for class certification.

Held:

1. This Court has jurisdiction under 28 U. S. C. § 1257(2) to decide whether the United States Arbitration Act pre-empts § 31512 of the California statute. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469. To delay review of a state judicial decision denying enforcement of an arbitration contract until the state litigation has run its course would defeat the core purpose of the contract. On the other hand, since it does not affirmatively appear that the request for class certification was "drawn in question" *on federal grounds*, this Court is without jurisdiction to resolve this question as a matter of federal law under § 1257(2). Pp. 6–9.

2. Section 31512 of the California statute directly conflicts with § 2 of the United States Arbitration Act and hence violates the Supremacy Clause. Pp. 10–16.

(a) In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. That Act, resting on Congress' authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1. To confine the Act's scope to arbitrations sought to be enforced in federal courts would frustrate what Congress intended to be a broad enactment. Pp. 10–14.

(b) If Congress, in enacting the Arbitration Act, had intended to create a procedural rule applicable only in federal courts it would not have limited the Act to contracts "involving commerce." Section 2's "involving commerce" requirement is not to be viewed as an inexplicable limitation on the power of the federal courts but as a necessary qualification on a statute intended to apply in state as well as federal courts. Pp. 14–15.

(c) The California Supreme Court's interpretation of § 31512 would encourage and reward forum shopping. This Court will not attribute to Congress the intent to create a right to enforce an arbitration contract and yet make that right dependent on the particular forum in which it is asserted. Since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. Pp. 15–16.

Appeal dismissed in part; 31 Cal. 3d 584, 645 P. 2d 1192, reversed in part and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 17. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 21.

Mark J. Spooner argued the case for appellants. With him on the briefs were *Peter K. Bleakley* and *Martin H. Kresse*.

John F. Wells argued the cause for appellees. With him on the brief were *Lise A. Pearlman* and *Fonda Karelitz*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the questions (a) whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause and (b) whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts.

I

Appellant Southland Corp. is the owner and franchisor of 7-Eleven convenience stores. Southland's standard franchise agreement provides each franchisee with a license to use certain registered trademarks, a lease or sublease of a convenience store owned or leased by Southland, inventory

*A brief of *amici curiae* was filed by *Simon H. Trevas* for the Securities Division of the State of Washington et al.

financing, and assistance in advertising and merchandising. The franchisees operate the stores, supply bookkeeping data, and pay Southland a fixed percentage of gross profits. The franchise agreement also contains the following provision requiring arbitration:

> "Any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

Appellees are 7–Eleven franchisees. Between September 1975 and January 1977, several appellees filed individual actions against Southland in California Superior Court alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law, Cal. Corp. Code Ann. § 31000 *et seq.* (West 1977). Southland's answer, in all but one of the individual actions, included the affirmative defense of failure to arbitrate.

In May 1977, appellee Keating filed a class action against Southland on behalf of a class that assertedly includes approximately 800 California franchisees. Keating's principal claims were substantially the same as those asserted by the other franchisees. After the various actions were consolidated, Southland petitioned to compel arbitration of the claims in all cases, and appellees moved for class certification.

The Superior Court granted Southland's motion to compel arbitration of all claims except those claims based on the Franchise Investment Law. The court did not pass on appellees' request for class certification. Southland appealed from the order insofar as it excluded from arbitration the claims based on the California statute. Appellees filed a petition for a writ of mandamus or prohibition in the California Court of Appeal arguing that the arbitration should proceed as a class action.

The California Court of Appeal reversed the trial court's refusal to compel arbitration of appellees' claims under the Franchise Investment Law. *Keating* v. *Superior Court, Alameda County*, 167 Cal. Rptr. 481 (1980). That court interpreted the arbitration clause to require arbitration of all claims asserted under the Franchise Investment Law, and construed the Franchise Investment Law not to invalidate such agreements to arbitrate.[1] Alternatively, the court concluded that if the Franchise Investment Law rendered arbitration agreements involving commerce unenforceable, it would conflict with § 2 of the Federal Arbitration Act, 9 U. S. C. § 2, and therefore be invalid under the Supremacy Clause. 167 Cal. Rptr., at 493–494. The Court of Appeal also determined that there was no "insurmountable obstacle" to conducting an arbitration on a classwide basis, and issued a writ of mandate directing the trial court to conduct class-certification proceedings. *Id.*, at 492.

The California Supreme Court, by a vote of 4–2, reversed the ruling that claims asserted under the Franchise Investment Law are arbitrable. *Keating* v. *Superior Court of Alameda County*, 31 Cal. 3d 584, 645 P. 2d 1192 (1982). The California Supreme Court interpreted the Franchise Investment Law to require judicial consideration of claims brought under that statute and concluded that the California statute did not contravene the federal Act. *Id.*, at 604, 645 P. 2d, 1203–1204. The court also remanded the case to the trial court for consideration of appellees' request for classwide arbitration.

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[1] California Corp. Code Ann. § 31512 (West 1977) provides: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."

We postponed consideration of the question of jurisdiction pending argument on the merits. 459 U. S. 1101 (1983). We reverse in part and dismiss in part.

II

A

Jurisdiction of this Court is asserted under 28 U. S. C. § 1257(2), which provides for an appeal from a final judgment of the highest court of a state when the validity of a challenged state statute is sustained as not in conflict with federal law. Here Southland challenged the California Franchise Investment Law as it was applied to invalidate a contract for arbitration made pursuant to the Federal Arbitration Act. Appellees argue that the action of the California Supreme Court with respect to this claim is not a "final judgment or decree" within the meaning of § 1257(2).

Under *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482–483 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when "the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . ." In these circumstances, we have resolved the federal issue "if a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 483.

The judgment of the California Supreme Court with respect to this claim is reviewable under *Cox Broadcasting*, *supra*. Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result "there would remain in effect the unreviewed decision of the State Supreme Court" holding that the California statute does not conflict with the Federal Arbitration Act. *Id.*, at 485. On the other hand, reversal

of a state-court judgment in this setting will terminate litigation of the merits of this dispute.

Finally, the failure to accord immediate review of the decision of the California Supreme Court might "seriously erode federal policy." Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration. The federal Act permits "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 22 (1983).

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 12 (1972), we noted that the contract fixing a particular forum for resolution of all disputes

> "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."

The *Zapata* Court also noted that

> "the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.*, at 14 (footnote omitted).

For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of

a contract to arbitrate. We hold that the Court has jurisdiction to decide whether the Federal Arbitration Act pre-empts § 31512 of the California Franchise Investment Law.

B

That part of the appeal relating to the propriety of superimposing class-action procedures on a contract arbitration raises other questions. Southland did not contend in the California courts that, and the state courts did not decide whether, state law imposing class-action procedures was pre-empted by federal law. When the California Court of Appeal directed Southland to address the question whether state or federal law controlled the class-action issue, Southland responded that *state law* did not permit arbitrations to proceed as class actions, that the Federal Rules of Civil Procedure were inapplicable, and that requiring arbitrations to proceed as class actions "could well violate the [federal] constitutional guaranty of procedural due process."[2] Southland did not claim in the Court of Appeal that if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause.

In the California Supreme Court, Southland argued that California law applied but that neither the contract to arbitrate nor state law authorized class-action procedures to govern arbitrations. Southland also contended that the Federal Rules were inapplicable in state proceedings. Southland pointed out that although California law provided a basis for class-action procedures, the Judicial Council of California acknowledged "the incompatibility of class actions and arbitration." Petition for Hearing 23. It does not appear that Southland opposed class procedures on *federal* grounds in the

[2] Supplemental Memorandum of Points and Authorities in Opposition to Petition for Writs of Mandate or Prohibition in Civ. No. 45162 (Ct. App. Cal., 1st App. Dist.), pp. 19–25.

California Supreme Court.[3] Nor does the record show that the California Supreme Court passed upon the question whether superimposing class-action procedures on a contract arbitration was contrary to the federal Act.[4]

Since it does not affirmatively appear that the validity of the state statute was "drawn in question" *on federal grounds* by Southland, this Court is without jurisdiction to resolve this question as a matter of federal law under 28 U. S. C. § 1257(2). See *Bailey* v. *Anderson*, 326 U. S. 203, 207 (1945).

[3] The question Southland presented to the State Supreme Court was "[w]hether a court may enter an order compelling a private commercial arbitration governed by the Federal Arbitration Act . . . to proceed as a class action even though the terms of the parties' arbitration agreement do not provide for such a procedure." Petition for Hearing in Civ. No. 45162 (Cal. 1980). Southland argued that (1) the decision of the Court of Appeal "is in conflict with the decisions of other Courts of Appeal in this State," *id.*, at 3; (2) class actions would delay and complicate arbitration, increase its cost, and require judicial supervision, "considerations [which] strongly militate against the creation of class action arbitration procedures," *id.*, at 22; and (3) there was no basis in law for class actions. According to appellants, the Federal Rules of Civil Procedure did not apply in California courts. *Id.*, at 23. Southland thus relied, not on federal law, but on California law in opposing class-action procedures.

[4] The California Supreme Court cited "[a]nalogous authority" supporting consolidation of arbitration proceedings by federal courts. 31 Cal. 3d, at 611–612, 645 P. 2d, at 1208. *E. g.*, *Compania Espanola de Petroleos, S. A.* v. *Nereus Shipping, S. A.*, 527 F. 2d 966, 975 (CA2 1975), cert. denied, 426 U. S. 936 (1976); *In re Czarnikow-Rionda Co.*, 512 F. Supp. 1308, 1309 (SDNY 1981). This, along with support by other state courts and the California Legislature for consolidation of arbitration proceedings, permitted the court to conclude that class-action proceedings were authorized: "It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case. We conclude that a court is not without authority to do so." 31 Cal. 3d, at 613, 645 P. 2d, at 1209. The California Supreme Court thus ruled that imposing a class-action structure on the arbitration process was permissible as a matter of state law.

III

As previously noted, the California Franchise Investment Law provides:

> "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." Cal. Corp. Code Ann. §31512 (West 1977).

The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment Law directly conflicts with §2 of the Federal Arbitration Act and violates the Supremacy Clause.

In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. The Federal Arbitration Act provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

Congress has thus mandated the enforcement of arbitration agreements.

We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration

Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce"[5] and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause. In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), the Court examined the legislative history of the Act and concluded that the statute "is based upon . . . the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Id.*, at 405 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The contract in *Prima Paint*, as here, contained an arbitration clause. One party in that case alleged that the other had committed fraud in the inducement of the contract, although not of the arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts," 388 U. S., at 400. The Court relied for this holding on Congress' broad power to fashion substantive rules under the Commerce Clause.[6]

At least since 1824 Congress' authority under the Commerce Clause has been held plenary. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). In the words of Chief Justice Mar-

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[5] We note that in defining "commerce" Congress declared that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. §1.

[6] The procedures to be used in an arbitration are not prescribed by the federal Act. We note, however, that *Prima Paint* considered the question of what issues are for the courts and what issues are for the arbitrator.

shall, the authority of Congress is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Ibid.* The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts. *Prima Paint, supra,* at 420.

In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S., at 1, 25, and n. 32, we reaffirmed our view that the Arbitration Act "creates a body of federal substantive law" and expressly stated what was implicit in *Prima Paint, i. e.*, the substantive law the Act created was applicable in state and federal courts. *Moses H. Cone* began with a petition for an order to compel arbitration. The District Court stayed the action pending resolution of a concurrent state-court suit. In holding that the District Court had abused its discretion, we found no showing of exceptional circumstances justifying the stay and recognized "the presence of federal-law issues" under the federal Act as "a major consideration weighing against surrender [of federal jurisdiction]." 460 U. S., at 26. We thus read the underlying issue of arbitrability to be a question of substantive federal law: "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Id.*, at 24.

Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts. The House Report plainly suggests the more comprehensive objectives:

> "The purpose of this bill is to make valid and enforcible *[sic]* agreements for arbitration contained *in contracts involving interstate commerce* or within the jurisdiction or *[sic]* admiralty, *or* which may be the subject of litigation in the Federal courts." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added).

This broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. The Arbitration Act sought to "overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 6 (1923) (Senate Hearing) (remarks of Sen. Walsh). The House Report accompanying the bill stated:

> "The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . ." H. R. Rep. No. 96, *supra,* at 1–2.

Surely this makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints. As was stated in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F. 2d 382, 387 (CA2 1961) (Lumbard, C. J., concurring), "the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." Congress also showed its awareness of the widespread unwillingness of state courts to enforce arbitration agreements, *e. g.*, Senate Hearing, at 8, and that

such courts were bound by state laws inadequately providing for

> "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute[;] but [the statutes] ha[d] nothing to do with validating the contract to arbitrate." *Ibid.*

The problems Congress faced were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.

JUSTICE O'CONNOR argues that Congress viewed the Arbitration Act "as a procedural statute, applicable only in federal courts." *Post*, at 25. If it is correct that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the Arbitration Act to contracts "involving commerce." 9 U. S. C. § 2. For example, when Congress has authorized this Court to prescribe the rules of procedure in the federal courts of appeals, district courts, and bankruptcy courts, it has not limited the power of the Court to prescribe rules applicable only to causes of action involving commerce. See, *e. g.*, 28 U. S. C. §§ 2072, 2075, 2076 (1976 ed. and Supp. V). We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce. We therefore view the "involving commerce" requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary

qualification on a statute intended to apply in state and federal courts.

Under the interpretation of the Arbitration Act urged by JUSTICE O'CONNOR, claims brought under the California Franchise Investment Law are not arbitrable when they are raised in state court. Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable.[7] *Prima Paint, supra.* The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts,[8] we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction.[9] Such an interpretation would frustrate con-

[7] Appellees contend that the arbitration clause, which provides for the arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach hereof," does not cover their claims under the California Franchise Investment Law. We find the language quoted above broad enough to cover such claims. Cf. *Prima Paint*, 388 U. S., at 403–404, 406 (finding nearly identical language to cover a claim that a contract was induced by fraud).

[8] It is estimated that 2% of all civil litigation in this country is in the federal courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 3 (1982) (206,000 filings in federal district courts in 12 months ending June 30, 1982, excluding bankruptcy filings); Flango & Elsner, Advance Report, The Latest State Court Caseload Data, 7 State Court J., 18 (Winter 1983) (approximately 13,600,000 civil filings during comparable period, excluding traffic filings).

[9] While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U. S. C. § 1331 or otherwise. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 25, n. 32 (1983). This seems implicit in the provisions in

gressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

In creating a substantive rule applicable in state as well as federal courts,[10] Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.[11] We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.

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§ 3 for a stay by a "court in which such suit is pending" and in § 4 that enforcement may be ordered by "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." *Ibid.*; *Prima Paint*, *supra*, at 420, and n. 24 (Black, J., dissenting); *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F. 2d 1004, 1006 (CA2 1933) (L. Hand, J.).

[10] The contention is made that the Court's interpretation of § 2 of the Act renders §§ 3 and 4 "largely superfluous." *Post*, at 31, n. 20. This misreads our holding and the Act. In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.

[11] The California Supreme Court justified its holding by reference to our conclusion in *Wilko* v. *Swan*, 346 U. S. 427 (1953), that arbitration agreements are nonbinding as to claims arising under the federal Securities Act of 1933. 31 Cal. 3d, at 602, 645 P. 2d, at 1202–1203. The analogy is unpersuasive. The question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

JUSTICE STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." *Post*, at 19. We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view,

IV

The judgment of the California Supreme Court denying enforcement of the arbitration agreement is reversed; as to the question whether the Federal Arbitration Act precludes a class-action arbitration and any other issues not raised in the California courts, no decision by this Court would be appropriate at this time. As to the latter issues, the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

The Court holds that an arbitration clause that is enforceable in an action in a federal court is equally enforceable if the action is brought in a state court. I agree with that conclusion. Although JUSTICE O'CONNOR's review of the legislative history of the Federal Arbitration Act demonstrates that the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature, I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached. I am nevertheless troubled by one aspect of the case that seems to trouble none of my colleagues.

For me it is not "clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable." *Ante*, at 15. The general rule prescribed by § 2 of the Federal

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"a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." *Post*, at 21. If we accepted this analysis, states could wholly eviscerate congressional intent to place arbitration agreements "upon the same footing as other contracts," H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

Arbitration Act is that arbitration clauses in contracts involving interstate transactions are enforceable as a matter of federal law. That general rule, however, is subject to an exception based on "such grounds as exist at law or in equity for the revocation of any contract." I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses.

The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978); see generally The Federalist No. 32, p. 200 (Van Doren ed. 1945) (A. Hamilton). Moreover, even where a federal statute does displace state authority, it "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470–471 (2d ed. 1973).

The limited objective of the Federal Arbitration Act was to abrogate the general common-law rule against specific enforcement of arbitration agreements, S. Rep. No. 536, 68th Cong., 1st Sess., 2–3 (1924), and a state statute which merely codified the general common-law rule—either directly by employing the prior doctrine of revocability or indirectly by declaring all such agreements void—would be pre-empted by the Act. However, beyond this conclusion, which seems compelled by the language of § 2 and case law concerning the Act, it is by no means clear that Congress intended entirely to displace state authority in this field. Indeed, while it is an understatement to say that "the legislative history of the . . . Act . . . reveals little awareness on the part of Congress that

state law might be affected," it must surely be true that given the lack of a "clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F. 2d 382, 386 (CA2 1961) (Lumbard, C. J., concurring).

The textual basis in the Act for avoiding such encroachment is the clause of § 2 which provides that arbitration agreements are subject to revocation on such grounds as exist at law or in equity for the revocation of any contract. The Act, however, does not define what grounds for revocation may be permissible, and hence it would appear that the judiciary must fashion the limitations as a matter of federal common law. Cf. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). In doing so, we must first recognize that as the "'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404, n. 12 (1967); see also, H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens. Cf. *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 69 (1966); see generally *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 671–672 (1979); *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Indeed, the lower courts generally look to state law regarding questions of formation of the arbitration agreement under § 2, see, *e. g.*, *Comprehensive Merchandising Catalogs*,

Inc. v. *Madison Sales Corp.*, 521 F. 2d 1210 (CA7 1975), which is entirely appropriate so long as the state rule does not conflict with the policy of § 2.

A contract which is deemed void is surely revocable at law or in equity, and the California Legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Investment Law, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I believe this declaration of state policy is entitled to respect.

