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Federal power, states' rights and nuclear waste: What is a just solution?

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FEDERAL POWER, STATES' RIGHTS
AND NUCLEAR WASTE:
WHAT IS A JUST
SOLUTION?

by

Steven Mark Randall

A thesis submitted in partial fulfillment
of the requirements for the degree of

Master of Arts

in

Ethics and Policy Studies

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ABSTRACT

*Federal Power, States’ Rights and Nuclear Waste: What Is A Just Solution?*, analyzes the issue regarding the right of the federal government to construct a high level nuclear waste storage facility on federal land within a state that is opposed to a storage facility within state boundaries. Within the thesis is an overview of federalism followed by a history of the Tenth Amendment and a case analysis. An examination of the ethical considerations of the issue is considered. Finally, an analysis of the current laws regarding nuclear waste storage is presented, followed by policy recommendations for the use of nuclear energy and the storage of nuclear waste. Current policy is revised to achieve a more just solution with regard to the rights of states.
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Introduction

The problem of nuclear waste has been at the forefront of the agenda for the last several Congressional legislative sessions in Washington D.C. Domestic nuclear waste has been accumulating at reactor sites for the past fifty years. The federal government has accepted responsibility for disposing of the waste, however, the government has been unable to deal with the political issues that have surrounded this problem.

Inarguably, nuclear waste disposal is a serious situation. Dealt with in a vacuum, i.e., without contemplating the political, economic, and social impact of nuclear waste disposal, the solution seems simple. In fact, the federal government, with significant encouragement from the nuclear power industry, has chosen the simplest solution. First, find a remote geographic location where the presence of nuclear waste will be physically isolated from large population centers. The geology of the site should be relatively free of ground water and have minimal cracks and crevices that might allow seepage. Indeed, it appears that the federal government has found the perfect site in the proposed Yucca Mountain Nuclear Waste Repository. The site is currently under study and is expected to be approved for storage of nuclear waste for a period of ten thousand years.
The concept of majority rule has played a significant role in our democratic process since this country was founded. This utilitarian philosophy, which incorporates the solution that is best for the majority of members in society, has been utilized in most elections and various policy decisions that have affected our society. Indeed, utilitarianism has been an important concept in our system of government. The federal government is using the concept of utilitarianism as justification for constructing a nuclear waste repository at Yucca Mountain.

However, in a case like the Yucca Mountain controversy, with potential lethal ramifications for the citizens of Nevada, utilitarianism must subordinate to the basic rights of all members of society. There is no precedent for majority rule in an issue with such potential deadly consequences. In a case of this magnitude, the basic rights of the minority must not be overcome by the wishes of the majority.

Construction of a nuclear waste repository certainly sounded simple until the federal government met the State of Nevada head-on in a political battle that continues to this day. It turns out that the State of Nevada does not want nuclear waste within the state boundaries. The leaders of the state, with almost unanimous support from its citizens, is steadfastly opposed to the project going forward. The citizens of the State of Nevada have grave concerns about how nuclear waste may affect their lives, physically, politically, and economically. Yet, the federal government continues to move forward with the project,
maintaining that it has the power within the law to place a nuclear waste repository in a state that does not want a repository.

Now, the situation is not so simple. Many issues have arisen out of this debate, such as how much power should the federal government be allowed over its citizens? How will this example of federal overreach into the states affect future decisions of the government to deal with complex problems? If this project goes forward, how can the minority members of a society be protected from oppression by the majority? What does our United States Constitution say about this issue?

This thesis will deal with these questions and argue that the federal government has no right to impose such a project on the State of Nevada without its consent. The scope of this thesis will not encompass alternatives. Much of the argument from the federal government has been, if not Nevada, then where? If not now, then when? Nevada does not use nuclear waste nor has it encouraged its development. Nevada was not a part of the negotiations between the nuclear power industry and the federal government when the government took responsibility for nuclear waste disposal. Based on this, the state should not have to go beyond simply declining the offer and forcing the federal government and the nuclear power industry to go elsewhere to solve their problem.

Chapter One will present a history of nuclear waste and how we got where we are at the current time. This chapter will address several of the many laws that have come out
of the debate on nuclear waste. It will also provide a brief overview of the Nevada Test Site and its evolution throughout the nuclear era and address Nevada's contribution to the national security effort.

Chapter Two will address the ethics of the problem that have come about by having a federal government force a program onto an unwilling host state. The basis for the discussion will be Political Liberalism, by John Rawls. Rawls believes that society should be structured to protect the rights of the weaker members within the society. Only in this way can societal equilibrium be maintained over many generations. Nevada has one of the smallest delegations to the United States Congress, therefore, it is considered to be a politically weak state. When the federal government forces itself onto a politically weak state, it may succeed in its specific endeavor, however, Rawls maintains that a far greater price is paid by disturbing the equilibrium of society.

Chapter Three examines how our country began and what it was intended to be when our founding fathers created the Constitution. The concept of federalism has played an important role throughout history. The relationship between the states and the federal government was an issue during the debate on the Constitution. The federalists favored a strong central government, while the anti-federalists wanted the states to have more power. This debate has continued throughout history and is important to the issue of nuclear waste.
Finally, Chapter Four will discuss several legal cases and analyze in detail two cases that have had an impact on the relationship between the states and federal government. The focus of this chapter, and indeed this thesis as a whole, is the Tenth Amendment to the Constitution. "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." This amendment to the Constitution seems to define how the federal government will conduct itself in its issues with the states. The chapter will address how the court system has reacted to the relationship between the states and the federal government.
Chapter One

The History of Nuclear Waste and the Laws It Generated

Approximately fifty years ago, the nuclear industry proposed that nuclear power plants be constructed in order to provide commercial and domestic energy. The new energy source was to provide power that was clean, efficient, and almost "too cheap to meter." The potential profits of the new industry were thought to be enormous, and indeed, have proven to be so over the past fifty years.

One of the variables that proved to be annoying to proponents of nuclear power was the problem of what to do with the highly radioactive waste produced in the process of atomic fission during the generation of energy. The federal government became involved, and ultimately approved the construction of nuclear power plants, provided the government be allowed to regulate the industry. The question of what to do with the nuclear waste was put aside, in hopes that future technology would solve the problem. The waste has been stored on site at the reactors ever since.
Fifty years later, the waste is beginning to pile up at the reactor sites. Unfortunately, technology has not found a solution to the waste problem, mainly because a solution was not seriously sought until recently. Since the federal government had accepted responsibility for waste disposal, private industry never had an incentive to invest in the research to find a waste solution. In 1982, the federal government entered into an agreement with the nuclear industry to provide long term disposal of the waste in exchange for a fee paid by users of nuclear power. The government has now accepted a significant amount of money from this fund, but has no place to put the nuclear waste. Inevitably, "politics," as opposed to a reasonably drafted policy, became the active ingredient in the process of nuclear waste disposal.

The federal government, convinced that geologic disposal is the best method of storing the waste, needed a remote place to construct a repository. Nevada was an easy choice because a significant portion of the state is seen by others to be desolate, the federal government owns the land which ultimately became the proposed site, and the nearby Nevada Test Site (NTS) seemed to justify the addition of a nuclear waste repository. Deep geologic disposal of the waste at a facility to be constructed at Yucca Mountain, Nevada, seemed to be the perfect solution. That is, it was the perfect solution as far as the federal government was concerned. It ran headlong into a major obstacle because it turns out that Nevada does not want a nuclear waste repository within its boundaries.
And so ensued a political battle that is being waged at the current time. The State of Nevada did all it could to impede the process, but the federal government was finally able to secure all the necessary permits and begin a study of the site. The study is ongoing, but it is suspected by Nevadans and others that the repository is being constructed in conjunction with, rather than contingent on, the study. So far the users of nuclear energy have spent a tremendous amount of money to study the issue. It seems logical that the more money spent on the study, the harder it will be to find the site unsuitable for nuclear waste storage. Additionally, with the current climate in Congress, the Nevada Test Site will likely be selected as a site for interim storage until a permanent repository can be approved and constructed. By placing nuclear waste in the State of Nevada, and within close proximity to the Yucca Mountain Site, the situation is one more argument to justify approving Yucca Mountain as the permanent repository site. Therefore, it seems inevitable that nuclear waste will be coming to Nevada at some time in the future.

The issue of nuclear waste storage has become vital to the citizens and government of Nevada. With the proposal of a high level nuclear waste repository to be located ninety miles northwest of Las Vegas, a social and political firestorm from the citizens of Nevada has come as somewhat of a surprise to the federal government, especially in light of the fact that Nevada embraced the activities of the Nevada Test Site beginning with the first nuclear test on January 27, 1951. The test site was seen as a patriotic contribution to national security and it was an era when the citizens of the country took at face value what
the government said to be true. Furthermore, in 1975 Nevada actually asked the federal
government to store nuclear waste at the Nevada Test Site as part of a proposal for future
activities at the test site, since the age of nuclear testing was beginning to draw to a close
and the state feared a potential loss of considerable federal revenue.¹

More recently, however, the State of Nevada has proclaimed that it is officially
opposed to the construction of a high level nuclear waste repository within its boundaries
on the grounds that the facility will compromise the safety of the citizens of Nevada.
Additionally, it may have a potentially negative impact on the economy. Nevada may be
viewed as an undesirable place to live, visit or conduct business if the presence of a
nuclear waste repository becomes a reality. With tourism as the main industry that
supports the state, discouraging visitors from coming to Nevada could have devastating
economic consequences.

The Nuclear Waste Projects Office, created in 1985 by the State of Nevada for
information purposes, has performed various studies on the potential impact of nuclear
waste on the State of Nevada. Several studies by this office between 1989 and 1993 found
the following:²

- A large majority of respondents said a repository would reduce the desirability of
  a community for raising a family.
- A majority said a repository would deter them from visiting for a vacation or
  attending a convention.
Job seekers could be deterred from seeking work in Las Vegas because of the repository and because of reduced job opportunities resulting from the repository's presence.

At least 30 percent of convention planners surveyed said they would reduce their rating of Las Vegas as a meeting site if a repository was located nearby. If the facility should experience accidents that are given extensive media coverage, 75 percent of planners would reduce their rating, and nearly 50 percent said they would no longer consider Las Vegas an acceptable convention site.

Real estate executives believed that the existence of a repository within 100 miles of a community would detract from its suitability as a location for administrative offices, business and professional services, and businesses to serve the hospitality industry.

Meanwhile, the courts have ruled that Nevada may not litigate the issue unless Yucca Mountain is found suitable for a permanent repository site. At this point in history, all the state can do to oppose this issue is to fight it in the Congress and proclaim opposition wherever possible. Many feel, however, that the prospects are grim. The Nuclear Waste Policy Act Amendments of 1987 single out Yucca Mountain as the sole study site, making it the only potential site in the foreseeable future for the construction of a repository. Based on this law and the fact that the Department of Energy has spent significant funds studying the site, approval of the site for the construction of the repository seems a strong possibility.

The purpose of this chapter is to explore the historical principles involved in the development of the nuclear power industry and the generation of nuclear waste. It will also examine the legal chronology involved in the proposition of this project and cite select court cases regarding nuclear waste issues. The federal laws that are most significant are
the Nuclear Waste Policy Act of 1982 and the Nuclear Waste Policy Act Amendments of 1987. There have also been a number of state resolutions approved by the Nevada state legislature having to do with nuclear waste policy.

**History of Nuclear Power**

The purpose of this analysis is to examine the development of domestic nuclear energy, which began after the nuclear weapons age was in full swing. Nuclear fission was initially developed as a tool of war. With Japanese-American relations crumbling in 1939, President Franklin D. Roosevelt turned his attention from the New Deal and focused on the international problems developing in Europe and Asia. Nobel prize winning physicist, Niels Bohr, was brought to Princeton University to spend a few months at the Institute For Advanced Study. During this period of time, Bohr explained the new development in physics that allowed a uranium nucleus to split into two lighter elements. Part of the energy needed to hold the nucleus together had been released, thus the concept of fission became a practical reality. The race for the bomb had begun. Over the next several years, a great deal of research and legislation ensued that directly impacted the control of nuclear development. In the future, nuclear physics was to become a major research field.

With the end of World War II, scientists, politicians, and ultimately, entrepreneurs began to study the feasibility of harnessing nuclear energy for the purpose of domestic use.
Initially, it was thought that atomic power would never be able to be used on a domestic scale. After learning how to use the radioactive materials to explode a bomb, the challenge was to produce energy in a steady and controllable output, in order to generate electricity. As a result of this effort, the domestic nuclear reactor was born.

The earliest use of a nuclear reactor to produce domestic electricity was thought to be in December 1951. Although this reactor was built in the United States, the first nuclear reactor designed expressly for the production of power was built in a small town near Moscow in 1956. This reactor was for demonstration purposes only and was considered too small to be a significant example of nuclear power production. Industrial scale reactors were not developed until 1956 in the United Kingdom.

As opposed to the making of plutonium for a nuclear bomb, power production required harnessing the heat from the reactor instead of throwing it away. The heat from the reactor produces steam, which is in turn used to produce power in a conventional manner, using turbines and other equipment. Technically, the concept was simple, but as we now know, the technology created some unique problems due to the high level of radiation involved.

Even while some reactors had a primary purpose of producing plutonium, it soon became understood that electricity was a useful by-product. Soon, reactors around the globe were being developed solely for the production of electricity. From 1945 to 1960,
the United States, U.S.S.R., Sweden, Belgium, Norway, France, India, United Kingdom, and Canada all had some form of experimental or larger commercial reactor under development or in full use. By 1971, ten percent of the power in the United Kingdom was generated by nuclear power plants. Britain was especially aggressive in this development. Since this country experienced significant energy shortages during the post war years, nuclear power promised a certain answer to the problem. France was in a similar situation. With its postwar supply of coal dwindling, the temptation of nuclear power was too much to resist. France began importing enriched uranium, natural uranium, and heavy water. The French government also acted as technical advisor to less developed countries concerning the development of nuclear energy.

After World War II, the United States found itself with an abundance of natural resources, mainly oil and coal. Because of this, the Americans were not as quick to develop nuclear reactors for domestic energy production. At the time, the United States was more concerned with the cheapest source of energy, and there were several alternatives. It was not until the early 1960s that market forces in the energy industry pointed to nuclear power as a feasible, and therefore profitable, source of electricity. In true American form, once development began, it outpaced the rest of the world by a large margin.

A 1962 United States Atomic Energy Commission report on the need for nuclear power stated that the immediate implementation and development of nuclear power would
result in a $10 billion savings in the cost of energy generation within eight years. This can be directly translated into an estimate of profit by developing nuclear energy. The report went on to recommend that development of nuclear plants should begin immediately and research should continue on the development of more efficient reactors. The report did not address the problem of nuclear waste that the newer, more efficient, reactors would produce.11

Additionally, the Atomic Energy Commission initiated a program to entice the private sector into investing in new reactors. Until this time, government entities had to provide funding for development and research because the financial risks were considered too high for a company to invest the large amount necessary to bring a reactor on line. As a part of the AEC’s Nuclear Development Policy, a statement presented to the Joint Congressional Committee submitted that it was the, "conviction of the Commission that progress toward economic nuclear power can be fully advanced through participation in the development program by qualified and interested groups outside the Commission." As a result, the relationship between the federal government and private investment groups was born.12

The early 1970s saw a major expansion of nuclear power due to the increase in oil prices. With this came fear of nuclear energy. Opposition to nuclear reactors had been almost unheard of until the mid-1970s, when governments around the world began announcing that the oil shortage would be dealt with by constructing nuclear power plants.
The oil crisis of the 1970s produced a two-fold result. First, citizens became educated about nuclear power, which ultimately led to most of the opposition during this period. Since the risks of nuclear power were not fully known, many citizens did not want nuclear reactors constructed in their communities and protested loudly when a reactor was proposed for their area.¹³

Second, due to the increase in oil prices, people learned to conserve energy. Paradoxically, as citizens learned to conserve, this resulted in a decreased demand for energy overall, and the development of new reactors dropped off significantly immediately following this period of rapid development. This, along with growing environmental concerns¹⁴, slowed the market for new reactors to a sluggish pace. Public opposition to nuclear reactors was a growing obstacle to development. With the real and received risks of radiation exposure to the public, siting became a critical issue, both politically and economically. Development of a nuclear reactor had considerable financial risk involved without consideration of the opposition to siting of the reactor itself. Thus, many investors were unwilling to become involved due to the uncertainty of public support.¹⁵

Proponents of nuclear energy saw this as a danger, since it would take approximately ten years to plan and build a reactor. In the event of a global energy crisis, it was thought that it could have devastating effects on the world in general if new energy sources are needed in the short term and are not available. With the uncertainty in oil markets, the only alternatives were thought to be coal and uranium. Since coal is highly

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pollutive, uranium was thought to be the best alternative by those who were involved in the nuclear industry.

Creating the Nuclear Waste

Although safety concerns have been the focus of the nuclear industry during the development of the reactors, the problem of nuclear waste has been more difficult to solve. These highly radioactive substances, which are created from the fission process itself, are some of the most toxic substances created by mankind. During the Manhattan Project, which created the atomic bomb used to end World War II, the problem of atomic waste was recognized and dealt with in what was supposed to be the best manner possible. From the creation and presence of nuclear waste, a new set of procedures, almost a science in itself, was developed in order to safeguard the staff at the worksite. Radiation protection became a focus as the participants in the project recognized the increasing dangers of nuclear waste. Even with extreme measures being taken to prevent over-exposure to radiation, work crews often recorded daily film badge readings slightly in excess of the allowed daily limit. The problem was also recognized as ships used for transport and testing needed to be decontaminated. The process proved daunting and almost insurmountable. A weekly report in 1946 to a radiological safety officer involved in the Manhattan Project stated that,
"All of these ships are unsafe for unrestricted clearance. Since some of the active material is decaying at a very slow rate, since these ships have already been extensively decontaminated, and since the contamination is in no way localized and probably covers at least the entire topside surface, it seems improbable that they could ever be decontaminated to the point where they would be safe for use, even for scrap purposes."\textsuperscript{16}

Nuclear waste does not create a huge bulk, as with an industrial slag heap or solid waste generated through domestic activities. Indeed, nuclear waste does not take up a lot of room. The waste has generally been stored at the reactor sites in concrete silos where it can be kept under surveillance. Despite small leaks, this method has been satisfactory and can be continued for many decades.\textsuperscript{17} Still, longer term methods need to be developed because, as the amount of nuclear waste increases at the reactor site, the greater the potential is for a catastrophic accident involving a large number of people. Although many in the nuclear industry would proclaim that the problem is not unsolved, the solution appears to be headed toward deep geologic disposal. This creates many questions which have gone unanswered.

The general principle of nuclear waste disposal is to create a series of barriers between the nuclear waste and man. This can happen by turning the waste itself into a glasslike material and placing the material in a waste container made of a long lasting material, such as stainless steel. In case of leaks, an absorbent layer should encompass the package, and finally, the package should be placed in a deep geologic repository where it allegedly poses little danger to mankind.
Theoretically, leakage through all these layers would be very slow, resulting in a minute risk to living beings. Unfortunately, the scientists who propose this method are unable to project that a minute degree of risk can endure over the span of ten thousand years, the typical half life of nuclear waste. Since civilized society has not even been documented for that long, it is unlikely that anyone will be able to prove the process is safe, besides designing and implementing a ten thousand year monitoring project. Based on this, the nuclear waste dilemma has developed into a political mess that does not appear close to a resolution that is not beneficial to the citizens of Nevada.

Creating The Nuclear Waste Policy

It seems that an idea must only show a glimmer of hope for profit before man rushes in to exploit the idea, many times selling out long term common sense to short term gain. Nuclear power was no different. When the federal government gave the go-ahead for development of nuclear power plants without a viable solution for the disposal of nuclear waste, the future generations of society were sold out for immediate profit. Creating a question of constitutionality in itself, the government proclaimed that it would become a partner with private enterprise to develop and produce nuclear power.\textsuperscript{18} Now, at a cost of billions of dollars to the present generation, the problem of nuclear waste that was created by this partnership does not appear close to resolution.
Public distrust of institutions has increased dramatically over the past thirty years. As mentioned earlier, the government was not forthcoming with the possible outcome of spreading radioactive fallout throughout southern Nevada and Utah. Therefore, it is with little surprise that the public discovers the government has created another huge problem without a solution that is satisfactory to Nevadans.

