TO BE ARGUED ON OCTOBER 3, 2003

Case No. 03-1009

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, *et al.,*

Petitioners,

v.

UNITED STATES OF AMERICA*, et al.*

Respondents.

PETITION FOR REVIEW OF JOINT RESOLUTION DESIGNATING YUCCA MOUNTAIN, NEVADA AS NUCLEAR WASTE REPOSITORY SITE

PETITIONERS' REPLY BRIEF

Charles J. Cooper
Robert J. Cynkar
Brian S. Koukoutchos
Vincent J. Colatriano
COOPER & KIRK, PLLC
1500 K Street, N.W., Suite 200
Washington, DC 20005
(202) 220-9600
(202) 220-9601 Fax

Antonio Rossmann
Special Deputy Attorney General
Roger B. Moore
Special Deputy Attorney General
ROSSMAN AND MOORE, LLP
380 Hayes Street, Suite One
San Francisco, CA 94102
(415) 861-1401
(415) 861-1822 Fax

June 26, 2003

Brian Sandoval, Attorney General
Marta A. Adams, Senior Deputy Attorney General
STATE OF NEVADA
100 North Carson Street
Carson City, NV 89701
(775) 684-1237
(775) 684-1108 Fax

Joseph R. Egan*
Special Deputy Attorney General
Charles J. Fitzpatrick
Martin G. Malsch
Howard K. Shapar
EGAN, FITZPATRICK & MALSCH, PLLC
7918 Jones Branch Drive, Suite 600
McLean, VA 22102
(703) 918-4942
(703) 918-4943 Fax
* Counsel of Record

Additional counsel listed on reverse

William H. Briggs, Jr.
ROSS, DIXON & BELL, L.L.P.
2001 K Street, N.W.
Washington, DC 20006-1040
(202) 662-2063
(202) 662-2190 Fax

Joseph R. Egan
Elizabeth A. Vibert
Deputy District Attorney
CLARK COUNTY, NEVADA
500 South Grand Central Parkway
Las Vegas, NV 89106
(702) 455-4761
(702) 382-5178 Fax

Joseph R. Egan
Bradford R. Jerbic, City Attorney
William P. Henry, Senior Litigation Counsel
CITY OF LAS VEGAS, NEVADA
400 Stewart Avenue
Las Vegas, NV 89101
(702) 229-6590
(702) 386-1749 Fax

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Authorities upon which Petitioners chiefly rely are marked with asterisks.

Constitutional Provisions

Statutes

Regulations and Regulatory Materials

Secondary Materials

GLOSSARY

DOE – United States Department of Energy

FEIS – Final Environmental Impact Statement

NEI – Nuclear Energy Institute, Inc.

NEI Br. – Brief of Amicus Curiae NEI In Support of Respondents

NWPA – Nuclear Waste Policy Act of 1982

NWPAA – Nuclear Waste Policy Act Amendments of 1987

Pet.Br. – Petitioners' Opening Brief

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

Resp.Br. – Brief for the Respondents

Secretary – United States Secretary of Energy

WIPP -- Waste Isolation Pilot Plant

Yucca – Yucca Mountain, Nevada

NOTE: Citations to the three Certified Records and the Final Environmental Impact Statement submitted by DOE in the companion case, *Nevada v. DOE*, No. 01-1516, are identified herein by source, document number, and page number in the following formats:

Guidelines Case Record:	GR-25-10
Recommendations Case Record:	RR-1.0025-10
NEPA Case Record:	NR-1.0025-10

Final Environmental Impact Statement:	FEIS-2-25
Supplemental Appendix:	SA-025-10

The Supplemental Appendix refers to documents important to these cases that Petitioners believe should have been included in the certified record in *Nevada v. DOE*, No. 01-1516.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case rests on the proposition that the structure of dual sovereignty established by the Constitution prevents the federal government from singling out one State to bear an unwanted burden for the benefit of all the others – here, a repository for the Nation's radioactive waste – without a neutral, rational justification. Though the question here may be unprecedented, this proposition is a modest expression of what the "fundamental postulates implicit in the constitutional design"[1] entail as they unfold in these new circumstances.

Respondents do not challenge this proposition directly, in terms of the "principles of federalism derived generally from the Constitution"[2] on which it rests, but piecemeal, in terms of discrete clauses of the Constitution which manifest federalism principles in their particular contexts, but which are not invoked here. Indeed, Respondents' brief contains no references to the records of the Constitutional Convention or ratification debates. Respondents' dismissive treatment of our Nation's founding principles culminates in their argument that this Court "need not evaluate" the Constitution to decide this case. Resp.Br. 51. This deflection serves Respondents' cause, but it defies

---

[1] *Alden v. Maine,* 527 U.S. 706, 728-29 (1999).

[2] *South Carolina v. Baker,* 485 U.S. 505, 511 n.5 (1988).

repeated admonitions that resolution of federalism issues requires consideration of the "significance of federalism in the whole structure of the Constitution."[3]

Respondents further dodge our challenge by recasting it into claims not made, such as the notion that the Constitution mandates "geographic uniformity." Resp.Br. 49. In the end, Respondents do not, because they cannot, answer the question, "Why Nevada?"

That failure is aggravated by Respondents' insistence that the Resolution is legally distinct from the NWPA and cannot be evaluated under that statute. The only justification for Yucca's selection, then, is DOE's recommendation, which fails to explain any role Yucca's geology will play in safely and permanently isolating waste at that site. Even if it were not true, as we noted in No. 01-1516, that DOE's analysis shows that the "isolating" of wastes at Yucca will be accomplished almost exclusively by man-made packages, DOE's "total system" analysis does not explain why this "system" logically should be put at Yucca, as opposed to a wealth of locations in other States.

