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PRELIMINARY MEMORANDUM

January 10, 1992 Conference
List 3, Sheet 2 (Page 13)

No. 91-543-CFX

State of NEW YORK (clarify *Garcia*, please)	Cert to CA2 (Meskill, McLaughlin, Pierce [sr])	
v.		
UNITED STATES	Federal/Civil	Timely
States of WASHINGTON, NEVADA, and SOUTH CAROLINA, Intervenors-Respondents		

No. 91-558-CFX

COUNTY OF ALLEGANY, State of New York	Same	
v.		
UNITED STATES	Same	Same

No. 91-563-CFX

COUNTY OF CORTLAND, State of New York — Same

v.

UNITED STATES — Same — Same

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1. *Summary*: In this case, CA2, relying mainly on *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, 485 U.S. 505 (1988), upheld against 10th Amendment and Republican Guarantee Clause challenges a statute that forces the States to dispose of low-level radioactive waste or else to take title to it, whether or not the State produces the waste itself, whether or not a State chooses to dispose of the waste voluntarily, and whether or not the State receives federal funds for waste disposal -- a statute that goes farther than those sustained in *Garcia* or *Baker* or any of other cases in that line. The State of New York and two New York counties are the petrs in these three curve-lined petitions, the United States and three other States are resps, and 16 States and a territory have filed as amici on behalf of petrs. Petrs and amici contend that CA2 read too much into *Garcia* and *Baker*, but that if CA2 did read *Garcia* and *Baker* correctly, those cases should be overruled. Because the petitions cleanly present an important (and recurring) question concerning the substantive limits, if any, on Congress's power to regulate the States, and because the case

concerns an issue of national significance, I recommend that the Ct grant the three petitions and consolidate the cases.

2. *Facts and Decisions Below*: As hospitals, research laboratories, and nuclear reactors continued to produce more low-level radioactive waste, most of the States failed to keep pace in addressing the problems concerning waste disposal. By 1978 only Washington, Nevada, and South Carolina were operating in-state waste-disposal facilities (and voters in those States were not especially happy about it, see, *e. g.*, *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627 (CA9 1982) (Commerce Clause challenge to a ban on out-of-state waste), cert. denied, 461 U.S. 913 (1983)). Congress soon stepped into the fray and eventually enacted the Low-Level Radioactive Waste Policy Act of 1980 pursuant to recommendations from the National Governors' Association. That solution proved feeble, so Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985, the statute at issue in this case.

Under the 1985 Act, each State is responsible, either alone or in cooperation with other States, for disposing of low-level radioactive waste generated within that State. See 42 U.S.C. §2021c(a)(1). If a State fails to dispose of the waste, penalties ensue, pursuant most significantly to the "take-title provision":

> "If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to

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

Petr the State of New York chose to go it alone and in 1986 passed laws promulgating standards for the selection and construction of disposal sites. A state commission later designated five potential sites, three located within petr Allegany County and two within petr Cortland County.

In February 1990, New York and Allegany and Cortland counties sued resps the United States, the Secretaries of Energy and Transportation, the Attorney General, and the Nuclear Regulatory Commission and its Chairman, asking for a declaration of the 1985 Act's constitutionality. The States of Washington, Nevada, and South Carolina intervened as of right on the side of resps. All the parties then moved or cross-moved for summary judgment. The dct (Cholakis, J.; N.D.N.Y.) entered summary judgment for resps, and petrs appealed.

CA2 affirmed. Petrs first contend that the 1985 Act violates the 10th Amendment. Our analysis begins with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), where the SCt told us that "[s]tate sovereign interests ... are

more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power," *id.*, at 552. Since *Garcia*, the Ct has stressed that the judicial role in evaluating 10th Amendment challenges is narrowly cabined. See *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits are structural, not substantive."); [two law review articles saying similar things]. Quite simply, "[w]ith rare exceptions, ... the Constitution does not carve express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia*, 469 U.S., at 550.

