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THE COMMERCE CLAUSE, FEDERALISM, AND ENVIRONMENTALISM: AT ODDS AFTER OLIN?

LYDIA B. HOOVER

"The powers delegated . . . to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite."¹

— James Madison

"[The natural world] is built of a series of inter-relationships between living things, and between living things and their environment. You can’t just step in with some brute force and change one thing without changing a good many others."²

— Chief Seattle

INTRODUCTION

America is a nation that was founded on the idea of a separation of powers between the federal and the state governments. This division of power has been a source of conflict between the two levels of government.³ The conflict, however, was seen as necessary in order to preserve the values

of federalism⁴ and the liberty of the American people.⁵ Over two centuries have passed since the drafting of the Constitution. The time that has passed has not demonstrated, however, a similar passing or ebbing of the conflict between the state and national governments. Indeed, in recent years, there has been a resurgence of states’ rights claims in the court systems.⁶ In two recent Supreme Court decisions, the Court decided in favor of the states and limited the reach of federal power.⁷ The conflicts and tensions revolving around the ideal of federalism have spread to other areas of concern as well.

Even to those not interested in the structure of government or in the Framers’ contribution to political science vis-à-vis the creation of a federal system, federalism is linked inextricably with any area of concern that has been the focus of both federal and state laws and regulations. The area of focus of this Note is environmentalism.⁸ Generally, the public’s knowledge of environmental issues has increased steadily over the decades. This

⁴ See infra notes 23-39 and accompanying text.
⁵ See Olin, 927 F. Supp. at 1522.
⁶ See United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that Congress exceeded its Commerce Clause authority, and thereby its delegated powers in attempting to regulate possession of a gun in a local school zone); New York v. United States, 505 U.S. 144 (1992) (holding that a federal provision requiring states to either take title to or regulate waste according to federal law was outside of Congress’ enumerated powers and violative of the Tenth Amendment); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994) (stating that Brady Act provisions requiring state law enforcement to carry out background checks on handgun applicants violates the powers delegated to Congress in Article I, Section 8 and under Amendment X of the U.S. Constitution, and thereby violates the separation of powers between the state and federal governments), aff’d in part, rev’d in part, dismissed in part by Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), cert. granted, 116 S. Ct. 2521 (1996). The plaintiffs in these suits reiterate the Anti-Federalists’ concerns about the people’s potential loss of local control and about the necessity of decentralized government to democratic self government. See KENNETH M. DOLBEARE, AMERICAN POLITICAL THOUGHT 134 (2d ed. 1989).
⁸ The term “environmentalism” is used broadly here to encompass all ideas relating to either preservation or conservation of the natural world.
awareness has led to what some have referred to as an "environmental consciousness," composed of thought and action of individuals and groups, trying in different ways to have a positive effect on the natural world.\(^9\)

With regard to many environmental concerns, legislatures have responded by promulgating laws with the purpose of either protecting or remedying the problems of the natural environment.\(^10\) The question of federalism arises once these laws are made. At this point when federalism issues are triggered, one must question whether Congress has the power to make such a law\(^11\) and whether the law violates the powers reserved to the states.\(^12\)

In exploring environmental laws under the context of federalism, environmentalists and legal scholars may have conflicting opinions as to what the state and federal governments should do, or are able to do, with respect to environmental laws. This conflict arises when faced with questions about the constitutionality of federal regulations and when determining the best means to effect environmental protection ends in the face of federalism realities as opposed to federalism ideals.

Of particular interest in this context are the recent decisions rendered in United States v. Olin Corp.\(^13\) and ACORN v. Edwards.\(^14\) The Olin court,

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\(^12\) See id. amend. X.


in light of recent Supreme Court decisions,\textsuperscript{15} held that the Comprehensive Environmental Response, Compensation and Liability Act\textsuperscript{16} ("CERCLA") was not retroactive. The court further found that the application of CERCLA to the facts of the case exceeded Congress' enumerated powers under the Commerce Clause, and thereby created a separation of powers problem.\textsuperscript{17} The Olin ruling, which came after both United States v. New York\textsuperscript{18} and United States v. Lopez,\textsuperscript{19} is the first court to rule against the application of CERCLA on the basis that Congress lacked Commerce Clause authority.\textsuperscript{20}

In another environmental law case, the Fifth Circuit ruled that the Safe Drinking Water Act ("SDWA") provision requiring states to establish remedial action programs for lead removal from school drinking water systems\textsuperscript{21} was violative of the Tenth Amendment.\textsuperscript{22} This Note focuses on these lower court decisions considered in light of the progression of the Supreme Court's interpretation of both the Commerce Clause and the Tenth Amendment, and the future of environmental law.

Part I discusses federalism and the Tenth Amendment and how such decisions have progressed and culminated in the New York v. United States decision. Part II focuses on the Commerce Clause and the progression of Supreme Court views through United States v. Lopez. Part III gives a general history of environmentalism and an overview of some important environmental laws. Part IV explains the link between the Commerce Clause and the Tenth Amendment, paying particular attention to what this linkage

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\textsuperscript{17} See Olin, 927 F. Supp. at 1503.

\textsuperscript{18} 505 U.S. 144.

\textsuperscript{19} 115 S. Ct. 1624.

\textsuperscript{20} See Superfund: Court Refuses to Apply CERCLA Retroactively, Says No Authority to Address Intrastate Cleanup, [27 Current Developments] Env't Rep. (BNA) 386-88 (May 31, 1996).