In spite of the problems created by the federal government’s short-sightedness, the negative impact is exacerbated by the federal government’s inability, or unwillingness, to form acceptable working relationships with state governments and Indian tribes that are affected by its actions. By the 1980s, the relationships between the Department of Energy (DOE) and various state governments had deteriorated to a stage of hostility, creating a perception of superiority on the part of the DOE, and an attitude of defiance on the part of the states. With this type of relationship, it is unlikely that a practical solution could be rendered that will be in the best interest of either party. Even during the search process for a suitable site, the DOE’s high handed tactics of not consulting with or asking for participation of state governments resulted in two-thirds of the states banning site exploration within their borders.

The Department of Energy has not indicated a willingness to create new institutional roles for the states in developing a repository program. Although attempts to fragment support within the State of Nevada have utterly failed, some would argue that the DOE maintains its position of power and control over the process instead of allowing
the public to have input into the repository program. Any restructuring of the current program may mean retreating from the forced siting at Yucca Mountain, and so far this has proven to be unacceptable to the DOE.\footnote{31}

In the book, *One Hundred Centuries of Solitude*, numerous authors have put forth recommendations for the badly failing nuclear waste disposal program in the United States. The program has been plagued by technical problems, poor (and inconsistent) management, budget overruns, state opposition, and technical uncertainties. Worst of all, the program has experienced a high level of public mistrust, and in a democratic form of government, problems that are in dire need of resolution typically become worse when the public does not have faith in the government institution to act in the best interest of the citizens.

The following recommendations have been put forth by these authors to get the United States nuclear waste program back on track.

- **Reevaluate the commitment to underground geologic disposal.** Congress should place a moratorium on the current program. Further research should be done on technical problems, including study of the comparative advantages and disadvantages of different geologic structures and engineered barriers to isolate HLNW from the environment. Most importantly, the federal government must make a genuine effort to gain public acceptance and political support for the program.

- **Use interim storage facilities.** Above ground storage in dry casks at reactor sites or a centralized monitored retrievable storage facility could be used to store wastes for 10 years or more. This would allow the program to respond to the essential
technical and socioeconomic problems rather than being driven by the current arbitrary schedule. Although onsite interim storage is already in use, it could be easily, and inexpensively, expanded to accommodate a much larger quantity of nuclear waste over a longer period of time.

- **Evaluate more than one site.** Every effort must be made to find several states and communities willing to be considered as the location of an interim or permanent storage facility. It is crucial to keep several options open until very late in the selection process, because the repository is a first-of-its-kind facility with a great many associated uncertainties and a well-demonstrated ability to evoke intense public and political opposition.²²

- **Employ a voluntary site selection process.** Procedures to select Yucca Mountain for site characterization have been a major source of conflict and have evoked fierce public and political opposition. To avoid such conflicts in the future, Congress should mandate that no community will be forced to accept a repository against its will and that potential host communities should be encouraged and permitted to play a genuine and active role in the planning, design, and evaluation of the repository.

- **Negotiate agreements and compensation packages.** A voluntary siting program must offer sufficient benefits to potential host communities and regions so that their residents feel their situation has improved over the status quo.

- **Acknowledge and accept the legitimacy of public concerns.** A repository program has social and economic dimensions that will seriously affect the quality of life in neighboring communities. Most notably, such a project has the potential to stigmatize these communities, making them less attractive to residents, visitors, businesses, and in-migrants. The full range of socioeconomic impacts should be addressed as part of a negotiated siting process.

- **Guarantee stringent safety standards.** Public acceptance of the repository program requires assurances that public safety will be a priority. The federal government must negotiate contingent agreements with any community or region that agrees to host a repository and specify what actions will be taken should there be an accident or unforeseen events, interruptions of service, changes in standards, or the emergence of new scientific data about risks or impacts.²³

- **Restore credibility to the waste program.** This is not so much of a recommendation, but a probable result if the above recommendations are implemented.²⁴
Federal Laws

The development, testing, and use of nuclear weapons ultimately led to the development of nuclear power. In the late 1950s, the federal government and nuclear power industry embarked on a proliferation of nuclear power plants. Nuclear power was to be clean, inexpensive, and highly profitable. The question of nuclear waste was debated, but ultimately the solution to the problem was deferred to later generations in the hopes that technology would create a solution before the problem became significant. But technology did not come through. Not because a solution could not be found, but because a solution was not sought until recently. The country invested billions of dollars in nuclear power plants, but only a few hundred million to research disposal methods of high level nuclear waste. As a percentage of the total investment, it was highly unlikely that such a low expenditure would produce viable results. Over the years, as the problem of nuclear waste increased, the Congress was forced to take action. Because of this, a proliferation of legislation began in the federal and state legislatures. Following is a synopsis of the most relevant laws concerning this issue.

Nuclear Waste Policy Act of 1982

Considering that Congress was dealing with a problem that should have never existed in the first place, the Nuclear Waste Policy Act of 1982 was a good piece of legislation. It was the first major statute that actively implemented a search process for
a solution to the disposal problem. Overall, the law gave highest priority to finding and scheduling construction of a geologic repository in which to store the waste, allowing for the possibility of establishing an interim waste facility. In addition to assigning the responsibility for nuclear waste management to specific federal agencies, the act also delineated how the Department of Energy and other federal departments would communicate with state and local governments and Indian tribes. Finally, the Act established the Nuclear Waste Fund to cover disposal costs, paid for by users of nuclear power.

At this point, the concept of fairness was evident. The states that were to be affected would be involved at almost every level and would retain veto power over certain proposals. The law directed the Department of Energy to find a suitable site for a repository, to be paid for by the users of nuclear energy. There was to be one potential site in the East and one potential site in the West. It is interesting to note that the law specifies a suitable site in which "the public and the environment will be adequately protected from the hazards posed by high level nuclear waste." 27 A search for the best geologic site was not indicated, only a site that was adequate. Therefore, the fact that the State of Nevada declined the opportunity to host a nuclear waste repository should have removed Yucca Mountain from the list of potential candidates, presuming that there were other adequate sites where the state government would be willing to host a repository. Additionally, the search for a site outside the country has not been conducted.
Nuclear Waste Policy Act Amendments of 1987 (NWPA)

It appears that the number of adequate repository sites will never be known. In 1987, the Nuclear Waste Policy Act of 1982 was amended with some major changes. The amended law, known locally as the "Screw Nevada Bill," specifies only Yucca Mountain as a potential repository site and postpones consideration of a second repository site until at least 2007. The State of Nevada strongly objected to this amendment and passed what it believed to be a legal notice of objection under the provisions of the Nuclear Waste Policy Act. Based on this premise, the State of Nevada refused to issue the permits to begin the site characterization process. The U.S. Court of Appeals ruled, and their decision was upheld by the U.S. Supreme Court, that the State of Nevada could officially disapprove of the repository after the site characterization process was complete and the President recommended to Congress that the site be developed as a waste repository. Therefore, the official disapproval from the state was deemed to be premature and the state (reluctantly) processed the necessary permits. Site characterization tests at Yucca Mountain commenced in 1991.28

Nevada Action

Since the Nuclear Waste Policy Act Amendments were implemented, the State of Nevada has continued to voice opposition to the project. At no time during this period did the state indicate any type of official approval. In hindsight, the state should have refused
to issue the initial permits as an official show of disapproval, even after the Supreme Court decision. The federal government does not need the permits to proceed with operations, especially with a Supreme Court sanction, and the refusal to issue the permits would have been a show of force from the beginning. As it stands at the current time, it will be politically difficult to fight the repository once site characterization is completed. It will be hard for the federal government to justify walking away from a site after more than six billion dollars have been expended to study the site to date. With only one site under consideration and the huge amounts of money being expended to study the site, the "Screw Nevada Bill" appears to be appropriately named.

The NWPA called for consultation and cooperation with potential host states and Indian tribes that might be affected by the site selection process. However, the reality of the matter is that all of the power rests with the Department of Energy and Congress. Since Nevada is a small state with a small legislative delegation, it has been difficult for the representatives of Nevada to gain support for their side. In a perfect example of the "Nimby" (not in my backyard) Syndrome, no other politician is going to stand with Nevada in opposition to nuclear waste for fear of the waste being targeted for his or her own particular state.

Some of the legislative action taken by the State of Nevada includes Assembly Joint Resolution No. 15 (File No. 184, Statutes of Nevada, 1975), which urges the Energy Research and Development Administration to choose the Nevada Test Site for
disposal of nuclear waste and for solar energy research under the Solar Energy Research, Development and Demonstration Act of 1974. This was the initial action of the State of Nevada with regard to an attempt to keep the activities at the Nevada Test Site ongoing. As the age of nuclear testing drew to a close, many alternatives were considered for the Test Site, including storage of nuclear waste. At that time, the issue of nuclear waste was relatively obscure, and the State of Nevada had not had adequate time to study the issue. In time, it was concluded that storage of nuclear waste within the State of Nevada would not be in the best interest of the citizens, and opposition to nuclear waste in Nevada began.

Assembly Joint Resolution No. 16 (File No. 20, Statutes of Nevada, 1977) urges the President of the United States not to suspend the operation of the Nevada Test Site because it was important economically to the State of Nevada. Senate Bill 67 (Chapter 561, Statutes of Nevada, 1985) authorizes the governor to negotiate for an agreement with the United States concerning disposal of such waste. The Act requires a public hearing and the signatures of the governor and the chairman of the legislative commission to make the agreement effective. Assembly Joint Resolution No. 4 (File No. 74, Statutes of Nevada, 1989) urges Congress not to allow the location of a repository for nuclear waste in Nevada. This resolution is yet another vehicle for Nevada to express opposition to a nuclear waste site. Assembly Joint Resolution No. 6 (File No. 73, Statutes of Nevada, 1989) expresses the legislature’s refusal to consent to the placement of a repository for high-level radioactive waste in Nevada. Assembly Bill No. 222
(Chapter 866, Statutes of Nevada, 1989) prohibits the storage of high-level radioactive waste in Nevada. The United States Ninth Circuit Court ruled in 1990 that Assembly Bill No. 222 is pre-empted by federal law because it stands as an obstacle to the accomplishment of the full purpose and objectives of Congress. Any state legislation which frustrates full effectiveness of federal law is rendered invalid by the Supremacy Clause of the United States Constitution. Assembly Joint Resolution No. 26 (File No. 120, Statutes of Nevada, 1995) expresses vehement opposition of the Nevada state legislature to storage of radioactive waste in Nevada. This was an action directed at Lincoln County, which had initiated negotiations to store nuclear waste on an interim basis. In order to maintain official state opposition to nuclear waste on the federal level, this resolution was developed to prohibit any Nevada counties from benefiting economically from interim storage of nuclear waste.

The evolution of atomic energy law has been unusual because it has involved a financial relationship between the private and public sectors. As a result, the State of Nevada has been involved in several court cases in which the state attempted to maintain its position against the storage of nuclear waste within its boundaries, the most notable case based on 42 U.S.C. 10131 et seq. In this case, the State of Nevada argues that it is not fair for the federal government to establish a permanent nuclear waste repository within state boundaries against the wishes of the state. The Court ruled that the State of Nevada does not have the legal right to protest the repository unless, or until, the
repository is found to be suitable. Therefore, the State of Nevada awaits the outcome of the studies at Yucca Mountain before it can move forward legally.

Additionally, the State of Nevada has been involved in a lawsuit between the state and a local government entity. Lincoln County attempted to negotiate with the federal government to provide nuclear waste storage on an interim basis. This economically depressed county cited the lack of employment opportunities and the financial boost interim storage would provide for the residents of the County. In Case No. 14-3-95, the State of Nevada sued Lincoln County for a declaratory judgement to nullify the Lincoln County Resolution to accept nuclear waste on an interim basis. The court found that the State of Nevada had pre-empted the field with respect to the development of interim nuclear waste storage facilities within its boundaries by virtue of numerous legislative resolutions and acts implemented at the state level.

The State of Nevada has been clear that it does not want the nuclear waste repository. Therefore, the federal government should begin to weigh other options about how to handle this problem. Forcing the situation may result in strained relations among the state and federal government, and in a system designed for these two entities to work together, the results could have a negative impact on the State of Nevada in addition to the nuclear waste issue.
The Department of Energy could take a lesson from Sweden. A country known for its strong environmental commitments, Sweden has developed a high level nuclear waste disposal program at a fraction of the cost that the United States has spent studying the issue. The country has also developed a waste transportation program, which the United States has not, and is making steady progress in finding a permanent site for nuclear waste. This accomplishment has been attributed to the following:

- A sincere commitment to two-way communication with the public; extraordinary efforts have been made to elicit public debate and feedback.
- Putting safety first and ensuring high quality technical scrutiny of the program by experts from around the world.
- Maintaining flexibility with the existence of an interim storage capability that buys time to conduct careful site studies for the permanent repository and to encourage community dialogue.
- Relying on long-lived engineered barriers, in addition to geologic barriers, to isolate HLNW (high level nuclear waste), so as to err on the side of safety and minimize the impact of unforeseen events.\(^{30}\)

This approach obviously seeks to accommodate, rather than override state and local concerns. It helps to build a state and national consensus that will facilitate the resolution to a problem instead of causing a political struggle. Other countries have taken a similar approach to the problem. The Canadian program has adopted a policy that a repository site will not be studied or accepted until the public accepts the idea of a particular site. The Canadians were very careful to stipulate that, under no circumstance, would a site be forced onto an unwilling community. Even France, known in the past for its hardball
approach to anti-nuclear sentiment, has realized that a long-term program such as nuclear waste disposal cannot be implemented without some level of public support. Based on the comparative policies of other countries in their efforts to deal with nuclear waste, the United States could be more inclusive in their efforts to find a suitable solution to the nuclear waste disposal problem.
ENDNOTES


5. Ibid, p. 482-530.


9. Ibid, See chart, p. 133.


14. The March 28, 1979 accident at Three Mile Island ushered in the era of nuclear danger. As the public became aware of the reality of what could go wrong in a nuclear accident, opinions began forming about the feasibility of using such a toxic process for energy production. Although proponents of nuclear energy tout this incident as a real life demonstration of the built-in safety mechanisms in a nuclear power reactor, the public perception of nuclear energy was to be forever changed.


17. See McKay, p. 139.


22. The Nuclear Waste Policy Amendments Act of 1987 effectively put all the eggs in one basket. Therefore, if the site is found unsuitable by technical concerns, or the courts ultimately prevail in favor of the State of Nevada, the government will have expended billions of dollars on the nuclear waste program and have nothing to show for it.

23. Convincing the public that the government is watching out for their safety may not be feasible in the initial stages of the program. Based on past experience at Nevada Test Site, the trust of the American people may come only through the DOE establishing a positive track record of keeping promises and commitments.

24. See *One Hundred Centuries of Solitude - Redirecting America’s High-Level Nuclear Waste Policy*, p. 16 - 17.


26. Since nuclear power was not a self-contained concept, ie, it was not financially feasible if the waste disposal element was included in the equation, it should never have been
developed, or at most, developed on a limited basis until the disposal problem was resolved.

27. 42 U.S.C. 10131 et seq.

28. At the current time, the issue of placing retrievable nuclear waste at the Nevada Test Site on an interim basis is expected to be considered and voted on by the upcoming 105th Congress. If this comes to pass, it will have a two-fold effect on Nevada. First, it will bring nuclear waste into the State. It is unlikely that this waste will be returned to its rightful owners if the Yucca Mountain site is found to be unsuitable for permanent storage. Second, it will likely be used to convince Nevada to accept the permanent repository without opposition since we would already have nuclear waste above ground and it would be safer to be in a permanent geologic setting.


Chapter Two

Justice or Instability?

This chapter will examine the problem of a federal government imposing its will on an unwilling member state by analyzing *Political Liberalism*, by John Rawls. In this book, Rawls asks, and answers the question, "When may citizens by their vote properly exercise their political power over one another when fundamental questions are at stake?" The fundamental questions are such things as how the constitution should be interpreted, what is justice as fairness, and what are the two principles of liberty? The power of the federal government over the state, in the case of long-term nuclear waste disposal, does not seem to be compatible with a well-ordered society, especially when the primary unit of government that was set up by our constitution was the entity of the state. It is the state government that was intended to be the deciding voice on matters that concern activities within the state boundaries. This authority can be usurped as a matter of national security, but the existence of nuclear waste is not a threat to national security. Therefore, current nuclear waste management policy seems to go against the grain of justice as fairness, as Rawls describes the concept in *Political Liberalism*.

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Rawls presents three basic concepts consisting of cooperation, reasonableness, and rationality. These three concepts build upon one another and will be developed through several categories that Rawls uses as a structure for society. Cooperation will be included in the category of Representation and Toleration. Reasonableness will be analyzed in the category of the Priority of Right and Ideas of the Good. Rationality will fall under the categories of Primary Goods, Basic Liberties, Regulation and Social Organization, and Social Cooperation. These concepts interwoven through these categories lay out the ideal society according to Rawls. The entire concept of Political Liberalism begins in the "Original Position", where the basic tenets of society are established.

**Original Position**

Rawls begins his description of the well ordered society by describing a concept he calls the original position. The original position specifies the principles involved in how citizens will interact in a fair and just manner, realizing liberty and equality in a fair system of justice. This does not mean that equality must exist in every aspect of society. The main idea is that the original position connects the individual and their sense of social cooperation with specific principles of justice, regardless of social position (Rawls, p. 304). Indeed, as a society of free citizens go about their daily activities, pursuing their interests in life and fulfilling the desires that they believe are most important for their lives, inequality will certainly exist. This inequality will mostly be in the form of economic inequality, since resources will be disproportionately acquired by those who are
very ambitious. This should not result in a societal problem as long as there are fair terms of cooperation established in the original position that disallows those with greater wealth, or resources, to take advantage of, or impose their will on, those with fewer resources.

In other words, just because a citizen chooses to spend his life involved in activities other than acquiring wealth does not mean he is less equal as a member of that well ordered society. The fact that a person occupies a particular social position is no reason to propose a conception of justice that would favor the person in that position in a political sense. Even if a proposal were submitted by someone in a powerful social position, it cannot be expected to be readily accepted by others who might occupy an "inferior" social position.

The parties in the original position, that being the members of society, can be described as rationally autonomous citizens in society. As citizens, it is incumbent on them to do the best they can to acquire their own idea of the good within the restrictions set forth in the original position. Within this concept is what Rawls considers to be the "veil of ignorance." This means that the parties within the society do not know about social position, or the conception of the good, or not much else about the other members of society. Through the concept of a veil of ignorance, fair terms of cooperation can thrive because nobody knows the social position of another member of society who may be making a claim involving their own basic liberties (Rawls, p. 305). This forces the parties within a society to agree to certain principles of justice to carry out the concept
of a well-ordered society. This agreement between citizens establishes a connection between a shared principle of justice and a person's own conception of the good.

The idea of political liberalism does not embrace the concept of utilitarianism in the original position. In fact, it opposes it, according to Rawls. Where utilitarianism advocates the policies of that which will benefit the most, political liberalism searches for a solution that will provide a level of acceptance for all members of society, even though it may not be ideal for the majority of the society's members. Where utilitarianism accepts the majority rule concept, political liberalism, by starting society at the original position, protects the rights of the minority who will ultimately pay the price for the wishes of the majority under a utilitarian scenario. A society that has been formed on the concept of utilitarianism must sanction the state to exert a level of power in order to enable it to remain utilitarian; therefore, oppression by such a government entity is inevitable for the minority members of that kind of society.

It is in the original position that the most basic principles of society are constructed. Thus, the concept of justice as fairness becomes a vital ingredient to maintaining a stable environment. Within the formation of justice as fairness in the original position, three points of view are examined. First is that of the parties in the original position. This is the members, and groups that are to be involved in the society. What are their general value systems and priorities? How can the society evolve, yet always guarantee justice as fairness to all of the members of society? Upon examination
of this point of view, the basic groundwork will be laid for a system of justice (Rawls, p. 35).