Congress itself struck a similar balance in § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, and did not find it necessary to amend the Federal Arbitration Act. Rather, this Court held that the Securities Act provision invalidating arbitration agreements in certain contexts could be reconciled with the general policy favoring enforcement of arbitration agreements. *Wilko* v. *Swan*, 346 U. S. 427 (1953). Repeals by implication are of course not favored, and we did not suggest that Congress had intended to repeal or modify the substantive scope of the Arbitration Act in passing the Securities Act. Instead, we exercised judgment, scrutinizing the policies of the Arbitration Act and their applicability in the special context of the remedial legislation at issue, and found the Arbitration Act inapplicable. We have exercised such judgment in other cases concerning the scope of the Arbitration Act, and have focused not on sterile generalization, but rather on the substance of the transaction at issue, the nature of the relationship between the parties to the agreement, and the purpose of the regulatory scheme. See, *e. g.*, *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974), rev'g 484 F. 2d 611 (CA7 1973); see also, *id.*, at 615–620 (Stevens, Circuit Judge, dissenting). Surely the general language of the Arbitration Act that arbitration agreements are valid does not mean that all such agreements are valid

irrespective of their purpose or effect. See generally *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930) (holding arbitration agreement void as a restraint of trade).

We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government. I find no evidence that Congress intended such a double standard to apply, and I would not lightly impute such an intent to the 1925 Congress which enacted the Arbitration Act.

A state policy excluding wage claims from arbitration, cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117 (1973), or a state policy of providing special protection for franchisees, such as that expressed in California's Franchise Investment Law, can be recognized without impairing the basic purposes of the federal statute. Like the majority of the California Supreme Court, I am not persuaded that Congress intended the pre-emptive effect of this statute to be "so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement." App. to Juris. Statement 18a.

Thus, although I agree with most of the Court's reasoning and specifically with its jurisdictional holdings, I respectfully dissent from its conclusion concerning the enforceability of the arbitration agreement. On that issue, I would affirm the judgment of the California Supreme Court.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

Section 2 of the Federal Arbitration Act (FAA) (also known as the United States Arbitration Act) provides that a written arbitration agreement "shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1] Section 2 does not, on its face, identify which judicial forums are bound by its requirements or what procedures govern its enforcement. The FAA deals with these matters in §§ 3 and 4. Section 3 provides:

> "If any suit or proceeding be brought *in any of the courts of the United States* upon any issue referable to arbitration . . . the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."[2]

Section 4 specifies that a party aggrieved by another's refusal to arbitrate

> "may petition *any United States district court* which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . ."[3]

Today, the Court takes the facial silence of §2 as a license to declare that state as well as federal courts must apply §2. In addition, though this is not spelled out in the opinion, the Court holds that in enforcing this newly discovered federal right state courts must follow procedures specified in §3. The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to rec-

[1] 9 U. S. C. §2.

[2] 9 U. S. C. §3 (emphasis added).

[3] 9 U. S. C. §4 (emphasis added). Section 9, which addresses the enforcement of arbitration awards, is also relevant. "If no court is specified in the agreement of the parties, then such application may be made to the *United States court in and for the district within which such award was made. . . .*" 9 U. S. C. §9 (emphasis added).

ognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.

I

The FAA was enacted in 1925. As demonstrated *infra*, at 24–29, Congress thought it was exercising its power to dictate either procedure or "general federal law" in federal courts. The issue presented here is the result of three subsequent decisions of this Court.

In 1938 this Court decided *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. *Erie* denied the Federal Government the power to create substantive law solely by virtue of the Art. III power to control federal-court jurisdiction. Eighteen years later the Court decided *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956). *Bernhardt* held that the duty to arbitrate a contract dispute is outcome-determinative—*i. e.* "substantive"—and therefore a matter normally governed by state law in federal diversity cases.

Bernhardt gave rise to concern that the FAA could thereafter constitutionally be applied only in federal-court cases arising under federal law, not in diversity cases.[4] In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404–405 (1967), we addressed that concern, and held that the FAA may constitutionally be applied to proceedings in a federal diversity court.[5] The FAA covers only contracts involving interstate commerce or maritime affairs, and Congress "plainly has power to legislate" in that area. *Id.*, at 405.

[4] Justice Frankfurter made precisely this suggestion in *Bernhardt*. 350 U. S., at 208 (concurring opinion).

[5] Two Circuits had previously addressed the problem. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (CA2 1959), cert. dism'd pursuant to stipulation of counsel, 364 U. S. 801 (1960); *American Airlines, Inc.* v. *Louisville & Jefferson County Air Bd.*, 269 F. 2d 811 (CA6 1959).

Nevertheless, the *Prima Paint* decision "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued on in state or federal courts." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 731–732 (2d ed. 1973).[6] Today's case is the first in which this Court has had occasion to determine whether the FAA applies to state-court proceedings. One statement on the subject did appear in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983), but that case involved a federal, not a state, court proceeding; its dictum concerning the law applicable in state courts was wholly unnecessary to its holding.

II

The majority opinion decides three issues. First, it holds that §2 creates federal substantive rights that must be enforced by the state courts. Second, though the issue is not raised in this case, the Court states, *ante*, at 15–16, n. 9, that §2 substantive rights may not be the basis for invoking federal-court jurisdiction under 28 U. S. C. §1331. Third, the Court reads §2 to require state courts to enforce §2 rights using procedures that mimic those specified for federal courts by FAA §§3 and 4. The first of these conclusions is unquestionably wrong as a matter of statutory construction; the second appears to be an attempt to limit the damage done by the first; the third is unnecessary and unwise.

[6] In *Robert Lawrence*, *supra*, the Second Circuit had flatly announced—in dictum, of course—that the FAA was "a declaration of national law equally applicable in state or federal courts." 271 F. 2d, at 407. One Justice in *Prima Paint* was prepared to adopt wholesale the Second Circuit's more broadly written opinion. 388 U. S., at 407 (Harlan, J., concurring). But the *Prima Paint* majority opinion did not do so. In these circumstances, the majority opinion speaks loudly by its complete silence regarding the Act's applicability to state courts.

A

One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.

In 1925 Congress emphatically believed arbitration to be a matter of "procedure." At hearings on the Act congressional Subcommittees were told: "The theory on which you do this is that you have the right to tell the Federal courts how to proceed."[7] The House Report on the FAA stated: "Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . ."[8] On the floor of the House Congressman Graham assured his fellow Members that the FAA

> "does not involve any new principle of law except to provide a simple method . . . in order to give enforcement. . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts."[9]

[7] Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 17 (1924) (hereinafter Joint Hearings) (statement of Mr. Cohen, American Bar Association). See also Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (hereinafter Senate Hearing).

[8] H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). To similar effect, the Senate Report noted that the New York statute, after which the FAA was patterned, had been upheld against constitutional attack the previous year in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924). S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). In *Red Cross* Justice Brandeis based the Court's approval of the New York statute on the fact that the statute effected no change in the substantive law.

[9] 65 Cong. Rec. 1931 (1924).

A month after the Act was signed into law the American Bar Association Committee that had drafted and pressed for passage of the federal legislation wrote:

> "The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts." [10]

Since *Bernhardt*, a right to arbitration has been characterized as "substantive," and that holding is not challenged here. But Congress in 1925 did not characterize the FAA as this Court did in 1956. Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.[11]

If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings. Mr. Cohen, the American Bar Association member who drafted the bill, assured two congressional Subcommittees in joint hearings:

> "Nor can it be said that the Congress of the United States, *directing its own courts* . . . , would infringe upon

[10] Committee on Commerce, Trade and Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153, 154–155 (1925). See also Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 275–276 (1926).

[11] That Congress chose to apply the FAA only to proceedings related to commercial and maritime contracts does not suggest that the Act is "substantive." Cf. Fed. Rule Civ. Proc. 81; Fed. Rule Evid. 1101; Fed. Rule Crim. Proc. 54.

> the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." [12]

The House Report on the FAA unambiguously stated: "Before [arbitration] contracts could be enforced in the Federal courts . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States." [13]

Yet another indication that Congress did not intend the FAA to govern state-court proceedings is found in the pow-

[12] Joint Hearings 39–40 (emphasis added). "The primary purpose of the statute is to make enforcible *[sic]* in the Federal courts such agreements for arbitration. . . ." *Id.*, at 38 (statement of Mr. Cohen). See also Senate Hearing 2 ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction").

[13] H. R. Rep. No. 96, *supra*, at 1. Commentators writing immediately after passage of the Act uniformly reached the same conclusion. The A. B. A. Committee that drafted the legislation wrote: "So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual states." Committee on Commerce, Trade and Commercial Law, *supra*, at 155. See also Cohen & Dayton, *supra*, at 276–277; Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N. Y. U. L. Q. Rev. 428, 459 (1931). Williston wrote: "Inasmuch as arbitration acts are deemed procedural, the United States Act applies only to the federal courts . . . ." 6 S. Williston & G. Thompson, The Law of Contracts 5368 (rev. ed. 1938).

More recent students of the FAA uniformly and emphatically reach the same conclusion. *Prima Paint*, 388 U. S., at 424 (Black, J., dissenting); Note, 73 Harv. L. Rev. 1382 (1960); Note, Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy, 69 Yale L. J. 847, 863 (1960); Note, Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism, 58 Nw. U. L. Rev. 468, 492 (1963).

ers Congress relied on in passing the Act. The FAA might have been grounded on Congress' powers to regulate interstate and maritime affairs, since the Act extends only to contracts in those areas. There are, indeed, references in the legislative history to the corresponding federal powers. More numerous, however, are the references to Congress' pre-*Erie* power to prescribe "general law" applicable in all federal courts.[14] At the congressional hearings, for example: "Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[15] And in the House Report:

> "The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. . . ."[16]

Plainly, a power derived from Congress' Art. III control over federal-court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts.

[14] For my present purpose it is enough to recognize that Congress relied *at least in part* on its Art. III power over the jurisdiction of the federal courts. See *Prima Paint*, 388 U. S., at 405, and n. 13 (majority opinion); *id.*, at 416–420 (Black, J., dissenting).

[15] Joint Hearings 38. See also *id.*, at 17, 37–38.

[16] H. R. Rep. No. 96, *supra* n. 8, at 1. Immediately after the FAA's enactment the A. B. A. drafters of the Act wrote:

"[The FAA] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power." Committee on Commerce, Trade and Commercial Law, *supra* n. 10, at 156.

Numerous other commentators writing shortly after the FAA's passage, as well as more recently, have made similar statments. See, *e. g.*, Cohen & Dayton, *supra* n. 10, at 275; Baum & Pressman, *supra*, at 430–431; Note, 73 Harv. L. Rev., at 1383; Note, 58 Nw. U. L. Rev., at 481.

The foregoing cannot be dismissed as "ambiguities" in the legislative history. It is accurate to say that the entire history contains only one ambiguity, and that appears in the single sentence of the House Report cited by the Court *ante*, at 12–13. That ambiguity, however, is definitively resolved elsewhere in the same House Report, see *supra*, at 27, and throughout the rest of the legislative history.

B

The structure of the FAA itself runs directly contrary to the reading the Court today gives to § 2. Sections 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts. Section 4 refers to the "United States district court[s]," and provides that it can be invoked only in a court that has jurisdiction under Title 28 of the United States Code. As originally enacted, § 3 referred, in the same terms as § 4, to "courts [or court] of the United States."[17] There has since been a minor amendment in § 4's phrasing, but no substantive change in either section's limitation to federal courts.[18]

[17] The use of identical language in both sections was natural: § 3 applies when the party resisting arbitration initiates the federal-court action; § 4 applies to actions initiated by the party seeking to enforce an arbitration provision. Phrasing the two sections differently would have made no sense.

[18] In 1954, as a purely clerical change, Congress inserted "United States district court" in § 4 as a substitute for "court of the United States." Both House and Senate Reports explained: "'United States district court' was substituted for 'court of the United States' because, among Federal courts, such a proceeding would be brought only in a district court." H. R. Rep. No. 1981, 83d Cong., 2d Sess., 8 (1954); S. Rep. No. 2498, 83d Cong., 2d Sess., 9 (1954).

Even without this history, § 3's "courts of the United States" is a term of art whose meaning is unmistakable. State courts are "in" but not "of" the United States. Other designations of federal courts as the courts "of" the United States are found, for example, in 28 U. S. C. § 2201 (1976 ed., Supp. V) (declaratory judgments); Fed. Rule Evid. 501; and the Norris-La Guardia Act, 29 U. S. C. § 104, see *Boys Markets, Inc.* v. *Retail Clerks*,

None of this Court's prior decisions has authoritatively construed the Act otherwise. It bears repeating that both *Prima Paint* and *Moses H. Cone* involved *federal-court* litigation. The applicability of the FAA to state-court proceedings was simply not before the Court in either case. Justice Black would surely be surprised to find either the majority opinion or his dissent in *Prima Paint* cited by the Court today, as both are, *ante*, at 11, 12. His dissent took pains to point out:

> "The Court here does not hold . . . that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act." 388 U. S., at 424 (footnotes omitted).

Nothing in the *Prima Paint* majority opinion contradicts this statement.

The *Prima Paint* majority gave full but precise effect to the original congressional intent—it recognized that notwithstanding the intervention of *Erie* the FAA's restrictive focus on maritime and interstate contracts permits its application in federal diversity courts. Today's decision, in contrast, glosses over both the careful crafting of *Prima Paint* and the historical reasons that made *Prima Paint* necessary, and gives the FAA a reach far broader than Congress intended.[19]

398 U. S. 235, 247 (1970) (BRENNAN, J.). References to state and federal courts together as courts "in" or "within" the United States are found in the Supremacy Clause ("Judges *in* every state"); 11 U. S. C. § 306 (1982 ed.); 22 U. S. C. § 2370(e)(2); and 28 U. S. C. § 1738. See also W. Sturges, Commercial Arbitrations and Awards § 480, p. 937 (1930).

[19] The Court suggests, *ante*, at 12, that it is unlikely that Congress would have created a federal substantive right that the state courts were not required to enforce. But it is equally rare to find a federal substantive right that cannot be enforced in federal court under the jurisdictional grant of 28 U. S. C. § 1331. Yet the Court states, *ante*, at 15–16, n. 9, that the FAA must be so construed. The simple answer to this puzzle is that in 1925 Congress did not believe it was creating a substantive right at all.

III

Section 2, like the rest of the FAA, should have no application whatsoever in state courts. Assuming, to the contrary, that § 2 *does* create a federal right that the state courts must enforce, state courts should nonetheless be allowed, at least in the first instance, to fashion their own procedures for enforcing the right. Unfortunately, the Court seems to direct that the arbitration clause at issue here must be *specifically* enforced; apparently no other means of enforcement is permissible.[20]

It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure. "'[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 299 (1949). But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights. Before we undertake to read a set of complex and mandatory procedures into § 2's brief and general language, we should at a minimum allow state courts and legislatures a chance to develop their own methods for enforcing the new federal rights. Some might choose to award compensatory or punitive damages for the violation of an arbitration agreement; some might award litigation costs to the party who remained willing to arbitrate; some might affirm the "validity and enforce-

[20] If my understanding of the Court's opinion is correct, the Court has made § 3 of the FAA binding on the state courts. But as we have noted, *supra*, at 29, § 3 by its own terms governs only *federal-court* proceedings. Moreover, if § 2, standing alone, creates a federal right to specific enforcement of arbitration agreements §§ 3 and 4 are, of course, largely superfluous. And if § 2 implicitly incorporates §§ 3 and 4 procedures for making arbitration agreements enforceable before arbitration begins, why not also § 9 procedures concerning venue, personal jurisdiction, and notice for enforcing an arbitrator's award after arbitration ends? One set of procedures is of little use without the other.

ability" of arbitration agreements in other ways. Any of these approaches could vindicate §2 rights in a manner fully consonant with the language and background of that provision.[21]

The unelaborated terms of §2 certainly invite flexible enforcement. At common law many jurisdictions were hostile to arbitration agreements. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 982–984 (CA2 1942). That hostility was reflected in two different doctrines: "revocability," which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and "invalidity" or "unenforceability," equivalent rules[22] that flatly denied any remedy for the failure to honor an arbitration agreement. In contrast, common-law jurisdictions that enforced arbitration agreements did so in at least three different ways—through actions for damages, actions for specific enforcement, or by enforcing sanctions imposed by trade and commercial associations on members who violated arbitration agreements.[23] In 1925 a forum allowing *any one* of these remedies would have been thought to recognize the "validity" and "enforceability" of arbitration clauses.

This Court has previously rejected the view that state courts can adequately protect federal rights only if "such courts in enforcing the Federal right are to be treated as Federal courts and subjected *pro hac vice* to [federal] limitations . . . ." *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 221 (1916). As explained by Professor Hart:

[21] See Note, 69 Yale L. J., at 864–865; Note, 73 Harv. L. Rev., at 1385; Note, 58 Nw. U. L. Rev., at 493.

[22] See J. Cohen, Commercial Arbitration and the Law 53–252 (1918); Sturges, *supra*, §§ 15–17 (discussing "revocability"); *id.*, § 22 (treating as equivalent different courts' declarations that arbitration agreements were "contrary to public policy," "invalid," "not binding upon the parties," "unenforceable," or "void"). See also Note, 73 Harv. L. Rev., at 1384.

[23] See Sturges, *supra*, §§ 22–24.

> "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. . . . Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered. If the differences become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants."[24]

In summary, even were I to accept the majority's reading of §2, I would disagree with the Court's disposition of this case. After articulating the nature and scope of the federal right it discerns in §2, the Court should remand to the state court, which has acted, heretofore, under a misapprehension of federal law. The state court should determine, at least in the first instance, what procedures it will follow to vindicate the newly articulated federal rights. Cf. *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

IV

The Court, *ante*, at 15–16, rejects the idea of requiring the FAA to be applied only in federal courts partly out of concern with the problem of forum shopping. The concern is unfounded. Because the FAA makes the federal courts equally accessible to both parties to a dispute, no forum shopping would be possible even if we gave the FAA a construc-

[24] Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954). See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 567–573 (2d ed. 1973).

tion faithful to the congressional intent. In controversies involving incomplete diversity of citizenship there is simply no access to federal court and therefore no possibility of forum shopping. In controversies *with* complete diversity of citizenship the FAA grants federal-court access equally to both parties; no party can gain any advantage by forum shopping. Even when the party resisting arbitration initiates an action in state court, the opposing party can invoke FAA §4 and promptly secure a federal-court order to compel arbitration. See, *e. g.*, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983).

Ironically, the FAA was passed specifically to rectify forum-shopping problems created by this Court's decision in *Swift* v. *Tyson*, 16 Pet. 1 (1842).[25] By 1925 several major commercial States had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases.[26] The drafters of the FAA might have anticipated *Bernhardt* by legislation and required federal diversity courts to adopt the arbitration law of the State in which they sat. But they deliberately chose a different approach. As was pointed out at congressional hearings,[27] an additional goal of the Act was to make arbitration agreements enforceable even in federal courts located in States that had no arbitration law. The drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law, patterned after New York's path-breaking state statute,[28] and simultaneously to press for passage of coordinated state legislation. The key language of the Uniform Act for Commercial Arbitration was, accordingly, identical to that in §2 of the FAA.[29]

In summary, forum-shopping concerns in connection with the FAA are a distraction that does not withstand scrutiny. The Court ignores the drafters' carefully devised plan for dealing with those problems.