Perusing the legislative history of the 1985 Act, we discover, not defects in the political process, but indications that both the 1980 and the 1985 Acts are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics. See [a law review article entitled *Waste Wars*.] With respect to both statutes, Congress acted only after robust debate and a clearly articulated acceptance of the recommendations of the National Governors' Association and other state-based recommenders. New York's senior Senator, Pat Moynihan, urged adoption of the final version of the proposed amendments, proclaiming that

> New Yorkers will continue to light some of their lights with nuclear electricity -- and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will citizens of South Carolina

-- and they will be able to watch New York, and the rest of the nation, make their own arrangements to dispose of their own low-level radioactive wastes.

Turning to the penalty section that New York finds so offensive, we reject petrs' allegation that the take-title provision, which they call a last-minute addition to the House bill added to placate Senate demands, is the product of a grievous defect in the political process, namely, that the provision was not subject to timely scrutiny and committee debate. This grumbling seems particularly ironic when we recall that the Senate Environment and Public Works Committee wrote the take-title provision; among that committee's members is Senator Moynihan of New York. In any event, petrs misperceive the issue. "The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S., at 556; see also *Nevada* v. *Watkins*, 914 F.2d 1545, 1556 (CA9 1990), cert. denied, 111 S. Ct. 1105 (1991) ("[T]he 10th Amendment does not protect a State from being out-voted in Congress.").

Petrs raise an alternative objection to the take-title provision. Noting that *Garcia*, 469 U.S., at 556, cited *Coyle* v. *Oklahoma*, 211 U.S. 559 (1911), petrs argue that the 10th Amendment, even after *Garcia*, does impose *some* substantive limits on federal power, and they conclude that the take-title provision falls into that forbidden zone. We disagree. In *Coyle*, Congress had sought to condition Oklahoma's entry into the Union on its

putting its capital in Guthrie. The SCt found that condition a palpable violation of the 10th Amendment. In testing the waters surrounding the SCt's laconic reference to *Coyle*, the dct in this case perceptively noted that the SCt's central concern in *Coyle* was "equality in dignity and power" among the several States, see 221 U.S., at 568, a concern clearly not at issue here, where the motivating engine of both the 1980 and 1985 Acts was identical treatment for all States. In sum, we are satisfied that the take-title provision does not undermine the constitutional structure and does not violate principles of federalism as explained in *Garcia*.

Finally, we reject Allegany County's contention that the statutes violate the 11th Amendment [abandoned in the county's petition]. See, *e. g.*, *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion) ("Congress's authority to regulate commerce includes the authority directly to abrogate States' immunity from suit."); [CA2 decisions]. Similarly, we agree with the dct that petrs' Guarantee Clause argument is analytically indistinct from their 10th Amendment arguments. See *Baker*, 485 U.S., at 511 n.5 ("We use 'the Tenth Amendment' to encompass any implied ~~any~~ constitutional limitation on Congress's authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived

generally from the Constitution."). Petrs' remaining arguments are without merit.

3. *Contentions*: Petr State of New York (No. 91-543): CA2's decision improperly narrows the scope of 10th Amendment challenges under *Garcia*. In *Garcia*, the Ct expressly recognized that additional 10th Amendment protection might be available to the States in cases in which federal action, though not the product of a defective political process, was more intrusive than that reviewed in *Garcia* or its antecedents: "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." 469 U.S., at 556; see also *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991).

The 1985 Act differs from all federal statutes previously reviewed by the Ct under the 10th Amendment. This is the first statute that imposes upon each State an affirmative duty to exercise its sovereign powers of legislation and regulation within the State, in accordance with a federal regulatory scheme, without the State's consent, and with no option for the State's withdrawal from the role of regulator or actor in the field. The imposition is threefold: the assignment to the States of responsibility for a federal regulatory concern; the establishment of parameters and a timetable for compliance; and the attachment of draconian penalties for a refusal or failure to

comply. Most insidiously, the take-title provision transfers by congressional edict -- by congressional fiat -- the ownership obligations of federal and private parties to the State, obligations imposed solely in light of the State's sovereign capacity. Thus, the 1985 Act differs from the Fair Labor Standards Act upheld in *Garcia*, which were generally applicable laws extended to the States. Moreover, while in the past Congress has used the Commerce Clause to encourage state participation in federal regulatory schemes, those schemes have either provided for voluntary state action in lieu of federal regulation (see, *e. g.*, the Clean Water Act) or conditioned receipt of federal funds on compliance (speed limits and highway funds). Here, in contrast, the States have no choice, and without that choice the federal system is severely compromised and state governments are become unwilling subordinates to the dictates of Congress. The 1985 Act proves a truth that this Ct recognized in *Garcia*: The process of federal lawmaking, however informed, does not guarantee that Congress will not err and through such error damage the federal system.