The second point of view is that of the citizens of society. These are citizens, now, because of the work completed in the first point of view. It is here where each citizen begins to identify with groups that are closest to his or her point of view, value system, and beliefs. The units of government may be formed within this point of view. The concept of justice as fairness must now begin to be broken down to serve smaller groups within the society. Finally, the point of view of the individual can now be considered. Individuals must determine how a system of justice can be applied to themselves and also serve to create and maintain a stable society. This is not a selfish conception of justice, but one that considers fair terms of cooperation, reasonableness, and rationality. There is, however, a self-interest concept, as each person wants to "cover" himself since he does not know who he will be in relation to other members of the society.

A. Cooperation

Whatever the social position of an individual, that person must have the right to make claims on governmental institutions in order to advance his conception of the good. This is the essence of fair terms of cooperation, where the idea of each participant's rational advantage, or good, is recognized. This does not mean that an individual can control the outcome of government activity. Indeed, a system where individuals could,
at will, alter the course of society would soon result in anarchy. It means, in its most basic form, that an individual, no matter what his or her social position, may submit their own rational idea of the good as it pertains to the original position. Therefore, the individual member of society can have a great influence over those in superior positions because the veil of ignorance inhibits recognition of social position. This is carried out by simply calling attention to the original position, whatever that might be, and reminding other members of society what the intent of the rules of fair cooperation were in the original position. Therefore, each participant's idea of the rational good can be related back to the original position through fair terms of cooperation. In this way, citizens can refer to themselves as free.

It is here that the test of equilibrium can be employed. How well can a system of justice that is acceptable to a general society be applied to our own existence in accepting fair terms of cooperation? After all adjustments and revisions, how well does this system work with all levels of generality? A conception of justice that meets all aspects of this criterion is one that, as far as we can tell at this point, is most reasonable for society and the individual simultaneously. Cooperation is different from simply coordinated social activity. It is directed through rules that are publicly accepted as those that should be in effect to properly regulate social conduct. In addition to compromise, it should also include a degree of reciprocity. The system of justice is the primary fabric of a society that specifies not only individual rights, but also individual duties to other members of society. Therefore, the idea that a member of society can visualize his or her own
conception of the good can be recognized through the system of justice using fair terms of cooperation. Reciprocity is a relationship among the members of a well ordered society based on its political conception of justice.

A well-ordered society will be comprised of citizens who know they can count on each other's conception of justice. We should assume that a person normally wants to act in a just manner and be recognized by others as someone who can be counted on to act as a cooperating (and reciprocating) member of society over a complete life. Citizens in a well-ordered society are fully autonomous because they accept constraints of being reasonable, which reflects in a political life that recognizes the individual as one who has the capacity to carry out his own idea of the good under fair terms of cooperation with other members of society (Rawls, p. 50).

Although the original position is based on the formation of a constitution, or formal guideline for how the society will be structured, a pure original position cannot be based on a preceding constitution, because then it would not be considered original. This is an unlikely, or more appropriately, unrealistic scenario since all people hold belief and value systems based on previous experience and upbringing. This is a minor objection, however, because any society, at the time it is developing, can establish an original position by drafting a constitution which specifies the fair terms of cooperation that have been agreed upon by all members of the society.
Through fair terms of cooperation, a well-ordered society will emerge. The original position is an imaginary "state of affairs," not a set of principles. It has no moral philosophy, *per se*. The principles and morals of society arise from the original position. Thus, here the U.S. Constitution would be considered by Rawls to have arisen from the original position for the United States, or the ideological philosophy of the founding fathers.

Although this document originally set out the system of justice, it has been amended many times over the course of history to revise or refine the rules of our fair terms of cooperation. Although a significant number of revisions have taken place, the basic system of justice established at the Constitutional Convention in Philadelphia has remained intact.

The idea that a citizen within a society can live with fair terms of cooperation over generations is developed with two companion ideas. First is the concept of citizens as being free and equal, that is, all carrying out their personal desires of life, but maintaining an equal voice in the outcome of government (Rawls, p. 3). The second is the idea of a well ordered society as one that is effectively regulated by a public conception of justice (Rawls, p. 4). Everyone in society accepts, and understands that everyone else in the society accepts, the same principles of justice. The most fundamental structure, its main political and social institutions and how they work together as a system of cooperation, is understood by every member of society.
Having an effective conception of justice makes it easy for the members of the society to comply with the established system of justice and cooperate with society's institutions. This creates a democratic society with a reasonable pluralism, that is, many different citizens can live together as long as they have accepted the principles of justice established in the original position. In fact, there is no reason for any member of society to not accept the principles of justice as long as they were set up with reasonable and fair terms of cooperation. Although the different members of society will submit various comprehensive doctrines, or specific belief systems, the fair terms of cooperation can be discovered and applied through an "overlapping consensus" (Rawls, P. 35).

Rawls describes the overlapping consensus as one where different comprehensive doctrines have common ground and can find a compatible solution for all in the society. This consensus consists of all reasonable opposing religious, philosophical, and moral beliefs that are likely to exist over generations within a society. The overlapping consensus exists in the system of justice as fairness that is accepted by all of these comprehensive doctrines. The overlapping consensus creates an environment of reasonable pluralism where a conception of justice can be embraced by a wide variety of different and opposing comprehensive doctrines as long as they are reasonable.

The concept of an overlapping consensus can be easily misunderstood and dismissed as a philosophical concept that does not exist in the real world. Indeed, in everyday politics, there seems to always be a winner and a loser. However, the idea of an
overlapping consensus to provide stability within a society is required in order for that society to survive over generations. As the powerful citizens within society drift away from the concept of justice formed in the original position, the overall society becomes weaker and less stable.

This very idea can be illustrated with the proposed nuclear waste repository at Yucca Mountain. The federal government has overstepped its bounds as laid out by the Tenth Amendment to the U.S. Constitution by proceeding with a project against the wishes of a state simply because it controls the ownership of the land. Although the federal government owns the land, it has ignored its obligation to allow the state to formulate policy that is in the best interest of the state. The project is going forward in the face of tremendous opposition from the State of Nevada, therefore, the federal government is in violation of the Tenth Amendment to the Constitution, which gives the states power to control activities within their boundaries unless specifically designated by the Constitution.

There has been no offer of reciprocity that has been considered acceptable to the State of Nevada. Likewise, a compromise does not seem to be likely since this situation is one that will either result in a nuclear waste repository or not. Since the federal government has adopted a concept of utilitarianism in making this decision, they must also sanction themselves as politically superior, resulting in political oppression for the State of Nevada.
Indeed, there have been several federal and Supreme Court cases involving the Tenth Amendment where the concept of fairness was one of the most significant factors in deciding the outcome of the cases. These cases illustrate not only how terms of fair cooperation must be observed by the federal government toward lower government entities, and ultimately individual citizens, but also the duty that the lower government entities have toward the overall society.

Representation and Toleration

After the original position has been established, the citizens of the society must adhere to the fair terms of cooperation that have been established and accept the grounds for representation of individual conceptions of the good and toleration of the overlapping consensus of the different religious, philosophical, and moral systems within the society. These systems in the overlapping consensus have been affirmed in the original position, so the elements of a particular comprehensive doctrine are no longer subject to debate as long as a particular comprehensive doctrine is operating within the bounds of justice as fairness. Having this established allows the shared political conception to serve as basis for public reason in discussions when constitutional questions arise.

As stated earlier, all citizens in the society are given a right to have access to their government institutions in order to be represented. This representation allows the fundamental elements of the original position to be presented as many times as necessary
when resolving political differences. The representation part of the society is straightforward and easy to understand. All citizens are politically equal, regardless of the proportion of resources that have been acquired by any one individual. The aspect that requires a closer examination is the subject of toleration and how its presence and practice is vital to a well ordered society to carry out the good of the citizens over generations.

**B. Reasonableness**

Toleration must include the concept of being reasonable. Citizens are reasonable when they propose principles of justice and standards as fair terms of cooperation, and agree to comply with them, knowing that others in the society do likewise. In order to practice the element of being reasonable, the citizens must understand reciprocity. Reciprocity lies somewhere between partiality and impartiality. The idea of mutual advantage, where everyone is advantaged to some degree, considers the resolution to the political problem to be reasonable by the members of society. Therefore, everyone in the society should agree that any political action is reasonable for the greater good of retaining individual rights in society. Again, this is not to be confused with utilitarianism, where the minority may pay a significant price so the majority group within the society can enjoy some good. In political liberalism, every situation is resolved with some satisfaction to all parties.
For example, supposing Rawl's political liberalism, if the federal government wants to construct a nuclear waste repository within the State of Nevada, it must reach an acceptable agreement with the State of Nevada in order to proceed. If the federal government is unable to meet the demands of the State of Nevada, or the idea of a nuclear waste repository is so repulsive to the citizens of Nevada that they would not accept it for any price, then the project should not go forward. To do so would create political inequality within the society, which is incompatible with the U.S. Constitution, or that which documents our original position. In this case, currently the federal government is not practicing the toleration necessary to maintain a well ordered society over the generations.

For Rawls, rational citizens are not limited to means-end reasoning, i.e., they do have to resolve a situation to the point where everyone is satisfied with the outcome. The citizens of Nevada have decided that a nuclear waste repository is incompatible with their conception of the good, therefore, the rights of the members of the State of Nevada have been violated. Applying Rawls, the holders of nuclear waste must tolerate the comprehensive doctrine of the state concerning nuclear waste disposal and find an alternative solution to the problem. This presents a problem for the citizens of society who do not know what to do with their nuclear waste. What is very obvious and straightforward to some may be unintelligible to others, especially when dealing with a problem reaching crisis proportions. The only reasonable way to resolve the matter is, after due reflection, to decide which view offers the most convincing argument.
It is by our choice of the reasonable that we enter the world of others and submit, or accept, a proposal that must always include the fair terms of cooperation that were agreed to in the original position. This process may seem adversarial and without virtue, but that does not mean we should not do it. As Rawls describes, "...the moral power that underlies the capacity to propose, or to endorse, and then to be moved to act from fair terms of cooperation for their own sake is an essential social virtue all the same." This is how Rawls sees it under the best of circumstances. If you have your group and I have my group, the fair terms of cooperation not only allow us to live in harmony, but to interrelate as well.

The fair terms of cooperation ought never to be abandoned. However, they have been abandoned in the Yucca Mountain case. Once the federal government implemented the Nuclear Waste Policy Act as amended in 1987, which singled out Yucca Mountain as the sole site for a proposed repository, they indicated that cooperation with the State of Nevada was not part of their intention. Because of this, the overall societal structure experiences a flaw that will most likely worsen over time, unless the federal government agrees to return to the fair terms of cooperation established in the original position.

As reasonable citizens, we must assess the strength and value of other's claims, not only against our own good, but against the other members of society and institutions. It is the reasonable that addresses the public world of society. However, as rational citizens,
we must balance our various ends and estimate their appropriate place in our way of life as we seek to discover our conception of the good.

Reasonable pluralism, or the diversity of a society, can be destroyed only by the oppressive use of state power. It is, therefore, unreasonable to use political power to suppress comprehensive doctrines that are not unreasonable and it is irrational to accept the claims of others that go against the grain of our comprehensive doctrines. These burdens of judgement are placed on every citizen and every institution within a society and are the basis for a democratic concept of toleration.

The federal government has been aware of the concerns of the State of Nevada since the beginning of the nuclear waste issue. The state made it clear that the physical safety of its citizens would be jeopardized by construction of the nuclear waste repository. Additionally, the impact on the tourist based economy has potential negative financial consequences for the citizens of Nevada. Based on this, the federal government violated the most basic comprehensive doctrine of the citizens of Nevada. They have denied them the right to determine a safe environment for themselves and future generations of the State of Nevada.
The Priority of Right and Ideas of the Good

In the Rawlsian concept of justice as fairness, the "priority of right" means that the principles of political justice impose limits on permissible ways of life. Therefore, the claims that citizens make to pursue their own desires or pursuits which transgress those limits established by the terms of justice have no weight and should not be implemented, or even be attempted to be implemented, within the society. A political conception of justice must contain within it enough space for a diversity of ways of life. The ways of life permitted within the society have already been generally sanctioned in the original position.

The original position does not typically deal with specific situations, therefore, it is unreasonable for proponents of an action that transgresses a particular comprehensive doctrine to say that there is nothing within the original position that disallows the desired activity. Instead, the original position defines how situations will be dealt with and provides guidelines for determining degrees of reasonableness. Again, through the original position, the priority of right can be determined by examining how the rights of the individual citizens relate to the powers of the societal institutions.

In the Yucca Mountain issue, the fact that the federal government is forcing the State of Nevada to deal with the nation's nuclear waste so the other forty nine states do not have to deal with the waste is a perfect example of a violation of the premises created in
the original position. Pushing down a member of society so the other members can be up
is not a part of the fair terms of cooperation.

The priority of right and ideas of the good are complementary concepts that work
together. In other words, a political conception, one that is based in the original position,
must draw upon the ideas that the citizens of the society have deemed as good. Ideas of
good are typically general, as opposed to specific. It would be impossible to establish an
original position dealing with all foreseeable issues, let alone those that are unfathomable
at the time the original position is created. Therefore, the tenets of the original position,
or various ideas of the good, will focus on the rights of the citizens versus the powers of
the institution that can be applied to many, if not all, specific situations. These rights are
to be shared by all citizens that are free and equal, regardless of their social position
within the society.

C. Rationality

One of the most primary ideas of the good is that of rationality. This idea assumes
that the citizens of the society have a rational plan for life that will carry on over the
generations. This includes scheduling their most important endeavors and allocating their
various resources to pursue what they perceive to be the good over a complete life. If this
cannot be considered rational by all members of the society, it can at least be perceived
as sensible. In planning their complete life, people have expectations that concern their
needs in all phases of their lives so long as they can ascertain them under the normal conditions of life. As we shall see, this is an invaluable point in forming an argument against a nuclear waste repository in Nevada.

The citizens of Nevada have determined that a nuclear waste repository will endanger their idea of the good, both directly and indirectly. The site may or may not be safe. Scientists have argued both sides of that issue and there does not appear to be any forthcoming evidence to decide the issue in a way that rational people, acting reasonably, would fashion into a consensus. It appears to be beyond human capacity to project with any certainty how a toxic substance like nuclear waste will react over a period of ten thousand years. Based on this, the citizens of Nevada appear to have a rational claim when they say they do not want to accept this project as a permanent part of their life plans for the next three hundred generations.

The unknown variables involved in this facility will place the current and future resources, both physical and economic, of the State of Nevada in jeopardy. That is inconsistent with their idea of the good to be applied over a complete life. Based on Rawls' conception of political liberalism, the federal government, specifically Congress and the Department of Energy, have disregarded the established political conception of justice and have not acknowledged human life and the fulfillment of basic human requirements for existence in society. They have ignored rationality as a basic principle of our political and social organization.
Primary Goods

Primary goods are the basic rights and liberties that a citizen is entitled to within a society. This includes freedom of movement and free choice of occupation (which is protected by the fair equality of opportunity). Society uses these primary goods to assess principles of justice. The role of the individual as a citizen should be seen as a political conception, not one belonging to a comprehensive doctrine. The individual citizens, and the rights that each receives in the original position, are at issue regardless of the comprehensive doctrine to which they subscribe.

A well-ordered political society must have a public understanding of not only the claims that a citizen has the right to make, but how those claims must be substantiated. This includes the public perception of citizen needs and what is reasonably advantageous for all. Political liberalism looks for a shared idea of the good that is independent of any comprehensive doctrine because that is where an overlapping consensus will be found. It is in the overlapping consensus that a resolution to a conflict would have to reside. It is reasonable to assume this is possible, because the majority of citizens within a society, regardless of their own comprehensive doctrine, need the same primary goods, the same basic rights, liberties and opportunities to carry out their own idea of the good. An overlapping consensus should be easy to reach if an acceptable degree of reasonableness and rationality are applied to the situation.
The fundamental question of this political philosophy is how to specify fair terms of cooperation among the various comprehensive doctrines. Additionally, the manner in which the needs of the citizens subscribing to their particular comprehensive doctrines in carrying out their idea of the good within the framework of a society must be evaluated. A scheme of basic rights and liberties, guaranteed by the basic structure of society ensures all citizens the adequate development of their moral powers and their fair share of the means essential in advancing their conception of the good. This concept is not unlimited. All conceptions of the good cannot be recognized or pursued because some involve a violation of the basic rights and liberties of other members of society. If a comprehensive doctrine, or a specific conception of the good, is unable to be agreed upon in a society where it has received the same basic rights and liberties, along with the concept of mutual toleration, then there is little chance that it can, or should, be preserved as being consistent with democratic values. It will, therefore, fall into a state of irrelevance if not embraced by society within a system of fair cooperation among citizens as free and equal.

As the federal government ignores the basic rights established in the Constitution (which was developed from the tenets of the original position of the United States), the government itself will become irrelevant to the citizens of the society and will ultimately experience an erosion of power. This will be too late for the citizens of Nevada, but if the government proceeds with the nuclear waste repository at Yucca Mountain, the support of the federal government by the people of Nevada in general will diminish, as will the
individual rights and liberties of the citizens. In short, such a majority tyranny goes against the grain of a well-ordered society as defined by Rawls.

An argument has been made that the people of Nevada are being unreasonable, that the construction of the nuclear waste repository at Yucca Mountain will be best for the country in general. But justice as fairness honors the claims of those who wish to withdraw from the society, if even on a specific issue, provided that they respect the principles of the political conception and abide by the political ideals of the individual and society. This assumes that citizens have an effective sense of justice that enables them to understand and apply principles of justice. A properly structured society provides its citizens with adequate means to accomplish this. These means are provided by way of the primary goods which empower their moral capacity to participate in fair terms of cooperation. This concept also allows them to withdraw when a comprehensive doctrine is attempting to coerce the citizens in a situation that could not be determined by them to be developing under fair terms of cooperation.

Withdrawal may be especially relevant when ideas fostered are not political ideas, and do not meet the restrictions imposed by the political conception of justice or fit into the space limited by fair terms of cooperation. Although sometimes necessary when the fair terms of cooperation are violated, withdrawal is an undesirable scenario. A portion of the society should never be forced to retreat, or withdraw, because of unreasonable claims on its idea of the good. As Rawls states,
"...without a widespread participation in democratic politics by a vigorous and informed citizen body, and certainly with a general retreat into private life, even the most well-designed political institutions will fall into the hands of those who seek to dominate and impose their will through the state apparatus either for the sake of power and military glory, or for reasons of class and economic interest, not to mention expansionist religious fervor and nationalist fanaticism. The safety of democratic liberties requires the active participation of citizens who possess the political virtues needed to maintain a constitutional regime (Rawls, p. 205)."

The most significant part of a well-ordered society, the most reasonable assurance that political liberalism allows, is that our political institutions provide enough space for individual citizens to carry out their idea of the good. For our political society to function appropriately, to assure that it will survive over the generations, the political institutions created in the original position must not become so powerful that the primary goods of the citizens, i.e., freedom to carry out their conception of the good over a complete life, begin to erode beyond the bounds of rationality.

The Basic Liberties

A significant problem with establishing the basic liberties in the original position is that, over the generations, the legislative and judicial institutions may drift away from the original intent of the framers of the constitution on how these liberties should be adjusted to one another within a social context. This can be partially eliminated by making clear the two principles of justice. They are as follows:
1. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

2. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society (Rawls, p. 291).

The principles of liberty in the first condition can be unlimited, but may be, at least, specified as follows: freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and the rights and liberties covered by the rule of law. The second condition requires that the least advantaged members of society cannot be put down or silenced by restricting their political position within the society (Rawls, p. 291).

The United States, patterned after a concept of democratic thought, focused on achieving certain basic liberties and specifying these liberties in written form through creation of and amendment to a constitution. The U.S. Constitution, amended many times, contains within its original form and the first ten amendments, a conceptual similarity to what Rawls describes as the basic liberties.

The first ten amendments, or the Bill of Rights, was not so much an addition of liberties to the original position, but a clarification of the liberties that the framers of the Constitution intended for the citizens to have in the first place. By incorporating the two
principles of justice into the Constitution and by clarifying the rights for each citizen, a better understanding of the claims of freedom and liberty to which each citizen is entitled will result. The framers of the Constitution incorporated not only what they ideally sought for the new country, but that which had worked well in previous constitutions. They were careful to create a constitution that was clear about the liberties available to all of us who live within the general concept of justice as fairness. This concept was incorporated into what is typically called the formation of federalism in the United States. This has the important consequence of establishing liberty as a priority and creates a satisfactory list of liberties, along with the principles of justice, which assign them priority (Rawls, p. 293-4).