\textsuperscript{22} See ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996).
and recent decisions mean to the future of environmental laws. Finally, Part V concludes that from a legal standpoint, environmental statutes may be in jeopardy under current Commerce Clause analysis, but this does not necessarily mean that the environment will be jeopardized.

I. FEDERALISM AND THE TENTH AMENDMENT

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The words indicate a federal form of government, divided between a national government and the states. The meaning, however, is not as clear as the words. The meaning depends on whether an originalist approach or an evolutionary approach is taken in the reading of the Constitution and whether the Tenth Amendment is considered to be a mere tautology or something more.

A. Federalism

The Constitution is the product of a people who deliberately constructed the kind of government under which they wished to live. Not wanting an overly strong central government or a mere confederation, the Framers of the Constitution attempted to create one effective common government through a division of powers between a central government and the states. The granting of certain powers to the central government, with
others retained by the states, was done to set an effective limit on both spheres of government.27

1. Originalism

The intent of the Framers of the Constitution was to secure a form of government that would allow the spheres of federal government and state government to operate both independently and together; the primary motivation was securing the freedoms of the people.28 The Framers particularly were concerned with the practicalities involved in the implementation of the new system of dual sovereignty and how that dual system could promote three complementary objectives: securing the public good, protecting private rights, and preserving the spirit and form of popular government.29

In order to secure the public good, the Framers looked to decentralized government because smaller units of government are better able to further the interests of the people.30 Decentralized decision-making also is better able to reflect the diversity of interests of the individuals in different parts of the nation.31 The allocation of decision-making to the smaller governments prevents attempts by outside communities to take advantage of their neighbors,32 and it allows for innovation and competition among the states, thereby preventing a monopoly of power by one central government.33

freedom in every genuine democracy.


27 See HAYEK, supra note 25, at 184.
28 See DOLBEARE, supra note 6, at 97.
30 See id. at 1493.
31 See id.
32 See id.
33 See id.
James Madison was a proponent of state power in the area of individual liberties, noting that state and local governments can preserve individual liberties better than a central national government. Madison feared a tyranny of the majority and felt that this tyranny would be worse on a national level. States allow for more liberty because people are able to move between them and choose the state having the laws best suited to them. In addition, the separation or diffusion of power between the governments is a check against any government from becoming too strong.

The Framers looked to a federal system in order to preserve the spirit and form of popular government. They feared that a strong national government would lead to another type of despotic rule over the country. To allay this fear, the Framers intended the states to help enforce the laws in order to provide a government closer to the people and to cultivate public spiritedness. In short, federalism was seen as a way to preserve individual liberties while enjoying the security of a united nation under a centralized government as an anchor of strength.

2. Evolutionary or Modern Approaches

Those favoring a more evolutionary approach do not necessarily agree with the Framers' idea of federalism. Under the political process approach, the political process is looked upon as the protector of rights and freedoms. The officials elected to Congress from the individual states are supposed to

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34 See generally THE FEDERALIST NO. 10 (James Madison), supra note 1, at 41-48.
35 See id. at 44.
36 See McConnell, supra note 29, at 1503.
37 See id. at 1504-05.
38 See id. at 1508.
39 See id.
act as a check on federal power because their concerns lie with the interests of the state from which they were elected. Proponents of this approach subscribe to the notion that members of Congress still have in mind the best interests of their individual states when they are in the halls of Congress drafting national laws.

The political process approach, however, cannot be reconciled with the ideal of federalism. Thomas Jefferson, in speaking of concentrating power not in the executive, but in the national legislature, pointed out that such a concentration of power in many hands could be as oppressive as one. To allow the national legislature to mimic the philosophies and decisions of an individual state defeats the purpose of having a federal system of government. The political process approach, however, should not be taken as the modern view of federalism, at least not by the Supreme Court.

There is, however, the approach that has been referred to as "new federalism." Under this approach, two themes have emerged: reverence toward state sovereignty and protectiveness of traditional state functions. This approach of the Supreme Court has been noted to have emerged in Justice O'Connor's opinion in New York v. United States and has continued to evolve through the Court's elaboration in United States v. Lopez.

O'Connor's approach consists of two main elements:

[F]irst, that the federal government must respect state governments as the seat of autonomous legislative processes even where the federal government has the power completely

42 See id.
45 See id.
46 See id. at 621-23.
to preempt state regulation; and, second, that under *M'Culloch v. Maryland* the judiciary has the duty to police Congressional encroachment on the autonomy of the states in obedience to the spirit of the Tenth Amendment. 47

New federalism not only favors dual government, but seems to place state government above national government by mandating that the federal government respect state autonomy even in areas where the federal government is allowed to act and preempt state government actions.

**B. The Tenth Amendment**

The Tenth Amendment, while reserving powers to the states, often has been read as a tautology or a mere truism. 48 That is, the Amendment is nothing more than a needless repetition of things that already exist. Others have read it as a true substantive right. 49 One author has described the federal government as “one of enumerated powers . . . and because the Tenth Amendment reserved all unenumerated powers to the states, state and federal authorities were absolutely sovereign within their respective spheres of power.” 50 Both sides can agree that whether the Tenth Amendment provides for substantive rights or merely “reserves” power to the states, the wording of the Tenth Amendment really sheds no light on the type of congressional actions that unduly interfere with state autonomy. 51 This ambiguity has led

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48 See United States v. Darby, 312 U.S. 100, 123-24 (1941) (stating that the Tenth Amendment is a “truism” putting no substantive limits on congressional power).