---

[3] *United States v. Lopez,* 514 U.S. 549, 575 (1995) (Kennedy, J., concurring). *See also Printz v. United States,* 521 U.S. 898, 923 n.13 (1997); *Alden*, 527 U.S. at 730-31.

It may be that the NWPA's mandate that geology must be "primary" in site selection has been overtaken by engineering advances. Perhaps reliance on rock to achieve long-term disposal of waste is now unnecessary. Yet, if so, a site's geology no longer provides a neutral, rational basis to select it, and no other comparable criteria have been substituted to justify a selection. If engineered barriers alone will now suffice, no justification of the choice of Yucca as a superior, or even reasonable, site has been offered, much less expressly endorsed, by Congress.

Forcing such an unprecedented health and safety burden on any State in this way cannot meet the most elementary constitutional threshold. Strikingly, Respondents not once acknowledge the ramifications of their decisions. Respondents' defense of their "plenary" right to do anything on federal property might as well be justifying the construction of a post office instead of a lethal waste dump.

Following Respondents' logic, DOE could simply dump toxins on the surface of the ground so long as it is *federal* ground. Not even in such circumstances, where the federal government has abandoned its duty to protect public health and safety, is the State's parallel, sovereign responsibility to protect its citizens implicated, under Respondents' theory.

This is wrong. If a State is to be forced to bear a national burden that poses a threat to the health and safety of its citizens, the State's sovereign interest at least requires that its selection from among its sister States was owing to neutral, rational criteria. That is all Petitioners ask. We do not contend that State sovereignty must be respected by absolutely equal results or "geographic uniformity." Resp.Br. 49. Real differences between States can yield different results in national programs. But Respondents' speculation that a Yucca repository relying on man-made containers might be safe would still not establish that such repository would not be equally safe, or safer, elsewhere.

The NWPA provided for drastically expedited congressional consideration of the Resolution, achieved by truncating "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prod. Co.,* 304 U.S. 144, 152 n.4 (1938). Thus, the constrained procedures for enacting the Resolution properly invite "more searching judicial inquiry," *id.,* to determine if the Resolution's substantive results violate fundamental constitutional norms.

Finally, Respondents' argument that *Nevada v. Watkins,* 914 F.2d 1545 (9th Cir. 1990), precludes our challenge misconceives the issues in these cases, and misapplies issue preclusion. Because *Watkins* involved a

different challenge to a different statute, it did not decide issues that are the same as those here.

ARGUMENT

I. THE RESOLUTION IS UNCONSTITUTIONAL

A. Congress' Exercise of Enumerated Powers Is Not Immune From Constitutional Scrutiny.

1. Respondents would shield the Resolution from constitutional inquiry because it was enacted pursuant to the "plenary" authority of the Property Clause. Resp.Br. 28-32. But Respondents misapply precedent in contending that, because of this "plenary" authority, "there can be no valid claim" that the Resolution is unconstitutional, *id.* 35-36, a breathtaking assertion of near-total immunity for what is done on federal property.

"Congress exercises its conferred powers subject to the limitations contained in the Constitution." *New York v. United States,* 505 U.S. 144, 156 (1992). We do not argue that Congress cannot use its property power to establish a repository, but rather that the Constitution limits "the power of Congress to regulate in the *way* it has chosen." *Id.* 160 (emphasis added). Nothing about the Property Clause uniquely places it beyond other constitu-

tional curbs on governmental power.[4] The very case on which Respondents rely, *Kleppe v. New Mexico,* 426 U.S. 529 (1976), makes this clear.

Plaintiffs claimed in *Kleppe* that Congress had no power to protect horses on federal lands unless those horses were moving in interstate commerce or were damaging federal land. *Id.* 532-33. In rejecting these qualifications on the *scope* of the Property Clause power, *Kleppe* held that this federal power is "without limitations," and "necessarily overrides conflicting state laws." *Id.* 539, 543 (citations omitted). *Kleppe* involved no claim that some *other* constitutional principle constrained how the government protected these horses; its focus was solely on whether the government had power to enact such protections at all. Accordingly, while *Kleppe* recognized that Congress "exercises the powers both of a proprietor and of a legislature" over federal land, *id.* 540, in our constitutional regime neither proprietors nor legislatures have absolute power (even regarding subjects appropriately within their purview), and *Kleppe* does not suggest that the Property Clause conveyed such absolute power to Congress. *Id.* 537-38.

---

[4] Respondents offer no other example of an enumerated power so independent of other constitutional norms, and we know of none. *See, e.g., Board of Trustees v. Garrett,* 531 U.S. 356, 364 (2001) ("Congress may not … base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Alden,* 527 U.S. at 714.

While deferring to Congress in making "needful" rules for federal property, *Kleppe* does not suggest that such rules are beyond judicial scrutiny. Respondents quote *part* of a sentence from *Kleppe* to the effect that "determinations under the Property Clause are entrusted primarily to the judgment of Congress." Resp.Br. 31. However, the full sentence reads: "In answering this question [whether a statute can be sustained under the Property Clause], we must remain mindful that, *while the courts must eventually pass upon them,* determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe*, 426 U.S. at 536 (citation omitted) (emphasis added). *Kleppe* does not support Respondents' notion that, as long as a statute enacted under the Property Clause is enacted according to constitutional procedures, no further inquiry into that statute's compliance with the substance of the Constitution may proceed. Resp.Br. 38.[5]