V

Today's decision adds yet another chapter to the FAA's already colorful history. In 1842 this Court's ruling in *Swift* v. *Tyson*, *supra*, set up a major obstacle to the enforcement of state arbitration laws in federal diversity courts. In 1925 Congress sought to rectify the problem by enacting the FAA; the intent was to create uniform law binding only in the federal courts. In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and then in *Bernhardt Polygraphic Co.*, 350 U. S. 198 (1956), this Court significantly curtailed federal power. In 1967 our decision in *Prima Paint* upheld the application of the FAA in a *federal-court* proceeding as a valid exercise of Congress' Commerce Clause and admiralty powers. Today the Court discovers a federal right in FAA §2 that the state courts must enforce. Apparently confident that state courts are not competent to devise their own procedures for protecting the newly discovered federal right, the Court summarily prescribes a specific procedure, found nowhere in §2 or its common-law origins, that the state courts are to follow.

[25] See Joint Hearings 16 (statement of Mr. Cohen, A. B. A.); Senate Hearing 2. See also Cohen & Dayton, *supra* n. 10, at 275–276; Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Prob. 580, 590 (1952).

[26] See, *e. g.*, *Atlantic Fruit Co.* v. *Red Cross Line*, 276 F. 319 (SDNY 1921), aff'd, 5 F. 2d 218 (CA2 1924); *Lappe* v. *Wilcox*, 14 F. 2d 861 (NDNY 1926).

[27] Joint Hearings 35.

[28] See S. Rep. No. 536, *supra* n. 8, at 3.

[29] The Uniform Act tracked the "valid, irrevocable, and enforceable" language of §2. See 47 A. B. A. Rep. 318 (1922). It was also hoped that other States might pattern their arbitration statutes directly after the federal Act. See, *e. g.*, Joint Hearings 28. By 1953 it was reported that arbitration statutes "quite similar" to the FAA had been enacted in 12 other States. Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Tompkins, 39 Cornell L. Q. 74, 76, n. 7 (1953). See also *Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N. Y. 2d 576, 584–585, 255 N. E. 2d 774, 778–779 (1970).

Today's decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA's antecedents and the intervening contraction of federal power, inexplicable. Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far. I respectfully dissent.

PULLEY, WARDEN *v.* HARRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–1095. Argued November 7, 1983—Decided January 23, 1984

Respondent was convicted of a capital crime in a California court and was sentenced to death, and the California Supreme Court affirmed, rejecting the claim that California's capital punishment statute was invalid under the Federal Constitution because it failed to require the California Supreme Court to compare respondent's sentence with sentences imposed in similar capital cases and thereby to determine whether they were proportionate. After habeas corpus relief was denied by the state courts, respondent sought habeas corpus in Federal District Court, again contending that he had been denied the comparative proportionality review assertedly required by the Constitution. The District Court denied the writ, but the Court of Appeals held that comparative proportionality review was constitutionally required.

Held:

1. There is no merit to respondent's contention that the Court of Appeals' judgment should be affirmed solely on the ground that state decisional law entitles him to comparative proportionality review. Under 28 U. S. C. § 2241, a federal court may not issue a writ of habeas corpus on the basis of a perceived error of state law. In rejecting respondent's demand for proportionality review, the California Supreme Court did not suggest that it was in any way departing from state case-law precedent. Moreover, if respondent's claim is that because of an evolution of state law he would now enjoy the kind of proportionality review that has so far been denied him, the state courts should consider the matter, if they are so inclined, free of the constraints of the federal writ of habeas corpus. Pp. 41–42.

2. The Eighth Amendment does not require, as an invariable rule in every case, that a state appellate court, before it affirms a death sentence, compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Pp. 44–54.

(a) This Court's cases do not require comparative proportionality review by an appellate court in every capital case. The outcome in *Gregg* v. *Georgia*, 428 U. S. 153 (upholding Georgia's statutory scheme which required comparative proportionality review), and *Proffitt* v. *Florida*, 428 U. S. 242 (upholding Florida's scheme under which the appellate court performed proportionality review despite the absence of a

FEDERALISM AND SUPREMACY: CONTROL OF STATE JUDICIAL DECISION-MAKING

MARGARET G. STEWART*

In Chicago, there are certain inevitable signs of spring: the first robin; the first frostbitten tulip leaf; the "unexpected" April snow storm; and, given my college's curricular calendar, the glazed expressions of first year law students confronted with the bewildering mystery of *Erie*.[1] After a few day's exposure, a faint hope seems to dawn and relieved voices chime, "state substance, federal procedure." But then come "outcome determinative" and "forum shopping," and confusion again reigns supreme. As if all that were not enough to bear, in the last week a merciless professor asks, "What if a state court is hearing a case which arises under federal law?" One brave voice will usually whisper, "federal substance, state procedure?" only to be abashed by reference to "completely different theoretical sources" and to a Supreme Court command to construe allegations in one such complaint pursuant to federal rather than state law. Defeated, students tend to put the entire conundrum into the folder of "things I hope won't be on the bar exam."

But what if that one brave voice was right?

Of course, the reasons why federal and state courts in some circumstances utilize some portion of the other system's law are theoretically distinct. Federal courts constitutionally must use state law when the federal system lacks regulatory authority over the conduct at issue in the litigation[2] and are statutorily compelled to do so, in the absence of contrary federal legislation, whenever state law is a "rule of decision."[3] State courts, on the other hand, are free to utilize whatever law the state chooses absent some constitutional, or constitutionally proper congressional restraint. Other than the guarantees of individual rights, the pri-

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1. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

2. Given the current scope of the Commerce Clause, such situations are increasingly difficult to hypothesize. Presumably, today the restraint as a practical matter is statutory (Rules of Decision Act) and discretionary (court-imposed limits on the creation of federal common law) rather than constitutional. Nonetheless, the concept of the federal government as one of limited rather than general power is historically central to our understanding of the United States and is the "distinct" theory distinguishing *Erie* from cases like *Dice*, *see infra* note 10 and accompanying text.

3. 28 U.S.C. § 1652 (1988).

mary[4] source of such federal restraint is the Supremacy Clause.[5] That clause refers generally to laws of the United States "made in [p]ursuance" of the Constitution, thus negating any obligation to accord supremacy to laws passed under the Articles of Confederation. However, other than that chronological clue, the clause does not define "law." There is initially no intuitive guide pointing decisively to "any law," "all law," "substantive law," "rules of decision" or any other set of congressional statutes and federal common law.

There is general agreement however, that our one brave voice was half-correct: in deciding cases which arise under federal law, state courts must use federal substantive law. A preliminary question involves when state courts can or must be open to adjudicate federal claims. For purposes of this Essay, it suffices to say that states may not discriminate against claims based on their legal source and so must hear federal cases unless there is a valid, i.e. neutral, excuse[6] or unless Congress has precluded the exercise of such jurisdiction by making federal jurisdiction exclusive.[7] A more complex question is the definition of "substantive" law. There is little controversy over the narrowest definition, put most clearly by Justice Harlan: substantive law is that law which controls "the primary activity of citizens."[8] In other words, laws that tell you what promises you must keep, what degree of care you must exercise toward others, and what lies you may not tell, all regulate your daily conduct and are "substantive."

In the context of *Erie*, federal courts are constitutionally compelled to use such state laws if the regulated conduct falls outside federal authority. In the parallel situation, the Supremacy Clause logically must require state courts to use such federal "substantive" law; failure to do so would grant the states an effective veto over federal regulatory choices within the states' spheres or render meaningless their obligation to provide a forum for such causes of action. Assuming that doctrines of preemption, also grounded in the Supremacy Clause, would prevent a state

4. Article I, § 10, and Article IV, §§ 1 and 2, of the U.S. Constitution impose some direct restraints on the states, the most notable of which are the inability to impair the obligation of contract, the requirements of full faith and credit, and the Privileges and Immunities Clause.

5. U.S. CONST. art VI.

6. Testa v. Katt, 330 U.S. 386 (1947).

7. Such exclusive jurisdiction most frequently is found as part of specific regulatory enactments, but also may explain the result in cases preventing state courts from issuing writs of mandamus to federal officers, M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), or granting habeas corpus to one in federal custody, Tarbles's Case, 80 U.S. (13 Wall.) 397 (1872).

8. Hanna v. Plumer, 380 U.S. 460, 474 (1965). *See also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (defining the command of *Erie* as a federal court obligation to accept state "premises of decision in those respects which are important to the generality of people in everyday, pre-litigation life").

from enforcing state law contrary to the federal choice (certainly the least required by the supremacy of federal law), failure to use federal substantive law would make state enforcement of such federal regulation impossible.

Beyond this basic demand, however, lies confusion. A generally held assumption mirrors the whispering student: courts of a sovereign state, within the confines imposed by the due process clause, are free to regulate their procedures as they see fit, and litigants raising federal claims in such courts take the courts as they find them.[9] This assumption is reflected in the notion that states may have a valid excuse to decline to hear certain federal cases, as well as in the freedom of the states to ignore the strictures of the Seventh Amendment regarding civil juries. Given the incorporation of the rest of the Bill of Rights into the Fourteenth Amendment, the states' continuing freedom to define the contours of civil juries for themselves underscores dramatically the systemic independence of state judiciaries. The confusion arises because the assumption appears to have been rebutted by certain Supreme Court decisions, raising the question of the assumption's source. If states may regulate their own procedures, why may they do so? Because constitutionally they always may do so? Because constitutionally sometimes they may do so? Because usually Congress permits them to do so? Because usually the Supreme Court permits them to do so? Finally (and most enjoyably), is there a difference between the answers garnered from Supreme Court opinions and those arguably best designed to maintain both federalism and supremacy? What if that one brave voice was not only right as a matter of general practice but also constitutionally correct?

The case whose name is synonymous with the problem under discussion is *Dice v. Akron, Canton & Youngstown Railroad Co.*[10] *Dice* was the last in a series of cases considering what federal law state courts needed to apply in cases arising under the Federal Employers' Liability Act ("FELA") and required Ohio to submit to a jury the question of whether plaintiff's employer had fraudulently procured a release from liability. Prior cases had compelled the use of federal law with respect to burdens of proof[11] and the construction of a complaint,[12] while preventing states from directing verdicts in favor of employers[13] and allowing states to enter a verdict in favor of the employee-plaintiff in the absence

9. Hart, *supra* note 8, at 508.
10. 342 U.S. 359 (1952).
11. Central Vt. Ry. v. White, 238 U.S. 507 (1915).
12. Brown v. Western Ry. of Ala., 338 U.S. 294 (1949).
13. Bailey v. Central Vt. Ry., Inc., 319 U.S. 350 (1943).

of a unanimous verdict.[14] In none of the cases was there any indication that the state court was treating the FELA claim any differently than it treated analogous state-created claims; supremacy, not discrimination, was the issue.

The case compelling states to follow federal law regarding burdens of proof need not detain us. As the Court noted, the issue of whether a plaintiff must prove himself free from contributory negligence or whether the defendant must prove that the plaintiff was contributorily negligent involves the obligations which flow from the employer to the employee—it is a question of "substantive" law.[15] Dissents in two other cases, *Dice* and *Bailey*, presented arguments (which they rejected and which the majorities failed to adopt) that the federal law involved might also be characterized as substantive. In *Dice*, if juries are uniformly more favorable to employees than to employers, then utilizing a jury would effectively lessen the plaintiff's burden of proof.[16] Similarly, in *Bailey*, if juries favor plaintiffs even in the absence of evidence indicating an employer's negligence, preventing the direction of a verdict in favor of the employer allows the jury to convert the FELA into a strict liability statute, obviously affecting the substantive obligations of the employer.[17]

Ignoring the fact that the cases were not decided pursuant to these rationales, three problems preclude the conclusion that the Court got it "right" (federal substance and state procedure), albeit without its own coherent scheme. In the first place, the underlying assumption that the choice of jury rather than judge will lessen a plaintiff's burden is unsubstantiated and was unpersuasive to the Court in a different context.[18] Secondly, if the underlying assumption controlled the results, it is difficult to reconcile the Court's willingness to allow a state to enter judgment on a non-unanimous verdict. If the choice of jury rather than judge affects substantive rights because of its effect on a plaintiff's burden, surely the choice between unanimous and less-than-unanimous jury verdicts is even more clearly "substantive," indicating that here too states

14. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

15. *Central*, 238 U.S. at 512.

16. *Dice*, 342 U.S. at 368 (Justices Franfurter, Reed, Jackson, and Burton concurring for reversal but dissenting from the Court's opinion).

17. *Bailey*, 319 U.S. at 358 (Roberts, J. & Frankfurter, J., dissenting).

18. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958). Technically, the case held that the *state's* choice not to utilize a jury was serendipitous, reflecting no *state* attempt to affect burdens of proof. It then considered whether the difference in decision-maker was actually likely to affect the outcome of the case in the context of determining whether, on balance, the Rules of Decision Act mandated federal use of non-substantive state law. While it is possible that a congressional choice of jury could reflect an attempt to ease plaintiff's burden, it seems an oddly inept tool for that purpose.

must follow federal law. And in any event, there is the third problem presented by the other case in the quartet. By no even arguably logical stretch of the imagination can rules of construction applied to pleadings affect the primary, every-day activities of individuals. Whether a pleading is construed most strictly against the pleader or in the light most favorable to her, the activity affected is that of pleading, a clear litigation activity. Even if rules concerning the degree of specificity necessary to withstand a motion to dismiss or a demurrer are viewed, not as historical hang-overs from English common law, but rather as the tools needed to enforce systemic choices about how much information a party should have before being allowed to engage the judicial machinery, such rules remain non-substantive. When applied at the time of *trial*, they define the situations in which an obligation is owed to the plaintiff; when applied to the *complaint*, they define procedural choices about the allocation of judicial resources. Such choices do obviously affect the ease with which litigation may be pursued, but that impact does not convert those choices into "substantive" law.[19]

If the fairest characterization of all cases but the one involving burden of proof is that they determined whether a state must follow federal procedural or non-substantive law, it may be critically revealing that in only one instance was a state not required to do so—when the state procedure made it easier, rather than more difficult, for an employee to recover against his employer. That result, when contrasted with the others, at least eliminates the opposite of the general assumption of state procedural independence; the Supremacy Clause of its own force does not compel state courts to adopt federal procedural rules in federal question cases.[20] The source of the compunction then must be either federal common law or Congress. The creation of federal common law is ordinarily limited to those situations in which there is either a uniquely governmental interest (interpretation of federal bonds, etc.; foreign affairs; state border disputes) or a federal statutory gap which must be filled

19. Even if seen as "outcome determinative" such choices remain procedural. The policies underlying *Erie* may require that certain state procedures be considered "rules of decision" which federal courts are statutorily compelled to follow, but those policies are distinct from those underlying the Supremacy Clause.

20. Theoretically, I suspect the Supremacy Clause of its own force probably doesn't force the states to follow anything but the Constitution. If Congress chose to pass federal regulatory legislation, or if the Senate chose to consent to a treaty, which permitted the continued state enforcement of contrary state regulations, it is hard to understand how the Supremacy Clause would be violated. The "supreme" law itself would provide for enforcement of something other than itself. To the extent that such an Alice-in-Wonderland scenario might result in a party being simultaneously subject to incompatible regulations, the party would surely have a due process objection to enforcement of both regulations, but that is a separate story.

(statute of limitations for violations of the securities acts, for example).[21] In other instances, when the Court announces what federal law is, it usually speaks in terms of interpreting congressional intent. The difference between this and "interstitial" judicial rule-making is nebulous and, in this context anyway, doesn't matter. If the Court, as a matter of policy, is itself deciding when federal common law compels states to use federal procedures, its choices may be overturned by Congress, and its authority is no greater than the authority to which Congress can constitutionally lay claim. If, on the other hand, the Court is divining congressional intent, its divination may again be overturned by Congress, and its interpretation of congressional choice leaves open the issue of congressional authority to act upon that choice. In either event, the ultimate source of the requirement is Congress.

What then is the requirement imposed on the states by the FELA cases? Since three of the four relevant ones involve the use of juries, an initial response might focus on the fundamental nature of the right to trial by jury in the federal system. States, then, would be compelled to follow non-substantive federal law when the federal procedural choice was "fundamental." Language in *Bailey* quoted with approval in *Dice* lends some support to this construct. The problem, of course, is that the Fourteenth Amendment incorporates fundamental rights articulated by the first eight amendments, and the right to a civil jury is not included among those fundamental rights. However, perhaps the right is "fundamental" enough that Congress may require states to recognize it but insufficiently "fundamental" that the Constitution compels its recognition. The state's ability to endorse a non-unanimous verdict, although federal practice was to the contrary, would then be explained by the distinction between the fundamental "right" and the "various incidents" of that

21. To the extent that such gaps are procedural, of course, compelling states to use the federal common law (or for that matter a statutory gap-filler) raises the precise problem under discussion. Interestingly, at least with respect to statutes of limitations, the assumption that states must follow federal law seems well-entrenched. *See* Felder v. Casey, 487 U.S. 131, 153 (1988) ("It cannot be disputed that, if Congress had included a statute of limitations in 42 U.S.C. § 1983, any state court that entertained a § 1983 suit would have to apply that statute of limitations.") (White, J., concurring).

Setting aside the fact that "it cannot be disputed" brings out the worst in any law professor I know, the statement does not seem to me to be self-evident. If such statutes are designed to keep stale litigation out of court and are not substantively discriminatory (*see infra* notes 31 et seq., and accompanying text), it is certainly arguable that the state's procedural choice should not be forcibly set aside. If states would routinely permit suits subsequent to the running of the federal statute, and if that is contrary to strongly-held federal policy, federal jurisdiction may be made exclusive. On the other hand, if states would routinely impose a shorter time period than the federally chosen one, the federal system remains open to vindicate that federal procedural choice.

right,[22] which the state would remain free to change.

Unfortunately, strong arguments can be made that both *Dice* and *Bailey* also involved "incidents" of the right, rather than the right itself. At issue in *Bailey* was the sufficiency of evidence as against a motion for a directed verdict. The same term, the Court had upheld the constitutionality of such a motion in the federal courts.[23] Even assuming that the degree of control a judge may exercise over a jury is part of the fundamental right,[24] it is hard to argue convincingly that, granted a judge *may* take a case from the jury if there is no real relevant factual dispute, the sub-standard applied to judge evidentiary sufficiency is also fundamental. In *Dice*, the state court permitted disputed facts in legal claims to be resolved by a jury but adhered to the traditional view that the issue of fraudulent procurement of a release sounded at equity. The law/equity distinction is embodied in the Seventh Amendment as well and is clearly "fundamental." But the varying historical and modern definitions determining what issues fall on which side of the line is arguably "incidental" to the key division.[25] And in any event, the notion of "fundamental" procedure fails totally to account for the result in *Brown*, the non-jury case in the quartet involving construction of the plaintiff's complaint.