49 See Hayek, supra note 25, at 185-86 (discussing the enumerated protection given to certain rights by the Bill of Rights).


to judge-made law that attempts to define the limits and the powers of the Tenth Amendment.\textsuperscript{52} The problem that emerges is that the Supreme Court has been far from consistent in defining a limiting principal beyond which national power is improper.\textsuperscript{53} The Court, in more recent opinions, regards the Tenth Amendment as, if not a true substantive right in itself, then representative of the division of powers and states’ rights to be free from national government interference.\textsuperscript{54}

II. THE COMMERCE CLAUSE

The Commerce Clause of the Constitution states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”\textsuperscript{55} Much like the Tenth Amendment, the Commerce Clause is worded clearly on its face, and the difficulty with its application comes with interpreting those words and also with the changing interpretation over the years. As with the Tenth Amendment, the Supreme Court’s Commerce Clause interpretation has been far from consistent.\textsuperscript{56}

A. Originalism and the Move Away

If one examines the original intent of the Framers, their Commerce Clause interpretation is different from the Commerce Clause interpretation in recent years. Justice Thomas has been a proponent of the original understanding view that commerce means commerce. He pointed out that, historically, “‘commerce’ consisted of selling, buying, and bartering, as well

\textsuperscript{52} See id.


\textsuperscript{55} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{56} See infra notes 217-32 and accompanying text.
as transporting for these purposes” and “... was used in contradistinction to productive activities such as manufacturing and agriculture.”

The view of Justice Thomas is in accord with an early Supreme Court decision focusing on the text of the Constitution. Justice Thomas explained that “commerce” encompasses commodities and the intercourse of such commodities. The Commerce Clause is aimed at allowing Congress to regulate trade. The Framers purpose in drafting the Commerce Clause was to maintain free trade among the states and to prevent disagreements between the states that would interfere with interstate commerce.

The Commerce Clause, from an originalist viewpoint, “does not, however, contemplate congressional regulation of anything that happens to affect commerce.” If read so broadly, any activity could be seen to affect commerce in some way. The Framers, arguably, did not intend the power to be unlimited. Indeed, the Constitution granted limited powers to Congress and those powers not given to Congress were reserved for the states. If one is to read and interpret the Constitution as containing no surplusage, then under an unlimited Commerce Clause framework, other granted powers in the Constitution would be unnecessary. For example, if commerce power applies to anything that affects commerce and not just the instrumentalities, the bankruptcy power is not needed.

57 Lopez, 115 S. Ct. at 1643 (Thomas, J., concurring in judgment).
58 See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-91 (1824).
59 See Lopez, 115 S. Ct. at 1643.
60 See id.
61 See THE FEDERALIST NO. 7 (Alexander Hamilton), supra note 1, at 28-29.
63 See id. at 1075.
64 See U.S. CONST. amend. X.
65 See Wille, supra note 62, at 1076. In addition, the Necessary and Proper Clause, a critical tool to the broad application of the Commerce Clause, was not meant to expand the already enumerated powers, such as the Commerce Clause, but to ensure that Congress had the authority to execute those powers. See id. at 1082-83. See generally THE FEDERALIST NO. 33 (Alexander Hamilton), supra note 1, at 154-58 (explaining that the Necessary and Proper Clause permits Congress to pass laws “within the just bounds of its authority” that are necessary
The Commerce Clause, under the Supreme Court's interpretation has not, however, remained as narrow as the Framers' intent. Until recently, the Supreme Court's interpretation of the Commerce Clause had become very broad in favor of congressional power.

III. ENVIRONMENTALISM AND THE LAW

"Environmentalism" has become a catchall term when speaking of man's use of and impacts upon the natural world. Environmentalism possesses a duality in itself when the public is told to "think globally and act locally" and when there are both state and federal laws aimed at regulating how individuals may act in relation to particular areas of the environment. These statutory enactments are aimed at specific goals and are often a compromise among competing interests.

A. Historical Overview of Environmental Activism in the United States

The progress of environmentalism to the present day has come in stages—what have been referred to as "awakenings." When America was first developing into a new nation, the young country had no cathedrals, no museums, and no tradition of art. What America did have was its
wilderness. By the 1870s, the vanishing of the wilderness became apparent enough that Congress began to set aside land, and in 1872, Yellowstone became the United States' first National Park. Preserves were established, along with the bureaucratic institutions necessary to carry out the accompanying responsibilities. The next awakening was spurred by the loss of animal species, exemplified by the extinction of the passenger pigeon in the early part of this century.

The next two stages of awakening concerned pollution of drinking water and contamination of food. Later, during the New Deal, the once fertile prairies of the Great Plains became known as the Dust Bowl due to soil erosion and the accompanying desertification of the land. In the middle of this century, the first air pollution emergency in the United States occurred in Donora, Pennsylvania. A little over a decade later, Rachel Carson alerted the public to the crisis of pesticides and contaminants in the environment.