Finally, this Ct has previously expressed concern over legislation like that at issue here, see, *e. g.*, *FERC* v. *Mississippi*, 456 U.S. 742 (1982) (upholding sections of the Public Utility Regulatory Policies Act of 1976 and noting that "[t]here is nothing in Purpa 'directly compelling' the States to

enact a legislative program," and that "the two challenged Titles do not threaten the States' 'separate and independent existence' and do not impair the ability of the States 'to function effectively in a federal system.'"); see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and the Ct has never repudiated those concerns. In short, CA2 erred in concluding that *Garcia* barred substantive review of the 1985 Act, for the statute exceeds any proper "affirmative limits the constitutional structure might impose upon federal action affecting the States under the Commerce Clause." 469 U.S., at 556. And should this Ct decide that CA2 read *Garcia* correctly, you might consider whether *Garcia* should be overruled.

Petr County of Allegany (No. 91-558): (1) In 1975, three appellate cts expressed concern over the EPA's attempt to implement a plan under the Clean Air Act by ordering state governments to take certain actions. See *Maryland* v. *EPA*, 530 F.2d 215 (CA4 1975); *District of Columbia* v. *Train*, 521 F.2d 971 (CADC 1975); *Brown* v. *EPA*, 521 F.2d 837 (CA9 1975). When the EPA rescinded the rule, this Ct granted cert, then vacated and remanded for consideration of mootness problems, *EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam). The 10th Amendment issue presented in those cases is now presented in this one, and the Ct should review CA2's decision to uphold this congressional threat to state sovereignty.

(2) This case raises the question whether the Guarantee Clause limits congressional action taken under the Commerce Clause power, a question that the Ct itself hinted at in *Gregory*, 111 S. Ct., at 2402-03 ("[T]he authority of the people of the States to determine the qualifications of their most important government officials ... is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause].... As against Congress' powers '[t]o regulate Commerce among the several States,' the authority of the people of the States to determine the qualifications of their government officials may be inviolate."). The Ct should review CA2's upholding of a statute that implicitly repudiates a basic constitutional promise.

Petr County of Cortland (No. 91-563): (1) The statute upheld in this case is far more intrusive than any that this Ct has ever before condoned: either those statutes that required that a State conform to federal standards before engaging in voluntary regulation; those that treat the States as they treat private parties; or those that impose conditions on the receipt of federal funds. Through this statute, in contrast, Congress has done something entirely new: It has baldly issued direct orders to the States to undertake new activity. CA2 treated this novel device as if it were just like prior exercises of congressional power, concluding that the statute was lawful under

Garcia. *Garcia*, however, concerned an attempt to regulate the States along with similarly situated private parties. So did *Baker*. This Ct has thus left unclear whether *Garcia* applies when a statute singles the States out and lifts burdens from private parties and shifts them to the States. The issue is too important, and the implications too broad, to leave the decision in this case to an intermediate appellate ct -- especially in light of the *Garcia* dissents.

(2) The 1985 Act is similar to the EPA regulations considered in the EPA cases from 1975 [see *supra*], and CA2's decision in this case conflicts with the decisions of CADC, CA4, and CA9 in those. Moreover, in both *FERC* v. *Mississippi* and *Baker* this Ct left open the question that this case presents.