The basic liberties have a special status within society. Equal political liberties cannot be denied to certain social groups on the grounds that these liberties may enable them to block policies needed for economic efficiency and growth. This idea is paramount in the argument against the construction of a nuclear waste repository at Yucca Mountain. To deny the liberties of the State of Nevada in order to solve the problem of nuclear waste goes against the grain of political liberalism. The federal government is attempting to deny these rights, which rightfully belong to the citizens of Nevada. These rights should never be denied for reason of public good. To do so would require force by government institutions, which would lead to oppression and, ultimately, erosion of the principles of justice and the concept of fair terms of cooperation. If this happens, the society will begin
to decay until the basic liberties first established in the original position have been reestablished.

To exercise majority power over the people of Nevada would benefit the most advantaged members of society, not the least advantaged, as Rawls requires for a just society. The political liberties would become unequal. Interestingly, Rawls believes these liberties to be so important that he makes no exceptions, even in the case where the members of society that would be most advantaged by a claim should not accept such an advantage if their own basic liberties are violated (Rawls, p. 295).

Regulation and Social Organization

A well-ordered society does not function automatically. Instituting the basic liberties requires a degree of social organization. As the citizens of a society go about their lives, fulfilling their idea of the good through reason and rationality, this reason and rationality must be regulated. The priority of liberty requires this to be done to preserve the tenets of the original position and ensure that citizens who have a greater social standing not benefit unequally politically. This priority protects the central range of application of each liberty.

As the list of liberties expands, or existing liberties are further clarified, the risk of weakening the most essential and basic liberties becomes a reality. This can happen so
gradually that it may not be evident to the members of society. In order to create more
liberties, it is possible that the basic liberties may be thrown off balance.

The issue at Yucca Mountain exemplifies this taking place. The federal
government is operating on the premise that nuclear waste is a significant problem, as it
is. It is operating on the premise that burying nuclear waste in Nevada would be a greater
good for more people within the country, and it would. On the surface, the argument
seems plausible. However, as the federal government attempts to expand the rights, and
therefore the claims, of other members of society, the basic rights of the citizens of
Nevada have been compromised beyond Rawl's limits.

With this in mind, a system of regulation must be in place to ensure the basic
liberties of all citizens of society. In the United States, the judicial system is the institution
that provides such regulation. The citizens of Nevada can only hope that the system will
work around the politics of the issue and not interpret the law in favor of oppression by
the federal government. Since each liberty has a central range of application, the basic
liberties should be able to work together as long as all of these liberties are being exercised
within this range (Rawls, p. 297). It is up to the judicial component of society to
determine which liberties are being exercised outside the central range of application.
Social Cooperation

The final concept that will be discussed is the idea of social cooperation. All of the components of a well-ordered society work together. Social cooperation is the final piece of the puzzle that, along with basic liberties, justice as fairness, fair terms of cooperation, reasonableness, and rationality, makes a society balanced and workable. In justice as fairness, the conception of political and social justice should be worked out to accommodate the most deeply held convictions of the members of society. To do this, the idea of the person as an individual must be recognized. Social cooperation is always for mutual benefit. This implies a shared notion of fair terms of cooperation, which each member of society should reasonably come to accept, along with the idea of reciprocity and mutuality.

For social cooperation to exist, all members of society must benefit in claims, or share common burdens that are judged to be appropriate comparisons. This can be determined through what is perceived by members of society to be the reasonable. Reason is established through rationality of each member of society as to how a societal claim from a particular comprehensive doctrine will affect their lives. Because each member of society has a differing view of what is their own rational advantage, the unity of social cooperation rests on what the members of society perceive to be fair terms (Rawls, p. 299-300).
Social cooperation is the thread that connects all of the social institutions including the constitution, the economic model, the legislative and judicial orders and the concept of property rights. Without social cooperation comes unwilling compliance with unfair policies, resentful attitudes toward the governmental institutions and other comprehensive doctrines, resistance to further claims by other members of society that may be legitimate, and ultimately, civil war.

The key ingredient to a successful and well-ordered society is a comprehension by all of society's members and institutions of a sense of right and justice. This includes the ability to implement fair terms of cooperation and have a sense of the reasonable and to exercise the rational by having a conception of the good for one's own life.

A conception of the good consists of a plan with means and ends, of life desires, and the ability to carry them out without interference from unfair claims by other comprehensive doctrines. It is a way of life that means equal persons are willing to cooperate in good faith with the other members of society over the generations and to have mutual respect for all other comprehensive doctrines. To reiterate, even though the social positions of the members of society will become unequal over the generations, the individuals of society must always be viewed as equal citizens, even though equal citizens will have differing conceptions of the good (Rawls, p. 301-3).
Fifty years ago, nuclear energy was seen by the fledgling industry as the energy of the future. It was inexpensive, clean, and easy to develop. This was truly a remarkable dream. However, when the solution to the inevitable problem of nuclear waste was postponed, and ultimately ignored, a keen observer could have predicted the political conflicts that would arise.

Without a waste solution in place, the industry was given the "go-ahead" to develop the concept of domestic nuclear energy. The government's naive hope for technology to provide a waste solution in the future could never materialize because, without regulation, the industry was not required to seek a solution. The market forces that might have encouraged research into the issue were never strong enough to justify feasibility of pursuing this issue.

When the federal government approved the construction of the first nuclear power plants, and then took responsibility for disposing of nuclear waste, the stage was set for a future violation of basic rights of certain members of society, while other members of society were to benefit disproportionately. The primary goods established in the original position of the United States would have to compromised in order to meet the needs of the more advantaged members of society.

Indeed, this has already happened and has been analyzed in this chapter. In the category of Representation and Toleration, Rawls emphasizes that cooperation is the key
component. However, the federal government has not cooperated with the State of Nevada in the study of Yucca Mountain and has not been forthcoming with new information. Even though the law directs the Department of Energy to cooperate with local government entities and Indian Tribes, the degree of cooperation has been unsatisfactory to almost every group that the federal government has dealt with.

Each member or group in society is entitled to its own Priority of Right and Ideas of the Good. Rawls states that this is accomplished through the concept of reasonableness. However, the federal government has been unreasonable in assuming that burying tons of nuclear waste in a host state would be acceptable when it is against the will of the citizens of the state.

Primary Goods are the basic rights and liberties that a citizen is entitled to within a society. In order to maintain these basic liberties, regulation and social organization are required, which is accomplished through social cooperation. Maintaining the liberties involved in the primary goods requires the concept of rationality, or that which is the rational plan for a person's life that will carry on over the generations. The federal government is conducting itself in an irrational manner to believe that accepting nuclear waste that will have potentially harmful effects for three hundred generations is within the rational plan for a citizen's life. In fact, the federal government has been informed many times that nuclear waste is not a rational part of the life plan for the citizens of Nevada.
Additionally, the amount of accumulated nuclear waste that requires permanent disposal already exceeds the capacity of Yucca Mountain. Therefore, this irrational process will most likely be inflicted on another unwilling host state at some time in the future. Based on the federal government's violations of justice as fairness, societal instability can be expected to develop among the citizens of society as the federal government continues to trample on the citizen's priority of the right and ideas of the good.

In the Rawls concept of Political Liberalism, the above scenario cannot happen in a well-ordered society. The governmental institutions that are subjugating the State of Nevada are doing so in a way that violates the Nevada citizens' idea of the good and the opportunity to carry out this idea of the good over a complete life. Therefore, if maintaining the basic rights of a well-ordered society is important to the federal government, as it should be, an alternative solution should be sought for the problem of nuclear waste disposal.
Endnotes

Chapter Three

The Concept of Federalism In American Culture

On July 4, 1776, the signing of the Declaration of Independence ushered in a new era between England and the colonies. It was an era involving natural rights, the social compact, and limited government so the people of the society could live and involve themselves in economic activity without the burden of a bureaucratic government imposing onerous regulations and unfair taxes. The Declaration of Independence was followed by the close of the American Revolutionary War and the subsequent Constitutional Convention of 1787.

Before, during, and after the Constitutional Convention of 1787, the focus of the debate was centered on the role that a central government would play. Clearly, the Anti-federalist movement was opposed to the structure of a central, or federal government, because it wanted to reserve as much power to the states as possible. This group was more inclined to favor the Articles of Confederation, a document that the United States Constitution ultimately ended up replacing. The Articles of Confederation gave greater power to the states and placed less emphasis on a central government. It was more of a
document that created a "league of friendship" between the states, as each state remained completely sovereign with one vote in Congress, regardless of size or population.²

The concept of federalism has been described in many ways over the course of history. Among these are,

"Federalism may be defined as the division of political power between a central government, with authority over the entire territory of a nation, and a series of local governments, called 'states' in America."³

"A federation is a single state in which the powers and functions of government are divided between a central government and several local governments, each having a sphere of jurisdiction within which it is supreme."⁴

"The essential relationship involves a division of activities between the autonomous parts and the common or central organs of a composite whole."⁵

The Anti-federalists, those who argued against a federalistic type of government, ultimately lost and the Constitution was ratified by the states shortly after the Constitutional Convention. The ratification of the Constitution did not quiet the debate concerning states' rights. Indeed, even after the ratification of the Constitution, the process of in-fighting and politicking began a course that would wind its way through history. In 1861, a Civil War would tear the country apart over the basic issue of states' rights and the balance of power between the states and the federal government. To this day the debate has oscillated back and forth as to just how much power the federal government should be allowed.
The Supreme Court has been heavily involved in deciding cases that affect the power of the states versus the power of the federal government since the ratification of the Bill of Rights in 1791. The Bill of Rights served as an assurance to the Anti-federalists that the purpose of the federal government would be that of administrator, arbitrator, and umpire in foreign policy and domestic commerce. The Tenth Amendment, the last amendment in the Bill of Rights, will be the focus of study here as it pertains to the separation of state and federal power. The Tenth Amendment states, "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."

In this chapter, I will discuss the concept of federalism and why the balance of power between the states and the central government was of such a concern to so many people. This discussion will include a detailed look at the debates for and against and the ultimate ratification of the Constitution. Although this thesis is intended, in part, to be an analysis of the Supreme Court decisions that have affected the balance of power between the state and federal governments, an historical examination of federalism is necessary to establish the importance, impact and overall meaning of the Supreme Court decisions regarding this issue.

The two major entities that make up the American form of government, those being the state and federal governments, have often found themselves in the precarious position of being in competition with one another, yet remaining dependent on one another in many
areas. Over the past two hundred years, this relationship has grown so enmeshed that a separation of the two entities would seem impossible. The states have the voice of the people and carry the will of the people to the federal government through elected representatives. The federal government controls massive amounts of money and land, therefore, wielding significant political power, in both domestic and foreign issues.

The cohesion of the states into the federal government has resulted in the most powerful and technically advanced nation on the face of the earth. The American military is superior in almost all facets of tactical and strategical ability. The American economy, while up and down over the business cycle, has proven stable compared to the wild fluctuations of less developed countries. Through state cooperation, the federal government has established an interstate highway system to allow travel and commerce to flow freely from state to state. Federal programs have ensured the conservation of natural resources and public lands so these resources will not only be available, but will be conserved for generations to come. Through federal programs, child labor has been made illegal, elderly people can retire with the assurance that they will not be destined for poverty, and the nation's poorest and most destitute members are taken care of. Federal programs have resulted in the highest quality and quantity of food in the world. Additionally, all Americans are provided a public education.

Based on this discussion, it appears that the American people have created a type of ideal state of being, where all is well in the world and where no one suffers extensively
while others thrive disproportionately. Ideologically, this may be true, but it brings up many arguments about the purpose and function of the federal government and what it was intended to be. With a central government, a degree of utilitarianism must be involved, for without it, the federal government could not function. The federal government could not justify even one expenditure on a project or program without the argument that it will be good for the majority of the people, even if not everyone benefits. Should federal tax dollars taken from Nevada be spent on a mass transit system in San Antonio? Clearly, the residents of San Antonio are getting more than their money’s worth because they paid a fraction of the cost in their own tax money to implement and operate a mass transit system. Should the federal government be supporting poor people who might be able to work or should the realities of the marketplace force these people to obtain and market their skills in order to survive on their own? Should the federal government be involved in agriculture in order to assure a stable supply of food at an affordable price or should the marketplace decide what that supply and price should be?

The discussion of where and how the federal government should be involved in the lives of the citizens of this country has been ongoing since its inception. The actions of the federal government have both benefitted and cost all Americans at one time or another; therefore, an individual would have a difficult time remaining consistently on one side of the issue. Those who argue that the federal government should be minimized have probably not made a close examination of how the federal government has benefitted them. Those that advocate a strong federal government to deal with the majority of issues that
face Americans on a daily basis have not realized the full impact of the cost of these programs on the average working American and the fairness of how that cost is distributed among the taxpayers.

Obviously, there are no easy or comprehensive answers as to where the federal government should be involved, and to what degree. Each issue must be examined on its own merits, and the will of the people must be heard and carried out by the elected officials that represent them. The balance of state and federal power will be discussed as long as this country continues to exist and thrive under the current system.

Although federalism has been defined in many ways over the years, today federalism is probably referred to with regard to the balance of power between the federal government and the states. Discussions that take place in the current time concerning this issue use the term 'federalism' rather loosely, making it confusing as to which side of the argument the writer is siding with. In David Walker's recent book, The Rebirth of Federalism⁶, the title alone might make the reader think that the topic is about the rebirth of federal power over the states. To the contrary, the subject matter of the book concerns itself with the renewed discussions taking place over how the federal government has encroached on the powers of the states and how the state governments are able to carry out the desires of the people in a more efficient and cost-effective manner. With regard to eighteenth century American history, where the term originated, the title of the book might more appropriately be titled The Rebirth of Anti-Federalism.
The concept of federalism and the balance of power between the states and the federal government was of great concern to many people. This discussion will include a detailed look at the debates for and against and the ultimate ratification of the Constitution.

Repeatedly, in the legislative, executive, and judicial branches, the argument has returned to the idea of what this country and this system of government was intended to be; an examination of the intent of the framers of the Constitution inevitably unfolds. This chapter will examine the arguments for both a strong national government with a central, sovereign focus and a weak national government, with the majority of the power given to the states. A discussion of the argument for a strong national government must begin with the two strongest advocates of this type of system, James Madison and Alexander Hamilton. The ideas of these two men will be discussed in the following section, as the debate for the Constitution unfolds in Philadelphia in the hot summer months of 1787.

Argument For A Strong National Government

Perhaps the most significant statement advocating ratification of the Constitution was *The Federalist*, a collection of writings by James Madison, Alexander Hamilton, and John Jay. Although these men were advocates for a strong federal government, *The Federalist* is more of an appeal for ratification of the Constitution itself. The mindset among this group was to get the document ratified and then let it become amended as needed. Most importantly, the Constitution would bind the states together into one
cohesive unit, instead of a group of small, politically weak, relatively independent states. The power of one central government would provide physical and financial security for the entire population. It is the writings in The Federalist that presents the national position and argues for federal supremacy by saying that the end result will be more powerful states.

Alexander Hamilton was a learned, ambitious man who enthusiastically favored a strong federal government. What should be noted, and this can probably go for all of the framers favoring a strong national government, was that Hamilton did not advocate not having states, nor did he favor a dominating federal government that might become tyrannical over the states. Instead, he believed, and logically so, that the formation of a federal government was vital to the preservation of the states. Hamilton's ideas were academic and intellectual, as well as practical. He had reasons for what he said and he relied on the history of other governments in forming his own ideas about how this government should be designed. He stated,

It is impossible to read the history of the petty Republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept in a state of perpetual vibration, between the extremes of tyranny and anarchy.

Using history as an example of what would become of an unstable government comprised of multiple small entities, Hamilton believed that the distraction of politics
would make it impossible to move forward as a nation with so many small governments attempting to work together. With a larger government comprised not of people, but representatives of people, the system would be able to move forward and operate with a minimum of complications. Hamilton referred to this as the "enlargement of the orbit within which such systems are to revolve either in respect to the dimensions of a single state, or to the consolidation of several smaller states into one great confederacy."

Without this cohesion, this coming together as a nation, Hamilton believed that the states would ultimately begin, "...splitting ourselves into an infinity of little jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord and the miserable objects of universal pity or contempt."  

A main point of contention for the advocates of a strong federal government was the issue of who would be the representatives. In The Federalist No. 35, Hamilton purported that if a system of strong state government were implemented, it would lead to huge numbers of small groups being represented by men not qualified to serve in government, men whose achievements, "do not travel beyond the circle of his neighbors and acquaintances." Similarly, in The Federalist No. 3, John Jay stated,

When once an efficient national government is established, the best men in the country...will generally be appointed to manage it...more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government - especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the states.
The proponents of a strong federal government were adamant about the notion that the tradition of the upper class, or some variation of the gentry, should look after the overall welfare of the country. Those men with lesser qualifications should go about the business of making a living and the well-to-do and educated of the population would provide an environment for that to happen. This was not meant as a snobbish or controlling act. The reality of the situation was that, if a strong system of state government were to develop, the representatives would not possess the education, training and background to address the complex issues of national and international economics and foreign policy. The population involved in the agrarian industries and the day-to-day shopkeepers did not possess the sophistication to run a system of states bound together into one nation. Too much was at stake to allow unqualified men at the helm of government just for the sake of comprehensive representative government. The government should be representative, but it must also be a system that would work. The advocates of a strong national government believed that allowing less qualified men into leadership positions was not a scenario that would provide longevity to the new nation.10

Up to and including the time of the formation of the new government, the leaders who came forth were those learned gentlemen, called the gentry, who usually served out of obligation, not seeking financial gain or public notoriety. The gentry held posts in government, often with little or no pay, as a way of supporting those who had to work for a living. The gentry were rich, owning land and having business interests, both at home
and abroad. With the formation of the states, the common man started getting involved in government. Farmers and merchants wanted to represent their own interests. They did not want to rely on the gentry to make decisions for their lives, for as long as the gentry were making the policy decisions in government, the farmers would never be able to become wealthy themselves (at least that was their contention).

Hamilton did not believe the common man having an active role in government was good for the country as a whole. He believed the common man was more intrigued with the prestige of government office, and seeing themselves as a gentry of sorts, instead of truly representing their own interests. Hamilton wrote, "...such a desperate expedient, by the multiplication of petty offices, answer the views of men, who possess not qualifications to extend their influence beyond the narrow circles of intrigue, but it could never promote the greatness or happiness of the people of America." Without qualifications to provide the necessary leadership to be involved in government, the states would inevitably end up fighting among themselves over minor issues that should affect the country as a whole. Hamilton went on to say that the states would ultimately fail without a federal government to act as a binding force.

Should a popular insurrection happen, in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.
In The Federalist No. 9, Hamilton refers to ancient civilizations and the writing of Montesquieu to reach his conclusion that a federal government is not only desirable, but necessary, for the states to survive as political units. It is on the concept of sovereign power that Hamilton bases his argument. The states must be subordinate to the sovereign power of the federal government in order to maintain their own sovereign power as states. Thus the concept of dual federalism is introduced, but it will not be called this for another 150 years.

In The Federalist No. 14, Madison makes the point of saying,

We have seen the necessity of the Union as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the old world, and as the proper antidote for the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own.  

Madison was one of the most forceful advocates of a strong national government for this reason. The states could not survive as separate entities. In Madison's mind, those men proposing a system of strong state government were being too ideological in their argument. History provided sufficient evidence that the states simply were unable to perform all of the necessary functions in a complex world in order to survive as a government. A foreign country, or the American military itself, could methodically defeat each state until the nation was overcome with tyranny.
As Madison wrote in *The Federalist* No. 10, factions within the government could gain power by attacking and devouring the weaker states, gaining power, and moving on to the larger, stronger states. In order to survive as a nation, the states must become united as a nation. The guard against a national tyranny would be the existence of the states themselves, sending representatives of the citizens to participate in the federal government. The dual system of government would provide an interconnected web, acting as a safety net of checks and balances to limit the power of the federal government in order to avoid tyranny, yet allowing it enough power to protect the individual states within the union. With a federal system of government, there would be no weak links in the system, or if there were, they would be exposed and strengthened at the national level before the states could be overcome by a subversive force.