[5] Many of Respondents' authorities for a Property Clause power to discriminate against States (Resp.Br. 48-51) do not involve that clause, and in any event confirm that, even under mere rational basis review, statutory discrimination must be justified by some neutral rationale. *See North v. Russell*, 427 U.S. 328, 338 (1976) (State can have different judicial systems for different areas by "articulat[ing] reasons for differing [judicial] qualifications" such as "population and area factors"); *McGowan v. Maryland*, 366 U.S. 420, 426-28 (1961) (statutory distinctions in Sunday-closing law are "not invidious" where "reasonable basis" for distinctions); *Griffin v. County School Bd.*, 377 U.S. 218, 231 (1964) (State may apply different rules in different counties, when "there are reasons why one county ought not to be

2. Respondents' understanding of the Property Clause has no principled limit. Are Congress' choices concerning the use of federal land totally unfettered? Could Congress decide simply to dump radioactive waste on Yucca's surface (or on federal land in Manhattan)? Or could Congress command that a prison contain only inmates of one race, and these be subjected to cruel and unusual punishment, simply because the prison is on federal land? Given that Congress can transform virtually any land into federal land through its eminent domain power, Respondents' view of the "plenary" nature of Property Clause power is an invitation to a near totalitarian expansion of power.

One naturally recoils from the destinations to which Respondents' interpretation of the Property Clause inexorably leads. Not surprisingly, so do Respondents' cases, which make clear that Property Clause power is not committed to the absolute discretion of Congress. As *Ashwander v. TVA,* 297 U.S. 288, 338 (1936), explains: "The [Property Clause] is silent as to the method of disposing of property belonging to the United States. That

---

treated like another."); *Columbia River Gorge United-Protecting People & Prop. v. Yeutter*, 960 F.2d 110, 115 (9th Cir. 1992) ("Different treatment of different areas is permissible, provided there are reasons for such treatment."); *Minnesota v. Block*, 660 F.2d 1240, 1251 (8th Cir. 1981) ("Congress acted within its power under the Constitution to pass needful regulations respecting public lands" only insofar as "[f]rom the evidence presented, Congress could rationally reach these conclusions").

method, of course, … must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States."

And even *Watkins* cautioned, "The powers granted to Congress to legislate in specific areas 'are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.'" 914 F.2d at 1553-54 (citation omitted). Indeed, *Watkins* followed the analytical model we advance here. The Ninth Circuit first concluded that the Property Clause provided "a sufficient textual basis for Congress' authority to enact" the 1987 NWPAA, and then examined other constitutional limitations on how that authority was exercised. *Id.* 1553-58.

Kleppe's link of Property Clause power to the Supremacy Clause confirms the existence of such constitutional limits. "The Supremacy Clause ... makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]'; so the Supremacy Clause merely brings us back to the question" whether the challenged laws "violate state sovereignty and are thus not in accord with the Constitution." *Printz,* 521 U.S. at 924-25. *See also Alden,* 527 U.S. at 731; *Federal Maritime Comm'n*

v. South Carolina State Ports Auth., 535 U.S. 743, 766-68 (2002).[6]

3. Respondents rely on the Commerce Clause and Congress' power "to protect national security" to support a point not disputed here: whether Congress had a rational basis for determining that nuclear waste disposal is a "national problem." Resp.Br. 58-61. The question here is much narrower: whether Congress' means of addressing this problem in the Resolution was constitutional. Though the Commerce Clause power is extensive, *how* that power is exercised has never been viewed as beyond constitutional scrutiny.

Respondents' Commerce Clause theory (and their Property Clause theory) suffers from the precise flaw identified in *Lopez,* in that "it is difficult to perceive any limitation on federal power, even in areas … where States historically have been sovereign," 514 U.S. at 564, if Respondents' views are credited. We have no quarrel over Congress' authority to determine that the Nation should have a nuclear waste repository. Yet that judgment does not give Congress a "blank check," *id*. 602 (Thomas, J., concurring), to arbitrarily single out one State to bear this burden on behalf of the other 49. *See* Pet.Br. 59.

---

[6] Respondents' other cases also recognize this principle. *See Block,* 660 F.2d at 1252; *Don't Tear It Down, Inc. v. PADC,* 642 F.2d 527, 533 (D.C. Cir. 1980).

Similarly, Respondents' claim that "national security" justifies a repository says nothing about where it should be placed. Moreover, Respondents ground this "authority" in irrelevant constitutional provisions. Resp.Br. 60. The "Common Defense Clause," art. I, §8, cl.1, deals not with substantive regulatory power but with *taxing* power, and only sets out the *scope of purposes* for which Congress may tax, *i.e.*, "to provide for the common Defence and general Welfare." *See* J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 906, 911 (1833) (clause is "qualification or limitation of the power to lay taxes"); THE FEDERALIST Nos. 30, 31, 34, 35; *Gibbons v. Ogden*, 22 U.S. 1, 199 (1824); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 311-12 (1937).

The remaining clauses cited by Respondents, dealing with the power to raise armies, to provide for a navy, to regulate the armed forces, and to call out the militia, have no conceivable relevance to Yucca's selection. It is far too late for such generalized references to these specific "national security" powers to support the governmental action here. *Cf. Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585-87 (1952).

B. Federalism Principles Are Not Limited Only to Laws Regulating States as States.

Respondents argue that the "first essential prerequisite for a valid Tenth Amendment claim [is] that a state must show that the challenged fed-

eral legislation regulates the states as states," Resp.Br. 40, without which there can be no "impermissible infringement of State sovereignty." *Id*. 20. This formulaic understanding of federalism is not the law.

The Tenth Amendment does not impose a specific *rule* that applies only to *certain kinds* of federal action; rather, it "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). This "constitutional policy" of respecting "our system of dual sovereignty," *Printz*, 521 U.S. at 923 n.13, logically does not have any "prerequisites" to its application; federalism is, in this sense, the whole point of the Constitution. *See* Pet.Br. 36-40.