When read together, the four cases reveal a pro-plaintiff bias and a concern that "unnecessary" state rules may frustrate the congressional remedial purpose. The history of the FELA demonstrates that Congress was in fact concerned that state courts, frequently more geographically convenient for plaintiffs, be a realistic option; suits brought under the FELA against railroads (as were the quartet) may not be removed to federal court.[26] The final choice of forum, therefore, belongs to the injured employee. But geographical convenience may be offset by procedural inconvenience. Perhaps the cases stand for the proposition that

22. Colgrove v. Battin, 413 U.S. 149 (1973) (the last in a series of cases dealing with the required size of a criminal jury in both the state and federal systems).

23. Galloway v. United States, 319 U.S. 372 (1943).

24. If the assumption is correct, the right of judges to comment on the evidence, for example, would also be "fundamental," a result which seems to confuse "fundamental" and "important." Size and unanimity are both important, though neither may be fundamental.

25. In any event, it is possible today to argue that not all issues need be resolved by a jury. Tull v. United States, 481 U.S. 412 (1987), permitted the judge rather than the jury to determine the appropriate civil penalty for violation of a "legal" statute; perhaps defenses and rebuttals are no more "fundamental" than damages. This argument, however, is sillier and more dangerous than it's worth. When the Court first distinguished between fundamental and non-fundamental aspects of the right, it did so in the context of what a jury *is* rather than what a jury *does*. It is fundamental that juries be unprejudiced; it is not fundamental that they be comprised of twelve people. However, it is indeed fundamental that juries decide factual issues in legal claims (though the definitions of "fact" and "legal" may not be fundamental), if for no other reason than that it is not possible to articulate a neutral hierarchy of such issues.

26. 28 U.S.C. § 1445 (1988).

Congress may "even the playing fields" by removing "unnecessary" boulders in the state's field. If so, it is necessary to realize that congressional authority to require state compliance with federal procedure in federal question cases is judicially unlimited. Any state practice Congress did not wish to be followed would by definition be "unnecessary" and its removal critical to assure similar fields. Deference to those kinds of congressional determinations effectively insulates them from review.[27]

This imposition on the states by Congress must be justified by reference to some grant of congressional or at least federal authority in the Constitution. Two sources come to mind: whatever regulatory authority supports the substantive law giving rise to the federal cause of action, or the Supremacy Clause.

The degree of regulatory authority that Congress may currently constitutionally exercise pursuant to the Commerce Clause in combination with the "Necessary and Proper" Clause is virtually unlimited, save by "external" restraints regarding individual rights. But there does remain a distinction between laws governing conduct and laws designed to enforce the regulation of conduct. *Erie* itself reflected precisely that distinction, though in a situation opposite to our problem. In *Erie*, the authority of the federal system to enforce regulation of conduct was not at issue; Article III and congressional statutes clearly provided for the exercise of subject matter jurisdiction by federal courts in cases which arose between citizens of different states. However, the authority to enforce governmentally imposed standards of conduct did *not* carry with it the systemic authority to create those standards of conduct—the ability to create courts inferior to the U.S. Supreme Court did *not* permit Congress (or the courts themselves) to create the substantive law to be applied by those courts. For that power, it was necessary to look to other sections of Article I which directly address the areas in which the federal government may regulate out-of-court-room activity. If, then, the power to enforce regulation does not carry with it the power to regulate, it would seem intuitive that the power to regulate does not carry with it the power to enforce the regulation.[28]

27. The reading does at least preclude Congress from insisting that states make it easier for federally-favored parties to prevail in state court than it would be in federal court. It seems incredible in any event that Congress should wish to do so.

28. Two of my colleagues have argued that symmetry is not necessarily intuitive. But I still think that if two powers are separate in one context, they should be considered separate in the other. A contrary result would require that the power to regulate be defined as "greater" than the power to enforce and thus inclusive of that "lesser" power. However, I see no particular reason why such a hierarchy should be assumed; there is certainly no constitutional language to justify it. True, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), linked the existence of a vested right to the existence

Intuition is supported by history and at least one current doctrine.[29] The existence of a federal court system itself was a matter of some debate in the Constitutional Convention; the structure of Article III, establishing the Supreme Court but leaving to congressional discretion the existence of the rest of the judicial machinery, reflects a compromise between those who believed the lack of a federal judiciary was one of the critical weaknesses under the Articles of Confederation and those who believed the states could be relied upon to enforce federal law. There is no indication that any of the participants thought that an enforcement mechanism could be devised simply as "necessary and proper" to carrying out regulatory requirements. Similarly today, the Court has firmly rejected the notion that Article I regulatory authority inevitably carries with it the power to create non-Article III courts to hear and decide disputes arising under appropriate federal law.[30] While the Court has also rejected a blanket prohibition on such courts, recognition of the issue reflects the distinction between regulation and enforcement. Admittedly, two central concerns of the Court in this context, the effects of such bodies on both the values of Article III itself and the Seventh Amendment right to trial by jury, are not implicated when the exercise of congressional enforcement power is directed at state rather than alternative federal judiciaries. As will be argued more extensively below, however, the federal structure of our government *is* implicated and provides another reason for continuing to separate differing powers.

Standing against intuition, history and analogy is an alternative and troublesome analogy drawn from *FERC v. Mississippi*.[31] Building on the

of a remedy for its violation, but the Constitution provides for both in the federal system in separate grants of authority. It is this separateness for which I argue.

29. One side in the academic debate concerning the constitutionality of so-called "protective jurisdiction" also reflects a bit murkily this separateness. Briefly, the argument for protective jurisdiction is that, "Congress *could* regulate X; it may, therefore, choose *not* to regulate X but to grant federal courts 'arising under' jurisdiction over cases involving X, even though those cases will be decided under state laws and do not arise between citizens of different states." The Court has never read a congressional statute to confer such jurisdiction, but arguments against the theory, couched though they may be in terms of "obliterating the limitations of Article III," depend on the distinction between regulation and enforcement and deny the proposition that the latter is a lesser-included part of the former.

30. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

31. 456 U.S. 742 (1982).

New York v. United States, 112 S. Ct. 2408 (1992), logically casts doubt on *FERC*, although the majority opinion carefully distinguished it. Failure to consider congressionally proposed regulations in *FERC* would have resulted in preemption of state law in the area; failure of New York to provide for a radioactive waste disposal site or to form a compact with other states to do so would have resulted in New York's taking title to (and becoming legally liable for all damages caused by) such waste in the state. Encouragement, the Court stated, is constitutional; coercion may not be. The

uncontroversial statements that Congress could directly regulate the kind of commerce there involved and that such regulation could preempt any state regulation, the Court permitted Congress to condition continued state regulation on state consideration of federally proposed regulations under certain "procedural minima."[32] State arguments that federal regulation of state regulation of commerce did not constitute regulation of commerce and that federal use of state machinery to advance federal goals violated the Tenth Amendment were rejected. Setting a state's legislative agenda would seem as intrusive as imposing procedural rules on its judiciary, so to the extent federalism provides the justification for denying federal authority, *FERC* constitutes a recognized road-block. It does not, however, necessarily weaken the argument that regulation and enforcement are separate powers. While the legislation involved in that case did require state enforcement of certain federal regulations, it was not in that context that the "procedural minima" were imposed. Rather, those requirements were addressed to the process by which federally proposed regulations were to be considered by the state.[33] Given congressional authority under the Commerce Clause to compel such state consideration, it is unsurprising that some control over the "how" is "necessary and proper" to the regulation of the "what." It is precisely the argued *lack* of congressional power under the Commerce Clause to compel state enforcement which leads to consideration of the Supremacy Clause.

Constitutionally proper federal law must be followed and not discriminated against by states. The line of cases culminating in *Dice* seems to indicate the Court's belief that the "law" referred to in the Supremacy Clause is substantive law and whatever attendant procedural law Congress finds it necessary for the states to follow. But if the source of congressional authority to promulgate procedural law is its authority to create inferior *federal* courts, rather than its various grants of regulatory authority, the *Dice* result is belied by the wording of the Supremacy Clause itself: laws of the U.S. passed "pursuant to" the Constitution are supreme, *i.e.* laws which the Constitution empowers Congress to pass.

Commerce Clause (or perhaps the Tenth Amendment) does not permit Congress to "commandeer" state governments into the service of federal regulatory purposes. *Id.* at 2420. If the thrust of the opinion is that the federal system ought not ordinarily use the state systems to do federal work, the result in *FERC* seems dubious. Of course, the Supremacy Clause itself "coerces" the states to use their judicial resources to enforce federal substantive law, but the issue is the extent to which Congress may further coerce them to change otherwise proper procedures.

32. *FERC*, 456 U.S. at 771.

33. The requirements were neither particularly burdensome nor unusual; indeed, it was argued that they simply parallelled the requirements of due process, providing for notice and hearings.

The clause of its own force does not increase congressional power; it only provides the hierarchy between exercises of the power elsewhere granted and contrary state enactments or policies.

The one brave voice *is* constitutionally correct.

Interestingly, the Court in considering the *Dice* problem has spoken more in terms of rather amorphous policy than in the language usual to constitutional construction. The FELA line of cases demonstrate a Court-found congressional intent to make it at least as easy for employees to recover against their employers in state courts as it would be in the federal system. Assuming the accuracy of the intention, given its argued unconstitutionality, consideration of the evils of the alternative world view might reopen the constitutional inquiry. If federalism is undercut by the recognition of state procedural supremacy, perhaps one should argue that any federal law, constitutional when applied in the federal system, may be, in the discretion of Congress, considered supreme as compared to state law.[34]

The clear concern of the Court in a *Dice* fact pattern is that state procedures may eviscerate constitutionally required state enforcement of federal substantive law. The placement of "unnecessary burdens" is avoided by demanding that those burdens be replaced by federal procedural choices.

Certainly the fear of state attempts to overcome state obligations imposed by the Constitution but contrary to the particular political climate of the state is historically well-grounded in various contexts. Indeed, it is in the context of federal civil rights actions under 42 U.S.C. § 1983 that the Court has most recently (and most appealingly) precluded a state from utilizing its own arguably procedural law. In *Felder v. Casey*,[35] Wisconsin was barred from insisting that a plaintiff comply with a notice-of-claim statute, which required anyone desiring to sue any governmental subdivision, agency or officer to provide written notice of the claim within 120 days and wait 120 days thereafter before filing suit. Casting the issue as one of preemption, none of the three opinions focused on the theoretical issue of congressional power to engage in procedural preemption. The majority's argument is two-fold. First, the notice-of-claim requirement conflicts with the broad remedial purpose of § 1983 and, by carving out a subset of tort defendants that parallels those covered by § 1983, discriminates against the federal substantive claim.

34. The argument is vaguely illogical, however; to separate the issue of constitutionality from the issue of scope of applicability is hardly traditional analysis.

35. 487 U.S. 131 (1988).

To the extent that the decision rests on the assertion that Wisconsin cannot make it more difficult to recover against state actors whom it wishes to protect from federally created liability than it is to recover against other similarly-situated defendants,[36] it parallels cases insisting that states utilize federal burdens of proof and is uncontroversial.[37] The second prong of the majority's opinion, however, is much more troublesome. "Unnecessary burdens" cannot impede enforcement of federal rights; apparently a burden is "unnecessary" if it makes it more difficult for the plaintiff to recover; apparently as well the plaintiff need not (at least if Congress decides the plaintiff need not) play by the rules of the forum she selects.[38] In an attempt, presumably, to bolster this much more general allegation, reliance is placed on *Erie* and the notion of impermissibly altered outcomes.[39] Oddly enough, *Dice* is not cited.

Given the narrow applicability of the Wisconsin statute and the logic of the first part of the majority opinion, the result in *Felder* is defensible. But to extrapolate from that case the general proposition that Congress may always over-set state procedures in federal question cases because otherwise states could preclude the effective enforcement of federal substantive law in state courts goes too far. Fear of such attempts made via generally applicable rules of civil procedure[40] is simply impractical, as the *Felder* Court itself recognized.[41] In the first place, while states might favor employers while Congress favors employees, it is not clear whether employers or employees would benefit from general rules of pleading favoring plaintiffs over defendants; in some situations each is more likely to play either role. Secondly, general procedural rules are just that—general. Even if one could conclude that employees are most likely to be plaintiffs in disputes with their employers, rules of construction burdening plaintiffs burden all plaintiffs, not just employees. It seems politically absurd to make such procedural choices in an attempt to affect substantive outcomes. A scatter-gun is a poor weapon with which to kill a fly. Furthermore, procedural choices which place severe burdens on any specified group of litigants are politically dangerous as

36. *Id.* at 144.

37. *See supra* note 11 and accompanying text.

38. *Felder*, 487 U.S. at 150. The extent to which the *Felder* Court is ready to accept the supremacy of federal procedural rules in state courts is reflected by its reliance on Brown v. Western Ry. of Ala., 338 U.S. 294 (1949), the case in the FELA group requiring that a complaint be construed in accordance with federal rather than state standards.

39. *See supra* note 19.

40. Criminal procedures might more easily lend themselves to bias; the state would obviously be able to make assumptions about which party it preferred to favor, knowing as a general matter whether that party was more likely to be victim or defendant.

41. *Felder*, 487 U.S. at 141, 144-45.

well as absurd. The inability of states to discriminate against federal cases means that the choices governing them also govern state cases and affect more than those parties whose claims are hypothetically systemically unpopular. Finally, irrational state procedural choices would certainly run afoul of the due process clause; if there is no judgment call involved in determining that a procedural burden is "unnecessary," it should not be imposed on any litigant. If there is a judgment call involved, it belongs to the state.

Setting aside unlikely concerns of procedural hostility, there remains a more theoretical argument in favor of *Dice*: federalism is best served when states act as full partners in the enforcement of federal law, but such partnership is dependent upon litigant choice.[42] That choice, in turn, may well depend on the degree to which burdens imposed on the parties by each system are equivalent. A plaintiff who perceives the federal rules of pleading to be less burdensome than the states' might well choose federal court; a defendant sued in the state system with the same perception might well remove the case to the federal court. To foster state participation, reduction of procedural cost of state choice is a reasonable method, arguably sanctioned by the authority of Congress to "make all Laws necessary and proper for carrying into Execution . . . all other Powers [including the power to protect the federal structure] vested by this Constitution in the Government of the United States . . . ."[43] The fact that increasing the attractiveness of state fora to potential federal litigants also may serve to lower federal judicial costs and case load is a politically pleasing side effect.

For those with a dim memory of cases following *Erie*, the notion that the federal system might have legitimate reasons to promote forum shopping may set off alarm bells. Forum shopping is wrong, right?[44] Not exactly.[45] Shopping for "better" outcomes when the only reason the federal "store" is open is to provide a non-biased forum is frowned upon because not all parties are allowed in. But the reasons for providing a federal "store" in federal question cases go far beyond neutrality and themselves encompass the search for "better" outcomes in the context of expertise, maintenance of federal supremacy, etc. And in any event, to encourage use of the *state* store is to direct litigants to the systems to

42. This assumes, of course, that Congress has granted federal courts subject matter jurisdiction over the case at issue.

43. U.S. CONST., art. I, § 8.

44. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

45. Technically, it's clear that *York* isn't relevant here; it provides part of the definition of what state law is a "rule of decision" to be applied by federal courts pursuant to 28 U.S.C. § 1652 in the absence of contrary federal law, *i.e.* primarily in diversity cases.

which all have access, thus again precluding discrimination against those denied entry to the store.

There is, however, a real difficulty with the argument, itself also based on notions of federalism. State judiciaries are currently perhaps the most autonomous branch of state governments. The U.S. Constitution prevents them from discriminating on the basis of the legal source of a claim and, particularly in the area of criminal law, imposes on them certain procedural minima. Congress occasionally removes their jurisdiction over certain kinds of federal question cases. Federal questions decided by them may be reviewed by the U.S. Supreme Court. But their independence today is not notably diminished from that which they enjoyed in the nineteenth century. The functional independence of other branches of state government, however, has been seriously undercut by radically changed notions of the appropriate (or possible) balance of regulatory authority between the federal and state governments since the New Deal. Given the breadth of federal authority under the Commerce Clause and the nearly complete politicization of the Tenth Amendment, state judiciaries remain possibly the last bastion of judicially enforced federalism. The procedural choices those systems make remain varied and changing, supporting the classic argument that the states serve as laboratories for less-than-nation-wide experiments. The sacrifice of such autonomy in order to lure parties to choose state court is simply too high a price to pay. The lack of express attempts by Congress to exact it, and the infrequent Court cases finding it, may provide the most eloquent argument against it. Yet the implication of *Dice* stands, throwing a shadow across judicial protection of state judicial independence—and continuing to bewilder my class each spring.

worries that, under this ordinance, the county will charge a premium to control the hostile crowd of 10,000, resulting in the kind of "heckler's veto" we have previously condemned. *Ante*, at 2403–2404. But there have been no lower court findings on the question of whether or not the county plans to base parade fees on anticipated hostile crowds. It has not done so in any of the instances where it has so far imposed fees. *Ante*, at 2402. And it most certainly did not do so in this case. The District Court below noted that:

> "[T]he instant ordinance alternatively permits fees to be assessed based upon 'the expense incident to ... the maintenance of public order.' If the county had applied this portion of the statute, the phrase might run afoul of ... constitutional concerns....
>
> "However, in the instant case, plaintiff did not base their [*sic*] argument upon this phrase, but contended that the mere fact that a $100 fee was imposed is unconstitutional, especially in light of the organization's financial circumstances. *The evidence was clear that the fee was based solely upon the costs of processing the application and plaintiff produced no evidence to the contrary.*" App. to Pet. for Cert. 14 (emphasis added).

The Court's analysis on this issue rests on an assumption that the county will interpret the phrase "maintenance of public order" to support the imposition of fees based on opposition crowds. There is nothing in the record to support this assumption, however, and I would remand for a hearing on this question.

For the foregoing reasons, I dissent.

NEW YORK, Petitioner,

v.

UNITED STATES et al.

COUNTY OF ALLEGANY, NEW YORK, Petitioner,

v.

UNITED STATES.

COUNTY OF CORTLAND, NEW YORK, Petitioner,

v.

UNITED STATES et al.

Nos. 91–543, 91–558 and 90–563.

Argued March 30, 1992.

Decided June 19, 1992.