This system would also provide certain economies of scale, where the need for redundancy within each state government would be eliminated. Each state would not need a Secretary of Commerce, assuming they even had anyone who was qualified. One Secretary of Commerce could represent each state within the entire nation. This would not only eliminate unneeded expense to the state governments, but would provide a level of consistency in the marketplace, which would be especially important in foreign trade.

Without cohesion in the union, it would have been simple for a foreign country to pit state against state, since in a system where the federal government was weak, the states would basically be in competition with another. As a unified nation, regulations would be possible that would allow the states to act together, instead of in opposition.
The protection against opposition that Madison believed so important would provide the states the opportunity to turn its energy to prosperity. By showing that the nation was not vulnerable, Madison believed that the nation could establish multi-national business interests. In The Federalist No. 51, Madison wrote,

> In the extended Republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of the majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself.

The case for a strong national government was put forth by learned men speaking, not from emotion, but from logic, history, and experience. The cohesion of the states into a strong central government was the only way to ensure that the fledgling nation would survive, especially in the vulnerable start-up period. If not for the ultimate ratification of the Constitution, the new nation may have failed before having a chance to get started.
Argument For A Weak National Government

Following the Revolutionary War, there was a diversity of interests in the Union which resulted in a clash of partisan politics15. At this time, the Anti-federalists consisted of members of individual states who viewed the concept of a constitutionally endorsed central government with a great deal of suspicion. The Anti-federalists were citizens with agrarian interests who did not trust a government to look out for their best interest in a central location so far from their homes. As far as they were concerned, their needs and desires as a community could be handled much more efficiently and inexpensively if they undertook it themselves. The proponents of a weak national government were strong and independent and took the liberty that they had fought for during the American Revolution very seriously. The business and commerce role that the central government proposed to play was threatening to them because it meant that governmental control of agricultural markets was a virtual certainty. Additionally, the central government proposed to play a role in foreign trade. Although having an experienced foreign policy element in the government could have the potential for opening up new markets overseas, the fact that the government had control of this function meant that it could also control the flow of imports, thereby bringing competing goods to the markets at home.

The first response of the Federalists would be that the government would never do anything to jeopardize the interests of American business, but the concerns of the Anti-federalists were that a central government would become self-consumed and implement
policy that would be beneficial to the government, but not for the people. These plebeian Anti-federalists did not view society as a hierarchy of rank and order, nor did they view it as a homogenous, one-size-fits-all society with a central form of control having priority over states' interests. They also believed that the constitutional convention, and the modified system of government, meaning a federal system, that resulted from the convention, were anything but judicious. To them, the new social order was (or if it was not, it should be) pluralistic and diverse, with government control distributed outward to the states, making the desires of the local citizens easier to fulfill since, logistically, state government was closer to the people and, therefore, more easily controlled by the people. It was only in this way that the Anti-federalists were willing to go forward with an established government. Based on the text of the new Constitution, it is understandable that they were reluctant to give up the Articles of Confederation.

The Anti-federalists consisted of more than just a band of disorganized farmers, although they never did mount a formal opposition to the formation of the federal government. In addition to commercial concerns, the group consisted of idealists such as Thomas Jefferson, who has gained the reputation throughout history of being one of the most formidable states' rights advocates of his time. Jefferson's concern about the Constitution and the formation of a new national government was that the people would eventually be left out and the government would come to resemble more of an English establishment, that which so many people had come to America to get away from. In a letter to James Madison in 1787, he said,
I own I am not a friend to a very energetic government. It is always oppressive. It places the governors indeed more at their ease, at the expense of the people...Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them...They are the only sure reliance for the preservation of our liberty. After all, it is my principle that the will of the majority should prevail.19

Jefferson was so adamant about the states not being under the domination of the federal government that in 1798 he wrote the Kentucky Resolution, a proposal which justified the power of the states to nullify federal laws.20 The Kentucky Resolution, penned in 1798, was a response to the Sedition Act. The Sedition Act outlawed writing or publishing any scandalous, malicious, or false statements against the President or either house of Congress and forbade any speech that would bring the government into contempt or disrepute; or, "excite against them...the hatred of the United States." Jefferson saw this act as a blow to the concept of free speech. The Kentucky Resolution proclaimed, "Resolved, that the United States of America are not united on the principle of unlimited submission to their general government," and that the Sedition Act, "does abridge the freedom of the press, is not law, but is altogether void, and of no force."

Jefferson went on to write that where the powers of the Constitution are not specifically delegated, "nullification of the act is the rightful remedy," implying that every state had the right to reject the law. Jefferson was strongly in favor of freedom of the press and freedom of speech, rights which had been fought and died for in the American Revolution. Therefore, the Kentucky Resolution was, in his mind, an appropriate
response to an unconstitutional law. Jefferson was not one to submit to unreasonable laws
of the central government, and his greatest fear was that the central government would
bombard the states with laws until the government resembled nothing different than that
of England, the very government every citizen of the United States had fought to liberate
themselves from. Therefore, this independent nature would lead to attitudes such as, "on
the tree of liberty must spill the blood of patriots and tyrants," and, "a little rebellion now
and then is a good thing," a "medicine necessary for the sound health of government."
One of Jefferson's strongest statements was that, "whenever any form of government
becomes destructive" of citizen's rights, "it is the right of people to alter or abolish it."
This is in direct contrast with the proponents of a strong federal government, who wanted
to create an infallible institution that could withstand onslaught from both inside and
outside its borders.

Outcome of the Debate on the Constitution

The proponents of a weak national government were fearful that all that they had
fought for would eventually erode away into a huge bureaucracy if they were to concede
to a strong national government. The proponents of a strong national government
contended that the states would eventually dissolve anyway if there was not a central
institution to protect the union of states from outside forces and internal insurrections that
could threaten the political and economic stability of the union.
And so the argument continues. Starting with the Anti-federalists of the eighteenth century and continuing into the current time, the role of the federal government has been and will be argued as long as there are people to take both sides of the issue. Who had the better argument? Only an examination of history could answer the question. It turns out that both sides were right to a certain degree.

Hamilton, Madison, and the other proponents of a strong federal government were correct in their contention that a central government was necessary in order to form a strong nation. Indeed, some two hundred years later, the fledgling nation that resulted from the American Revolution is one of the most politically and economically powerful nations on the face of the earth. It is unlikely that the states themselves could have developed the nation into what it is today without a central locus of power to lead the way. The inevitable political infighting would have, at best, slowed the development of the nation and, at worst, brought the nation into another revolution that would have started the whole process over again.

On the other hand, all of Jefferson's worst fears, and some that he never dreamed of, have come true. The government has evolved into a huge bureaucracy that has become so cumbersome that the different departments and entities of the government seem to overlap in many areas and, as a result, are in competition with one another for survival, instead of to serve the people of the union. The central government has made the gentry obsolete. The gentry has been replaced by the career politician, who must buckle to
special interest groups and lobbyists in order to perpetuate their careers. The larger the
government has become, the less responsive to the wishes of the people it has become.
In the modern age, the majority of laws are initiated by the desires of interest groups and
those to whom the politician is indebted. Campaign laws have forced politicians to accept
support from interest groups in order to get elected or re-elected.

The Impact of Interest Groups: Federalist or Anti-Federalist?

The issue of a nuclear waste facility has many cloaks. In one sense, it is a
scientific issue, whereby, scientists are attempting to deal with nuclear waste in the safest
and most efficient manner. This issue is also an ethical one, addressing the impact on
surrounding communities wherever nuclear waste may end up, and the rights of a
government to put it there.

Most significantly, the issue is one of a political nature. The federal government
promised the nuclear industry that they would take responsibility for nuclear waste by
1998, therefore, there is pressure on the government to come up with a solution. Over the
past fifty years, since nuclear waste began being generated, our system of government has
evolved away from direct representation of the people and closer to representation of
interest groups. Interest groups provide a great deal of campaign money to politicians,
and therefore, acquire a great deal of political debt. Additionally, interest groups function
as representatives of an interest on a specific issue.
The nuclear industry has retained the services of many lobbying firms in order to advance their cause of finding a permanent disposal site for the nuclear waste they have generated. As such, the nuclear industry has grown into its own interest group. By contributing to the campaigns of select state delegates to Congress, and subsequently pressuring these delegates to vote in their favor, the issue has evolved from doing what may be best for all involved, to satisfying the groups applying the pressure to Congressional representatives.

Although, the past fifty years has seen a dramatic increase in the type and number of interest groups, it is not a new phenomenon. Since the interest group is playing such a significant role in the nuclear waste issue, it makes sense to examine a brief history of the interest group to determine how they have evolved over the years and how they have come to have such significant input in the relationship between the state and federal governments.

The interest group, or pressure group, has been in existence in one form or another since approximately the mid-1800s. It came into being because the voice of many is much more effective when a group of individuals desires to achieve a single specific objective. Because of this, the interest group is viewed as a "bargaining agent" in the allocation of public goods and services. It would be logistically impossible for a person in a large society to individually negotiate his or her own needs from the government. When individuals have a collective interest in pursuing a policy objective, be it tax relief, racial
desegregation, labor interests, or farming issues, to name a few, the interest becomes a collective "good" for the interest group to obtain.22

Clive S. Thomas defines the interest group as "an association of individuals or organizations, usually but not always formally organized, which attempts to influence public policy."23 Arthur Bentley, known as the "grandfather" of group theory, stated that when groups are adequately described, they encompass the whole theory of social science. The group theory did not receive significant attention until the 1920s, when it gained acceptance as scholars began to study the forces behind the group.24

The internal structure of an interest group varies depending on the composition of the members and the objective of the organization. Those groups with a specific social cause will tend to be more highly structured and better funded. The internal politics of an interest group emulate that of a corporation, where members may, in fact, be competing for control of the organization in addition to carrying out the mission of the organization.25

During the period between the Revolutionary War and the Civil War, known as the Agrarian Century, there was little evidence of interest groups, especially in the rural areas. Farming was the predominant form of economy and it was centered around the family.26 This fostered a high degree of self sufficiency because the family provided for its own needs on the farm. Even if it would have been desirable to form a cooperative interest group, the physical separation between farms would have made it difficult. The people
of rural communities had a great deal of suspicion for those in the urban areas, especially for that of banks, known then as loan sharks. The suspicion was based on a belief, whether justified or not, that banks would take advantage of the farmer's lack of financial knowledge and pull him into a mass of debt, ultimately foreclosing on the farm.27

The citizens of the rural areas also had a disdain for politicians. Because of this distrust, even those politicians who were sympathetic to the interests of the farmers were not readily accepted. This distrust, in part, was a response to an arrogant attitude on the part of politicians, who perceived themselves to be the only people to establish effective public policy because they alone were "disinterested, public-spirited men."28 Based on this, the cities were seen as an adversary and the farmers of this time appeared content to stay to themselves.

Although the people were independent by nature and by physical location, the first interest groups appeared during the Agrarian Century. These were brief periods in which the farmers were willing to act as a cooperative for the expression of grievances. These "cooperatives" took the form of armed conflict, examples being Shay's Rebellion and the Whiskey Rebellion. These informal, disorganized acts seem to indicate that the farmers were attempting to come together to express shared attitudes about agricultural-financial issues.
As agriculture evolved from the independent farm to mechanized farming, a higher degree of specialization occurred that forced farmers to purchase technology in the form of farm implements. This specialization increased their dependence on their adversaries in the city. With the purchase of farm machinery, credit became essential, resulting in the farmers being forced into a relationship with the banks. As farmers became more specialized in the crops they produced, their interaction with other people in the market was inevitable. Not only were farmers forced into the farm implement market, but they were also involved in the development of other technology that would increase crop production or, otherwise, create a more efficient operation. This brought them in contact, not only with bankers, but manufacturers and designers of farm technology. As time went by, they grew more comfortable with these relationships as they learned the ways of not only the farming world, but the business world as well.

One of the first known interest groups was the Patrons of Husbandry, otherwise known as The Grange. The Grange was organized in 1867 with a fraternal and educational objective. Although the founders of the Grange envisioned a large membership around the country, the organization found little acceptance. By this time in history, most farmers weren't interested in discussing (at least with other) how to increase crop production or in recreating with fellow farmers. They were most interested in how to deal with the numerous middlemen and the exorbitant transportation costs that were driving the prices of farm products down in the market. It is important to note that, with the changes occurring in the market, the peer relationship of farmers gave way to the
competitor relationship. Farmers soon began to see each other as competitors, or adversaries, and the bankers in the city as someone who could help them gain an advantage in the market. Because it was insensitive to the needs of prospective members, The Grange ultimately declined into insignificance. Although The Grange was not to become a representative interest group for farmers, it marked the beginning of the time when a group of people came together with a common cause to solve a problem that affected everyone concerned.

The transition from independent farmer to market participant was not an easy one. Regulatory control from the federal government began to become an issue that would affect the economy. Adam Smith published *The Wealth of Nations* in 1776, a volume that, still today, defines the market economy in its most open form. As the Civil War approached, the period of laissez faire would become the predominant market force in the country. The period of economic independence had come to a close. Due to the interdependence of people on themselves and the government, they began to form groups in order to have a larger voice with government in the fulfillment of their own social and economic desires.

Today, there are many different types of interest groups. There are those that attempt to further the cause of their group on a societal basis, including minority groups such as the NAACP and a variety of women's groups. Religious groups that interact with government for something that benefits their organizations are also considered to be
interest groups. There are those groups that focus on economic benefits, mostly being lobbyists for corporations. There are also those groups that perform a "watchdog" function, monitoring and reporting on governmental operations. There are even those groups that monitor the activities of other interest groups. Over time, the number of interest groups has increased because society is trending toward smaller, more specialized groups. The activities and strategies of these groups are shifting toward more specific solutions to their objectives. As such, as society becomes increasingly segmented, we can probably expect to see the number of interest groups continue to proliferate in the foreseeable future. At the present time, there are over ninety-five groups involved in criminal justice alone and hundreds more involved in every conceivable issue.

Interest groups with economic objectives and "watchdog" interest groups are usually more interested in obtaining access to the legislative and executive branches of government because these are the areas that they have found to be most effective in achieving their objectives within a short time period. They also have more resources in which to gain access to these branches of government. Thus, the culture that modern government has evolved into must cater to the desires of the interest group. Numbers of individuals with specific interests have created a powerful force in Washington. Therefore, any representative government action will, from here on, involve a number of special interest groups in the final outcome of any policy decision.
The Impact of The Supreme Court On State and Federal Relations

Jefferson also became an outspoken critic of the Supreme Court and feared the federal consolidation of powers that could ultimately arise out of the court's decisions. Indeed, his concerns were justified in some sense. However, James Madison argued in favor of a Supreme Court, believing that qualified individuals could be selected as justices when he wrote,

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue of the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.36

Despite the argument as to whether virtuous people have been selected to serve, the Supreme Court has played an active role in determining state versus federal powers over the course of history and, as Jefferson feared, the political composition of the court, and not the content of the Constitution itself, has been the driving force behind these decisions. One of the first cases in which political influence and preference was manifested was in *Marbury v. Madison*, 5 U.S. 137 (1803). In this case, Marbury was appointed a justice of the court late in the presidency of John Adams. After Thomas Jefferson was elected, the new administration blocked the appointment of Marbury to the bench. In one of the first instances of judicial review, the Supreme Court found for the
administration and Marbury was denied appointment to the bench. In spite of the ruling in favor of his administration, Jefferson saw the implications of judicial review and remained opposed to the court using judicial review to pass judgement on the validity of a congressional act. The debate continues today whether the Supreme Court should be passing judgement on legislative acts or letting those issues be decided at the ballot box. Granted, most politicians may not have evil intentions, even if their legislation may result in placing some citizens at a disadvantage. Legislators dealing with the issue of nuclear waste are not out to get Nevada, but are honestly attempting to deal with a problem in the best way they know how. That is why the courts are needed to weed out legislation that is unconstitutional. In his book on public law and public policy, Jeremy Rabkin notes that,

If the legalistic perspective were not wrong, there would scarcely be any need for courts or for any separation between the judiciary and the executive. Most litigation between private citizens and government agencies - arising, say, from disputes over tax assessments, licensing decisions, or the requirements of a government contract - do not arise because government officials have willfully and maliciously flouted their obligations under the law. It is the rare case, in fact, in which the judge or even the private litigant charges executive officials with evil intentions. In some cases, no doubt, executive officials are guilty of arrogance, negligence, or extreme bias; but the same is true of judges in some cases, too. If we were to speculate on the relative frequency of such cases, it would probably be more reasonable to fear displays of bad character among life-tenured judges than among politically accountable executive officials.

Before the adoption of the Tenth Amendment, the Anti-federalists were greatly concerned with the problem of jurisdictional disputes between the state and federal governments. This began a debate on enumerated rights which spelled out a direction for the balance of state and federal power to be established. The Bill of Rights was the
hallmark of the Anti-federalist movement and it gave them something to point to as being partially victorious in the formation of the new government system.

The court system has been deeply involved in deciding Constitutional issues throughout history. Although I will present a case history involving Tenth Amendment issues in Chapter Four, it is appropriate to discuss the case of McCulloch vs. Maryland in this chapter because it was one of the first times the issue of state and federal relations was examined by the court system, and it is directly related to the topic of federalism because it dealt specifically with the powers claimed by the state and federal governments under the Constitution.

The case occurred during the early nineteenth century; the Constitution was only three decades old at the time. The United States Congress chartered the Second Bank of The United States in 1816, and it quickly expanded to include branches in many states. In 1818, the State of Maryland enacted a law to impose a tax on all banks and their branches doing business in the State of Maryland, but not chartered by the state legislature. Banks operating in the State of Maryland without this charter could issue notes only on stamped paper provided by the state and pay a fee, the amount depending on the value of the note.40

The law suit was initially brought by John James, suing for himself and the state, against James McCulloch, who was serving as the Cashier of the Baltimore Branch of the
Bank of the United States. The Bank, admittedly, was doing business without a charter from the state, and had issued bank notes without the stamped paper required by law. Initially, the case was decided against McCulloch and upheld in the Maryland Court of Appeals. The case was submitted to, and accepted by, the Supreme Court.

The majority opinion was written by Chief Justice John Marshall, who opened the opinion by asking the question of whether Congress had the Constitutional authority to incorporate a bank. Chief Justice Marshall believed that this question must be addressed before examining the more specific question of whether the State of Maryland could tax this bank.

Initially, the opinion addressed the fact that Congress had acted in such a manner previously by establishing numerous functions of the federal government. Apparently, Marshall believed they knew what they were doing when he wrote,

The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became law.41

With this Marshall was implying that he did not necessarily have to start from scratch on the issue and seemed to be giving Congress the benefit of the doubt on, at least
this, Constitutional issue. He believed that, based on the debates within Congressional sessions, the members of Congress did their best to create laws that were within the framework of the Constitution, therefore, their interpretation would be given considerable emphasis.

The State of Maryland saw it differently. The state argued that since the law was not an act of a sovereign and independent state, it could not be valid since the powers of the general government are delegated by the states, and must be exercised in subordination to the states. The State of Maryland argued that the states alone possess supreme dominion.⁴²

Marshall disagreed. He stated that it would be difficult to sustain this argument since the Constitutional Convention which framed the Constitution was elected by state legislatures. Although it is true that, after the Convention, the delegates assembled in the respective states to discuss the document, where else were they to meet? So by consequence, the Constitution was ratified by the states, but the act, ultimately the Constitution, became measures of the people themselves as they attempted to sew the states together into a union. Therefore, the states are not sovereign since they acted together to create a Constitution that would uniformly apply to all states.