Even in reviewing regulation of purely private behavior, courts must ensure that the "federal balance" is not "contradict[ed]." *Lopez*, 514 U.S. at 583 (Kennedy J., concurring); *see also United States v. Morrison*, 529 U.S. 598, 647 n.18 (2000) (describing majority's reasoning as based upon "'the spirit of the Tenth Amendment'") (Souter, J., dissenting) (citation omitted). The vigilance of the courts to maintain the "federal balance" has not been limited to circumstances where there is regulation of the States as States, but has been manifested "through judicial exposition of doctrines such as ab-

stention, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of pre-emption, and many of the rules governing … habeas jurisprudence." *Lopez,* 514 U.S. at 578 (Kennedy, J., concurring). The governing principles of federalism always inform judicial review, and so are expressed in such varied ways, because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or other level of Government has tipped the scales too far." *Id.* 578.

This judicial vigilance over the Constitution's essential "federal balance" has also driven the Supreme Court to characterize a law as "regulating States" even where it formally does not do so. While Congress, in *Baker*, had merely removed a tax exemption for bearer bonds issued by any borrower, the Court, "for purposes of Tenth Amendment analysis," treated the law "as if it directly regulated States by prohibiting outright the issuance of bearer bonds." 485 U.S. at 511. Thus, the Court looked at the substance of Congress' regulation to assess whether it impinged improperly upon sovereign State prerogatives. Here, while the Resolution's form is to approve development of a repository on federal property, its substance is to prohibit Nevada, and Nevada alone, from legislating to protect her citizens from the

hazards of radioactive waste. That outright prohibition is a far more direct "regulation of States" than is the revocation of tax exemptions, and the "implied constitutional limitation[s] on Congress's authority to regulate state activities" are every bit as applicable here as they were in *Baker*. *Id.* 511 n.5.[7]

The Supreme Court has invoked these implied limitations of federalism to require Congress to speak plainly and unambiguously when it seeks to preempt State law, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), to exhibit "congruence and proportionality" when it abrogates State immunity, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), and, in at least some circumstances, to make formal findings of the predicate facts justifying regulation of interstate commerce. *Lopez*, 514 U.S. at 562. Likewise, an individual State, by dint of its sovereignty, has the right to be free from discriminatory treatment through arbitrary federal laws. *Baker,* 485 U.S. at 513.

We agree that "Congressional legislation is not unconstitutional merely because it displaces state policy choices in an area in which Congress has the power to regulate." Resp.Br. 36. But Congress may not achieve this result through a process that is lacking in any neutral, rational basis. Con-

[7] Similarly, while our federal system is most deeply offended by Congressional attempts to directly commandeer State officials to implement federal programs, *Lopez* and *Morrison* confirm that whenever Congress displaces State law, it effectively commands the State to cease legislating in that area; federalism principles are necessarily implicated and must be applied to determine if the displacement is constitutional.

gress could not treat an individual so arbitrarily; *a fortiori* it may not treat a *sovereign State* that way. "As far as the Constitution is concerned, a State should not be equated with any private litigant. Instead, the autonomy of a State is an essential component of federalism." *Garcia v. San Antonio Metro. Trans Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting). Accordingly, the Supreme Court has expounded the special status of States as litigants in a host of federalism doctrines. *See Lopez,* 514 U.S. at 578 (Kennedy, J., concurring). This is especially true where the federal government seeks to intrude upon an area "where States historically have been sovereign," *Lopez*, 514 U.S. at 564, such as safeguarding the health and welfare of her residents. *See, e.g., Ex Parte Boyce*, 27 Nev. 299, 332 (1904). *See also Hill v. Colorado*, 530 U.S. 703, 715 (2000).[8]

Just as the Commerce Clause is no warrant for Congress "to completely obliterate the Constitution's distinction between national and local authority," *Morrison*, 529 U.S. at 615, the Property Clause cannot be used to override all concerns of State sovereignty. Rather, its exercise must be

[8] By invoking its sovereign interest in protecting public health and safety, Nevada is not seeking to advance the rights of its citizens, as in a *parens patriae* action. Thus, *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990), is inapposite. Resp.Br. 37. Nevada is here asserting that the Constitution creates a right for each of the *sovereign States* that protects them from gross abrogations of their sovereign responsibilities caused by arbitrary and discriminatory use of federal power.

"consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States." *Ashwander*, 297 U.S. at 338. The Property Clause certainly could not empower the federal government to require a State to locate its capital on federally owned property. *See Coyle v. Smith*, 221 U.S. 559 (1911). Nor can it empower the federal government to single out a State and override State measures designed to protect the health and safety of its citizens, absent a neutral, rational *reason* for doing so.