State brought action challenging provisions of Low-Level Radioactive Waste Policy Act. The United States District Court, Northern District of New York, Con. G. Cholakis, J., 757 F.Supp. 10, dismissed, and state appealed. The Second Circuit Court of Appeals, 942 F.2d 114, affirmed. On writs of certiorari, the Supreme Court, Justice O'Connor, held that: (1) Act's monetary and access incentive provisions are consistent with Constitution's allocation of power to federal government, but (2) Act's "take title" provision, requiring states to accept ownership of waste or regulate according to instructions of Congress, lies outside Congress' enumerated powers and is inconsistent with Tenth Amendment.

Affirmed in part and reversed in part.

Justice White filed concurring and dissenting opinion in which Justices Blackmun and Stevens joined.

Justice Stevens filed concurring and dissenting opinion.

1. Health and Environment ⇐25.5(7)
States ⇐4.17

Constitution does not confer upon Congress ability to compel states to provide for

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Amend. 10.

2. United Sta
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3. Commerce
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4. States ⇐4.1
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5. Commerce ⇐
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6. Commerce ⇐
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7. States ⇐4.18,
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disposal of radioactive waste generated within their borders, though Congress has substantial power under Constitution to encourage states to do so. U.S.C.A. Const. Amend. 10.

2. United States ⇐22
Congress exercises its conferred power subject to limitations contained in Constitution.

3. Commerce ⇐82.20
Under commerce clause, Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in exercise of that power by First Amendment. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 1.

4. States ⇐4.16
Tenth Amendment restrains power of Congress, but that limit is not derived from text of Tenth Amendment itself, which is essentially a tautology, but rather, Tenth Amendment confirms that power of federal government is subject to limits that may, in given instance, reserve power to states. U.S.C.A. Const.Amend. 10.

5. Commerce ⇐52.10
Regulation of interstate market in radioactive waste disposal is within Congress' authority under commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce ⇐12
Allocation of power contained in commerce clause authorizes Congress to regulate interstate commerce directly, but does not authorize Congress to regulate state governments' regulation of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

7. States ⇐4.18, 4.19
United States ⇐82(2)
Constitutionally permissible methods, short of outright coercion, by which Congress may urge state to adopt legislative program consistent with federal interests include attaching conditions to receipt of federal funds and, where Congress has authority to regulate private activity under commerce clause, offering states choice of regulating that activity according to federal standards or having state law preempted by federal regulation as part of program of "cooperative federalism." U.S.C.A. Const. Art. 1, § 8, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

8. United States ⇐82(2)
Under Congress' spending power, conditions attached by Congress to receipt of federal funds must bear some relationship to purpose of federal spending. U.S.C.A. Const. Art. 1, § 8, cl. 1.

9. States ⇐4.17
United States ⇐82(2)
Where recipient of federal funds is state, conditions attached to funds by Congress may influence state's legislative choices. U.S.C.A. Const. Art. 1, § 8, cl. 1.

10. Health and Environment ⇐25.5(7)
Low-Level Radioactive Waste Policy Act's mandate that each state "shall" be responsible for providing for disposal of waste is not congressional command to states independent of remainder of Act but, rather, construed as whole, Act comprises three sets of "incentives" for states to provide for disposal of waste generated within their borders; construing mandate as direct, independently enforceable command would upset usual constitutional balance of federal and state powers and the alternative construction is equally plausible. Low-Level Radioactive Waste Policy Act, § 3(a)(1)(A), as amended, 42 U.S.C.A. § 2021c(a)(1)(A).

11. Commerce ⇐12
Commerce clause's limitation on states' ability to discriminate against interstate commerce may be lifted by expression of unambiguous intent of Congress. U.S.C.A. Const. Art. 1, § 8, cl. 3.

12. States ⇐4.17
United States ⇐82(2)
Low-Level Radioactive Waste Policy Act's provision for special escrow account for funds deriving from surcharge imposed

by states with waste disposal sites on waste received from other states, such funds to be received by states achieving series of milestones identified in Act, was within Congress' authority under spending clause, despite statement that funds deposited in account "shall not be the property of the United States." Low-Level Radioactive Waste Policy Act, § 5(d)(2)(A), as amended, 42 U.S.C.A. § 2021e(d)(2)(A); 23 U.S.C.A. § 118; U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10.

13. Commerce ⇐52.10

Provisions of Low-Level Radioactive Waste Policy Act authorizing states and regional compacts with disposal sites to gradually increase cost of access to sites, and then to deny access altogether, to non-sited states not meeting federal deadlines represent authorized conditional exercise of Congress' commerce power and, thus, do not intrude on states' sovereignty in violation of Tenth Amendment; no state need expend funds, or participate in federal program, nor must any state abandon field if it does not accede to federal direction. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10; Low-Level Radioactive Waste Policy Act, § 5(e)(2)(A-D), as amended, 42 U.S.C.A. § 2021e(e)(2)(A-D).

14. States ⇐4.17

Low-Level Radioactive Waste Policy Act's "take title" provision, offering states choice of either accepting ownership of waste generated within their borders or regulating according to instructions of Congress, neither of which options could be constitutionally imposed as freestanding requirement, was outside Congress' enumerated powers and infringed upon state sovereignty in violation of Tenth Amendment. U.S.C.A. Const.Amend. 10; Low-Level Radioactive Waste Policy Act, § 5(d)(2)(C), as amended, 42 U.S.C.A. § 2021e(d)(2)(C).

15. Federal Courts ⇐13.25

Constitutional challenge to Low-Level Radioactive Waste Policy Act's "take title" provision, requiring states to accept ownership of waste generated within their borders or regulate according to instructions of Congress, was ripe for review, even though provision would not take effect for over three years; state challenging provision had to take action now in order to avoid consequences of take title provision. Low-Level Radioactive Waste Policy Act, § 5(d)(2)(C), as amended, 42 U.S.C.A. § 2021e(d)(2)(C).

16. States ⇐4.16, 18.3

Constitution does not give Congress authority to require states to regulate, no matter how powerful the federal interest involved; rather, Constitution gives Congress authority to regulate matters directly and to preempt contrary state regulation. U.S.C.A. Const.Amend. 10.

17. States ⇐4.17

Consent by state officials to enactment of Low-Level Radioactive Waste Policy Act did not preclude determination that Act unconstitutionally infringed on state sovereignty. Low-Level Radioactive Waste Policy Act, § 2 et seq., as amended, 42 U.S.C.A. § 2021b et seq.; U.S.C.A. Const. Amend. 10.

18. States ⇐4.17

Where Congress exceeds its authority relative to states, departure from constitutional plan cannot be ratified by "consent" of state officials, as Constitution does not protect sovereignty of states for benefit of states or state governments as abstract political entities, or even for benefit of public officials governing states but, rather, Constitution divides authority between federal and state governments for protection of individuals. U.S.C.A. Const.Amend. 10.

19. Constitutional Law ⇐50

Constitution's division of power among the three branches is violated where one branch invades territory of another, regardless of whether encroached-upon branch approves encroachment.

20. Constitutional Law ⇐50
States ⇐4.17

Constitutional authority of Congress cannot be expanded by "consent" of gov-

ernmental unit whose domain is thereby narrowed, whether that unit is executive branch or state and, thus, state officials cannot consent to enlargement of powers of Congress beyond those enumerated in Constitution. U.S.C.A. Const.Amend. 10.

21. Estoppel ⇐62.2(2)

State's prior support for Low-Level Radioactive Waste Policy Act did not estop it from asserting Act's unconstitutionality. Low-Level Radioactive Waste Policy Act, § 2 et seq., as amended, 42 U.S.C.A. § 2021b et seq.

22. States ⇐6

Fact that Low-Level Radioactive Waste Policy Act embodied compromise among states did not elevate Act to status of interstate agreement requiring Congress' approval under compact clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amend. 10; Low-Level Radioactive Waste Policy Act, § 2 et seq., as amended, 42 U.S.C.A. § 2021b et seq.

23. States ⇐4.3

Constitution's guaranty clause was not violated by provisions of Low-Level Radioactive Waste Policy Act providing monetary incentives for compliance by states with federal regulatory scheme and providing for denial of access to disposal sites for failure to meet deadlines; under both provisions, states retained ability to set their legislative agendas and state government officials remained accountable to local electorate. Low-Level Radioactive Waste Policy Act, §§ 2 et seq., 5(d)(2)(B)(i-iv), (d)(2)(C), (e)(1)(A-D), (e)(2)(A-D), as amended 42 U.S.C.A. §§ 2021b et seq., 2021e(d)(2)(B)(i-iv), (d)(2)(C), (e)(1)(A-D), (e)(2)(A-D); U.S.C.A. Const. Art. 4, § 4; Amend. 10; Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

24. Statutes ⇐64(2)

Unconstitutional "take title" provision of Low-Level Radioactive Waste Policy Act, requiring states to accept ownership of waste generated within their borders or to regulate according to instructions of Congress, was severable from rest of Act. Low-Level Radioactive Waste Policy Act, § 5(d)(2)(C), as amended, 42 U.S.C.A. § 2021e(d)(2)(C).

Syllabus *

Faced with a looming shortage of disposal sites for low level radioactive waste in 31 States, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other things, imposes upon States, either alone or in "regional compacts" with other States, the obligation to provide for the disposal of waste generated within their borders, and contains three provisions setting forth "incentives" to States to comply with that obligation. The first set of incentives—the monetary incentives—works in three steps: (1) States with disposal sites are authorized to impose a surcharge on radioactive waste received from other States; (2) the Secretary of Energy collects a portion of this surcharge and places it in an escrow account; and (3) States achieving a series of milestones in developing sites receive portions of this fund. The second set of incentives—the access incentives—authorizes sited States and regional compacts gradually to increase the cost of access to their sites, and then to deny access altogether, to waste generated in States that do not meet federal deadlines. The so-called third "incentive"—the take title provision—specifies that a State or regional compact that fails to provide for the disposal of all internally generated waste by a particular date must, upon the request of the waste's generator or owner, take title to and possession of the waste and become liable for all damages suffered by the generator or owner as a result of the State's failure to promptly take possession. Petitioners, New York State and two of its counties, filed this suit

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

against the United States, seeking a declaratory judgment that, *inter alia*, the three incentives provisions are inconsistent with the Tenth Amendment—which declares that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States"—and with the Guarantee Clause of Article IV, § 4—which directs the United States to "guarantee to every State ... a Republican Form of Government." The District Court dismissed the complaint, and the Court of Appeals affirmed.

Held:

1. The Act's monetary incentives and access incentives provisions are consistent with the Constitution's allocation of power between the Federal and State Governments, but the take title provision is not. Pp. 2417–2432.

(a) In ascertaining whether any of the challenged provisions oversteps the boundary between federal and state power, the Court must determine whether it is authorized by the affirmative grants to Congress contained in Article I's Commerce and Spending Clauses or whether it invades the province of state sovereignty reserved by the Tenth Amendment. Pp. 2417–2419.

(b) Although regulation of the interstate market in the disposal of low level radioactive waste is well within Congress' Commerce Clause authority, cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 621–623, 98 S.Ct. 2531, 2534–2535, 57 L.Ed.2d 475 and Congress could, if it wished, pre-empt entirely state regulation in this area, a review of this Court's decisions, see, *e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1, and the history of the Constitutional Convention, demonstrates that Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals. Pp. 2419–2423.

(c) Nevertheless, there are a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. As relevant here, Congress may, under its spending power, attach conditions on the receipt of federal funds, so long as such conditions meet four requirements. See, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206–208, and n. 3, 107 S.Ct. 2793, 2795–2797, and n. 3, 97 L.Ed.2d 171. Moreover, where Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of "cooperative federalism," offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. See, *e.g.*, *Hodel, supra*, 452 U.S., at 288, 289, 101 S.Ct., at 2366, 2367. Pp. 2423–2424.

(d) This Court declines petitioners' invitation to construe the Act's provision obligating the States to dispose of their radioactive wastes as a separate mandate to regulate according to Congress' instructions. That would upset the usual constitutional balance of federal and state powers, whereas the constitutional problem is avoided by construing the Act as a whole to comprise three sets of incentives to the States. Pp. 2424–2425.

(e) The Act's monetary incentives are well within Congress' Commerce and Spending Clause authority and thus are not inconsistent with the Tenth Amendment. The authorization to sited States to impose surcharges is an unexceptionable exercise of Congress' power to enable the States to burden interstate commerce. The Secretary's collection of a percentage of the surcharge is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Finally, in conditioning the States' receipt of federal funds upon their achieving specified milestones, Congress has not exceeded its Spending Clause authority in any of the four respects identified by this Court in *Dole, supra*, 483 U.S., at 207–208, 107 S.Ct., at 2796. Petitioners' objection to the

form of the expenditures as nonfederal is unavailing, since the Spending Clause has never been construed to deprive Congress of the power to collect money in a segregated trust fund and spend it for a particular purpose, and since the States' ability largely to control whether they will pay into the escrow account or receive a share was expressly provided by Congress as a method of encouraging them to regulate according to the federal plan. Pp. 2425–2427.

(f) The Act's access incentives constitute a conditional exercise of Congress' commerce power along the lines of that approved in *Hodel, supra*, 452 U.S., at 288, 101 S.Ct., at 2366, and thus do not intrude on the States' Tenth Amendment sovereignty. These incentives present nonsited States with the choice either of regulating waste disposal according to federal standards or having their waste-producing residents denied access to disposal sites. They are not compelled to regulate, expend any funds, or participate in any federal program, and they may continue to regulate waste in their own way if they do not accede to federal direction. Pp. 2427–2428.

(g) Because the Act's take title provision offers the States a "choice" between the two unconstitutionally coercive alternatives—either accepting ownership of waste or regulating according to Congress' instructions—the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment. On the one hand, either forcing the transfer of waste from generators to the States or requiring the States to become liable for the generators' damages would "commandeer" States into the service of federal regulatory purposes. On the other hand, requiring the States to regulate pursuant to Congress' direction would present a simple unconstitutional command to implement legislation enacted by Congress. Thus, the States' "choice" is no choice at all. Pp. 2428–2429.

(h) The United States' alternative arguments purporting to find limited circumstances in which congressional compulsion of state regulation is constitutionally permissible—that such compulsion is justified where the federal interest is sufficiently important; that the Constitution does, in some circumstances, permit federal directives to state governments; and that the Constitution endows Congress with the power to arbitrate disputes between States in interstate commerce—are rejected. Pp. 2429–2431.

(i) Also rejected is the sited state respondents' argument that the Act cannot be ruled an unconstitutional infringement of New York sovereignty because officials of that State lent their support, and consented, to the Act's passage. A departure from the Constitution's plan for the intergovernmental allocation of authority cannot be ratified by the "consent" of state officials, since the Constitution protects state sovereignty for the benefit of individuals, not States or their governments, and since the officials' interests may not coincide with the Constitution's allocation. Nor does New York's prior support estop it from asserting the Act's unconstitutionality. Pp. 2431–2432.

(j) Even assuming that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out a claim that the Act's money incentives and access incentives provisions are inconsistent with that Clause. Neither the threat of loss of federal funds nor the possibility that the State's waste producers may find themselves excluded from other States' disposal sites can reasonably be said to deny New York a republican form of government. Pp. 2432–2434.

2. The take title provision is severable from the rest of the Act, since severance will not prevent the operation of the rest of the Act or defeat its purpose of encouraging the States to attain local or regional self-sufficiency in low level radio-

active waste disposal; since the Act still includes two incentives to encourage States along this road; since a State whose waste generators are unable to gain access to out-of-state disposal sites may encounter considerable internal pressure to provide for disposal, even without the prospect of taking title; and since any burden caused by New York's failure to secure a site will not be borne by other States' residents because the sited regional compacts need not accept New York's waste after the final transition period. Pp. 2434–2435.

942 F.2d 114 (CA5 1991), affirmed in part and reversed in part.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined, and in Parts III–A and III–B of which WHITE, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part.

Peter H. Schiff, Albany, N.Y., for petitioners.

Lawrence G. Wallace, Washington, D.C., for the federal respondent.

William B. Collins, Buffalo, N.Y., for the state respondents.

Justice O'CONNOR delivered the opinion of the Court.

[1] This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law. The public policy issue involves the disposal of radioactive waste: In this case, we address the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub.L. 99–240, 99 Stat. 1842, 42 U.S.C. § 2021b *et seq.* The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States. We conclude that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so. We therefore find that only two of the Act's three provisions at issue are consistent with the Constitution's allocation of power to the Federal Government.

I

We live in a world full of low level radioactive waste. Radioactive material is present in luminous watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants. Low level radioactive waste is generated by the Government, by hospitals, by research institutions, and by various industries. The waste must be isolated from humans for long periods of time, often for hundreds of years. Millions of cubic feet of low level radioactive waste must be disposed of each year. See App. 110a–111a; Berkovitz, Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?, 11 Harv.Envtl.L.Rev. 437, 439–440 (1987).

Our Nation's first site for the land disposal of commercial low level radioactive waste opened in 1962 in Beatty, Nevada. Five more sites opened in the following decade: Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971). Between 1975 and 1978, the Illinois site closed because it was full, and water management problems caused the closure of the sites in Kentucky and New York. As a result, since 1979 only three disposal sites—those in Nevada, Washington, and South Carolina—have been in operation. Waste generated in the rest of the country must be shipped to one of these three sites

for disposal. See Low-Level Radioactive Waste Regulation 39–40 (M. Burns ed. 1988).

In 1979, both the Washington and Nevada sites were forced to shut down temporarily, leaving South Carolina to shoulder the responsibility of storing low level radioactive waste produced in every part of the country. The Governor of South Carolina, understandably perturbed, ordered a 50% reduction in the quantity of waste accepted at the Barnwell site. The Governors of Washington and Nevada announced plans to shut their sites permanently. App. 142a, 152a.

Faced with the possibility that the Nation would be left with no disposal sites for low level radioactive waste, Congress responded by enacting the Low-Level Radioactive Waste Policy Act, Pub.L. 96–573, 94 Stat. 3347. Relying largely on a report submitted by the National Governors' Association, see App. 105a–141a, Congress declared a federal policy of holding each State "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently ... on a regional basis." § 4(a)(1), 94 Stat. 3348. The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States. § 4(a)(2)(B), 94 Stat. 3348. The 1980 Act included no penalties for States that failed to participate in this plan.

By 1985, only three approved regional compacts had operational disposal facilities; not surprisingly, these were the compacts formed around South Carolina, Nevada, and Washington, the three sited States. The following year, the 1980 Act would have given these three compacts the ability to exclude waste from nonmembers, and the remaining 31 States would have had no assured outlet for their low level radioactive waste. With this prospect looming, Congress once again took up the issue of waste disposal. The result was the legislation challenged here, the Low-Level Radioactive Waste Policy Amendments Act of 1985.