The federal government itself is not specifically granted the power to incorporate a national bank, even though it may benefit the people. However, there is no clause in the
Constitution that excludes implied powers, as evidenced by the numerous government functions that have been created by Congress, yet not specifically mentioned in the Constitution. Indeed, a Constitution that could possibly encompass all of the specific situations that would ever arise would probably not be intelligible to the ordinary citizen, even if it were possible to create such a document. Based on this, every situation must be specifically addressed and the power given to the representatives must be entrusted with ample means for their execution and, if a corporation is most convenient to employ these powers, then it shall be so allowed.\textsuperscript{43}

The opinion was premised on the Necessary and Proper Clause of the Constitution, stating that it has already been established that Congress had the right to incorporate whatever means necessary to carry out the functions of the federal government. The subject of convenience was compared with necessity and, indeed, it was easily concluded that a federally operated bank might be convenient, but convenience was not enough to justify an action. If an action by the federal government was justified by convenience alone, it would not take long to swallow up all of the powers delegated to the states on this basis. Therefore, the Constitution restrained the federal government to that which is necessary.\textsuperscript{44}

Marshall had determined that Congress had the power to incorporate a bank if it could establish necessity. Marshall described necessity as follows,
It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.\textsuperscript{45}

Having established the concept of 'necessary' as a gray issue, the Chief Justice continued to give the benefit of the doubt to the actions of Congress. The word is used in various senses and is not as concrete as the word, "absolutely," the State of Maryland contending that the two words were synonymous in this sense. With that, Marshall concluded that the Congress had the power to establish a national bank since they believed it was necessary to carry out the functions of the federal government.

Having established the right of the federal government to incorporate a bank, Marshall addressed the issue of whether a state could tax the bank under its own laws. He conceded the fact that the power to tax was of vital importance, and that the state had the right to tax. However, the states are expressly forbidden to lay taxes on imports or exports, therefore, this power is not unlimited. Although the state had the power to tax, it did not have the power to destroy a legitimate federal government function and Marshall believed that the state could use its power of taxation to destroy the bank. The State of Maryland disagreed. The state was not saying that it had the power to resist a law of Congress, it simply wanted to exercise their power of taxation. Taxes should not affect a federal Bank any more than a private bank that was subject to the same laws. The State
of Maryland argued that the Constitution leaves it this power in the confidence that it will not abuse it.\footnote{46}

Again Marshall disagreed. He did not believe that confidence in the state to do the right thing was a part of the power entrusted to the state, especially when taxing a government function that would affect people in other states. Additionally, Marshall believed that by allowing the states to tax a federal government function would open a Pandora's Box of sorts.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states...If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it?...if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.\footnote{47}

It is apparent that Chief Justice Marshall did not have the confidence in the states to do the right thing with respect to their power of taxation, and rightfully so. To concede the power of unlimited taxation on the federal government to the states would inhibit the
relationship between the states and the federal government. The threat of taxation would bring the federal government function a standstill.

Based on this, the Marshall court reversed the decision of the Maryland Court of Appeals. This case illustrated the supremacy that the federal government has exercised over the states at one point in history, but on a larger scale, is more illustrative of the oscillation of power between the federal government and the states. A 1995 case, United States v. Lopez, illustrates how the federal government has given power back to the states to manage their own affairs. This case, involving the possession of a gun at a public school, was decided by the Rehnquist court, and is of the opinion that the federal government had no business deciding issues where the state government has a clear advantage in making a correct decision. United States v. Lopez will be discussed further in the case analysis chapter.

History of the Balance of Power Since Ratification of the Constitution

The United States Constitution was ratified in 1788, approximately one year after the end of the Constitutional Convention in Philadelphia. No one won or lost in the ratification of the Constitution, because the Constitution was not intended to be a rigid document, meaning that the people of the new nation could amend it as they saw necessary. And amend it they did. Shortly after the ratification, the Bill of Rights was included as the first Ten Amendments. The bulk of this effort came from the advocates
of a strong state government. It was a way for them to ensure to themselves that, in spite of how large the central government became, enumerated individual rights would always be there for the people. This seemed to be the first evidence of the balance of power taking shape.

The Bill of Rights signified that the people would retain individual rights as the government started to develop its military, economic, and regulatory functions.

For example, the Ninth Amendment states,

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

and the Tenth Amendment states,

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.

Throughout history, the people have come back to the Constitution, and the government itself, time and time again, to amend, to change, and to limit or expand the power of government. In the 1930s, Franklin Roosevelt, in response to an economic crisis, swelled the size and function of government which has had ramifications even today. The balancing act took place, however, and it still takes place at the current time. Shortly after the FDR era, Leonard D. White wrote, "...the march of power to Washington should be reversed wherever it is possible, that the states should strengthen their capacity to take a greater share in the burden of government, and that they should
preserve a wide range of freedom of action in programs jointly supported and administered. *\(^4\)

This is an example of a phenomenon that the Framers of the Constitution did not foresee. It is clear throughout history that the system of a national government with a union of states, with the people deciding the power distribution, will be self-balancing. Taking history out of context will help self-serving special interest groups strengthen their arguments and push forward their agenda. However, examining history as a continuum illustrates that various events took place for various reasons.

In recent times, dramatically illustrated by the elections of November, 1994, a states rights push has been ongoing, which indicates the nation's political ideologies may be leaning to a more conservative nature. It is typical for the people involved in this push to conservatism to demonize Franklin Roosevelt for his governmental implementations during the New Deal era. This, they proclaim, is what Jefferson feared so much. Big government getting bigger and ever more intrusive in the daily lives of the citizens, in fact, going against the will of the people. But this is taking history out of context. The New Deal era was in response to the people of the nation demanding that government do something about the problems that faced the nation at that time in history. Leading up to the Great Depression, the economy was a loosely knit web with few alternatives. If a person had savings, he had a choice of a passbook account at the bank or investing in the stock market. When one of these institutions failed, people lost their savings and the
economy became severely weakened. When both of these institutions failed, the economy became devastated and the nation was thrown into a state of destitution. Thus, the policies of Franklin Roosevelt were in response to the needs of the people. Without a strong central government, the people of this nation would have had a much more difficult time recovering from such a financial devastation and would have left the country vulnerable to the outside world.49

Many people lost their life savings during this time, thus social security was created so elderly Americans would always have a financial safety net. Jobs were lost and careers were ruined, thus the Tennessee Valley Authority and numerous other government programs were implemented in order to create jobs. This creation of jobs was the foundation for restoring the economy, for once people had money to spend, it would create a snowball effect and the economy would eventually self-right. The theories, for the most part, worked. The economy recovered and, with the end of World War II, the nation experienced an economic boom that had never been seen until that time. Was the central government a tyrannical force that overwhelmed the people and their rights? Those most affected by the Depression, who had lost their homes, jobs, and families due to economic instability were not concerned about their rights at that time, but their survival. It was the central government that restored the average citizen back to a place where he had the luxury of worrying about his rights.
Federal regulation has been around for almost as long as the nation itself.\textsuperscript{50} The federal government has regulated business since the inception of the Interstate Commerce Commission in 1887. Especially during the New Deal era, restrictions and regulations were implemented over supply and prices as a means to bring the country out of the Depression.\textsuperscript{51}

To this day, the legacy of the New Deal era lives. The programs that were implemented to see the country through the hardest of economic times have, in many ways, become a financial burden to the economy at the current time. This has led to other federal government impositions such as unfunded mandates of social problems from the federal government to the states. The entitlement benefits of social security and medicare have increased over time as more and more interest groups have lined the halls on Capital Hill in order to get the most for their clients. As a result, entitlement programs take a larger and larger percentage of the federal budget every year. But the inevitable balancing act continues to reactivate itself whenever necessary. The political climate has leaned to the conservative philosophy and parts of the programs are sure to be dismantled in the conservatively dominated Congress. Even a Democratic president recently signed a welfare reform bill that is designed to drastically decrease expenditures on welfare programs over five years. Whether this is good or bad depends on where a person stands on the entitlement issue. Without calling it good or bad, it can certainly be called inevitable, because history has shown that this nation has an uncanny ability to self-correct itself through the system of a central government combining a union of states.
This is, in effect, the essence of federalism, the essential characteristic being the division of power or supremacy between the state and the federal governments.\(^2\) So in answer to Jefferson's fear about the federal government having too much power, history shows that the federal government has always had just enough power to see the nation through whatever problem that comes up, and the people of the nation retrieve that power for the states when the federal government does not need it anymore. Ironically, this is exactly how Madison and Hamilton envisioned the role of the federal government. Jefferson's fears were only partly justified because, on one hand, the federal government would be able to seize a great deal of power in order to implement its policies for the nation, but Jefferson incorrectly surmised that, once power was in the hands of the federal government, it would never be returned to the states.

It should be noted that states have the right to be represented in the federal government. The federal government does not have the right to be represented in the state government. Therefore, the guarantee of return of power to the states is inevitable. The states' representatives must simply go to Washington and get it. Daniel Elazar states.

While the political process has been put to hard use to find ways to guarantee state political integrity against the pressures of centralization, virtually nothing has been added to the constitutional guarantees that allow federal authority to be used to maintain representative government within the states. It has been determined that Congress has the exclusive authority to decide whether a state has a "republican form of government" by accepting or refusing to seat that states' elected representatives. It has also been clear that Congress will rarely exercise its powers in this respect.\(^3\)

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One way to visualize the future of federalism is to look at the past. The system that the framers established, whether by design or by accident, has thus far worked in being able to tip the balance of power whenever it is needed. The prevalent argument is, when should the federal government pay for programs and when should the states pay for programs? If neither one wants to pay for the program, then it should be eliminated. This has increasingly been the case since the cities have become the established hubs of commerce. As a state Governor, Nelson Rockefeller once stated, "There is no greater challenge in our age to the inventiveness of the federal idea than the surging tide of urbanism. And here - While all three levels of government in the United States are necessarily involved - the states have a crucial role." What he means is that the states must look to themselves for the operation and funding of the cities within their states. Said more plainly,

State and local governments play a significant role in the nation's affairs because of the nature of the American federal arrangement. Unlike regional and local governmental units in most other nations, the states and localities are not merely instruments for the implementation of national policies. Instead, the American federal system devolves real power to its components. State and local governments make meaningful policy choices, allocate public resources, and resolve conflict without the involvement of the national government. As a result, they have retained their vitality in the face of urbanization and industrialization, the development of a national economy, the erosion of regional differences, the organization of national news media, and the vast expansion of federal activities into areas once the exclusive preserve of the states and localities.

Although the federal government has served, among other things, in national crisis intervention, it is the states that must look to the future and chart their own course. Thus,
the balance of power swings back to the states while the economy is expanding. With this expansion comes a host of social problems that must also be dealt with. Increased population in cities means more crime or less housing. These are problems that must be dealt with by the states because they are in the best position to assess the problem and determine a solution. In this sense, the states are "systems within a system". The states are broken down into even smaller entities to deal with even more specific problems of society. Although this presents the problem of shared responsibility, the smaller, or more appropriately, the more specific the problem, the smaller the governmental entity available should be the entity to address the problem on a policy formulating basis. The smaller government entity results in the individual having a greater say in the outcome of the policy decision. This will tend to avoid the problem of shared responsibility and "buck passing," because shared responsibility means shared authority. And when power becomes divisible, the lines of authority become blurred.56

Shared responsibility is inevitable between the federal government and the states because the responsibilities of each government have so much potential to overlap in so many areas. However, the constant tug between the two entities also provides for balance between the two entities. In fact, it is the states that will ultimately restrain the activities of the federal government.57 States are busy running the business of the state, while simultaneously, maintaining a relationship with the federal government. On the whole, state governments do not appear to be atrophying.58 In fact, with the increase in federal aid, the states have become much more active in attempting to secure these grants for
themselves. There is a great deal of grant money to be had, and the states are in direct
competition for it. This directly involves the state's representatives that have been elected
to represent the state in Washington D.C. National aid to the states began slowly with
land grants and evolved into a multi-billion dollar money grab spread out over hundreds
of programs. These types of federal grants have proliferated to the point that, at the
current time, the conservative nature of Congress has begun to scale back such grants in
order to reduce the overall expenditures of the federal government. Thus, with power
returning to the states, the decisions for funding or eliminating existing programs becomes
the responsibility of the states, the original concern of the Anti-Federalists.

With all philosophical preferences aside, the Framers of the Constitution seem to
have hit on a very practical system that has worked. As history passed, the moral and
philosophical implications of the controversy gave way to the fact that this system evolved
so as to work. In his inaugural address, James Buchanan deplored the fact that people
calculated the union for its mere material value and lamented, "if only men did not fret
over the values and purpose of the union." With this he meant that, whatever your
political ideology, the system will inevitably stay on course due to the balance of power
between the state and federal governments. It is the people that are, and always have
been, in control of this distribution of power.

Woodrow Wilson wrote in 1911 that the balance of state and federal powers within
the United States will not be settled, "by the opinion of any one generation." Thus, the
balance of power has oscillated back and forth throughout history, largely dependent on whether or not the federal government needed power. Jefferson's worst fears were imagined because the federal government has become a burdensome bureaucracy in many cases. However, Jefferson could never have envisioned such an oscillation of power as has been witnessed over the years. The agrarians of the mid-eighteenth century were correct to be afraid of what the federal government might become. Indeed, almost all of their predictions have come true. The part that these Anti-federalists underestimated was their own ability to assimilate to and adapt to the new system. As a result, the agrarians became sophisticated in the art of government and, largely through the formation and evolution of interest groups, carved out their power and influence within the federal system.

There was a great deal of animosity when the U.S. Constitution was being debated. What was feared most of all was that of an unknown element, in blindly adopting a system that the people would unwittingly become enslaved to, ultimately creating a system similar to that which the Revolutionaries had fought to free themselves from. Quite the contrary, it was, and appropriately so, the system that became enslaved to the people, for the people of the United States have shown an ability to change the system whenever it was not working to the expected efficiency. In his pamphlet Common Sense, Thomas Paine wrote, "Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expense and greatest benefit, is preferable to all others."
Additionally, in *The Federalist* No. 51, James Madison wrote,

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁶³

By establishing a government with state and federal power, the founders of this country, possibly inadvertently, established a system that would counter-balance itself throughout history, depending on the needs of the people.
ENDNOTES


9. Ibid, p. 120.


11. Ibid, p. 120.

12. Ibid, p. 121.


27. See Zeigler, p. 165.


31. See Zeigler, p. 171.


41. Ibid, p. 81.

42. Ibid, p. 81.

43. Ibid, p. 83.

44. Ibid, p. 96.

45. Ibid, p. 84.

46. Ibid, p. 89.
47. Ibid, p. 91.


Chapter Four

Case Analysis

The issue of nuclear waste and its disposal, although extensively debated within the halls of Congress, has also been heard before many of our courts. The specific issues of each case that have been debated has varied considerably; however, the most significant general issue is that of state and federal relations. The courts have decided in many cases just what the federal government can and cannot do within the boundaries of a state.

The concept of preemption has been a focal point of these court cases. The federal government has entered a number of different policy areas, not just for the placement of nuclear waste, but pollution control, racial relations, and many others. The expansion of federal power often times creates a conflict between state and federal power when state and federal policies are in conflict with one another. Federal preemption of state power has reached staggering proportions. Over 233 have been enacted since 1969. Although in recent years the court system has been reluctant to infer preemption in the direction of the federal government in many different policy areas, the area of nuclear waste disposal policy has more often been granted preemption of federal power over state policy. This
seems to correlate with the fact that federal preemption of state and local laws has been on the increase since the late 1960s.³

As the federal government has become increasingly concerned about what to do with growing amounts of radioactive waste, the state governments have been busy enacting laws to avoid acceptance of radioactive waste. Therefore, the question posed before the court system is, when and where may the federal government preempt state laws, based on the Constitution? If Congress does not expressly specify the intended extent of preemption within a given statute, the courts must determine whether preemption is implied.

Preemption is based on two clauses in the Constitution. The Supremacy Clause and Commerce Clause give the federal government preemptive powers over the states in areas that involve national security or a war powers act and in the area of having authority to regulate interstate commerce. Although it seems a stretch to proclaim that nuclear waste disposal is a national security issue, the courts decided exactly that in Pauling v. McElroy, when a U.S. District Court stated, "The (Atomic Energy) Act is a valid exercise of the authority of Congress to promote and protect the national defense and safety under the constitutional war power."⁴ Interestingly, this portion of the case did not mention that Congress added Section 274 to The Atomic Energy Act in 1959, which recognized the interests of the states in the peaceful uses of atomic energy and gave states limited authority over certain types of nuclear material.⁵
Justice Black defined preemption as occurring when the federal government enacts a "complete scheme of regulation." According to him, the states cannot "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." And so it seems that federal preemption over the states' attempts to co-regulate nuclear issues with the federal government has held up in court. In case after case, the federal government has prevailed, based predominantly on the Supremacy Clause of the Constitution.

In *Northern States Power Company v. Minnesota*, the state claimed that Section 274 of the Atomic Energy Act did not bar the concurrent exercise of state control. The courts decided against the state and held that the federal government has exclusive authority to regulate radioactive effluent discharged from nuclear power plants. Likewise, in *United States v. City of New York*, U.S. District court held that the New York City ordinance requiring local licensing of nuclear reactors was preempted by the Atomic Energy Act of 1954. In this case, the court stated that, "Congress did not leave room for dual federal-state regulation of radiation hazards associated with the operation of nuclear reactors." And in *Washington State Building and Construction Trades Council v. Spellman*, a district court struck down a Washington state initiative that banned the transportation and storage of all non-medical nuclear wastes, thereby attempting to create a "nuclear free zone." On appeal, the Supreme Court held that the initiative violated the Supremacy Clause and the Commerce Clause by attempting to regulate interstate transportation. The case of *Illinois v. General Electric Company* resulted in a similar local initiative being struck down.
These cases resulted in court interpretations that give the federal government total preemptive control over state regulations regarding nuclear issues. However, Section 274 of the Atomic Energy Act states that, "Nothing in the section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards." This is the only loophole that the states had to combat the infiltration of nuclear waste from other states. If a state can create an ordinance that deals directly with the issue of safety, the courts may uphold it based on Section 274.

Additionally, the state may have a chance if it can make an argument against nuclear waste based on economic reasons. The case of Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission (1983) serves to illustrate how the State of California was favored in a court of appeals ruling for enacting a statute that regulated nuclear power plants for economic reasons. The statute required that before additional nuclear power plants could be built, the state energy commission had to determine that there would be adequate capacity for storage of spent nuclear fuel rods. The law also imposed a moratorium on the certification of new nuclear plants until adequate technology for dealing with high level nuclear waste was available. Since the federal government had historically regulated nuclear power plants, the law was challenged by two utility companies.
Initially, the courts ruled in favor of the power plants, but the decision was overturned on appeal. The court of appeals stated that the ruling was being overturned, not for safety reasons, but for economic reasons. Historically, states have reserved the right to halt the issuance of approval certificates based on the public need for the facility. \(^\text{12}\)

The Supreme Court has not always ruled against the state. In 1978, the court upheld a section of New York law requiring appointments to the state police to be U.S. citizens, pointing out that, "it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of non-citizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens." \(^\text{13}\)

However, based on the majority of case history concerning nuclear issues, it does not look good for the states when it comes to opposing federal projects. It should be noted that in all of the cases cited thus far, the issue of regulation was a central theme.

The purpose of this thesis is to discuss, not the issue of regulation of nuclear waste, but whether the federal government has a right to bring nuclear waste into the state in the first place. The State of Nevada does not want to co-regulate the nuclear waste program with the federal government. In fact, the State of Nevada does not want to be a part of the nuclear waste program in any capacity. This desire is based upon concern for the safety of its citizens. Based on the Tenth Amendment of the Constitution, it can be argued that

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the federal government does not have the right to establish a program where no program exists within an unwilling host state.

The Tenth Amendment is the last of the Bill of Rights, the first ten amendments to the Constitution. James Madison did not believe that an amendment concerning state sovereignty was necessary because the proposed Constitution was based on state sovereignty with the federal government generally regulating commerce and engaging in relations with foreign countries. This does not mean that a state could willfully violate laws or go their own way whenever it suited them. It did, however, mean that while there were certain obligations that must be rendered to the federal government, the provisions in the Constitution should protect the states from tyranny. In the end, the Tenth Amendment was included as a protection for this concern. The Anti-federalists were suspicious of the new union and wanted that guarantee. Thomas Jefferson regarded the Tenth Amendment as "the foundation of the Constitution," and said, "To take a single step beyond the boundaries thus specially drawn...is to take possession of a boundless field of power, no longer susceptible to any definition."

The Tenth Amendment case analysis will consist of an examination of three significant Supreme Court cases that best illustrate the relationship between the federal government and the states. These cases are not related to nuclear waste, but are used as an illustration of how the state governments have a right to protect the safety of their
citizens and, most importantly, how the Supreme Court has used the concept of fairness in its decisions.