Of all the environmental events in recent years, the one that has involved the public the most was not a crisis but a signal of the changing environmental

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72 See id.; Hoban & Brooks, supra note 68, at 1.
73 See Revelle & Revelle, supra note 2, at 2.
74 See id.
75 See id. at 4. The nation's early response to this problem was the creation of wildlife refuges. See id.
76 See id. at 5-6. By the early 1900s, United States courts were ordering water suppliers to provide their contracting cities with pure water through the use of purification techniques of chlorination and filtration. See id. at 5. In response to hazardous food additives and unsanitary conditions of stockyards and slaughterhouses, the United States established agencies to oversee the safety of the food supply. These functions now come under the authority of the Food and Drug Administration, the Environmental Protection Agency, and the Department of Agriculture. See id. at 6.
77 See id. at 6. The government's response to this crisis was the creation of the Soil Conservation Service to educate farmers about erosion and to promote the proper farming techniques to prevent such erosion. See id.
78 See id. at 8. In this episode, seventeen people died and hundreds more fell ill over a 36 hour period due to the effects of smog. See id.
79 See generally Rachel Carson, Silent Spring (1962); see also Revelle & Revelle, supra note 2, at 8-9.
consciousness, the first Earth Day in 1970.\textsuperscript{80}

After each of these "awakenings," the government acted in some way to help ease the problems.\textsuperscript{81} Yet today, there are still the problems of air and water pollution, desertification of farmland, pesticides and other hazardous contaminants leaking into groundwater and being discarded improperly, and the dilemma of nuclear waste. As the world becomes more modern and industrialized, the predicaments of the old world continue to linger and are joined by newer problems that have moved to the forefront of consciousness.\textsuperscript{82}

B. The State of Environmental Laws

1. The Legal Perspective on Environmental Conditions

Some of the most well-known and recognizable laws related to the environment focus on either prevention or remediation, or a combination of both, in trying to protect the environment and preserve the welfare of the people.\textsuperscript{83} The areas covered by the various environmental statutes seem to be


\textsuperscript{81} See REVELLE & REVELLE, supra note 2, at 2-9.

\textsuperscript{82} Environmentalists have an eye towards creating a "sustainable society" in which the environment is cared for and drawn upon, but not depleted and destroyed. The optimistic environmentalists have seen the historical "awakenings" as being staggered and isolated reactions to problems. Now, however, given modern science and modern awareness, it is the hope that environmental problems can be dealt with in a unified manner. See REVELLE & REVELLE, supra note 2, at 10-11.

The main focus for current environmental problems includes air pollution, water pollution, noise pollution, wildlife protection, pesticides, and coastal zone management, in addition to the general goals of prevention and remediation.\textsuperscript{84}

2. The "Big" Federal Environmental Statutes

The most well-known environmental laws are the federal statutes. These statutes apply to everyone. States can only vary from the federal guidelines and regulations in that state environmental protection statutes may be stricter than the federal laws.\textsuperscript{85}

The National Environmental Policy Act of 1969\textsuperscript{86} ("NEPA") is now being seen as the first real step forward as a result of years of activism.\textsuperscript{87} Unlike other federal environmental laws, NEPA does not focus on substantive aspects of environmental harm prevention or remediation. Instead, NEPA focuses on procedure. "The act was designed primarily to institutionalize in the federal government an anticipatory concern for the quality of the human environment, that is, an attitude, a heightened state of environmental awareness that, unlike pollution abatement, is measurable only subjectively and qualitatively."\textsuperscript{88} NEPA has been heralded as a statement on the United States' environmental ethic.\textsuperscript{89} NEPA sets out a broad range of

\textsuperscript{85} See U.S. CONST. art. VI, § 2.
\textsuperscript{87} See ENVIRONMENTAL QUALITY REPORT at 15, reprinted in TABB & MALONE, supra note 80, at 211.
\textsuperscript{88} See id.
\textsuperscript{89} See id. Environmental ethics has been described as "the theory concerning the moral rightness and wrongness of human actions insofar as they affect the natural environment." Philip H. Hanson, Introduction to ENVIRONMENTAL ETHICS: PHILOSOPHICAL AND POLICY PERSPECTIVES 3, 3 (Philip H. Hanson ed., 1986). Aldo Leopold was perhaps the first to speak of the need of a "land ethic" in his Sand County Almanac. ALDO LEOPOLD, A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE 201-26 (2d ed. 1987). Attitudes toward the
policy goals, including the maintenance of "conditions under which man and nature can exist in productive harmony," the responsibility of the federal government to "use all practicable means" to improve federal plans and programs, and the responsibility of the individual. Probably the most important function of NEPA is the requirement on federal agencies to provide an environmental impact statement on all "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . .".

The Endangered Species Act of 1973 ("ESA") was enacted in order to set up a conservation program for the ecosystems of endangered and threatened species. In order to further this goal, the ESA prohibits all "takings" of endangered species by any person. As a result of the broad implications of the term "taking," the ESA has become a significant control on land use.

In the areas of water and air, the federal government has responded with the Federal Water Pollution Control Act ("FWPCA") and the Clean Air Act, ("CAA") respectively. The goal of the FWPCA is "to restore and maintain the chemical, physical and biological integrity" of the waters of the environment and the natural world are shaped by many different social aspects including Western religion and cultural assumptions, economic institutions, technology, population growth, and the standard of living. See Ian G. Barbour, Introduction to WESTERN MAN AND ENVIRONMENTAL ETHICS 1, 1-2 (Ian G. Barbour ed., 1973).