The 1985 Act was again based largely on a proposal submitted by the National Governors' Association. In broad outline, the Act embodies a compromise among the sited and unsited States. The sited States agreed to extend for seven years the period in which they would accept low level radioactive waste from other States. In exchange, the unsited States agreed to end their reliance on the sited States by 1992.

The mechanics of this compromise are intricate. The Act directs: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of ... low-level radioactive waste generated within the State," 42 U.S.C. § 2021c(a)(1)(A), with the exception of certain waste generated by the Federal Government, §§ 2021c(a)(1)(B), 2021c(b). The Act authorizes States to "enter into such [interstate] compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." § 2021d(a)(2). For an additional seven years beyond the period contemplated by the 1980 Act, from the beginning of 1986 through the end of 1992, the three existing disposal sites "shall make disposal capacity available for low-level radioactive waste generated by any source," with certain exceptions not relevant here. § 2021e(a)(2). But the three States in which the disposal sites are located are permitted to exact a graduated surcharge for waste arriving from outside the regional compact—in 1986–1987, $10 per cubic foot; in 1988–1989, $20 per cubic foot; and in 1990–1992, $40 per cubic foot. § 2021e(d)(1). After the seven-year transition period expires, approved regional compacts may exclude radioactive waste generated outside the region. § 2021d(c).

The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.

1. *Monetary incentives.* One quarter of the surcharges collected by the sited States must be transferred to an escrow account held by the Secretary of Energy. § 2021e(d)(2)(A). The Secretary then makes payments from this account to each State that has complied with a series of deadlines. By July 1, 1986, each State was to have ratified legislation either joining a regional compact or indicating an intent to develop a disposal facility within the State. §§ 2021e(e)(1)(A), 2021e(d)(2)(B)(i). By January 1, 1988, each unsited compact was to have identified the State in which its facility would be located, and each compact or stand-alone State was to have developed a siting plan and taken other identified steps. §§ 2021e(e)(1)(B), 2021e(d)(2)(B)(ii). By January 1, 1990, each State or compact was to have filed a complete application for a license to operate a disposal facility, or the Governor of any State that had not filed an application was to have certified that the State would be capable of disposing of all waste generated in the State after 1992. §§ 2021e(e)(1)(C), 2021e(d)(2)(B)(iii). The rest of the account is to be paid out to those States or compacts able to dispose of all low level radioactive waste generated within their borders by January 1, 1993. § 2021e(d)(2)(B)(iv). Each State that has not met the 1993 deadline must either take title to the waste generated within its borders or forfeit to the waste generators the incentive payments it has received. § 2021e(d)(2)(C).

2. *Access incentives.* The second type of incentive involves the denial of access to disposal sites. States that fail to meet the July 1986 deadline may be charged twice the ordinary surcharge for the remainder of 1986 and may be denied access to disposal facilities thereafter. § 2021e(e)(2)(A). States that fail to meet the 1988 deadline may be charged double surcharges for the first half of 1988 and quadruple surcharges for the second half of 1988, and may be denied access thereafter. § 2021e(e)(2)(B). States that fail to meet the 1990 deadline may be denied access. § 2021e(e)(2)(C). Finally, States that have not filed complete applications by January 1, 1992, for a license to operate a disposal facility, or States belonging to compacts that have not filed such applications, may be charged triple surcharges. §§ 2021e(e)(1)(D), 2021e(e)(2)(D).

3. *The take title provision.* The third type of incentive is the most severe. The Act provides:

> "If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment." § 2021e(d)(2)(C).

These three incentives are the focus of petitioners' constitutional challenge.

In the seven years since the Act took effect, Congress has approved nine regional compacts, encompassing 42 of the States. All six unsited compacts and four of the unaffiliated States have met the first three statutory milestones. Brief for United States 10, n. 19; *id.*, at 13, n. 25.

New York, a State whose residents generate a relatively large share of the Nation's low level radioactive waste, did not join a regional compact. Instead, the State complied with the Act's requirements by enacting legislation providing for the siting and financing of a disposal facility in New York. The State has identified five poten-

tial sites, three in Allegany County and two in Cortland County. Residents of the two counties oppose the State's choice of location. App. 29a–30a, 66a–68a.

Petitioners—the State of New York and the two counties—filed this suit against the United States in 1990. They sought a declaratory judgment that the Act is inconsistent with the Tenth and Eleventh Amendments to the Constitution, with the Due Process Clause of the Fifth Amendment, and with the Guarantee Clause of Article IV of the Constitution. The States of Washington, Nevada, and South Carolina intervened as defendants. The District Court dismissed the complaint. 757 F.Supp. 10 (NDNY 1990). The Court of Appeals affirmed. 942 F.2d 114 (CA2 1991). Petitioners have abandoned their Due Process and Eleventh Amendment claims on their way up the appellate ladder; as the case stands before us, petitioners claim only that the Act is inconsistent with the Tenth Amendment and the Guarantee Clause.

II

A

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. ——, ——, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); and while the Tenth Amendment makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, 4 L.Ed. 97 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.

These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See, *e.g.*, *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971); *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, *e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1869). In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See *United States v. Oregon*, 366 U.S. 643, 649, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575 (1961); *Case v. Bowles*, 327 U.S. 92, 102, 66 S.Ct. 438, 443, 90 L.Ed. 552 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534, 61 S.Ct. 1050, 1063, 85 L.Ed. 1487 (1941).

It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 (1941). As Justice Story put it, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). This has been the Court's consistent understanding: "The States unquestionably do retai[n] a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S., at 549, 105 S.Ct., at 1017 (internal quotation marks omitted).

[2–4] Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

The benefits of this federal structure have been extensively catalogued elsewhere, see, *e.g.*, *Gregory v. Ashcroft*, *supra*, 501 U.S., at ———, 111 S.Ct., at ———, 115 L.Ed.2d 410; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum.L.Rev. 1, 3–10 (1988); McConnell, Federalism: Evaluating the Founders' Design, 54 U.Chi.L.Rev. 1484, 1491–1511 (1987), but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63, 56 S.Ct. 312, 318, 80 L.Ed. 477 (1936).

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role. Among the provisions of the Constitution that have been particularly important in this regard, three concern us here.

First, the Constitution allocates to Congress the power "[t]o regulate Commerce ... among the several States." Art. I, § 8, cl. 3. Interstate commerce was an established feature of life in the late 18th century. See, *e.g.*, The Federalist No. 42, p. 267 (C. Rossiter ed. 1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience"). The volume of interstate commerce and the range of commonly accepted objects of government regulation have,

however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power. See, *e.g.*, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

Second, the Constitution authorizes Congress "to pay the Debts and provide for the ... general Welfare of the United States." Art. I, § 8, cl. 1. As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). Compare, *e.g.*, *United States v. Butler*, *supra*, 297 U.S., at 72–75, 56 S.Ct., at 322–323 (spending power does not authorize Congress to subsidize farmers), with *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). While the spending power is "subject to several general restrictions articulated in our cases," *id.*, at 207, 107 S.Ct., at 2796, these restrictions have not been so severe as to prevent the regulatory authority of Congress from generally keeping up with the growth of the federal budget.

The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const., Art. I., § 8, cl. 18. See, *e.g.*, *Legal Tender Case (Juilliard v. Greenman)*, 110 U.S. 421, 449–450, 4 S.Ct. 122, 131, 28 L.Ed. 204 (1884); *McCulloch v. Maryland*, 4 Wheat., at 411–421.

Finally, the Constitution provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted. See, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). We have observed that the Supremacy Clause gives the Federal Government "a decided advantage in th[e] delicate balance" the Constitution strikes between State and Federal power. *Gregory v. Ashcroft*, 501 U.S., at ——, 111 S.Ct., at 2400.

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority.

B

[5] Petitioners do not contend that Congress lacks the power to regulate the disposal of low level radioactive waste. Space in radioactive waste disposal sites is frequently sold by residents of one State to residents of another. Regulation of the

resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. Cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 621–623, 98 S.Ct. 2531, 2534–2535, 57 L.Ed.2d 475 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ——, ——, 112 S.Ct. 2019, 2023, 119 L.Ed.2d 139 (1992). Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. Rather than addressing the problem of waste disposal by directly regulating the generators and disposers of waste, petitioners argue, Congress has impermissibly directed the States to regulate in this field.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path. See *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (state schools and hospitals are subject to Fair Labor Standards Act); *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Wirtz*) (state employers are *not* subject to Fair Labor Standards Act); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities*) (state employers are once again subject to Fair Labor Standards Act). See also *New York v. United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946); *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975); *Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982); *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983); *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988); *Gregory v. Ashcroft*, 501 U.S. ——, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. Cf. *FERC v. Mississippi*, 456 U.S. 742, 758–759, 102 S.Ct. 2126, 2137, 72 L.Ed.2d 532 (1982).

This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way. Our cases have established a few principles that guide our resolution of the issue.

1

As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981). In *Hodel*, the Court upheld the Surface Mining Control and Reclamation Act of 1977 precisely because it did *not* "commandeer" the States into regulating mining. The Court found that "the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Ibid.*

The Court reached the same conclusion the following year in *FERC v. Mississippi*, *supra*. At issue in *FERC* was the Public Utility Regulatory Policies Act of 1978, a federal statute encouraging the States in various ways to develop programs to combat the Nation's energy crisis. We observed that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*, 456 U.S., at 761–762, 102 S.Ct., at 2139. As in *Hodel*, the Court

upheld the statute at issue because it did not view the statute as such a command. The Court emphasized: "Titles I and III of [the Public Utility Regulatory Policies Act of 1978 (PURPA)] require *only consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 456 U.S., at 764, 102 S.Ct., 2140 (emphasis in original). Because "[t]here [wa]s nothing in PURPA 'directly compelling' the States to enact a legislative program," the statute was not inconsistent with the Constitution's division of authority between the Federal Government and the States. *Id.*, 456 U.S., at 765, 102 S.Ct., at 2141 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra*, 452 U.S., at 288, 101 S.Ct., at 2366). See also *South Carolina v. Baker, supra*, 485 U.S., at 513, 108 S.Ct., at 1361 (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests"); *Garcia v. San Antonio Metropolitan Transit Authority, supra*, 469 U.S., at 556, 105 S.Ct., at 1020 (same).

These statements in *FERC* and *Hodel* were not innovations. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. See *Coyle v. Oklahoma*, 221 U.S. 559, 565, 31 S.Ct. 688, 689, 55 L.Ed. 853 (1911). The Court has been explicit about this distinction. "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane County v. Oregon*, 7 Wall., at 76 (emphasis added). The Court has made the same point with more rhetorical flourish, although perhaps with less precision, on a number of occasions. In Chief Justice Chase's much-quoted words, "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. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869). See also *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523, 46 S.Ct. 172, 174, 70 L.Ed. 384 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990) ("under our federal system, the States possess sovereignty concurrent with that of the Federal Government"); *Gregory v. Ashcroft*, 501 U.S., at ——, 111 S.Ct., at 2401 ("the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

Indeed, the question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers. Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress "could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such." Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1447 (1987).

The inadequacy of this governmental structure was responsible in part for the Constitutional Convention. Alexander Hamilton observed: "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra-distinguished from the INDIVIDUALS of whom they

consist." The Federalist No. 15, p. 108 (C. Rossiter ed. 1961). As Hamilton saw it, "we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government." *Id.*, at 109. The new National Government "must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations.... The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals." *Id.*, No. 16, p. 116.

The Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. 1 Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911). Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it has under the Articles of Confederation. 1 *id.*, 243–244. These two plans underwent various revisions as the Convention progressed, but they remained the two primary options discussed by the delegates. One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. As Randolph explained the distinction, "[t]he true question is whether we shall adhere to the federal plan [*i.e.*, the New Jersey Plan], or introduce the national plan. The insufficiency of the former has been fully displayed.... There are but two modes, by which the end of a Gen[eral] Gov[ernment] can be attained: the 1st is by coercion as proposed by Mr. P[aterson's] plan[, the 2nd] by real legislation as prop[osed] by the other plan. Coercion [is] *impracticable, expensive, cruel to individuals*.... We must resort therefore to a national *Legislation over individuals*." 1 *id.*, at 255–256 (emphasis in original). Madison echoed this view: "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." 2 *id.*, at 9.

Under one preliminary draft of what would become the New Jersey Plan, state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in this case: "[T]he laws of the United States ought, as far as may be consistent with the common interests of the Union, to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required." 3 *id.*, at 616. This idea apparently never even progressed so far as to be debated by the delegates, as contemporary accounts of the Convention do not mention any such discussion. The delegates' many descriptions of the Virginia and New Jersey Plans speak only in general terms about whether Congress was to derive its authority from the people or from the States, and whether it was to issue directives to individuals or to States. See 1 *id.*, at 260–280.

In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. 1 *id.*, at 313. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State's convention: "This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity.... But this legal coercion singles out the ... individual." 2 J. Elliot, Debates on the Federal Constitution 197 (2d ed. 1863). Charles Pinckney, another delegate at the Constitutional Convention, emphasized to the South Carolina House of Representatives that in Philadelphia "the necessity of having a government which

should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." 4 *id.*, at 256. Rufus King, one of Massachusetts' delegates, returned home to support ratification by recalling the Commonwealth's unhappy experience under the Articles of Confederation and arguing: "Laws, to be effective, therefore, must not be laid on states, but upon individuals." 2 *id.*, at 56. At New York's convention, Hamilton (another delegate in Philadelphia) exclaimed: "But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Then we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." 2 *id.*, at 233. At North Carolina's convention, Samuel Spencer recognized that "all the laws of the Confederation were binding on the states in their political capacities, . . . but now the thing is entirely different. The laws of Congress will be binding on individuals." 4 *id.*, at 153.

[6] In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *E.g., FERC v. Mississippi*, 456 U.S., at 762–766, 102 S.Ct., at 2138–2141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288–289, 101 S.Ct., at 2366; *Lane County v. Oregon*, 7 Wall., at 76. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

2

[7] This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

[8, 9] First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S., at 206, 107 S.Ct., at 2795. Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending, *id.*, at 207–208, and n. 3, 107 S.Ct., at 2796, and n. 3; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority. Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices. See Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum.L.Rev. 847, 874–881 (1979). *Dole* was one such case: The Court found no constitutional flaw in a federal statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age. Similar examples abound. See, *e.g., Fullilove v. Klutznick*, 448 U.S. 448, 478–480, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980); *Massachusetts v. United States*, 435 U.S. 444, 461–462, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403 (1978); *Lau v. Nichols*, 414 U.S. 563, 568–569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 142–

144, 67 S.Ct. 544, 553–554, 91 L.Ed. 794 (1947).

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra*, 452 U.S., at 288, 101 S.Ct., at 2366. See also *FERC v. Mississippi, supra*, 456 U.S., at 764–765, 102 S.Ct., at 2140. This arrangement, which has been termed "a program of cooperative federalism," *Hodel, supra*, 452 U.S., at 289, 101 S.Ct., at 2366, is replicated in numerous federal statutory schemes. These include the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, see *Arkansas v. Oklahoma*, 503 U.S. ——, ——, 112 S.Ct. 1046, 1054, 117 L.Ed.2d 239 (1992) (Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective"); the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. § 651 *et seq.*, see *Gade v. National Solid Wastes Management Assn.*, — U.S. ——, ——, 112 S.Ct. 2374, ——, — L.Ed.2d —— (1992); the Resource Conservation and Recovery Act of 1976, 90 Stat. 2796, as amended, 42 U.S.C. § 6901 *et seq.*, see *United States Dept. of Energy v. Ohio*, 503 U.S. ——, ——, 112 S.Ct. 1627, 1632, 118 L.Ed.2d 255 (1992); and the Alaska National Interest Lands Conservation Act, 94 Stat. 2374, 16 U.S.C. § 3101 *et seq.*, see *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (CA9 1988), cert. denied, 491 U.S. 905, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989).

By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. See Merritt, 88 Colum.L.Rev., at 61–62; La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 Nw.U.L.Rev. 577, 639–665 (1985).

With these principles in mind, we turn to the three challenged provisions of the Low-

Level Radioactive Waste Policy Amendments Act of 1985.

III

[10] The parties in this case advance two quite different views of the Act. As petitioners see it, the Act imposes a requirement directly upon the States that they regulate in the field of radioactive waste disposal in order to meet Congress' mandate that "[e]ach State shall be responsible for providing ... for the disposal of ... low-level radioactive waste." 42 U.S.C. § 2021c(a)(1)(A). Petitioners understand this provision as a direct command from Congress, enforceable independent of the three sets of incentives provided by the Act. Respondents, on the other hand, read this provision together with the incentives, and see the Act as affording the States three sets of choices. According to respondents, the Act permits a State to choose first between regulating pursuant to federal standards and losing the right to a share of the Secretary of Energy's escrow account; to choose second between regulating pursuant to federal standards and progressively losing access to disposal sites in other States; and to choose third between regulating pursuant to federal standards and taking title to the waste generated within the State. Respondents thus interpret § 2021c(a)(1)(A), despite the statute's use of the word "shall," to provide no more than an option which a State may elect or eschew.

The Act could plausibly be understood either as a mandate to regulate or as a series of incentives. Under petitioners' view, however, § 2021c(a)(1)(A) of the Act would clearly "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288, 101 S.Ct., at 2366. We must reject this interpretation of the provision for two reasons. First, such an outcome would, to say the least, "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S., at ——, 111 S.Ct., at 2401. "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance," *ibid.* (internal quotation marks omitted), but the Act's amenability to an equally plausible alternative construction prevents us from possessing such certainty. Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). This rule of statutory construction pushes us away from petitioners' understanding of § 2021c(a)(1)(A) of the Act, under which it compels the States to regulate according to Congress' instructions.

We therefore decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act. Construed as a whole, the Act comprises three sets of "incentives" for the States to provide for the disposal of low level radioactive waste generated within their borders. We consider each in turn.

A

The first set of incentives works in three steps. First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third, States achieving a series of milestones receive portions of this fund.

[11] The first of these steps is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. While the Commerce Clause has long been understood to limit the States' ability to discriminate against inter-

state commerce, see, *e.g.*, *Wyoming v. Oklahoma*, 502 U.S. ——, ——, 112 S.Ct. 789, 800, 117 L.Ed.2d 1 (1992); *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 13 L.Ed. 996 (1851), that limit may be lifted, as it has been here, by an expression of the "unambiguous intent" of Congress. *Wyoming, supra*, 502 U.S., at ——, 112 S.Ct., at 802; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427–431, 66 S.Ct. 1142, 1153–1156, 90 L.Ed. 1342 (1946). Whether or not the States would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress' approval, the States can clearly do so *with* Congress' approval, which is what the Act gives them.