These cases are *National League of Cities et al v. Usery, Secretary of Labor*, 426 U.S. 833 (1976), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *United States v. Lopez*, 93-1260 (Certiorari To The United States Court Of Appeals For The Fifth Circuit). The first two cases are a unique pair for analysis because the Court's ruling in *Garcia* overturns its own ruling in *National League of Cities*. Additionally, the *Lopez* case will demonstrate how the Supreme Court has returned more power back to the states.

A brief description will be presented of each case, followed by an analysis of the relationship between the two cases and the apparent indecisiveness of the court regarding Tenth Amendment issues. The Court was said to have "waffled" in the first two cases, as the decision in *Garcia* overturns the decision in *National League of Cities*. However, the point that is made by analyzing these cases is that the Court holds state sovereignty and fairness as significant in deciding issues that involve state and federal governments and the state's right to ensure the physical safety and economic well being of its citizens. The *Lopez* case indicates that the Court is perhaps beginning to re-examine the limits of federal power under the Commerce Clause.

The case was argued April 16, 1975, reargued March 2, 1976, and decided June 24, 1976. National League of Cities declared unconstitutional a federal statute implemented in 1974 that extended the minimum wage provisions and maximum hours outlined in the Fair Labor Standards Act (FLSA) to state and municipal employees. The maximum hours and minimum wage provisions of the Fair Labor Standards Act of 1974 had already been found constitutionally valid as they applied to private corporations. However, using the Tenth Amendment as a guide, the Supreme Court ruled that the provisions regarding state and municipal employees were unconstitutional and, therefore, interfered with an essential "attribute of sovereignty attaching to every state government."

The provisions were found to violate the Tenth Amendment.15

The case states as Held:

1. Insofar as the 1974 amendments operate directly to displace the states' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they are not within the authority granted Congress by the Commerce Clause. In attempting to exercise its Commerce Clause to prescribe minimum wages and maximum hours to be paid by the states in their sovereign capacities, Congress has sought to wield its power in a fashion that would impair the states' "ability to function effectively in a federal system," Fry v. United States, 421 U.S. 542, 547 n. 7, and this exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. Pp. 840-852.
2. Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. *Fry v. United States*, *supra*, distinguished; *Maryland v. Wirtz*, 392 U.S. 183, overruled. Pp. 852-855. 406 F. Supp. 826, reversed and remanded.


The opinion delivered by Justice Rehnquist opened with a brief history of the Fair Labor Standards Act. This Act required applicable employers to pay their employees a minimum wage and one and one-half times their regular pay for overtime, defined as any hours in excess of forty in one work week. The Act survived a judicial challenge in 1941 in the case of *United States v. Darby*, 312 U.S. 100. The decision was based on the Commerce Clause of the Constitution, stating,

> Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.16

The original text of the Fair Labor Standards Act excluded the states and their various forms of sub-governments from coverage and did not become an issue until the language of the Act was broadened during a thirteen year period, from 1961 to 1974, to
include the public employees employed by the states in their various state agencies. These amendments were affirmed in the case Maryland v. Wirtz, 392 U.S. 183 (1968). In 1974, the language was broadened further by specifically including a public agency in the definition of an employer and defining an employer as, "...the Government of the United States; the government of a state or political subdivision thereof...". After this sweeping amendment, the only employees left unaffected were executive, administrative, and professional personnel. The complaint filed by the National League of Cities, along with the National Governor's Conference and various other cities and states, stated that, although the conditions of employment were not in question with regard to the Act if the employees were employed in the private sector, the amended language of the Act eliminated the states' enjoyment of an intergovernmental immunity based on a long series of cases which protected this immunity.

Initially, the case was presented to a three judge panel in District court, but the complaint was dismissed on the grounds that it was not one in which relief could be granted. The Court stated that the plaintiff's contentions were,

...substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [Maryland v. Wirtz, supra]; but that is a decision that only the Supreme Court can make, and as a federal district court we feel obligated to apply the Wirtz opinion as it stands.17

With this decision, the District court was saying that the plaintiff may have a valid argument, but the District court was in no position to challenge a previous Supreme Court
ruling and, basically, recommended that the case be presented to the Supreme Court for consideration. Indeed, the Supreme Court recognized the complaints of the plaintiff as substantial and overruled the judgement of the District court, ultimately overturning its own decision in *Maryland v. Wirtz*.

The second portion of the opinion discusses the substantive issues of the complaint in greater detail. All of the provisions of the Fair Labor Standards Act had been implemented through the window of the Commerce Clause, asserting that Congress has the authority to implement control of,

...even activity that is purely intrastate in character...where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations. ¹⁸

But the plaintiffs were not disputing the authority of Congress with regard to the Commerce Clause. Instead, they argued from a different point of view. That point of view submitted that, in spite of the obvious control Congress had over interstate commerce, they had no power to regulate the states as employers. Indeed, Justice Rehnquist wrote in his majority opinion of the case,

Appellant's essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the states and subdivisions of the states as employers.
And so it would seem that the tide of federalism was ebbing. The balance of state and federal power has always been tipped by cases where one part of the Constitution conflicts with another, just as the Supremacy Clause conflicts with the Tenth Amendment in the Yucca Mountain controversy. It is the political composition of the court that Thomas Jefferson feared that ultimately weighs the parts of the Constitution for substance and decides which parts will receive the greater weight based on political preference. In this case, the Tenth Amendment was rediscovered and given preference over the Commerce Clause. Effectively, the decision gives preference of the states over the federal government.

One of the most important approaches in analyzing the decisions of the Court over a period of time is to examine the political climate at the time a justice is appointed and the personal politics of that particular individual. This notion is evidenced from many of the decisions in the Rehnquist court, National League of Cities v. Usery being one of them, that illustrates the conservatism that turned decades of liberal Supreme Court decisions to the right. Through this decision, power was being returned to the states that, many would argue, was the intention of the framers of the Constitution in the first place.

The dissenting opinion in National League of Cities v. Usery was written by Justice Brennan. The opinion concedes that Congress implemented the 1974 amendments to the Fair Labor Standards Act via its exclusive power under the Commerce Clause. The basis of the dissent was that the majority opinion had overruled decades of precedent that cannot
be ignored, even going back as far as the Marshall court to cite evidence of the court sanctioned power of the Commerce Clause. Justice Brennan argued that the divergence between opinion and dissent is a matter of how far the Commerce Clause can go in regulating the states. He spent several pages citing previous cases and quoting past justices about the supremacy of the federal government over the states and concluded by saying, "My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent." He later writes on Pp. 861-2 of the opinion,

The reliance of my Brethren on the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," not only suggests that they overrule governing decisions of this court that address this question but must astound scholars of the Constitution.

The problem that Justice Brennan had with the majority opinion is its apparent lack of compliance with judicial procedure of basing decisions on precedent. Indeed, the majority opinion does not appear to have strong support from past cases. It is, effectively, a complete turn in a different direction after many years of federal control over the states via the Commerce Clause. Justice Brennan purports that if a clear direction toward a decision is not evident through precedent, then it has been the practice of the court to not interfere with the legislating activities of Congress, and therefore, advocates judicial restraint.¹⁹
In one sense, both the majority opinion and dissent agree that the federal government has significant power vis a vis the Commerce Clause and neither enters the argument that the statute is invalid when supported by the Commerce Clause. The majority opinion has taken a step into the darkness by deciding a case with minimal, if any, support from previous decisions. As we will see in the following analysis, the Court ultimately overturned its own ruling via Garcia v. San Antonio Metropolitan Transit Authority. The National League of Cities case illustrates how political preference can enter into a judicial ruling without following established procedures for deciding a case. The Rehnquist court represents a turn toward conservatism that was made possible by the appointments of Justices by several conservative presidents. It is only natural to assume that the personalities and personal convictions of these justices can be found in the opinions that they produced in their tenure on the court.

*Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985)*

The case was argued March 19, 1984, reargued October 1, 1984, and decided February 19, 1985. The case was decided with No. 82-1951, Donovan, Secretary of Labor v. San Antonio Metropolitan Transit Authority, which was on appeal from the same court. In Garcia, the court overturned its own decision in the case of National League of Cities v. Usery, which was decided in 1976. The decision effectively reversed the Court's standing on the Tenth Amendment, ruling that those entities which are traditional state
government functions can be, under certain circumstances, required to abide by the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).

The case states as Held:

In affording SAMTA employees the protection of the wage and hour provisions of the FLSA, Congress contravened no affirmative limit on its power under the Commerce Clause. Pp. 537-557.
(a) The attempt to draw the boundaries of state regulatory immunity in terms of "traditional government functions" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled. Pp. 537-547
(b) There is nothing in the overtime and minimum wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The states' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the federal government itself. In these cases, the political process effectively protected that role. Pp. 547-555.


The opinion of the Court was delivered by Justice Blackmun and joined by Justices Brennan, White, Marshall, and Stevens. Justice Powell filed a dissenting opinion, joined by Justices Burger, Rehnquist, and O'Connor. Justice Rehnquist filed a separate dissenting opinion and O'Connor filed a separate dissenting opinion, which was joined by Justices Powell and Rehnquist.

The first thing that strikes a reader as being very curious is the fact that Justice Blackmun wrote a concurring opinion in National League of Cities, yet delivered the opinion in Garcia to overturn that ruling. This will become the focus of the case in Justice
Rehnquist's dissent as he described how the majority opinion of the case abandoned judicial procedure and almost completely avoided the principle of *stare decisis*. This has a ring of familiarity because it is along the same line that Justice Brennan dissented in *National League of Cities*. The majority opinion attempted to destroy the credibility of the "traditional government function" test that was developed in *National League of Cities* by describing it as, "not only unworkable but is inconsistent with established principles of federalism."

The opinion of the Court opened with an expansive history of public transportation in San Antonio, Texas to lay the foundation for a conclusion. Originally, public transportation was provided solely by private companies, but in 1913, the State of Texas authorized municipalities to regulate these private entities, usually coaches for hire. This is the first evidence of government involvement in this industry. Two years later, the Texas legislature went further to regulate the industry by enacting an ordinance applying franchising rules, insurance coverage, and safety requirements. The City of San Antonio continued to rely on publicly regulated private transportation companies until 1959, when it purchased the privately held San Antonio Transit Company and transformed it into the publicly run San Antonio Transit System (SATS), which served the entire county. Never in the history of San Antonio had a transportation system been publicly operated. The system ran by itself for approximately ten years, but as it began to grow and expand it discovered, like many public transportation systems, the operation was not self-supporting.
By 1970, the system was financially crippled and required assistance to continue operations. It sought financial assistance from the federal government.

Based on the Urban Mass Transit Act of 1964, SATS received its first federal government grant of $4.1 million in December, 1970. That was only the beginning. Over the next ten years, SATS received over $51 million in UMTA grants. Additionally, it received more than $30 million in capital grants, $20 million in operational grants, and other small amounts for technical assistance. From 1970 to 1972, SATS received almost four times as much in grants as it did in fares. At the time the case was decided in 1985, federal subsidies and local sales taxes comprised approximately 75% of the now re-named San Antonio Metropolitan Transit Authority’s (SAMTA) operating budget.

The opinion then reiterated the same history of the Fair Labor Standards Act that was presented in the opinion of National League of Cities. It described how federal labor regulation became increasingly inclusive until, in 1961, Congress finally extended the provisions of FLSA to include mass transit systems of state and local municipalities. These obligations were further expanded in 1974, when Congress extended the minimum wage and overtime provisions to virtually all state and local government employees. These provisions were turned back with the decision in National League of Cities, as states gained a new energy in claiming power over the federal government, based on the Tenth Amendment. Almost immediately after this decision was announced by the court, SATS informed its employees that it was no longer bound by the provisions of the FLSA.
Operations were relatively uneventful for SATS over the next five years. In 1978, SATS was transferred to the San Antonio Metropolitan Transit Authority, which took over day-to-day operations.

In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations were not immune from the minimum wage and overtime requirements of the FLSA. SAMTA immediately filed an action against the Secretary of Labor seeking a declaratory judgment that would, indeed, make SAMTA immune from the provisions at issue. This filing spurred a suit by a SAMTA employee named Garcia, who was joined in the suit by several other employees. The declaratory judgment that SAMTA sought was not to materialize immediately. Shortly after the suit was filed, the Department of Labor extended the provisions of FLSA to include publicly owned mass transit systems. The National League of Cities decision was beginning to crumble for state governments and local municipalities.

SAMTA was granted a motion for summary judgement in District court and the ruling was in favor of SAMTA. The court found that the operation of a mass transit system did, indeed, constitute a traditional government function under the test developed in National League of Cities. The case was appealed to the Supreme Court, which remanded the case back to District court with instructions to examine the newly decided case of Transportation Union v. Long Island R. Company. In this case, the District court ruled that a commuter railroad was not part of a traditional government function and ruled
against the transportation company. In spite of this development, the District court again found in favor of SAMTA, based on the "historical reality" of state involvement in mass transit. This included the fact that, although state and local governments had not always been involved in mass transit, they had been, for decades, involved in the regulation of transportation systems, in the case of San Antonio, dating back to 1913. The court declared that the historical basis of its decision gave the states an "inference of sovereignty." All in all, the court did not believe that the function of a mass transit system was significantly different from those government functions cited in National League of Cities. The court stated,

If transit is to be distinguished from the exempt [National League of Cities] functions it will have to be by identifying a traditional state function in the same way pornography is identified: someone knows it when they see it, but they can't describe it. 557 F. Supp., at 453.

The Supreme Court accepted the case on appeal based on the question, "Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered." The opinion was based on the principle that since the FLSA applied to all other private entities, and, indeed, it had been confirmed in court that it did, then the same provisions should also apply to all state and local government entities. Justice Blackmun reviewed the test of a traditional state government function as set forth in National League of Cities for determining state immunity from a federal statute:
1. The federal statute at issue must regulate the "states as states."
2. The federal statute must address matters that are indisputably attributes of state sovereignty.
3. State compliance with the federal obligation must "directly impair [the states'] ability to structure integral operations in areas of traditional government functions."
4. The relation of state and federal interests must not be such that "the nature of the federal interest...justifies state submission."

Many examples of cases were presented that might indicate SAMTA was protected from the federal obligation and many examples of cases were presented which might indicate SAMTA was not protected from the federal obligation. In short, there was no clear precedent by which to form a decision on the case.

This brings up two questions. First, if there was no distinction on where a judicial decision could be supported by previous cases, why would the Supreme Court overturn its own ruling? Secondly, if there is no clear direction and the court decides that state and local governments should be subject to the provisions of the FLSA, if only by judicial preference, why was National League of Cities decided in favor of the states? There does not seem to be a specific answer, especially since many of the judges on the Court for Garcia were also on the court for National League of Cities. In a 1985 writing, columnist George Will described the two decisions as the Supreme Court's big waffle. He stated in his article that the court had no other explanation than to say, "oops, we didn't mean to make that decision in National League of Cities, therefore we are going to reverse ourselves in Garcia."
The two cases involve separate arguments however. In National League of Cities, the focus was on the Tenth Amendment and how the federal government did not have the power to regulate a traditional government function over the states because it was not specifically given that power in the Constitution. The other side of the argument is the fact that Congress was given the right to regulate interstate commerce through the Commerce Clause, and the Commerce Clause had cast a wide net in multiple court cases and had been given the benefit of the doubt, i.e., received a favorable ruling in many of those cases. Therefore, there was a significant amount of commercial regulation that had been sanctioned by the court through the Commerce Clause.

Justice Blackmun was most accurate when he cited Fry v. United States, 421 U.S. 542, 558 (1975) in his opinion that,

Many constitutional standards involve 'undoubte[d]...gray areas,' and, despite the difficulties that this court and others courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause.

On the surface, the only way out of this situation is to defer to a case-by-case analysis and come to some independent conclusion, but upon further reflection, this is nothing more than a truism. All cases are decided on a case-by-case basis. If there was no need to individually consider specific conflicts there would be little need for the courts.
Therefore, each case is independently decided using various judicial principles, *stare decisis* being one of them.

The opinion of the Court never gave a good reason for overturning *National League of Cities* other than to imply that it was the right thing to do. The only support presented was a historical analysis of several cases involving vacillation and uncertainty, giving credibility to vacillation and uncertainty in the current case. From here, the opinion attempts to destroy the "historical reality" presented in previous cases and reiterated by the dissenting justices. The opinion of the court states,

> The most obvious defect in a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of states, changes that have resulted in a number of once private functions like education being assumed by the states and their subdivisions. Reliance on history as an organizing principle results in line drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

With these words, Justice Blackmun has solved his own problem. Historical analysis may not be the most perfect vehicle to arrive at a conclusion, but it is, nevertheless, a vehicle that can be very helpful. Justice Blackmun ignores the fact that historical events do not occur in a vacuum. Times and events lead to succeeding times and events. Things happen as a result of something else, and therefore, history establishes a pattern or trend of events. Therefore, this approach is very helpful in establishing a ruling if a court is willing to establish the line of events leading up to a specific court case. History
does not "prevent a court from accommodating changes in the historical functions of states." Those changes evolve naturally, usually without the help of the court. It is, simply put, the court's job to interpret these changes and apply them to their decisions. What Justice Blackmun seems to be implying is that if a judge is forced to consider historical patterns in deciding cases, usually it will interfere with what the court wants to do or believes that it ought to do, i.e., implementing fairness and equity. This will be an extremely important concept when the Yucca Mountain issue comes to court.

The Garcia case involved the question of which portion of the Constitution will gain greatest emphasis, the Tenth Amendment or the Commerce Clause. The decision in National League of Cities gave the Tenth Amendment a new life and seemed to bolster the power of the states over Congress and its increasing reliance on the Commerce Clause to implement its policies over the states. The decision in Garcia took the wind out of those sails and reaffirmed the federal nature of Congress and the sweeping power of the Commerce Clause, which is what Justice Blackmun considered most substantial in supporting the opinion of the Court.

The opinion of the Court also had many references to eighteenth century history, quoting The Federalist No. 39 and No. 46, proposing that the power of the states was manifested through their involvement in the federal government. Blackmun quoted James Wilson, who said,
...it was a favorite object in the Convention to provide for the security of the states against federal encroachment and that the structure of the federal government itself served that end.

Justice Blackmun's interpretation of history continued.

In short, the Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of the National government itself, rather than in discrete limitations on the objects of authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

With this, he is saying that the state government's sovereignty is empowered by its existence and co-working within the federal system. Indeed, the framer's intentions were that the federal government's laws and treaties were to be "the supreme law of the respective states."20 This is the part of the opinion that begins to make some logical sense, especially if deciding a case based on the "right thing to do."21

The state and federal governments have struggled to wrestle power from one another since the Constitutional Convention. It has occurred over the past two hundred years and will continue into the future. But the state and federal entities cannot exist without one another, and that was the main argument put forth by the federalists, namely Alexander Hamilton, John Jay, and, mostly, James Madison. The government does not and cannot exist as two separate systems. The government is one system with two parts.
and since the ratification of the Constitution, the two parts of the system have become more and more enmeshed and inseparable.

As this happens, the dual systems begin to function more like one system with two parts, each dependent on the other for survival. Ultimately, the majority of the people will be benefitted by the operations of this dual system and, together, the system will operate more efficiently than each could operate independent of one another. Thomas Paine hoped for just such a system when he wrote in his pamphlet *Common Sense*,

Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expense and greatest benefit, is preferable to all others.22

Justice Blackmun correctly cites the multiple federal grants that SAMTA received over the years and made note of the fact that SAMTA's operations were now seventy-five percent federal government supported. So the decision in *National League of Cities* was not overturned due to a finding against state sovereignty, but on fairness. If a state accepts financial incentives from the federal government, it should be prepared to reciprocate. He furthered this premise on a broader basis, stating that federal grants to states and localities exceeded $96 billion at the time the opinion was written and these grants now account for twenty percent of state and local government expenditures. There is a long history of
cases affirming the interest of the federal government to attach conditions to grants awarded to states.

However, this is not the case in the Yucca Mountain controversy. Nevada has received no such funds, other than those authorized for oversight of the site characterization process. Further, Nevada receives only minimal direct benefit from nuclear power and is tied to the nuclear industry only through small electricity acquisitions on the national grid.