Resp (SG) (all three cases): (1) CA2's decision is consistent with this Ct's decisions and does not conflict with a decision by any other court of appeals. (a) *Gregory* required that Congress plainly state its intent if it wants to constrain States' "fundamental decisions," and these statutes (both the 1980 Act and the 1985 Act) include that plain statement. (b) To the extent that *Baker* calls for a statute-specific review of the legislative process, it's pretty clear that New York was neither singled out and left "politically isolated and powerless" nor "deprived of any right to participate in the national political process," 485 U.S., at 513 -- especially in light of New York's

enthusiastic support (at the State and national levels) for the statutes' general approach as they were being drafted. (c) Even under the regime of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Ct eschewed the kind of wooden approach proposed by petrs: As the Ct recognized in *Virginia Surface Mining*, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission" even to federal enactments that regulate the "States as States," address indisputable "attributes of state sovereignty," and impair States' ability "to structure integral operations in areas of traditional government functions." 452 U.S., at 287-88 and n.29 (internal quotation marks omitted); see also *Garcia*, 469 U.S. 562-64 (Powell, J., dissenting). In this case, Congress was confronted with a nationwide crisis concerning the disposal of low-level radioactive waste and that Congress acted with due respect for the wishes of the States; together, these justify any intrusions the statutes may have on federalism. (d) Contrary to petrs' contentions, affirmative federal directives to the States are not necessarily inimical to the constitutional balance between state and federal sovereignty; for example, Congress may require state cts to hear actions under federal law. See *Testa* v. *Katt*, 330 U.S. 386 (1947); *FERC* v. *Mississippi*, 456 U.S., at 760-63. The responsibilities that devolve upon the States under these statutes are less onerous than those imposed under the Fair

Labor Standards Act, see *Garcia*, or the Clean Air Act regulations at issue in the three 1985 courts of appeals cases. Moreover, the 1975 EPA cases were vacated and thus cannot furnish the basis for any conflict with CA2's decision in this case. (e) In sum, even if constitutional principles of federalism would prohibit the imposition of affirmative obligations on the States in many circumstances, see *FERC* v. *Mississippi*, 456 U.S., at 765-66, the structure of these statutes is permissible, and indeed, the statutes advance the very values of governmental responsiveness, democratic participation, and local innovation that underlie the constitutional structure of dual sovereignty.

(2) The congressional declaration that each State is responsible for waste generated within its borders is a statutory recognition of the States' broad police powers, and it is difficult to see how that declaration standing alone offends state autonomy. Two of the provisions of the statutes are routine examples of Congress's ability to offer the States inducements to act. The take-title provision might raise federalism concerns if it becomes operational -- but it does not becomes operational until 1996. Although we do not argue that the case is unripe, we do think that the speculative nature of the harms alleged makes this case an inappropriate vehicle for review. At this stage, the federal cts have had no opportunity to provide guidance on how the statute works in practice.

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(3) Petr Allegany County argues that the 1985 Act violates the Guarantee Clause, but to the extent that the county sees that clause as an independent constraint on federal power, this Ct has consistently held that Guarantee Clause claims are nonjusticiable, see, *e. g.*, *Baker* v. *Carr*, 369 U.S. 186, 223-26 (1962).

Resps States of Washington, Nevada, and South Carolina (all three cases): (1) New York was not the unwilling victim of a devious Congress; rather than having been foisted upon New York, the 1985 Act, as CA2 noted, was a "paragon[] of legislative success, promoting state and federal comity in a fashion rarely seen in national politics." 942 F.2d, at 119. (2) CA2 correctly read *Garcia* and *Baker* to limit 10th Amendment review to an examination of the factual setting of legislation to ensure that the political process works. No other court of appeals has read those cases any differently. Here, the process worked: New York even sought actively the legislation, Senator Moynihan, a member of the committee that drafted the statute, enthusiastically supported it, and no member of New York's delegation (no member of *any* State's delegation, in fact) opposed it.

Amicus State of Connecticut Blumenthal (in support of petr in 91-543): (1) CA2's decision represents a dramatic and unwarranted extension of *Garcia*. Rather than imposing federal regulation on

(3) Petr Allegany County argues that the 1985 Act violates the Guarantee Clause, but to the extent that the county sees that clause as an independent constraint on federal power, this Ct has consistently held that Guarantee Clause claims are nonjusticiable, see, *e. g.*, *Baker* v. *Carr*, 369 U.S. 186, 223-26 (1962).