90 42 U.S.C. § 4331(a).
91 Id. § 4331(b).
92 See id. § 4331(c).
93 Id. § 4332(2)(C).
95 See id. § 1531(b).
96 See id. § 1538(a)(1).
United States. The CAA, one of the most complex of all environmental statutes, has the purpose of protecting the quality of the nation’s air as well as preventing pollution. Both of these acts accomplish their purposes through the use of oversight and permit programs.0

The goal of the Safe Drinking Water Act is to provide safe drinking water to the population via public water systems. In order to accomplish this goal, provisions of the Act provide for maximum allowable contamination levels and various other regulations. The SDWA gives the state primary enforcement responsibility for public water systems, provided that the state has adopted drinking water regulations at least as strict as the federal standards and has adopted and implemented procedures for the enforcement of the Act.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 contains the well-known Superfund provisions. CERCLA’s main purpose is to provide remedial action for contaminated hazardous waste sites. The government may clean up sites and then file...
lawsuits against potentially responsible parties ("PRPs"). If PRPs are not found or are insolvent, the Superfund alone pays for the cleanup.

3. State Environmental Laws

While federal laws may be the most well-known, the importance of state environmental laws should not be undercut. States historically have exercised their police power in regulating many areas that are now considered part of "environmental law," such as air quality, water quality, and solid waste disposal. With the increase in federal regulation, however, many state laws have been preempted.

Many states have enacted state environmental quality acts ("SEPAs") modeled after NEPA. SEPAs require state or local agencies to prepare environmental impact statements detailing the environmental impacts of projects that agencies approve or carry out. One example of this type of state law is the California Environmental Quality Act ("CEQA"). This Act

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110 See id. § 9611.
111 See DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW 5-3 (1996).
112 See id. at 5-6. This is the result of the Constitution's Supremacy Clause which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art VI, § 2.
113 See generally SELMI & MANASTER, supra note 111, at 10-1 to 10-59. Thus far, sixteen states, the District of Columbia, and Puerto Rico have enacted environmental policy acts. The states enacting such legislation are: Arkansas, California, Connecticut, Florida, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin. See id. at 10-4 n.4.
114 See id. at 10-2.
was patterned after NEPA but is stricter in its rules and regulations. Other states, as well, have instituted statutes that go further than the national standards and guidelines.

With respect to air and water pollution, many states had regulations already in force prior to the existence of the federal statutes. One of the impacts of the CAA is considerable uniformity among the states' air regulation schemes in meeting the national ambient air quality standards set by the Environmental Protection Agency ("EPA"). In some states, there are more stringent regulations for certain pollutants than under federal law. State water pollution permit laws are usually in line with the national provisions. In fact, in a number of states, the federal regulations are adopted specifically.

State hazardous waste regulations are newer than air and water regulations. Much of the current state regulations are byproducts of the Resource Conservation and Recovery Act of 1976 ("RCRA") and CERCLA. While states were not the first movers in this area of...
environmental regulation, with respect to cleanup, the majority of states have enacted legislation that supplements the federal guidelines and requirements of CERCLA.125 "By providing additional funds and enforcement authority, state cleanup laws give states the ability to respond to hazardous waste sites in a more timely and comprehensive manner than could be done through CERCLA alone."126

IV. HOW THE TENTH AMENDMENT AND COMMERCE CLAUSE FIT TOGETHER

As indicated by above discussions of the Tenth Amendment and the Commerce Clause, they are frequently discussed together because they depict complementary aspects of the federal system. Often, if Congress exceeds its Commerce Clause authority, the Tenth Amendment will have been violated as well, or at least implicated.127 Congress may not exceed its enumerated powers; the Tenth Amendment is a check on this overreaching.

A. The Tenth Amendment

Perhaps the best way to depict the Supreme Court's uncertainty with the Tenth Amendment is with a brief examination of the evolution of Court's Tenth Amendment analysis. In an early case, while not commenting directly on the Tenth Amendment, the Court noted that Congress is "invested with certain powers" and that Congress is sovereign to the extent of those powers.128 In addition, the Court pointed out that in carrying out these enumerated powers, Congress can "use all proper and suitable means, not specifically prohibited."129 In A.L.A. Schechter Poultry Corp. v. United

125 See id. at 9-4.
126 Id. at 9-6.
127 See generally Raoul Berger, Judicial Manipulation of the Commerce Clause, 74 TEX. L. REV. 695, 699 (1996) (stating that because of the Tenth Amendment, general terms should not be read to override traditional state jurisdiction); Farber, supra, note 44, at 615.
129 Id. at 324.
States, the Court stated that even in extraordinary circumstances, Congress cannot engage in action that lies outside of its authority, as anticipated and precluded by the Tenth Amendment. At this point in time, the Court viewed Congress' power over its enumerated rights as plenary but also limited solely to those rights. Any overreaching of federal power was precluded specifically by the Tenth Amendment. The United States v. Darby decision recognized Congress' power as plenary, as well as recognizing Congress' ability to use all means to reach a permitted end. The Court, however, took away the power of their decision with regard to the Tenth Amendment in stating that the amendment is a mere "truism that all is retained which has not been surrendered." The Court reasoned that the Amendment was nothing more than a declaration of the federal system of government that had been established prior to the Amendment's enactment.