Here, contrary to Respondents' and *amicus'* assertions, there is *no reason* to believe that Yucca will be an especially safe place to dispose of nuclear waste, and Nevada has for that reason consistently objected to such disposal.[9] Respondents falsely claim that we do "not challenge" Respon-

[9] NEI misleadingly claims that DOE's studies show that Yucca's "natural barriers acting alone" will contain over 99% of the waste. NEI Br. 10. But this conclusion arose from a comparison of the dose reduction caused by Yucca's natural barriers versus the situation "if the waste were not emplaced in the repository but simply dissolved in the water ingested by individuals each year." RR-1.0291-2-2. To say that burying waste at Yucca is safer than not burying it anywhere does *not* mean that Yucca's geologic "barriers" are themselves adequate to protect people and the environment. Indeed, DOE's documents show, for scenarios involving the failure of only two waste packages, that doses from Yucca could exceed 666 times the applicable limit. *See* RR-1.0291-E-11. DOE itself does not contend that this amounts to anything close to geologic isolation. Just one-millionth of one percent of a single one of the hundreds of lethal radioisotopes found in waste, Cesium 137 (*see* FEIS-A-9), if placed in water at Yucca's site boundary, would offer a lethal cocktail.

dents' conclusion that operation of a Yucca repository "would likely result in doses to the public far below" regulatory limits. Resp.Br. 16. To the contrary, Nevada has consistently argued that DOE cannot make the proper determination that Yucca is geologically "suitable" for the repository and that DOE has therefore merely adopted the tautology that *if* waste packages perform perfectly, dose levels should be safe. *See* Pet.Br. in 01-1516, at 34-36. But there is no reason to indulge this assumption of perfection, and DOE has itself admitted that if some packages fail, regulatory dose limits will be vastly exceeded. *Id.*[10]

Respondents maintain that evidence concerning the potential effects from operation of a Yucca repository, no matter how compelling, is necessarily "insufficient to show that Congress transgressed the Tenth Amendment," Resp.Br. 37, because the Property Clause power is not limited by the Constitution's federalism guarantees. By that logic, Congress could simply decide to dump raw wastes on the surface of federal land in Nevada merely because Nevada was the easiest State to render "politically isolated and powerless." Such a license to discriminatorily nullify a State's core preroga-

---

[10] NEI claims that the selection of Yucca was not "arbitrary," NEI Br. 11, but its "analysis" reduces to the notion that the repository is supposed to be "safe" according to current regulatory standards (which *abandoned* neutral geologic criteria for assessing a site). *Id.* 6-9. NEI thus offers no criteria to explain why the repository could not be as safe, or safer, elsewhere.

tives over health and safety makes no less a mockery of the notion that States retain a "residual and inviolable sovereignty" than does the commandeering of State institutions or officials.

At bottom, Respondents' suggestion that, because the Resolution involves a repository "on federal land," it "impinge[s]" "no sovereign interest of Nevada," Resp.Br. 61, ignores reality. Any significant use of federal property will have impacts, some adverse, some benign, on non-federal property, thus implicating the sovereign prerogatives and responsibilities of the State on which such property is located. And in the specific context of the federal activity involved here, it is noteworthy that the NWPA contemplates that operation of a repository will have impacts outside the repository and will "impinge" upon the sovereign interests of States.[11] Whatever the government's lawyers may say, *Congress* understood when it enacted the NWPA that repository site selection was a matter of intense interest to the States.

---

[11] *See, e.g.,* 42 U.S.C. §§10131(b)(3) (NWPA's purposes include "defin[ing] the relationship between the Federal Government and State governments"); 10134-35 (providing for State veto/override procedure); 10136(c) (providing for grants dealing with impacts of repository on State and local governments); 10137(b) (Secretary to "consult and cooperate" with States regarding repository impacts); 10141(a) (standards for protection of "general environment" from "offsite releases"); 10144 (referring to "adverse effect" of repository's use of water on "development of the area in which such repository is located").

C. The Resolution Offers No Neutral Criteria To Justify Singling Out Nevada.

Respondents do not address the core of Nevada's argument: that it is unconstitutional for the federal government to single out a State and force it alone to shoulder a universally unwanted burden for the benefit of all the States, without reference to any neutral selection rationale. Instead, they caricature our argument, asserting that it would render Congress "constitutionally disabled from enacting laws with different effects on different States." Resp.Br. 45. Nonsense. Respondents simply ignore the great pains we took to explain the limits of the constitutional principles we invoke. Pet.Br. 42-46, 53-54.

A State may be treated differently, even unequally, if there is a neutral, rational reason for the difference. What the Framers feared was the arbitrary imposition of unreasonable and "unequal burdens" on States. M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 365-66 (Rev. ed. 1937). What is forbidden is discriminatory treatment that "single[s] out" a State "in a way that le[aves] it politically isolated and powerless." *Baker*, 485 U.S. at 513. What is required is that federal "'regulation of subjects affecting the[] common interests'" of the States proceed by "classification" "based on neutral factors." *United States v. Ptasynski*, 462 U.S. 74, 81-82, 85 (1983).

The Resolution fails this test. Rather than selecting a repository on the basis of neutral, rational criteria – such as its suitability for "deep geologic disposal," pursued under the NWPA for 17 years[12] – it simply designates Nevada by name as the repository site on the basis of a new, lower "Nevada-only" standard.[13]

The analysis in *Garcia* and *Baker* was premised on Madison's proposition that "encroachments of the Federal Government" would alarm the States generally and therefore be checked politically, because Congress would of course act by neutral laws applying rational criteria. Pet.Br. 31-32.

---

[12] NEI wrongly likens Yucca to New Mexico's WIPP repository. NEI Br. 15-16. But that site's geology is so effective that *no credit whatsoever was given to man-made waste packages* in that repository's "total system" assessment. 63 Fed. Reg. 27,354, 27,396-97 (1998).

[13] Respondents suggest that Nevada is not being subjected to different rules from the rest of the country, but their footnote, Resp.Br. 57 n.10, does not answer the extensive analysis in Nevada's opening brief. Pet.Br. 2-9,12-14, 15-21, 49-52, 54-55, 56-57. Respondents claim that the rules now applicable everywhere but Nevada do not govern the recommendation of repository sites, but rather only "preliminary site screening." Resp.Br. 57 n.10. This misses the point. Prior to 2001, DOE's guidelines, which emphasized a site's physical characteristics and included "disqualifying conditions" based upon those characteristics, both applied to Yucca and governed the recommendation of repository sites. Only when DOE was poised to designate Yucca did DOE amend the guidelines to make them applicable only to "preliminary site screening" at sites *other than Yucca* and issue new rules, *applicable only to Yucca*, that no longer include disqualifying conditions. Respondents cannot deny that the new Yucca-only rule allowed Yucca to be recommended for development as a repository even though Yucca would not have survived the "preliminary site screening" stage under DOE's former rules.