The truth is that the states have come to the federal government and have received generous grants to improve their respective districts and subdivisions. Should these grants come with no strings attached? The "right thing to do" is easy to conclude by examining the intent of the Framers of the Constitution. It must always come back to the best thing for the people. The ruling in this case was considered the best thing for the people, specifically, Justice Blackmun meant the people that worked for SAMTA and the people that pay federal taxes. The best interest of the government, as represented by SAMTA, was not considered superior to the people who desired a minimum standard of living that all other people in the private sector were guaranteed by virtue of the FLSA. Is this the way Justice Blackmun thought the law should work? Thomas Hobbes wrote in the Leviathan.
For the use of laws, which are but rules authorized, is not to bind the people from all voluntary action; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as hedges are set, not to stop travellers, but to keep them in their way. And therefore a law that is not needful, having not the true end of law, is not good. A law may be conceived to be good, when it is for the benefit of the sovereign; though it be not necessary for the people; but it is not so. For the good of the sovereign and people, cannot be separated. It is a weak sovereign, that has weak subjects; and a weak people, whose sovereign wanteth power to rule them at his will.\textsuperscript{21}

In this case, Hobbes would apply to the notion of keeping the government on the straight and narrow, for if the sovereign has declared that all people in a society are entitled to a living (or minimum) wage, then the declaration should also apply to those who are subjects of the sovereign, in this case the employees of SAMTA. This is what Justice Blackmun thought of as the "right thing to do."

Having this apply to all people in the society is also good for the society as a whole because general tax revenues are being expended to fund the operation of the government entity. Therefore, if federal taxes are collected from the entire country and distributed to specific states for capital improvements or operational grants, then some federal oversight is not only appropriate, but necessary. If I pay federal taxes in Nevada for which a portion will be contributed to maintain a mass transit system in San Antonio, I would want some oversight as to how my money was spent. In the case of federal subsidies, a business arrangement is created that always involves give and take. This does not mean that state sovereignty has been destroyed, it only means that the City of San Antonio has voluntarily entered into an agreement with the federal government to obtain and use funds.
Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision...In short, Congress has not simply placed a financial burden on the shoulders of states and localities that operate mass transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass transit systems better off than they would have been had Congress never intervened at all in the area.

With this, Justice Blackmun declared the Commerce Clause to be superior to the Tenth Amendment and ruled for the plaintiff, reversing the decision in National League of Cities.

The dissent by Justice Powell attacked the procedure of the Court for not following the principle of stare decisis. He states that this principle was being abruptly ignored in the majority opinion.

In the present cases, the five justices who compose the majority today participated in National League of Cities and the cases reaffirming it. The stability of judicial decision, and with it respect for the authority of this court, are not served by the precipitate overruling of multiple precedents that we witness in these cases.
The Dissent

The dissent was a reiteration regarding the lack of adherence to judicial principles along the same line as the dissent in *National League of Cities*. Justice Powell then extended his criticism by referring to the majority opinion as weakening the Tenth Amendment to "meaningless rhetoric" by invoking the Commerce Clause. An unelected federal judiciary has been put in the position of deciding policy issues concerning states based on personal preference. He also attacked the issue of the states receiving federal funds for operational grants and capital improvements by saying that the court should not involve itself with the politics that take place in applying for and receiving these grants.

Apparently, Justice Powell believes that if the federal government gives federally taxed money to an individual state, the judiciary should not put itself in a position of deciding the conditions for which this money should be granted. That should be left to the political process. However, he did say the judiciary should be involved to protect the states from congressional overreach. And so the meaning of federalism again becomes the issue when deciding the balance of power between the states and the federal government.

Justice Powell makes a valid point in his criticism. In deciding the right or most logical path to take, an unelected judiciary sets about resolving policy issues that, according to Powell, "radically departs from long-settled constitutional values and ignores
the role of judicial review in our system of government." This brings up the counter-
argument that the judiciary is appointed by elected representatives, so there is an indirect
affirmation of allowing the judiciary to resolve these issues. The argument can again be
counterbalanced, as Justice Powell did in his dissent, by saying that, once elected,
representatives become members of the federal government and are prone to defend the
power of the federal government over the states, even though they are elected to represent
the rights of the people over any government entity.

Justice Powell used the President as an example when he said, "Although the states
participate in the Electoral College, this is hardly a reason to view the President as a
representative of the states' interest against federal encroachments." This is a valid point,
but it is also misleading. The President is elected at large, and is sent to office by the
people to represent the country as a whole. Although he may appoint judges at various
levels, it is the elected representatives of the individual states, the members of the Senate,
that ultimately approve or disapprove the nomination to a Supreme Court seat. Were it
not for these states' representatives, Robert Bork would be on the Supreme Court today,
but through these representatives, the will of the people indicated that Robert Bork was
not a suitable candidate for the Supreme Court. Therefore, the members of the Supreme
Court have more than just an indirect relation to the will of the people. Although this
argument does not entirely work for appointees that are not subject to Senate confirmation,
those cases that are considered by the Supreme Court should be regarded as being decided
by more than just a Presidential appointee.
This also brings up the issue of judicial efficiency. If the judiciary cannot involve itself in these types of issues, there would be little need for a court system to hear civil cases. After all, National League of Cities and Garcia were lawsuits involving plaintiffs and defendants. When the conflicting parties are unable to resolve their differences, then the courts are the only source in which to obtain a resolution. The fact that the majority of the Court in Garcia found for the plaintiff instead of the defendant does not appear to be relevant. That is, after all, what courts do.

There exists some valid criticism regarding the use of traditional methods and principles to arrive at a resolution in a case. The complete turnaround of a decision over a short period of time cannot be helpful to the integrity and credibility of the court. It brings up the question as to whether the court operates on sound judicial principles or whether their decisions are truly a matter of personal preference which will vacillate back and forth depending on the composition of the court and the votes available to overturn or affirm a judicial ruling. However, in an imperfect world, it seems the best system available, even if it does not seem to make sense some of the time.

Justice Powell continued to attack the majority for dismissing all of the conclusions in National League of Cities, including the test of immunity for "traditional government functions." The majority stated that a historical basis was not reliable to establish whether a state activity was a traditional government function. But history, or stare decisis in the case of law, is one of the most important principles that has traditionally been
adhered to in deciding the outcome of legal conflicts. As mentioned earlier, examining history over a long period of time can, in both of these cases, at least establish trends as to what may be, or what is intended to be, a traditional government function. By ignoring the historical principle, state sovereignty is almost helpless to defend itself against the influential status of the Commerce Clause, or in the case of Yucca Mountain, the Supremacy Clause.

Justice Powell provided a historical perspective of his own regarding state sovereignty and the Tenth Amendment. In Section III of his dissent he stated,

Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the states by the proponents of the Constitution were realized. Much of the initial opposition to the Constitution was rooted in the fear that the National government would be too powerful and eventually would eliminate the states as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the states, would be among the first business of the new Congress... [All of the states' Constitutional Conventions] included among their recommendations [for ratification] some form of the Tenth Amendment.

There is no arguing that at the time the Constitution was being debated, the balance of state and federal power was a predominant issue. It is clear that fear of federal domination was one of the largest obstacles that proponents of the Constitution had to overcome. It is unclear how this argument relates to the two cases being analyzed. At the time the Constitution was being debated, the issue of a federal grant to a state for capital improvements was unthinkable and, therefore, it is difficult to logically apply this
argument to the cases. This is a situation where the relationship between the states and the federal government has changed significantly since the ratification of the Constitution.

A more logical argument would be to invoke the Tenth Amendment in asking the question as to whether states should accept grants from the federal government for fear of becoming financially dependent on the federal government. The element of fear in Justice Powell’s argument appears to be somewhat misplaced. A state government, or one of its subdivisions, that voluntarily accepts over $100 million in grants as a free gift does not appear to manifest a great deal of fear of being dominated by the federal government.

Quite the contrary, it appears that the San Antonio Metropolitan Transit Authority came to the well and received funds as often as it was allowed. The fact that the federal government required certain conditions does not appear to be a relevant issue regarding state sovereignty. The City of San Antonio placed itself in a precariously submissive position when it accepted the grants.

The two cases presented are good examples of the potential influence of the Tenth Amendment. What would have made these cases even better examples is if SAMTA had never accepted any federal funds, therefore, being a self-supporting traditional government function. Although the minimum wage and overtime provisions of the FLSA do not mention the requirements being contingent on acceptance of federal funds, Justice
Blackmun appears to be implying an obligation on the part of SAMTA to comply with the FLSA, in part, as a result of accepting such funds.

So what does an analysis of the Fair Labor Standards Act have to do with nuclear waste disposal? In a judicial arena, the concept of state sovereignty and fairness can be applied to numerous situations. In *National League of Cities*, the court found that, based on the Tenth Amendment, states were sovereign entities, and therefore, not under the jurisdiction of the FLSA. This can also be applied to the decision to study Yucca Mountain as a potential repository site. The state, in its sovereign capacity to ensure the physical safety and economic well being of its citizens, has rejected the proposal for a repository, and the federal government should, therefore, seek other alternatives. The National League of Cities case specifically mentions public health as a traditional government function.

The decision in *Garcia* put forth the notion that, although state sovereignty does and should exist, fairness when dealing with the federal government must be a key component. It is unlikely that a state can receive millions of dollars in federal aid and then make the claim for state sovereignty when the government attempts to regulate the use of those funds. Does the concept of fairness apply to the Yucca Mountain issue? The State of Nevada uses minimal nuclear power, and it benefits only marginally from the use of nuclear power. Mandating that a state accept the waste from other states is not fair and
is not what the founders of this country and the framers of the Constitution envisioned when the idea of a union of states was conceived.

*United States, Petitioner v. Alfonso Lopez, Jr. No. 93-1260*

*Certiorari To The United States Court Of Appeals For The Fifth Circuit (1995)*

The case was argued November 8, 1994 and decided on April 26, 1995. At issue is a 12th grade student who brought a concealed handgun into a school in violation of the Gun-Free School Zones Act of 1990. The act forbids anyone from bringing a firearm into an area they know is a school zone. Initially, the respondent asked to have the motion dismissed, but the request was denied by the District court on the grounds that the Gun-Free School Zones Act is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. However, the Court of Appeals reversed the District court for what it described as insufficient power under the Commerce Clause for Congress to create such an act. The Supreme Court affirmed the decision of the Court of Appeals. The majority opinion was written by Chief Justice William Rehnquist, and joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

Justice Rehnquist began the opinion by describing the act of Congress referred to as the Gun-Free School Zone Act, which made it a federal offense for a person to knowingly possess a firearm at a place the individual knows, or has reason to believe, is a school zone. The act was premised to be constitutional by the Congressional power to
regulate interstate commerce. However, Rehnquist stated that the act neither regulates interstate commerce nor contains a requirement that the firearm possession be in any way connected to interstate commerce.

Historically speaking, the opinion states that on March 10, 1992, the respondent, then a 12th grade student in a San Antonio School District, carried a concealed .38 caliber handgun and five bullets onto school property. He was caught with the weapon and arrested. Initially, he was charged with violating Texas state law by possessing a firearm on school property. The next day, the state charges were dismissed and Lopez was charged with violation of the Gun-Free School Zones Act by federal agents.

After being indicted on one count of violating the Gun-Free School Zone Act, the respondent moved to dismiss the charges on the basis that the Gun-Free School Zone Act "is unconstitutional as it is beyond the power of Congress to legislate control over public schools." The District court disagreed, stating that it "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the business of elementary, middle and high schools...affects interstate commerce."

After waiving his right to a jury trial, Lopez underwent a bench trial where he was subsequently found guilty and sentenced to six months imprisonment and two years probation. On appeal, Lopez challenged his conviction on the grounds that the Gun-Free School Zones Act exceeded the power of Congress under the Commerce Clause. The
Court of Appeals agreed and reversed the decision. Certiorari was granted and the case was affirmed by the Supreme Court.

After the historical summary, Rehnquist laid out the Constitutional principles that enumerated the powers of the federal government. He quotes James Madison as saying,

"...just as the separation and independence of the coordinate branches of the federal government serves to prevent the accumulation of excessive power between the states and the federal government will reduce the risk of tyranny and abuse from either front."^24

Although the Constitution delegates to Congress the power to regulate interstate commerce, this cannot be taken into infinity by claiming that everything is somehow, however remotely, tied to commerce. Rehnquist believed the limitations were inherent and obvious. Commerce must involve an exchange between two entities that are involved in manufacturing, mining, or some type of production. In supporting this premise through numerous case citations, Rehnquist interpreted the Constitution to allow this power to Congress when general regulatory statute bears a substantial relation to commerce. The carrying of a firearm, in Rehnquist's opinion does not involve the commercial activity between states and certainly does not believe that the business of education bears a resemblance to interstate commerce. On this basis, the case was affirmed.

United States v. Lopez is the latest decision by the Supreme Court that returns power back to the states and gives the states the power to regulate their own affairs. This
case is vitally important in the issue of a nuclear waste facility for the State of Nevada because it gives the state a legal leg to stand on when arguing the power of the federal government over the power delegated to the states by the Constitution and has limited the power of federal preemption of the states' statutes.
ENDNOTES


2. Ibid, p. 335.


12. See Rossum and Tarr, p. 335 and p. 343-345.


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19. It is interesting to note that Brennan, the liberal Justice, advocates judicial restraint, which is considered conservative; meanwhile, Justice Rehnquist, the conservative Justice, writes for a more liberal policy decision.


21. It should be noted that, especially in the case of nuclear waste storage, the right thing for the federal government and the right thing for the state may be quite different.


Chapter Five

Conclusion

The issue of a nuclear waste repository in Nevada has been examined in several different ways. First, the history of the problem and laws that came out of that problem were set out. These laws were initially implemented by the federal government to give them legal power to place nuclear waste wherever it deemed to be the best site. Many of the state laws and resolutions that were drafted by the State of Nevada were either in protest to the site or in defense of the state against the federal government’s actions. In either case, the battle continues to go forth in the state and federal legislatures.

Political Liberalism, by John Rawls was discussed in the ethics chapter on how societal equilibrium can be maintained if the federal government is not willing to protect the rights of every member of society. The concept is contrary to every ethical principle in history. How can forty-nine states elect to assign the danger of a monumentally lethal substance to one state on the basis that the other states do not want to have the danger present in their own communities? Singling out a member or group within society to bear the problems of the majority of society is unjust, and can only hurt the society as a whole.
If societal rights begin to erode, beginning with the weakest members of society, the long term result will be instability or even anarchy. If one group in society can get away with destroying the rights of another group, then this process will slowly have a cancerous effect on society until it is finally reduced to the "strongest will survive" concept, the most base form of societal existence (tribal warfare).

The utilitarian approach of majority rule has been a part of our societal process since the founding of this country. Many situations call for certain members of society to forego some of their rights for the good of the entire society. For example, the process of eminent domain requires certain members of society to give up property as long as society provides compensation for a suitable substitute. The difference between this concept and the issue of nuclear waste storage is a matter of degree. Taking property through eminent domain may encroach on a citizen's rights, but it is rarely life threatening. The issue of nuclear waste storage at Yucca Mountain holds the potential for a life threatening situation for the citizens of Nevada. This not only infringes on Constitutional rights, but on personal rights as described by Rawls, and runs counter to the idea of federalism upon which this country was founded. Certainly utilitarianism has a place in society, but with an issue of this magnitude, utilitarianism is unacceptable.

The concept of federalism was examined and determined to be the process by which the federal government and the states maintain a working relationship. In the end, the states have only given up enough power to the federal government to make the federal
government effective in its role of providing national security and regulating commerce between the states. The act of forcing a program on an unwilling host state is everything the anti-federalists feared. Indeed, the founders of the Constitution, both federalist and anti-federalist, would not have approved of the federal government’s actions toward the State of Nevada with regard to nuclear waste.

The relationship between the State of Nevada and the federal government has already been strained. The states can no longer trust the federal government to look after their best interest. Based on past experience at the Nevada Test Site, when the federal government was not forthcoming with the actual and potential dangers of radiation fallout from weapons testing, the citizens of Nevada are wary of promises that the project will not pose a threat to public health and safety. Additionally, the secretive conduct of the Department of Energy, and its unwillingness to adequately provide for public involvement in the Yucca Mountain issue has left the public with little trust in the ability of the government to carry out a program that will benefit everyone involved, or equitably distribute the burdens of housing lethal nuclear waste.

Even the court system has sided with states in areas where the states have maintained their financial independence. If the states have accepted funding for a project, then the courts have rightly allowed federal regulation of the project. However, if a state has not accepted funding for a particular project, then the courts have been clear that the states should have the power to make independent decisions on programs that will have
an impact on its citizens. At the current time, the State of Nevada has not accepted funds or received financial benefit of any kind for nuclear waste storage. The only nuclear waste funding received by Nevada has been to finance specific nuclear waste studies on an independent basis. These funds have been expended on gathering information to help the state defend against nuclear waste and are not considered to be payment for acceptance of nuclear waste.

A key component of this issue is the oscillation of power between the states and the federal government. In the history of our country, power has oscillated back and forth between the states and the federal government depending on what the country is experiencing at any one time. If national security depends on the state giving up some power, it has done so, as in the case of the Nevada Test Site. However, the scope of the Yucca Mountain project is too large to allow oscillation of power, i.e., the project can never have a conceivable end as the Test Site did. According to scientists, nuclear waste takes a minimum of ten thousand years to degenerate into a harmless substance, therefore, once the first cask goes in the ground, the State of Nevada will most likely be stuck with the material for this time period. This is almost indefinite in scope, considering our country is only slightly more than two hundred years old. The federal government has chosen to not seek solutions other than geologic. Therefore, once a repository is constructed, it is unlikely that alternative solutions will be sought. This notion is supported by the minimal effort to deal with the problem up to this point in history. With only a few hundred million dollars having been spent on nuclear waste research after

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billions of dollars were spent on nuclear power plants (not to mention the many more billions reaped in profit), the nuclear power industry has indicated that it is willing to charge blindly ahead in search of profit as long as the federal government will allow it to do so.

The issue of placing nuclear waste at the Nevada Test Site on an interim basis is currently being considered by Congress. If this is approved, it will bring high level nuclear waste to the State of Nevada for permanent storage the first time. This scenario presents a problem. If the Yucca Mountain site is found to be unsuitable for permanent storage of nuclear waste, it is doubtful that the nuclear waste being stored on an interim basis would be returned to its rightful owners. Additionally, the presence of nuclear waste in the state will likely be used to convince Nevada to accept the permanent repository without resistance. After all, the state would already have nuclear waste and the scientific conclusions would most likely project that the waste would be much safer to store in a deep geologic setting as opposed to above ground storage.

What is a just solution to the problem of nuclear waste? The title of this thesis presented the question. The thesis has gone to great lengths to answer this question by determining what is not a just solution. It is not incumbent upon the State of Nevada to solve the nuclear waste problem simply because the state has been targeted for permanent disposal. The focus of the thesis has centered on the unjustness of the actions of the
federal government in forcing a permanent nuclear waste repository on an unwilling host state.

The solution to the nuclear waste problem can be found in the manner in which a solution is pursued. The federal government would most likely have an easier time of constructing a permanent facility for nuclear waste if it had a reputation for being straightforward and honest in its proceedings. But with the past experience at the Nevada Test Site, and the cover up of the dangers involved in the tests that were conducted, the citizens of Nevada have every right to be wary. Additionally, the actions of the Department of Energy in the site characterization studies of Yucca Mountain thus far have not included participation of the surrounding communities to the extent that the Nuclear Waste Policy Act of 1982 intended.

The federal government has taken a utilitarian approach to the issue of nuclear waste management. The problem with such an approach is that it tramples on the rights of certain members of society. If the weakest members or groups in a society must always answer to the desires of stronger members of society, then there is little reason for the weaker members to participate in the society and the contributions of that group would be lost. Based on this ethical factor alone, the federal government should not proceed with the proposed nuclear waste repository at Yucca Mountain. To do so would cause the citizens of the State of Nevada hardship by creating potential physical and economic consequences and disrupting the balance of society by forcing lethal risk on a weaker
group within society under the guise of "majority rule" and "greatest good for the greatest number."

That use of these principles in this case constitutes a national injustice. Based on this analysis, legislation should be reconsidered with regard to nuclear waste storage and the site characterization process at Yucca Mountain. In this particular case, the rights of the citizens of Nevada, as provided by the United States Constitution and as described by Rawls, should be more important than the good of the society as a whole.
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