More recently, while the Court continued to recognize the plenary power of Congress, the Court distinguished between exercising such full powers and regulating the states as states. In coming to its decision, the Court reasoned that states were regulated as states when federal regulations interfered with "traditional aspects of state sovereignty." This meant that there could be no federal law that would directly displace the states' right to structure laws regarding traditional state functions if the federal law was not among the enumerated powers granted to Congress. To do otherwise would limit the ability of the states "to function effectively in a federal

130 See 295 U.S. 495, 528 (1935).
131 See United States v. Darby, 312 U.S. 100, 124 (1941); see also Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) (holding that the Tenth Amendment did not deprive the federal government from resorting to all means necessary to exercise a granted power and that whenever state and national constitutional power conflict, the state must yield).
132 Darby, 312 U.S. at 124.
133 See id.
135 Id. at 849.
136 See id. at 849-52. Such traditional functions noted by the Court were fire prevention, police protection, sanitation, public health, and parks and recreation. See id. at 852.
The Court continued on this line of thought, with some modifications, in *Hodel v. Virginia Surface Mining and Reclamation Association*, where the Court held that in order for legislation to be set aside, three requirements must be met: first, the federal statute must regulate "States as States;" second, the legislation must address matters that are "indisputably attribute[s] of state sovereignty;" and third, "it must be apparent that states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'" The Court went on to recognize that if the federal legislation offers the state a choice on being regulated, then any federal preemption of traditional state functions is acceptable. Again in *Federal Energy Regulatory Commission v. Mississippi*, the Court explained that where an area of law was preemptive and could come under federal authority, federal regulation of that field was permissible because it gave the state the choice to either abide by the federal laws or allow for federal preemption.

Then, the Supreme Court seemed to switch gears with *Garcia v. San Antonio Metropolitan Transit Authority*. The Court overruled *National League of Cities v. Usery* and dispensed with the rule of drawing boundaries with "traditional governmental functions" of the states. Instead of looking at the functions that the state traditionally performs, the Court chose to focus on regulating "states as states," and in this situation, it found

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137 Id. at 852 (quoting Fry v. United States, 379 U.S. 542, 547 (1975)).
139 Id. at 287-88.
140 See id. at 288. The Court described this choice of the states in deciding to regulate or turn the area over to the federal government as "cooperative federalism." See id. at 289.
142 See id. at 771. The Act in question in *Federal Energy Regulatory Commission v. Mississippi* did not "compel" exercise of a state's sovereign power. See id. at 769.
145 See *Garcia*, 469 U.S. at 538.
no such regulation in question.\textsuperscript{146}

1. \textit{New York v. United States}\textsuperscript{147}

\textit{Garcia}, however, was not the end of the Tenth Amendment controversy—enter \textit{New York v. United States}. In this case, New York brought an action against the United States challenging provisions of the Low-Level Radioactive Waste Policy Act of 1985\textsuperscript{148} ("LRWPA"). At issue were the disposal of radioactive waste and the proper incentives of the federal government to encourage states to carry out the federal law.\textsuperscript{149} Justice O'Connor, writing for the majority, recognized the case as presenting a "constitutional question . . . as old as the Constitution" and involved "discerning the proper division of authority between the Federal Government and the States."\textsuperscript{150} The Court took note of Congress' substantial power to "encourage" states to provide radioactive waste disposal, but it concluded that the Constitution does not allow Congress to simply "compel" the states to do so.\textsuperscript{151}

The LRWPA established a federal policy, holding each state "responsible for providing, either by itself or in cooperation with other states, for the disposal of low-level radioactive waste generated within the state"\textsuperscript{152} because waste could be managed the "most safely and efficiently . . . on a regional basis."\textsuperscript{153} In order to encourage state compliance, the Act composed three types of incentives: monetary, access, and take title.\textsuperscript{154} The monetary incentives consisted of monies collected from surcharges on waste.\textsuperscript{155}

\textsuperscript{146} \textit{See id.} at 548-55.
\textsuperscript{147} \textit{505 U.S. 144} (1992).
\textsuperscript{149} \textit{See New York v. United States, 505 U.S. at 149.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{See id.}
\textsuperscript{152} 42 U.S.C. \textsection 2021(c)(a)(1).
\textsuperscript{153} \textit{Id.} \textsection 2021(d)(a)(1).
\textsuperscript{154} \textit{See New York v. United States, 505 U.S. at 152-54.}
\textsuperscript{155} \textit{See id.} at 152.
Secretary of Energy was to hold these funds and then make payments to the states that complied with the Act's deadlines. The access incentives involved denial of access to already existing disposal sites if the state failed to meet the deadline of opening up its own disposal sites. Finally, the take title provision, which was the most severe of the provisions, stated that "each state in which such waste is generated . . . shall take title to 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 . . . .")

Justice O'Connor recognized that the task of determining the correct balance of power between state and federal governments historically has taken one of two routes by the Court. The Court normally has inquired whether an act of Congress is authorized by one of the enumerated powers in Article I. Using the other route, the Court may determine whether an act of Congress invades the powers reserved to the states by the Tenth Amendment. In this case, however, the Court astutely decided that the inquiries were mirror images of one another. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."

Justice O'Connor then noted that the limit on congressional power is not derived from the text of the Tenth Amendment itself, but rather the Tenth Amendment merely confirms that the power of the federal government is subject to limits that may reserve power

157 See id. § 2021e(e)(2)(c).
158 Id. § 2021e(d)(2)(c).
159 See New York v. United States, 505 U.S. at 155.
162 New York v. United States, 505 U.S. at 156.
to the states.\textsuperscript{163}

The Court recognized that the activities that the federal government sought to regulate with the LRWPA would not have been contemplated by the Framers because the Framers would not have believed that the federal government would assume such responsibilities.\textsuperscript{164} The Court, however, did acknowledge that the language of the Constitution is broad enough to allow for an expansion of federal power.\textsuperscript{165} The Court gave examples of the expanding regulatory authority of the Commerce Clause attributable to the fact that certain activities have an effect on the national economy.\textsuperscript{166} In doing this, the Court noted that while the scope of the federal government's authority had changed, the underlying constitutional structure had not.\textsuperscript{167} Therefore, the Court held that Congress did have the power to dispose of low-level radioactive waste.\textsuperscript{168} New York and the Court agreed that, indeed, if the federal government wished, it could preempt state regulation of radioactive waste.\textsuperscript{169} The problem arose with how the federal government directed the states to regulate.\textsuperscript{170}