Respondents never dispute this.[14] The *Baker-Carolene Products* analysis, like equal protection analysis, applies even when the targeted political minority, including a single State, has *some* representation in the political process. When a legislative majority arbitrarily isolates a minority and saddles it with a discriminatory burden, the political process by definition fails to protect the minority.

---

[14] Respondents offer two grounds for not applying *Baker* and its *Carolene Products* analysis. First, they assert that *Carolene Products* narrowed the usual presumption of constitutionality *only* when a statute "'appears on its face to be within a specific prohibition of the Constitution.'" Resp.Br. 46. Respondents ignore the subsequent paragraph explaining that the presumption is *also* diminished when the legislature takes action discriminating against a political minority, "which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 152 n.4. This is the passage that cites *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *South Carolina v. Barnwell Bros*., 303 U.S. 177 (1938), and which was relied upon in *Baker*. Moreover, even the cited paragraph notes that the presumption of constitutionality is diminished when a challenged law appears to violate one "of the first ten amendments." *Carolene Products*, 304 U.S. at 152 n.4.

Second, Respondents assert that the cases cited in *Carolene Products* "concerned political defects arising from a complete lack of political representation in State legislatures, while Nevada indisputably was represented in the Congress." Resp.Br. 47. But Respondents misread these cases. *See* Pet.Br. 30. In *McCulloch,* the burden of Maryland's tax on a federal bank fell on all U.S. citizens, including Maryland citizens, but the usual political check was weakened because Maryland's citizens gained the entire benefit of the tax but suffered only a fraction of its burden. 17 U.S. at 428-29, 431, 435-36. In *Barnwell,* the burden of the nondiscriminatory regulation fell both on in-state and out-of-state parties, and the Court (which upheld the State regulation) contrasted the circumstance where a political check would be weakened if the burden fell "principally" (not exclusively) out-of-state. 303 U.S. at 184 n.2.

Nevada was "singled out" for a new repository-suitability rule custom-made exclusively for Yucca because Yucca had failed the previous, neutral standard of geologic suitability. And Nevada was "politically isolated" because that new rule applied nowhere else and thus placed no other State at risk of becoming the Nation's nuclear dump. This isolation of Nevada was abetted by the expedited procedures under which the Resolution was enacted. Those procedures truncated the familiar parliamentary processes used to protect, and force accommodation with, minority interests in Congress by limiting committee consideration, giving the Resolution privileged consideration on the Senate and House floors, limiting debate, and barring amendment. 42 U.S.C. §10135(d)-(f). Designed originally as a simple legislative veto, such procedures were used to enact a Resolution that, according to Respondents, broke from the NWPA's geologic criterion, and simply picked Yucca by name without reference to any neutral, rational criteria.

Respondents assert that Congress is free to "enact legislation that 'discriminates' against States," Resp.Br. 48, relying solely upon *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). But *Katzenbach* in fact supports Petitioners. That case involved the Voting Rights Act ("VRA"), which provided some remedies that were available everywhere, and some remedies, includ-

ing Justice Department "preclearance" of new State laws relating to voting, that were applicable only to a few States. *Id.* 328. The VRA was upheld against a claim that it violated principles of State sovereignty and equality.

The Court explained that, although the VRA "intentionally confines these remedies to a small number of States ... which in most instances were familiar to Congress by name," *id*., it established objective, neutral criteria for application of those remedies (based on a State's use of outlawed voting qualification tests). *Id.* 315-18. The Court also stressed the overwhelming evidence establishing egregious voting rights abuses in certain States, demonstrating the need in those States for the VRA's most invasive remedies. *Id*. 308-12, 328-30. In contrast, Respondents do not even offer a *reason* for preferring Nevada as the repository site, or for establishing a new selection standard that applies solely to Nevada.

Far from giving Congress freedom to discriminate against States, *Katzenbach* held that the constitutional principle of equal treatment of States was not violated by the VRA's regime targeting "local evils," *id*. 329, defined by rational, neutral statutory criteria. Because of the link Congress had established between the VRA's imposition of remedial burdens on a few States and the overwhelming evidence of voting rights abuses in those States, *Katzenbach* repeatedly stressed that the statute's "coverage formula"

was "rational in both practice and theory." *Id.* 330. *See also id.* 331 ("distinctions drawn" among States must "have some basis in practical experience"). Moreover, the VRA's remedial regime operated under neutral criteria: "There are no States … exempted … in which the record reveals recent racial discrimination involving tests and devices. *This fact confirms the rationality of the formula.*" *Id.* (emphasis added).

Far from approving discrimination against a State, *Katzenbach* sustained a statute only because it did *not*, in fact, discriminate arbitrarily against any State. If even a law enacted under Congress' expansive Fifteenth Amendment powers is subject to searching review when challenged under principles of State sovereignty and equality, then *a fortiori* a law, such as the Resolution, enacted under Congress' original enumerated powers is subject to such review.

II. PETITIONERS' CHALLENGE IS NOT BARRED BY *WATKINS*

Respondents contend that our challenge to the Resolution is foreclosed by the Ninth Circuit's decision in *Watkins* upholding the constitutionality of the 1987 NWPAA. Resp.Br. 22-27. Respondents misapprehend the very different issues raised here and in *Watkins*, and misapply issue preclusion.