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Amicus State of Connecticut (Blumenthal) (in support of petr in 91-543): (1) CA2's decision represents a dramatic and unwarranted extension of *Garcia*. Rather than imposing federal regulation on

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state activities in an area that may or may not be a "traditional governmental function," Congress here has compelled the States, against their will, to enter the field of disposal of radioactive waste and suffer draconian sanctions should they decline. This contrasts with the statutes upheld in *Garcia* and the other cases, which gave the States the choice, however onerous, to refrain from assuming regulatory responsibility in areas of federal regulation or to refrain from participation in federal programs if they did not want to accept Congress's burdens. *Garcia* itself recognized that there may be some "affirmative limits that the constitutional structure might impose on federal action affecting the States," 469 U.S., at 556, but this Ct has never since identified or defined those limits. This is the case in which to do so.

(2) The statute fails even under *Garcia*, since the national political process did not protect the States from unduly burdensome legislation: the members of Congress elected from the various States voted not as representatives of the States, but as "Members of the Federal Government." 469 U.S., at 564 (Powell, J., dissenting).

Amicus State of Michigan (in support of petr in 91-543): (1) Congress can use the carrot and stick approach, but this statute is extraordinary [repeating arguments similar to Connecticut's]. (2) This statute raises concerns over whether

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Congress is denying the people of the States majority rule, or in other words, a republican form of government.

Amicus State of Ohio[1] (in support of petr in 91-543): (1) CA2's decision permits Congress through the Commerce Clause not only to force the States to exercise their sovereign powers, but also to force them to become market participants. (2) CA2's decision ignores the teachings of *Gregory*. The 1985 Act violates the 10th Amendment and the Guarantee Clause. (3) The statute effects a taking of state property (such as trucks, warehouses, and money (if the States become liable under the take-title provision)) without just compensation, thus violating the 5th Amendment.[2]

4. *Discussion*: The scales bear arguments both for and against, but the weightier ones, I think, point towards a grant.

On the deny side, I see four considerations in the SG's brief worth discussing, though none in the end moved me. (1) (part of section 1.d of the SG's argument) *There is no conflict among the federal cts.* This is true. The 1975 EPA cases were vacated and in any event predate even *National League of Cities*. Two dcts, moreover, have upheld the 1985 Act against the same

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[1]Ohio is joined by (at last count) Alabama, Alaska, Arizona, Hawaii, Illinois, Indiana, Maine, Nebraska, New Jersey, Pennsylvania, Rhode Island, South Dakota, Wisconsin, and Guam.

[2]This argument is joined by all of the States listed in note 1 save Pennsylvania.

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challenges raised here, and it is also true, as the SG points out in a footnote, that appeals from those decisions are pending. *Concerned Citizens* v. *NRC*, No. CV90-L-70 (D. Neb. Oct. 19, 1990), appeal docketed, No. 91-2784 (CA8 Aug. 12, 1991); *Michigan* v. *United States*, 773 F. Supp. 997 (W.D. Mich. 1991), appeal docketed, No. 91-2281 (CA6 Nov. 19, 1991). On the other hand, the SG might have mentioned the pending appeals in a footnote because he sees no real benefits to waiting. I see none either. (2) (part of section 2 of the SG's argument) *The take-title provision does not go into effect until 1996.* The SG acknowledges that this fact does not make the case unripe, however, and argues instead that because the provision is susceptible to limiting constructions that might, in theory, make the constitutional problems evaporate, this Ct should wait for these and other constructions before rushing to judgment. This seems to me unpersuasive. The SG's limiting constructions are less than intuitive, and in the meantime New York is trying to plan for 1996. (3) (section 3 of the SG's argument) *Guarantee Clause challenges are nonjusticiable.* This is usually true, of course, but that doesn't necessarily mean that the Ct should excise the argument from the petitions, in part because the petrs' Guarantee Clause claims are bound up in their general federalism challenges. Cf. *Gregory*, 111 S. Ct., at 2402; *Baker*, 485 U.S., at 531 (O'CONNOR, J., dissenting) ("It is also arguable

that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution.").