The main issue in \textit{New York v. United States}, then, was under what circumstances Congress may use the states as "implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."\textsuperscript{171} The Court held that "Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."\textsuperscript{172} However, Congress does not "commandeer" a state in authorizing the federal government to take over the burdens of implementing
an act when the state fails to do so.\textsuperscript{173} The Framers chose a constitutional structure whereby the federal government could regulate individuals directly, not the states.\textsuperscript{174} Such a structure, however, does not prohibit the federal government from encouraging a state to act in certain ways through different types of federal incentives that influence a state's policy choices.\textsuperscript{175}

Congress has the power to regulate activity by offering the states the choice between either self-regulation or preemption by federal regulation.\textsuperscript{176} This situation has been termed by the Court as "cooperative federalism."\textsuperscript{177} It allows citizens of the individual states to retain the ultimate power as to whether or not the state will comply. Where Congress merely encourages state regulation and does not compel it, state governments remain responsible to the local electorate and the officials remain accountable to the citizens.\textsuperscript{178} This accountability and responsibility is not retained when the federal government directs the states to regulate. In that situation, the state officials face the disapproval of the public while federal officials remain insulated from any sort of accountability.\textsuperscript{179}

In deciding the constitutionality of the three types of incentives, the Court, in the past, has held that the only real restriction on monetary incentives is that the conditions must bear some relation to the purpose of the federal spending.\textsuperscript{180} The majority in \textit{New York v. United States} followed that approach and found the monetary incentives in \textit{New York} constitutional because, in that situation, the states were able to choose whether they would

\footnotesize{\textsuperscript{173} See id.}
\footnotesize{\textsuperscript{174} See id. at 165.}
\footnotesize{\textsuperscript{175} See id. at 166.}
\footnotesize{\textsuperscript{176} See id. at 167 (citing \textit{Hodel}, 452 U.S. at 288).}
\footnotesize{\textsuperscript{177} Id. The Court also cited various programs that engage in this type of cooperative federalism. They include the Federal Water Pollution Control Act, 33 U.S.C. \textsection\textsection 1251-1387 (1994 & Supp. I 1995); the Occupational Safety and Health Act, 29 U.S.C. \textsection\textsection 651-678 (1994); the Resource Conservation and Recovery Act, 42 U.S.C. \textsection\textsection 6901-6992k (1994 & Supp. I 1995); and the Alaska National Interest Lands Conservation Act, 16 U.S.C. \textsection\textsection 3101-3233 (1994).}
\footnotesize{\textsuperscript{178} See \textit{New York v. United States}, 505 U.S. at 168.}
\footnotesize{\textsuperscript{179} See id. at 169.}
\footnotesize{\textsuperscript{180} See \textit{South Dakota v. Dole}, 483 U.S. 203, 206 (1987).}
be eligible for federal funds or not. As for the access incentives, the states had the choice of either regulating their residents or allowing their residents to be subject to federal regulation. The states were not “compelled” by Congress to regulate because if they did not act, the federal government would.

The take title provision in *New York v. United States*, however, was subject to a different outcome. This provision required the states to either regulate according to federal law or take title to the low-level radioactive waste. Here, “Congress ha[d] crossed the line distinguishing encouragement from coercion.” The Court held that Congress could not order state governments to take title to waste or to directly order states to regulate pursuant to federal authority. To offer a choice between two options which Congress lacks the power to offer was no choice at all. “Either way, ‘the Act commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” Under this provision, no matter which “choice” the state made, the state still would be subject to the direction of Congress. The state had no option but to implement the will of Congress. Such commandeering is inconsistent with the federal structure of the United States government. While the Constitution does not allow Congress to require the states to regulate, Congress can regulate matters directly, and it may preempt state regulation.

The Court stated further that the Constitution protects the sovereignty

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181 *See* New York v. United States, 505 U.S. at 173.
182 *See* id. at 175.
183 *See* id.
184 *See* id. at 169.
185 *Id.* at 175.
186 *See* id. at 176.
187 *See* id.
188 *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 288 (1981)).
189 *See* id. at 177.
190 *See* id.
191 *See* id. at 178.
of states for the benefit and protection of individuals. In addition, where Congress exceeds its authority, such a departure from the Constitution is not allowed, even if the states consent. This type of action would undermine directly the federal structure of the government and could have the effect of overlooking the rights of the citizens. In doing this, states would become mere political subdivisions of the federal government and lose any power that states as states have under the Constitution.

The *New York v. United States* decision has reaffirmed the federal structure of government and reinvigorated the idea of states’ rights. What this decision also may have done is set a precedent for striking down, if not entire federal environmental statutes, at least portions of them. An outcome similar to the decision in *New York v. United States* is the decision rendered in *ACORN v. Edwards* from the Fifth Circuit.