The standards governing issue preclusion are straightforward:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined … in that prior case. … Third, preclusion … must not work a basic unfairness to the party bound by the first determination.

Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992). *See also Montana v. United States*, 440 U.S. 147, 155 (1979); RESTATEMENT (SECOND), JUDGMENTS §§27-28 ("RESTATEMENT"). The party invoking preclusion bears the burden of establishing these conditions. *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 842 F.2d 402, 409 (D.C. Cir. 1988).

The issues here are simply not "in substance the same" as those in *Watkins*. *Montana*, 440 U.S. at 155.[15] Our challenge to the Resolution assumes the NWPAA's constitutional validity. *See* Pet.Br. 3-6, 54-55. We challenge here Respondents' abandonment, for Yucca only, of selection standards designed to ensure that the natural characteristics of the repository site make it uniquely or particularly well-suited for the permanent geologic disposal of waste. The Resolution did not replace this reliance on geology

[15] *See also Gould v. Mossinghoff*, 711 F.2d 396, 398-99 (D.C. Cir. 1983); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 852 (D.C. Cir. 1981).

with any similarly neutral, rational standards, but simply "approved" the Yucca site "for the development of a repository."

No such issues were, or could have been, raised in *Watkins*. That case challenged an entirely different statute, the NWPAA, which did not share the constitutional defects undermining the Resolution. Unlike the Resolution, the NWPAA did not designate Yucca for development as a repository, but only directed that DOE perform "site characterization" there, which entailed analyzing the "geologic condition" of the site and performing tests "needed to evaluate the suitability" of the site. 42 U.S.C. §10101(21). Far from abandoning the geologic and other criteria governing the suitability of a site for repository selection, the NWPAA made clear that the ultimate decision whether to designate Yucca as a repository would continue to be governed by those criteria.

Watkins itself demonstrates that the Ninth Circuit did *not* decide the constitutionality of the NWPAA in a vacuum, but against the backdrop of this very different legal and factual context. In describing the NWPAA, the court noted that (1) the procedures for site characterization established in the NWPA would apply to Yucca; (2) section 112(a) of the NWPA, which contains the geologic and other criteria governing repository selection, "was retained unchanged;" and (3) the NWPAA made "clear" that "the guidelines

developed … pursuant to [section 112(a)] are to be utilized to determine" Yucca's suitability. 914 F.2d at 1550, 1562. In light of the differences between the NWPAA and the Resolution, and the very different contexts in which the statutes were enacted, the issues in *Watkins* and this case plainly are not "in substance the same." *Montana*, 440 U.S. at 155.[16]

To mask these material differences in the issues, Respondents describe them in such broad terms as to strip them of their factual and legal context. Respondents assert that the issue is "whether Congress' decisions concerning the use of Yucca Mountain are authorized under the Property Clause." Resp.Br. 24. But in *Watkins*, the "use" of Yucca was analysis of Yucca's geology to determine if it could qualify as the repository mandated by the NWPAA, while the "use" under the Resolution is the actual selection of Yucca as the repository site. These are markedly different "uses" arising from different legislation. Moreover, as discussed, all *Watkins* decided was that the NWPAA *and the circumstances surrounding its enactment* did not

[16] Because the factual and legal developments central to the issues raised here post-date *Watkins*, the issues here were not and could not have been litigated in *Watkins*. *Cf. CIR v. Sunnen*, 333 U.S. 591, 601 (1948); *Grosz v. Miami Beach*, 82 F.3d 1005, 1007 (11th Cir. 1996). Indeed, Respondents' contention that the provisions of the NWPA and NWPAA are irrelevant to the Resolution's approval of Yucca is inconsistent with their contention that the issues raised here and in *Watkins* are the same.

implicate other constitutional doctrines that limited the exercise of Property Clause power.

Respondents' claim that this case and *Watkins* involve the "same" "legal issue" and "relevant facts" concerning application of *Baker* is similarly wrong. Resp.Br. 25. The *Baker* "legal issue" raised in *Watkins* concerned Nevada's lack of representation on the conference committee that approved the NWPAA. *Watkins*, 914 F.2d at 1556. Nevada could not have raised in *Watkins* the same *Baker* argument we raise here, concerning the federal government's abandonment of neutral, rational site-selection criteria, since, if Respondents are correct, it was the Resolution that abandoned those criteria. The *Watkins* opinion was not an exercise in fortune-telling; it did not purport to decide that under the circumstances of *this* case, which obviously arose years later, Nevada could not show that it had been unconstitutionally singled out under *Baker*.[17] Thus, the "relevant facts" and "legal issues" are markedly different. *Cf. Stewart v. National Shopmen Pension*

[17] For similar reasons, Respondents' attempt to divorce Nevada's equal footing and Port Preference arguments from the context in which these doctrines were discussed in *Watkins* is unavailing. Resp.Br. 24. In any event, we do not argue that these doctrines independently "impose a substantive restriction" on Congress' enactment of the Resolution. *Id.* Rather, our argument is that these and other constitutional doctrines reflect a more fundamental equality principle that inheres in the structure of the Constitution. Pet.Br. 22-23, 41-46.

Fund, 730 F.2d 1552, 1556-57 (D.C. Cir. 1984). In short, Respondents' effort to define the "issues" resolved in *Watkins* so broadly as to bar litigation of any federalism-based challenge to any statute applying specifically to Yucca misreads *Watkins* and distorts the principles underlying issue preclusion. *Cf. North v. Walsh,* 881 F.2d 1088, 1095 (D.C. Cir. 1989).