The second step, the Secretary's collection of a percentage of the surcharge, is no more than a federal tax on interstate commerce, which petitioners do not claim to be an invalid exercise of either Congress' commerce or taxing power. Cf. *United States v. Sanchez*, 340 U.S. 42, 44–45, 71 S.Ct. 108, 110, 95 L.Ed. 47 (1950); *Steward Machine Co. v. Davis*, 301 U.S. 548, 581–583, 57 S.Ct. 883, 888–889, 81 L.Ed. 1279 (1937).

[12] The third step is a conditional exercise of Congress' authority under the Spending Clause: Congress has placed conditions—the achievement of the milestones—on the receipt of federal funds. Petitioners do not contend that Congress has exceeded its authority in any of the four respects our cases have identified. See generally *South Dakota v. Dole*, 483 U.S., at 207–208, 107 S.Ct., at 2796. The expenditure is for the general welfare, *Helvering v. Davis*, 301 U.S. 619, 640–641, 57 S.Ct. 904, 908, 81 L.Ed. 1307 (1937); the States are required to use the money they receive for the purpose of assuring the safe disposal of radioactive waste. 42 U.S.C. § 2021e(d)(2)(E). The conditions imposed are unambiguous, *Pennhurst State School and Hospital v. Halderman*, 451 U.S., at 17, 101 S.Ct., at 1540; the Act informs the States exactly what they must do and by when they must do it in order to obtain a share of the escrow account. The conditions imposed are reasonably related to the purpose of the expenditure, *Massachusetts v. United States*, 435 U.S., at 461, 98 S.Ct., at 1164; both the conditions and the payments embody Congress' efforts to address the pressing problem of radioactive waste disposal. Finally, petitioners do not claim that the conditions imposed by the Act violate any independent constitutional prohibition. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269–270, 105 S.Ct. 695, 702–703, 83 L.Ed.2d 635 (1985).

Petitioners contend nevertheless that the *form* of these expenditures removes them from the scope of Congress' spending power. Petitioners emphasize the Act's instruction to the Secretary of Energy to "deposit all funds received in a special escrow account. The funds so deposited shall not be the property of the United States." 42 U.S.C. § 2021e(d)(2)(A). Petitioners argue that because the money collected and redisbursed to the States is kept in an account separate from the general treasury, because the Secretary holds the funds only as a trustee, and because the States themselves are largely able to control whether they will pay into the escrow account or receive a share, the Act "in no manner calls for the spending of federal funds." Reply Brief for Petitioner State of New York 6.

The Constitution's grant to Congress of the authority to "pay the Debts and provide for the ... general Welfare" has never, however, been thought to mandate a particular form of accounting. A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose. See, *e.g.*, 23 U.S.C. § 118 (Highway Trust Fund); 42 U.S.C. § 401(a) (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. § 401(b) (Federal Disability Insurance Trust Fund); 42 U.S.C. § 1395t (Federal Supplementary Medical Insurance Trust Fund). The Spending Clause has never been construed to deprive Congress of the power to structure federal spending in this manner. Peti-

tioners' argument regarding the States' ability to determine the escrow account's income and disbursements ignores the fact that Congress specifically provided the States with this ability as a method of encouraging the States to regulate according to the federal plan. That the States are able to choose whether they will receive federal funds does not make the resulting expenditures any less federal; indeed, the location of such choice in the States is an inherent element in any conditional exercise of Congress' spending power.

The Act's first set of incentives, in which Congress has conditioned grants to the States upon the States' attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses. Because the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.

B

[13] In the second set of incentives, Congress has authorized States and regional compacts with disposal sites gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines. As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce. See *Northeast Bancorp, Inc. v. Board of Governors, Fed. Reserve System*, 472 U.S. 159, 174–175, 105 S.Ct. 2545, 2554, 86 L.Ed.2d 112 (1985). Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer states the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. See *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S., at 288, 101 S.Ct., at 2366; *FERC v. Mississippi*, 456 U.S., at 764–765, 102 S.Ct., at 2140.

This is the choice presented to nonsited States by the Act's second set of incentives: States may either regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign. A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. Cf. *Hodel, supra*, 452 U.S., at 288, 101 S.Ct., at 2366. Nor must the State abandon the field if it does not accede to federal direction; the State may continue to regulate the generation and disposal of radioactive waste in any manner its citizens see fit.

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power, along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the States by the Tenth Amendment.

C

[14] The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so

promptly. In this provision, Congress has crossed the line distinguishing encouragement from coercion.

[15] We must initially reject respondents' suggestion that, because the take title provision will not take effect until January 1, 1996, petitioners' challenge thereto is unripe. It takes many years to develop a new disposal site. All parties agree that New York must take action now in order to avoid the take title provision's consequences, and no party suggests that the State's waste generators will have ceased producing waste by 1996. The issue is thus ripe for review. Cf. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1721, 75 L.Ed.2d 752 (1983); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144–145, 95 S.Ct. 335, 359, 42 L.Ed.2d 320 (1974).

The take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement. On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. On the other hand, the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra*, 452 U.S., at 288, 101 S.Ct., at 2366, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

Respondents emphasize the latitude given to the States to implement Congress' plan. The Act enables the States to regulate pursuant to Congress' instructions in any number of different ways. States may avoid taking title by contracting with sited regional compacts, by building a disposal site alone or as part of a compact, or by permitting private parties to build a disposal site. States that host sites may employ a wide range of designs and disposal methods, subject only to broad federal regulatory limits. This line of reasoning, how-

ever, only underscores the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' 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.

IV

Respondents raise a number of objections to this understanding of the limits of Congress' power.

A

The United States proposes three alternative views of the constitutional line separating state and federal authority. While each view concedes that Congress *generally* may not compel state governments to regulate pursuant to federal direction, each purports to find a limited domain in which such coercion is permitted by the Constitution.

[16] First, the United States argues that the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission. This argument contains a kernel of truth: In determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court *has* in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State. See, *e.g., EEOC v. Wyoming*, 460 U.S., at 242, n. 17, 103 S.Ct., at 1063, n. 17; *Transportation Union v. Long Island R. Co.*, 455 U.S., at 684, n. 9, 102 S.Ct., at 1354; *National League of Cities v. Usery*, 426 U.S., at 853, 96 S.Ct., at 2475. The Court has more recently departed from this approach. See, *e.g., South Carolina v. Baker*, 485 U.S., at 512–513, 108 S.Ct., at 1361; *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S., at 556–557, 105 S.Ct., at 1020. But whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Second, the United States argues that the Constitution does, in some circumstances, permit federal directives to state governments. Various cases are cited for this proposition, but none support it. Some of these cases discuss the well established power of Congress to pass laws enforceable in state courts. See *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *Palmore v. United States*, 411 U.S. 389, 402, 93 S.Ct. 1670, 1678, 36 L.Ed.2d 342 (1973); see also *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912); *Claflin v. Houseman*, 93 U.S. 130, 136–137 (1876). These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the supreme Law

of the Land," enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.

Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law. See *Puerto Rico v. Branstad*, 483 U.S. 219, 228, 107 S.Ct. 2802, 2808, 97 L.Ed.2d 187 (1987); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 695, 99 S.Ct. 3055, 3079, 61 L.Ed.2d 823 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106–108, 92 S.Ct. 1385, 1394–1395, 31 L.Ed.2d 712 (1972); see also *Cooper v. Aaron*, 358 U.S. 1, 18–19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 (1958); *Brown v. Board of Ed.*, 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955); *Ex parte Young*, 209 U.S. 123, 155–156, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908). Again, however, the text of the Constitution plainly confers this authority on the federal courts, the "judicial Power" of which "shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . .; [and] to Controversies between two or more States; [and] between a State and Citizens of another State." U.S. Const., Art. III, § 2. The Constitution contains no analogous grant of authority to Congress. Moreover, the Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply. See *Puerto Rico v. Branstad*, *supra*, 483 U.S., at 227–228, 107 S.Ct., at 2808 (overruling *Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1861)).

In sum, the cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation.

Third, the United States, supported by the three sited regional compacts as *amici*, argues that the Constitution envisions a role for Congress as an arbiter of interstate disputes. The United States observes that federal courts, and this Court in particular, have frequently resolved conflicts among States. See, *e.g.*, *Arkansas v. Oklahoma*, 503 U.S. ——, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992); *Wyoming v. Oklahoma*, 502 U.S. ——, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). Many of these disputes have involved the allocation of shared resources among the States, a category perhaps broad enough to encompass the allocation of scarce disposal space for radioactive waste. See, *e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). The United States suggests that if the Court may resolve such interstate disputes, Congress can surely do the same under the Commerce Clause. The regional compacts support this argument with a series of quotations from The Federalist and other contemporaneous documents, which the compacts contend demonstrate that the Framers established a strong national legislature for the purpose of resolving trade disputes among the States. Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as *Amici Curiae* 17, and n. 16.

While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating state

regulation. The Constitution established Congress as "a superintending authority over the reciprocal trade" among the States, The Federalist No. 42, p. 268 (C. Rossiter ed. 1961), by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments. As Madison and Hamilton explained, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." *Id.*, No. 20, p. 138.

B

[17] The sited State respondents focus their attention on the process by which the Act was formulated. They correctly observe that public officials representing the State of New York lent their support to the Act's enactment. A Deputy Commissioner of the State's Energy Office testified in favor of the Act. See Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083, and H.R. 1267 before the Subcommittee on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 99th Cong., 1st Sess. 97–98, 190–199 (1985) (testimony of Charles Guinn). Senator Moynihan of New York spoke in support of the Act on the floor of the Senate. 131 Cong.Rec. 38423 (1985). Respondents note that the Act embodies a bargain among the sited and unsited States, a compromise to which New York was a willing participant and from which New York has reaped much benefit. Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of State sovereignty when state officials consented to the statute's enactment?

[18] The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. ——, ——, 111 S.Ct. 2546, 2570, 115 L.Ed.2d 640 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S., at ——, 111 S.Ct., at 2400 (1991). See The Federalist No. 51, p. 323.

[19, 20] Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the Branches of the Federal Government clarifies this point. The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment. In *Buckley v. Valeo*, 424 U.S. 1, 118–137, 96 S.Ct. 612, 682–691, 46 L.Ed.2d 659 (1976), for instance, the Court held that the Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. See *National League of Cities v. Usery*, 426 U.S., at 842, n. 12, 96 S.Ct., at 2469 n. 12. In *INS v. Chadha*, 462 U.S. 919, 944–959, 103 S.Ct. 2764, 2780–2788, 77 L.Ed.2d 317 (1983), we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Pres-

idents' approval of hundreds of statutes containing a legislative veto provision. See *id.*, at 944–945, 103 S.Ct., at 2781. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

[21, 22] Nor does the State's prior support for the Act estop it from asserting the Act's unconstitutionality. While New York has received the benefit of the Act in the form of a few more years of access to disposal sites in other States, New York has never joined a regional radioactive waste compact. Any estoppel implications that might flow from membership in a compact, see *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35–36, 71 S.Ct. 557, 564, 95 L.Ed. 713 (1951) (Jackson, J., concurring), thus do not concern us here. The fact that the Act, like much federal legislation, embodies a compromise among the States does not elevate the Act (or the antecedent discussions among representatives of the States) to the status of an interstate agreement requiring Congress' approval under the Compact Clause. Cf. *Holmes v. Jennison*, 14 Pet. 540, 572, 10 L.Ed. 579 (1840) (plurality opinion). That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.

V

[23] Petitioners also contend that the Act is inconsistent with the Constitution's Guarantee Clause, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. Because we have found the take title provision of the Act irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government, we need only address the applicability of the Guarantee Clause to the Act's other two challenged provisions.

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the "political question" doctrine. See, *e.g.*, *City of Rome v. United States*, 446 U.S. 156, 182, n. 17, 100 S.Ct. 1548, 1564, n. 17, 64 L.Ed.2d 119 (1980) (challenge to the preclearance requirements of the Voting Rights Act); *Baker v. Carr*, 369 U.S. 186, 218–229, 82 S.Ct. 691, 710–716, 7 L.Ed.2d 663 (1962) (challenge to apportionment of

state legislative districts); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140–151, 32 S.Ct. 224, 227–231, 56 L.Ed. 377 (1912) (challenge to initiative and referendum provisions of state constitution).

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden*, 7 How. 1, 12 L.Ed. 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to decide what government is the established one in a State." *Id.*, at 42. Over the following century, this limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts." *Colegrove v. Green*, 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432 (1946) (plurality opinion).

This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. See *Kies v. Lowrey*, 199 U.S. 233, 239, 26 S.Ct. 27, 29, 50 L.Ed. 167 (1905); *Forsyth v. Hammond*, 166 U.S. 506, 519, 17 S.Ct. 665, 670, 41 L.Ed. 1095 (1897); *In re Duncan*, 139 U.S. 449, 461–462, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891); *Minor v. Happersett*, 21 Wall. 162, 175–176, 22 L.Ed. 627 (1875). See also *Plessy v. Ferguson*, 163 U.S. 537, 563–564, 16 S.Ct. 1138, 1148, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (racial segregation "inconsistent with the guarantee given by the Constitution to each State of a republican form of government").

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See *Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392, 12 L.Ed.2d 506 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. See, *e.g.*, L. Tribe, American Constitutional Law 398 (2d ed. 1988); J. Ely, Democracy and Distrust: A Theory of Judicial Review 118, n., 122–123 (1980); W. Wiecek, The Guarantee Clause of the U.S. Constitution 287–289, 300 (1972); Merritt, 88 Colum.L.Rev., at 70–78; Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn.L.Rev. 513, 560–565 (1962).

We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government. As we have seen, these two incentives represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate. The twin threats imposed by the first two challenged provisions of the Act—that New York may miss out on a share of federal spending or that those generating radioactive waste within New York may lose out-of-state disposal outlets—do not pose any realistic risk of altering the form or the method of functioning of New York's government. Thus even indulging the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute, petitioners have not made out such a claim in this case.

VI

[24] Having determined that the take title provision exceeds the powers of Congress, we must consider whether it is severable from the rest of the Act.

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause, ... Congress' silence is just that—silence—and does not raise a presumption against severability." *Id.*, at 686, 107 S.Ct., at 1481. Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated. As the Court has observed, "it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties ... were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment." *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396, 14 S.Ct. 1047, 1054, 38 L.Ed. 1014 (1894). See also *United States v. Jackson*, 390 U.S. 570, 585–586, 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138 (1968).

It is apparent in light of these principles that the take title provision may be severed without doing violence to the rest of the Act. The Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste. It still includes two incentives that coax the States along this road. A State whose radioactive waste generators are unable to gain access to disposal sites in other States may encounter considerable internal pressure to provide for the disposal of waste, even without the prospect of taking title. The sited regional compacts need not accept New York's waste after the seven-year transition period expires, so any burden caused by New York's failure to secure a disposal site will not be borne by the residents of other States. The purpose of the Act is not defeated by the invalidation of the take title provision, so we may leave the remainder of the Act in force.

VII

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse.

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sov-

ereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them. The judgment of the Court of Appeals is accordingly

Affirmed in part and reversed in part.

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

The Court today affirms the constitutionality of two facets of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (1985 Act), Pub.L. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b *et seq.* These provisions include the monetary incentives from surcharges collected by States with low-level radioactive waste storage sites and rebated by the Secretary of Energy to States in compliance with the Act's deadlines for achieving regional or in-state disposal, see §§ 2021e(d)(2)(A) and 2021e(d)(2)(B)(iv), and the "access incentives," which deny access to disposal sites for States that fail to meet certain deadlines for low-level radioactive waste disposal management. § 2021e(e)(2). The Court strikes down and severs a third component of the 1985 Act, the "take title" provision, which requires a noncomplying State to take title to or to assume liability for its low-level radioactive waste if it fails to provide for the disposal of such waste by January 1, 1996. § 2021e(d)(2)(C). The Court deems this last provision unconstitutional under principles of federalism. Because I believe the Court has mischaracterized the essential inquiry, misanalyzed the inquiry it has chosen to undertake, and undervalued the effect the seriousness of this public policy problem should have on the constitutionality of the take title provision, I can only join Parts III-A and III-B, and I respectfully dissent from the rest of its opinion and the judgment reversing in part the judgment of the Court of Appeals.

I

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

The two signal events in 1979 that precipitated movement toward legislation were the temporary closing of the Nevada disposal site in July 1979, after several serious transportation-related incidents, and the temporary shutting of the Washington disposal site because of similar transportation and packaging problems in October 1979. At that time the facility in Barnwell,

South Carolina, received approximately three-quarters of the Nation's low-level radioactive waste, and the Governor ordered a 50 percent reduction in the amount his State's plant would accept for disposal. National Governors' Association Task Force on Low-Level Radioactive Waste Disposal, Low-Level Waste: A Program for Action 3 (Nov. 1980) (hereinafter A Program for Action). The Governor of Washington threatened to shut down the Hanford, Washington, facility entirely by 1982 unless "some meaningful progress occurs toward" development of regional solutions to the waste disposal problem. *Id.*, at 4, n. Only three sites existed in the country for the disposal of low-level radioactive waste, and the "sited" States confronted the undesirable alternatives either of continuing to be the dumping grounds for the entire Nation's low-level waste or of eliminating or reducing in a constitutional manner the amount of waste accepted for disposal.

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

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

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

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

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

Such concerns would have been mooted had Congress enacted a "federal" solution,

which the Senate considered in July 1980. See S. 2189, 96th Cong., 2d Sess. (1980); S.Rep. No. 96–548 (1980) (detailing legislation calling for federal study, oversight, and management of radioactive waste). This "federal" solution, however, was opposed by one of the sited State's Senators, who introduced an amendment to adopt and implement the recommendations of the State Planning Council on Radioactive Waste Management. See 126 Cong.Rec. 20136 (1980) (statement of Sen. Thurmond). The "state-based" solution carried the day, and as enacted, the 1980 Act announced the "policy of the Federal Government that ... each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders." Pub.L. 96–573, § 4(a)(1), 94 Stat. 3348. This Act further authorized States to "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste," § 4(a)(2)(A), compacts to which Congress would have to give its consent. § 4(a)(2)(B). The 1980 Act also provided that, beginning on January 1, 1986, an approved compact could reserve access to its disposal facilities for those States which had joined that particular regional compact. *Ibid.*

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

These discussions were not merely academic. The sited States grew increasingly and justifiably frustrated by the seeming inaction of unsited States in meeting the projected actions called for in the 1980 Act. Thus, as the end of 1985 approached, the sited States viewed the January 1, 1986 deadline established in the 1980 Act as a "drop-dead" date, on which the regional compacts could begin excluding the entry of out-of-region waste. See 131 Cong.Rec. 35203 (1985). Since by this time the three disposal facilities operating in 1980 were still the only such plants accepting low-level radioactive waste, the unsited States perceived a very serious danger if the three existing facilities actually carried out their threat to restrict access to the waste generated solely within their respective compact regions.