(4) (the SG's most important argument, found throughout section 1 of his brief) *CA2's decision does not conflict with the decisions of this Ct.* This argument assumes the answer to the question presented in this case: whether after *Garcia* the 10th Amendment (or "principles of federalism derived generally from the Constitution," *Baker*, 485 U.S., at 511 n.5) in any way limits Congress's power to regulate the States through the Commerce Clause. The upshot of CA2's decision is that it does not -- that the "States must find their protection from congressional regulation through the national political process, not thorough judicially defined spheres of unregulable state authority," *Baker*, 485 U.S., at 512. *Garcia* itself suggested otherwise, however, see 469 U.S., at 556 ("These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."), and several Justices have carefully staked their disagreement with *Baker*'s (and by extension CA2's) interpretation, see 485 U.S., at 528 (SCALIA, J., concurring and concurring in the judgment) ("[A]s observed by THE CHIEF JUSTICE, [part II of *Baker*] unnecessarily casts doubt upon [*FERC* v. *Mississippi*], and ... misdescribes the holding in [*Garcia*]. I do

not read *Garcia* as adopting -- in fact I read it as explicitly disclaiming -- the proposition attributed to it in today's opinion, that the 'national political process' is the States' only constitutional protection, and that nothing except the demonstration of 'some extraordinary defects' in the operation of that process can justify judicial relief."); see also *id.*, at 530-34 (O'CONNOR, J., dissenting).

It seems to me that CA2's position is consistent with *Baker*'s understanding of *Garcia*, and, if *Baker* is right, with *Garcia* itself. Under that reading of *Garcia*, this case would not be certworthy (and New York should rightly lose), mostly because the facts are so bad -- it is pretty clear, as CA2 noted, that the State of New York, or at least its senior Senator, participated fully in the political process. But the question that this case presents, as I mentioned, is whether *Garcia* and *Baker* require a qualitative review of the legislative process, statute-by-statute, or whether after *Garcia* and *Baker* there exist *any* substantive limits on Congress's Commerce Clause power. The facts of this case are good ones for answering that question -- if Congress can do what it did in the take-title provision, it's difficult to imagine anything that Congress wouldn't be able to get away with. CA2 tried to interpret *Garcia*'s cryptic citation to *Coyle*, but this Ct should probably explain what it meant. Also bearing heavily on the grant side is that four States are

parties to the suit, and that 16 States and Guam saw fit to enter the case as amici; indeed, this case affects all 50 States and the other territories as well.

In short, because the petitions cleanly present an important (and recurring) legal question, and because the case concerns an issue of national significance, I would grant them. I would limit review to the 10th Amendment and Guarantee Clause questions, and not reach the Takings Clause claim raised by the State of Ohio and its amici in this Ct, but neither raised in, nor considered by, the cts below.

5. *Recommendation*: Grant the petitions and consolidate them.

There are 2 briefs for 4 respondents (3 States and the United States) and 3 briefs for 17 amici (16 States and a territory).

January 3, 1992 Arnon Siegel 942 F.2d 114
CT/ CT-Patterson Jones / Yale
SEE ATTACHMENT

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JM Attachment

ATTACHMENT TO Nos. 91-543, -558, -563 (NY v. U.S.)

I recommend denial.

First, there's no split, and I frankly doubt that one will develop, because it just doesn't seem to be a very close issue under existing law. It would take a very activist-federalist CA panel to go the other way.

Moreover, I am highly influenced by the ripeness considerations; the take-title provision does not take effect until another 4 years. The pool writer says that this doesn't matter, because States must "plan." Plan for what? There is no question that Congress can require States to come up with plans to deal with radioactive waste -- they must plan anyway. The take-title provision is the only intrusive element.

If the Court grants here, it will be simply to reconsider Baker. After your seminal opinion in Garcia and Justice Brennan's in Baker, the 10 Amdmt is basically non-actionable, except when there is an "extraordinary defect" in the political process. The facts of this case hardly suggest any kind of breakdown in the political process (all of NY's congressional delegation supported the Act!). So, this case would be useless as a means of "clarifying" Garcia as the pool writer suggests in his parenthetical in the case caption.

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The poolwriter's bias is evident when he wonders whether Baker is still good law and when he speculates that the SG's fulfillment of his duty to inform the Court of like cases pending signifies that he secretly wants a grant. The pool writer also has a lousy jump shot -- like his pool memos, it has *no touch*.

JM Attachment

I think the Conference may well vote to grant -- certainly the CJ, SOC and AS would like to see change in this area of the law. CT is probably in their corner. AMK was a no par in Baker.

X JM January 7, 1992

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