Finally, this case involves "other special circumstances," *Montana*, 440 U.S. at 155, such that preclusion would "work a basic unfairness" to Petitioners and their citizens. *Yamaha*, 961 F.2d at 254. First, there have been "significant change[s] in the legal climate" relevant to our constitutional claim since *Watkins* was decided. *Montana*, 440 U.S. at 161 (citation omitted). Many of the Supreme Court decisions defining the powers of the federal government vis-à-vis the States upon which we rely have been issued since *Watkins*.[18] Given these intervening legal developments, preclusion is unwarranted. *Cf. Sunnen*, 333 U.S. at 600; RESTATEMENT §28(2) and cmt. c.[19]

---

[18] *See, e.g., Federal Maritime Comm'n*, *supra*; *Alden*, *supra*; *Printz*, *supra*; *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Lopez*, *supra*; *New York v. United States*, *supra*.

[19] These intervening developments could also create inequities in the event Congress singles other States out to bear different burdens. Any challenge by those States to such legislation would be assessed against the backdrop of the intervening legal developments, while Nevada's challenge to the Resolution, if preclusion applies, would not. *Cf.* RESTATEMENT §28.

Second, the importance of the issues here, and their implications for the public interest and numerous persons not before the Court, argue against preclusion. This case involves a constitutional dispute between two sovereigns concerning a federal measure that could impact the health and safety of millions of people for centuries to come. The Court should hesitate before concluding that the judgment by a different court, in a different case, involving a different challenge, to a different statute passed 15 years earlier precludes it from reaching the merits here. *See* RESTATEMENT §28(5) (no preclusion where there is "potential adverse impact … on the public interest or the interests of persons not themselves parties").[20]

CONCLUSION

For the foregoing reasons, the Petition should be granted.

[20] Preclusion is also inappropriate because Petitioners Clark County and Las Vegas were not parties to *Watkins*. Respondents do not argue that these Petitioners' claims are precluded by *Watkins*, but they instead suggest they lack standing because they are not States. Resp.Br. 1-2. Respondents are mistaken, as entities other than States have standing to raise federalism challenges. *Cf. Lomont v. O'Neill*, 285 F.3d 9, 13 (D.C. Cir. 2002); *Gillespie v. Indianapolis*, 185 F.3d 693, 701-04 (7th Cir. 1999); *Dillard v. Baldwin Cty. Commissioners*, 225 F.3d 1271, 1276-77 (11th Cir. 2000). *See also Printz*, *supra* (reaching merits of Tenth Amendment claim brought by county sheriffs); *New York v. United States*, 505 U.S. at 181-82 (Constitution protects State sovereignty for protection of individuals); *INS v. Chadha*, 462 U.S. 919, 935-36 (1983).

Respectfully submitted,

Charles J. Cooper*
Robert J. Cynkar*
Brian S. Koukoutchos
Vincent J. Colatriano*
COOPER & KIRK, PLLC
1500 K Street, N.W., Suite 200
Washington, DC 20001
(202) 220-9660
(202) 220-9601 – Fax

Antonio Rossmann*
Roger B. Moore
Special Deputy Attorneys General
ROSSMAN AND MOORE, LLP
380 Hayes Street, Suite One
San Francisco, CA 94102
(415) 861-1401
(415) 861-1822 – Fax

Brian Sandoval, Attorney General
Marta A. Adams,* Senior Deputy Attorney General
STATE OF NEVADA
100 North Carson Street
Carson City, NV 89701
(775) 684-1237
(775) 684-1108 – Fax

William H. Briggs, Jr.*
ROSS, DIXON & BELL, L.L.P.
2001 K Street, N.W.
Washington, DC 20006-1040
(202) 662-2063
(202) 662-2190 – Fax

Elizabeth A. Vibert
Deputy District Attorney
CLARK COUNTY, NEVADA
500 South Grand Central Parkway
Las Vegas, NV 89106
(702) 455-4761
(702) 382-5178 – Fax

Bradford R. Jerbic, City Attorney
William P. Henry, Senior Litigation Counsel
CITY OF LAS VEGAS, NEVADA
400 Stewart Avenue
Las Vegas, NV 89101
(702) 229-6590
(702) 386-1749 – Fax

Joseph R. Egan*
Special Deputy Attorney General
Counsel of Record for Petitioners
Charles J. Fitzpatrick*
Martin G. Malsch*
Howard K. Shapar*
EGAN, FITZPATRICK & MALSCH, PLLC
7918 Jones Branch Drive, Suite 600
McLean, VA 22102
(703) 918-4942
(703) 918-4943 – Fax

Charles J. Cooper*
Counsel for Petitioners

DATED: June 26, 2003

* Member, D.C. Circuit Bar

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and Circuit Rule 32(a)(2). In reliance on the word count of the word-processing system used to prepare this brief, I hereby certify that the portions of this brief subject to the type-volume limitation contain 6,998 words.

_____

Vincent J. Colatriano

COOPER & KIRK, PLLC
1500 K Street, NW, Suite 200
Washington, D.C. 20005
202-220-9600

June 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing document were served on the individuals listed below on this 26th day of June 2003 by First Class Mail, postage prepaid.

Ronald M. Spritzer, Esq.
John A. Bryson, Esq.
ENRD – Appellate Section
U.S. Department of Justice
P. O. Box 23795
(L'Enfant Plaza Station)
Washington, DC 20026-3795

Michael A. Bauser, Esq.
Robert W. Bishop
Ellen C. Ginsberg
Nuclear Energy Institute, Inc.
1776 I Street, N.W.
Suite 400
Washington, DC 20006

_____

Vincent J. Colatriano