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

taken by" the National Governors' Association and "embodied" the "fundamentals of their settlement." *Id.*, at 35204 (statement of Rep. Udall). In sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction.

There is no need to resummarize the essentials of the 1985 legislation, which the Court does *ante*, at 2415–2416. It does, however, seem critical to emphasize what is accurately described in one *amicus* brief as the assumption by Congress of "the role of arbiter of disputes among the several States." Brief for Rocky Mountain Low-Level Radioactive Waste Compact et al. as *Amici Curiae* 9. Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress. The distinction is key, and the Court's failure properly to characterize this legislation ultimately affects its analysis of the take title provision's constitutionality.

II

To justify its holding that the take-title provision contravenes the Constitution, the Court posits that "[i]n this provision, Congress has crossed the line distinguishing encouragement from coercion." *Ante*, at 2428. Without attempting to understand properly the take title provision's place in the interstate bargaining process, the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion. The Court candidly begins with an argument respondents do *not* make: "that the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments." *Ante*, at 2428. "Such a forced transfer," it continues, "standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Ibid.* Since this is *not* an argument respondents make, one naturally wonders why the Court builds its analysis that the take title provision is unconstitutional around this opening premise. But having carefully built its straw man, the Court proceeds impressively to knock him down. "As we have seen," the Court teaches, "the Constitution does not empower Congress to subject state governments to this type of instruction." *Ante*, at 2428.

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

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

A

In my view, New York's actions subsequent to enactment of the 1980 and 1985 Acts fairly indicate its approval of the interstate agreement process embodied in those laws within the meaning of Art. I, § 10, cl. 3, of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State." First, the States—including New York—worked through their Governors to petition Congress for the 1980 and 1985 Acts. As I have attempted to demonstrate, these statutes are best understood as the products of collective state action, rather than as impositions placed on States by the Federal Government. Second, New York acted in compliance with the requisites of both statutes in key respects, thus signifying its assent to the agreement achieved among the States as codified in these laws. After enactment of the 1980 Act and pursuant to its provision in § 4(a)(2), 94 Stat. 3348, New York entered into compact negotiations with several other northeastern States before withdrawing from them to "go it alone." Indeed, in 1985, as the January 1, 1986 deadline crisis approached and Congress considered the 1985 legislation that is the subject of this lawsuit, the Deputy Commissioner for Policy and Planning of the New York State Energy Office testified before Congress that "New York State supports the efforts of Mr. Udall and the members of this Subcommittee to resolve the current impasse over Congressional consent to the proposed LLRW compacts and provide interim access for states and regions without sites. *New York State has been participating with the National Governors' Association and the other large states and compact commissions in an effort to further refine the recommended approach in HR 1083 and reach a consensus between all groups.*" See Low-Level Waste Legislation: Hearings on H.R. 862, H.R. 1046, H.R. 1083, and H.R. 1267 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 99th Cong., 1st Sess., 197 (1985) (testimony of Charles Guinn) (emphasis added).

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

Although unlike the 42 States that compose the nine existing and approved regional compacts, see Brief for United States 10,

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

The State should be estopped from asserting the unconstitutionality of a provision that seeks merely to ensure that, after deriving substantial advantages from the 1985 Act, New York in fact must live up to its bargain by establishing an in-state low-level radioactive waste facility or assuming liability for its failure to act. Cf. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35–36, 71 S.Ct. 557, 564, 95 L.Ed. 713 (1951), Jackson, J., concurring: "West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact.... Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. *After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant*, West Virginia should be estopped from repudiating her act." (Emphasis added.)

B

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

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

Finally, to say, as the Court does, that the incursion on state sovereignty "cannot be ratified by the 'consent' of state officials," *ante*, at 2431, is flatly wrong. In a case involving a congressional ratification statute to an interstate compact, the Court upheld a provision that Tennessee and Missouri had waived their immunity from suit. Over their objection, the Court held that "[t]he States who are parties to the compact by accepting it *and acting under it assume the conditions* that Congress under the Constitution attached." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281–282, 79 S.Ct. 785, 790, 3 L.Ed.2d 804 (1959) (emphasis added). In so holding, the Court determined that a State may be found to have waived a fundamental aspect of its sovereignty—the right to be immune from suit—in the formation of an interstate compact even when in subsequent litigation it expressly denied its waiver. I fail to understand the reasoning behind the Court's selective distinctions among the various aspects of sovereignty that may and may not be waived and do not believe these distinctions will survive close analysis in future cases. Hard public policy choices sometimes require strong measures, and the Court's holding, while not irremediable, essentially misunderstands that the 1985 take title provision was part of a complex interstate agreement about which New York should not now be permitted to complain.

III

The Court announces that it has no occasion to revisit such decisions as *Gregory v. Ashcroft*, 501 U.S. ——, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983); and *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); see *ante*, at 2420, because "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *Ibid.* Although this statement sends the welcome signal that the Court does not intend to cut a wide swath through our recent Tenth Amendment precedents, it nevertheless is unpersuasive. I have several difficulties with the Court's analysis in this respect: it builds its rule around an insupportable and illogical distinction in the types of alleged incursions on state sovereignty; it derives its rule from cases that do not support its analysis; it fails to apply the appropriate tests from the cases on which it purports to base its rule; and it omits any discussion of the most recent and pertinent test for determining the take title provision's constitutionality.

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

Even were such a distinction to be logically sound, the Court's "anti-commandeer-

ing" principle cannot persuasively be read as springing from the two cases cited for the proposition, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981), and *FERC v. Mississippi*, 456 U.S. 742, 761–762, 102 S.Ct. 2126, 2138–2139, 72 L.Ed.2d 532 (1982). The Court purports to draw support for its rule against Congress "commandeer[ing]" state legislative processes from a solitary statement in dictum in *Hodel*. See *ante*, at 2420: "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting *Hodel*, *supra*, 452 U.S. at 288, 101 S.Ct., at 2366). That statement was not necessary to the decision in *Hodel*, which involved the question whether the Tenth Amendment interfered with Congress' authority to pre-empt a field of activity that could also be subject to state regulation and not whether a federal statute could dictate certain actions by States; the language about "commandeer[ing]" States was classic dicta. In holding that a federal statute regulating the activities of private coal mine operators was constitutional, the Court observed that "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." 452 U.S., at 292, 101 S.Ct., at 2368.

The Court also claims support for its rule from our decision in *FERC*, and quotes a passage from that case in which we stated that "'this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.'" *Ante*, at 2420 (quoting 456 U.S., at 761–762, 102 S.Ct., at 2138–2139). In so reciting, the Court extracts from the relevant passage in a manner that subtly alters the Court's meaning. In full, the passage reads: "*While* this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, cf. *EPA v. Brown*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977), *there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.*" *Ibid.* (citing *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975)) (emphasis added).[2] The phrase highlighted by the Court merely means that we have not had the occasion to address whether Congress may "command" the States to enact a certain law, and as I have argued in Parts I and II of this opinion, this case does not raise that issue. Moreover, it should go without saying that the *absence* of any on-point precedent from this Court has no bearing on the question whether Congress has properly exercised its constitutional authority under Article I. Silence by this Court on a subject is not authority for anything.

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

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

move the States to act in a given way," we stated in *FERC*, "or even to 'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of "integral governmental functions."'" 456 U.S., at 766, 102 S.Ct., at 2141. I thus am unconvinced that either *Hodel* or *FERC* supports the rule announced by the Court.

"And if those cases do stand for the proposition that in certain circumstances Congress may not dictate that the States take specific actions, it would seem appropriate to apply the test stated in *FERC* for determining those circumstances. The crucial threshold inquiry in that case was whether the subject matter was pre-emptible by Congress. See 456 U.S., at 765, 102 S.Ct., at 2140. "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement *in a pre-emptible field*—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks." *Id.*, at 771, 102 S.Ct., at 2143 (emphasis added). The *FERC* Court went on to explain that if Congress is legislating in a pre-emptible field—as the Court concedes it was doing here, see *ante*, at 2426–2427—the proper test before our decision in *Garcia* was to assess whether the alleged intrusions on state sovereignty "do not threaten the States' 'separate and independent existence,' *Lane County v. Oregon*, 7 Wall. 71, 76 [19 L.Ed. 101] (1869); *Coyle v. Oklahoma*, 221 U.S. 559, 580 [31 S.Ct. 688, 695, 55 L.Ed. 853] (1911), and do not impair the ability of the States 'to function effectively in a federal system.' *Fry v. United States*, 421 U.S., at 547, n. 7 [95 S.Ct., at 1795, n. 7]; *National League of Cities v. Usery*, 426 U.S., at 852 [96 S.Ct., at 2474]," *FERC*, *supra*, 456 U.S., at 765–766, 102 S.Ct., at 2144. On neither score does the take title provision raise constitutional problems. It certainly does not threaten New York's independent existence nor impair its ability to function effectively in the system, all the more so since the provision was enacted pursuant to compromises reached among state leaders and then ratified by Congress.

It is clear, therefore, that even under the precedents selectively chosen by the Court, its analysis of the take title provision's constitutionality in this case falls far short of being persuasive. I would also submit, in this connection, that the Court's attempt to carve out a doctrinal distinction for statutes that purport solely to regulate State activities is especially unpersuasive after *Garcia*. It is true that in that case we considered whether a federal statute of general applicability—the Fair Labor Standards Act—applied to state transportation entities but our most recent statements have explained the appropriate analysis in a more general manner. Just last Term, for instance, Justice O'CONNOR wrote for the Court that "[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system)." *Gregory v. Ashcroft*, 501 U.S. ——, ——, 111 S.Ct. 2395, 2413, 115 L.Ed.2d 410 (1991). Indeed, her opinion went on to state that "this Court in *Garcia* has left primarily to the *political process* the protection of the States against intrusive exercises of Congress' Commerce Clause powers." *Ibid.* (emphasis added).

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

of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" 469 U.S., at 554, 105 S.Ct., at 1019 (quoting *EEOC v. Wyoming*, 460 U.S., at 236, 103 S.Ct., at 1060). Where it addresses this aspect of respondents' argument, see *ante*, at 2427–2432, the Court tacitly concedes that a failing of the political process cannot be shown in this case because it refuses to rebut the unassailable arguments that the States were well able to look after themselves in the legislative process that culminated in the 1985 Act's passage. Indeed, New York acknowledges that its "congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts." Pet. for Cert. in No. 91–543, p. 7. The Court rejects this process-based argument by resorting to generalities and platitudes about the purpose of federalism being to protect individual rights.

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

3. With selective quotations from the era in which the Constitution was adopted, the majority attempts to bolster its holding that the take title provision is tantamount to federal "commandeering" of the States. In view of the many Tenth Amendment cases decided over the past two decades in which resort to the kind of historical analysis generated in the majority opinion was not deemed necessary, I do not read the majority's many invocations of history to be anything other than elaborate window-dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause. See generally F. Frankfurter & J. Landis, The Business of the Supreme Court 56–59 (1927); H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (1973); Corwin, The Passing of Dual Federalism, 36 Va.L.Rev. 1 (1950); Wiecek, The Reconstruction of Federal Judicial Power, 1863–1875, 13 Am.J.Legal Hist. 333 (1969); Scheiber, State Law and "Industrial Policy" in American Development, 1790–1987, 75 Calif.L.Rev. 415 (1987); Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453 (1989). While I believe we should not be blind to history, neither should we read it so selectively as to restrict the proper scope of Congress' powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature's authority than may have existed in the late 18th-century.

Given the scanty textual support for the majority's position, it would be far more sensible to defer to a coordinate branch of government in its decision to devise a solution to a national problem of this kind. Certainly in other contexts, principles of federalism have not insulated States from mandates by the National Government. The Court has upheld congressional statutes that impose clear directives on state officials, including those enacted pursuant to the Extradition Clause, see, *e.g.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 227–228, 107 S.Ct. 2802, 2808, 97 L.Ed.2d 187 (1987), the post-Civil

IV

Though I disagree with the Court's conclusion that the take title provision is unconstitutional, I do not read its opinion to preclude Congress from adopting a similar measure through its powers under the Spending or Commerce Clauses. The Court makes clear that its objection is to the alleged "commandeer[ing]" quality of the take title provision. See *ante*, at 2427. As its discussion of the surcharge and rebate incentives reveals, see *ante*, at 2425–2426, the spending power offers a means of enacting a take title provision under the Court's standards. Congress could, in other words, condition the payment of funds on the State's willingness to take title if it has not already provided a waste disposal facility. Under the scheme upheld in this case, for example, monies collected in the surcharge provision might be withheld or disbursed depending on a State's willingness to take title to or otherwise accept responsibility for the low-level radioactive waste generated in state after the statutory deadline for establishing its own waste disposal facility has passed. See *ante*, at 2426; *South Dakota v. Dole*, 483 U.S. 203, 208–209, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987); *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403 (1978).

Similarly, should a State fail to establish a waste disposal facility by the appointed deadline (under the statute as presently drafted, January 1, 1996, § 2021e(d)(2)(C)), Congress has the power pursuant to the Commerce Clause to regulate directly the producers of the waste. See *ante*, at 2426–2427. Thus, as I read it, Congress could amend the statute to say that if a State fails to meet the January 1, 1996 deadline for achieving a means of waste disposal, and has not taken title to the waste, no low-level radioactive waste may be shipped out of the State of New York. See, *e.g.*, *Hodel*, 452 U.S., at 288, 101 S.Ct., at 2366. As the legislative history of the 1980 and 1985 Acts indicates, faced with the choice of federal pre-emptive regulation and self-regulation pursuant to interstate agreement with congressional consent and ratification, the States decisively chose the latter. This background suggests that the threat of federal pre-emption may suffice to induce States to accept responsibility for failing to meet critical time deadlines for solving their low-level radioactive waste disposal problems, especially if that federal intervention also would strip state and local authorities of any input in locating sites for low-level radioactive waste disposal facilities. And of course, should Congress amend the statute to meet the Court's objection and a State refuse to act, the National Legislature will have ensured at least a federal solution to the waste management problem.

Finally, our precedents leave open the possibility that Congress may create federal rights of action in the generators of low-level radioactive waste against persons acting under color of state law for their failure to meet certain functions designated in federal-state programs. Thus, we have upheld § 1983 suits to enforce certain rights created by statutes enacted pursuant to the Spending Clause, see, *e.g.*, *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), although Congress must be cautious in spelling out the federal right clearly and distinctly, see, *e.g.*, *Suter v. Artist M.*, 503 U.S. ——, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous). In addition to compensating injured parties for the State's failure to act, the exposure

War Amendments, see, *e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 319–320, 334–335, 86 S.Ct. 803, 814, 15 L.Ed.2d 769 (1966), as well as congressional statutes that require state courts to hear certain actions, see, *e.g.*, *Testa v. Katt*, 330 U.S. 386, 392–394, 67 S.Ct. 810, 813–814, 91 L.Ed. 967 (1947).

to liability established by such suits also potentially serves as an inducement to compliance with the program mandate.

V

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

Justice STEVENS, concurring in part and dissenting in part.

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

The notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress," *ante*, at 2428, is incorrect and unsound. There is no such limitation in the Constitution. The Tenth Amendment [1] surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I.[2] Nor does the structure of the constitutional order or the values of federalism mandate such a formal rule. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions. Similarly, there can be no doubt that, in time of war, Congress could either draft soldiers itself or command the States to supply their quotas of troops. I see no reason why Congress may not also command the States to enforce federal water and air quality stan-

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

2. In *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), we explained: "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131, III *id.*, 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767–768; Story, Commentaries on the Constitution, §§ 1907–1908.

"From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Id.*, at 124, 61 S.Ct., at 462; see also *ante*, at 2417–2418.

dards or federal standards for the disposition of low-level radioactive wastes.

7. The Constitution gives this Court the power to resolve controversies between the States. Long before Congress enacted pollution-control legislation, this Court crafted a body of " 'interstate common law,' " *Illinois v. City of Milwaukee*, 406 U.S. 91, 106, 92 S.Ct. 1385, 1394, 31 L.Ed.2d 712 (1972), to govern disputes between States involving interstate waters. See *Arkansas v. Oklahoma*, 503 U.S. ——, ——–——, 112 S.Ct. 1046, 1052–1053, 117 L.Ed.2d 239 (1992). In such contexts, we have not hesitated to direct States to undertake specific actions. For example, we have "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 185, 103 S.Ct. 539, 546, 74 L.Ed.2d 348 (1982) (citing *Wyoming v. Colorado*, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999 (1922)). Thus, we unquestionably have the power to command an upstate stream that is polluting the waters of a downstream State to adopt appropriate regulations to implement a federal statutory command.

With respect to the problem presented by the case at hand, if litigation should develop between States that have joined a compact, we would surely have the power to grant relief in the form of specific enforcement of the take title provision.[3] Indeed, even if the statute had never been passed, if one State's radioactive waste created a nuisance that harmed its neighbors, it seems clear that we would have had the power to command the offending State to take remedial action. Cf. *Illinois v. City of Milwaukee*. If this Court has such authority, surely Congress has similar authority.

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

3. Even if § 2021e(d)(2)(C) is "invalidated" insofar as it applies to the State of New York, it remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect. Congress' consent to the compacts was "granted subject to the provisions of the [Act] ... and only for so long as the [entities] established in the compact comply with all the provisions of [the] Act." Appalachian States Low-Level Radioactive Waste Compact Consent Act, Pub.L. 100–319, 102 Stat. 471. Thus the compacts incorporated the provisions of the Act, including the take title provision. These compacts, the product of voluntary interstate cooperation, unquestionably survive the "invalidation" of § 2021e(d)(2)(C) as it applies to New York. Congress did not "direc[t]" the States to enter into these compacts and the decision of each compacting State to enter into a compact was not influenced by the existence of the take title provision: Whether a State went its own way or joined a compact, it was still subject to the take title provision.

WISCONSIN DEPARTMENT OF REVENUE, Petitioner,

v.

WILLIAM WRIGLEY, JR., CO.

No. 91–119.

Argued Jan. 22, 1992.

Decided June 19, 1992.

Wisconsin Tax Appeals Commission upheld tax assessment against out-of-state chewing gum manufacturer. The Circuit Court, Dane County, William A. Bablitch, J., reversed. Department of Revenue appealed. The Court of Appeals, 153 Wis.2d 559, 451 N.W.2d 444, reversed and remanded with directions. Manufacturer petitioned for review. The Supreme Court, 160 Wis.2d 53, 465 N.W.2d 800, reversed. State's petition for certiorari was granted. The Supreme Court, Justice Scalia, J., held that: (1) phrase "solicitation of orders" in Interstate Commerce Tax Act immunity