2. *ACORN v. Edwards*

The main issue in *ACORN v. Edwards* concerned the Lead Contamination Control Act of 1988 ("LCCA"). The LCCA amended the Safe Drinking Water Act by targeting lead contamination in drinking water coolers containing lead solder or lead-lined tanks in schools. This amendment was meant to remedy the condition of lead contaminated water existing in the school systems via the water outlets. Under the amendment, the EPA and the states shared the responsibility for rectifying this problem. The states had responsibilities under only two provisions of the LCCA. The

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192 See id. at 181.
193 See id. at 182.
194 See id. at 188.
196 81 F.3d 1387 (5th Cir. 1996).
199 See Edwards, 81 F.3d at 1388.
200 See id.
first provision stated that “[e]ach State shall provide for the dissemination to local education agencies, private nonprofit elementary or secondary schools and to day care centers of the guidance document and testing protocol” published by the Administrator as well as the list of non-lead free drinking water coolers provided to the states by the Administrator.\textsuperscript{201} The other provision in question stated that “each State shall establish a program . . . to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources . . . .”\textsuperscript{202} A separate section provided that the EPA Administrator make grants to the states to assist them in complying with their mandates.\textsuperscript{203} The main legal issue was whether the mandates to the states violated the Tenth Amendment.\textsuperscript{204} The \textit{ACORN v. Edwards} decision followed the teachings of \textit{New York v. United States}.\textsuperscript{205}

The court in \textit{Edwards} stated that:

\begin{quote}
[W]hen an Act of Congress is challenged under the Tenth Amendment, we must be concerned not only with whether Congress has the power under Article I to regulate the activity in question, but also with whether the method by which Congress has chosen to regulate the activity pursuant to that power invades that province of state sovereignty protected by the Tenth Amendment.\textsuperscript{206}
\end{quote}

This rationale was basically a restatement of \textit{New York v. United States’} coalescing of the two separate routes courts traditionally had taken in determining whether an act of Congress was beyond its constitutionally granted powers.\textsuperscript{207}

\begin{flushleft}
\textsuperscript{201} 42 U.S.C. § 300j-24(c).
\textsuperscript{202} \textit{Id.} § 300j-24(d).
\textsuperscript{203} \textit{See id.} § 220j-25.
\textsuperscript{204} \textit{See Edwards}, 81 F.3d at 1393.
\textsuperscript{205} \textit{See id.} at 1393-95.
\textsuperscript{206} \textit{Id.} at 1393.
\textsuperscript{207} \textit{See New York v. United States}, 505 U.S. at 155; \textit{Edwards}, 81 F.3d at 1393.
\end{flushleft}
In *Edwards*, the court quickly dispensed with whether Congress had the power to regulate lead contaminated drinking water coolers under the Commerce Clause. The court held that Congress did have such power. The court stated that the LCCA provisions in question fell squarely within the ambit of *New York v. United States*. A state’s failure to establish the mandated program subjected the state to civil enforcement proceedings. Thus, a state had the option of either regulating according to congressional will or being forced to do so through civil action under the LCCA. This court, like the Supreme Court in *New York v. United States*, held this to be “no choice at all.” Such “[c]ongressional conscription of state legislative functions is clearly prohibited under *New York’s* interpretation of the limits imposed upon Congress by the Tenth Amendment.” In *Edwards*, despite valid Commerce Clause authority to regulate, the states could not be forced to administer federal programs. The federal government was not allowed to regulate the states as states.

B. Progression of the Commerce Clause

The Commerce Clause has changed progressively from allowing congressional regulation of commerce to allowing the regulation of something more. In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court held that the Commerce Clause authority of Congress extends not only to the regulations of transactions in interstate commerce, but to the protection of such commerce from injury. The Court attempted to confine

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208 See *Edwards*, 81 F.3d at 1393.
209 See id.
210 See id. at 1394.
212 See *Edwards*, 81 F.3d at 1394.
213 See id.
214 Id.
215 See id.
this expansion to areas that "directly" affect interstate commerce.\textsuperscript{217} In \textit{United States v. Darby}, the Court further expanded Commerce Clause authority to include those activities that are \textit{intra}state "which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."\textsuperscript{218} In addition, the Court introduced the "substantial effects" test whereby Congress may regulate activities that have a substantial effect on interstate commerce.\textsuperscript{219}

Perhaps one of the best known examples of broad Commerce Clause authority is depicted in \textit{Wickard v. Filburn}, where the Court held that a farmer, who grew more than the allowed quota of wheat for personal use, was subject to Commerce Clause regulation.\textsuperscript{220} Commerce Clause authority was said to extend to those intrastate activities that so affect interstate commerce so as to make regulation permissible.\textsuperscript{221} The Supreme Court in \textit{Guy F. Atkinson v. Oklahoma} continued the substantial effects test and introduced the notion that "[i]t is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it."\textsuperscript{222} A further expansion of Commerce Clause power was the decision in \textit{Katzenbach v. McClung}, which rejected the need for Congress to make formal findings in exercising its power, requiring only a rational basis belief that something has a "substantial" effect on commerce.\textsuperscript{223} In addition, the Court held that Congress could even take "reasonable preventive measures" in regulating commerce under the auspices of Commerce Clause authority.\textsuperscript{224} This congressional power of prevention was tempered, however, by the

\textsuperscript{217} See id. at 546.
\textsuperscript{218} 312 U.S. 100, 118 (1941).
\textsuperscript{219} See id. at 119; see also Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941).
\textsuperscript{220} See 317 U.S. 111 (1942).
\textsuperscript{221} See id. at 125.
\textsuperscript{222} \textit{Guy F. Atkinson}, 313 U.S. at 527.
\textsuperscript{223} 379 U.S. 294, 299 (1964).
\textsuperscript{224} Id. at 301.
statement that "[t]he activities that are beyond the reach of Congress are those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.";225

In Heart of Atlanta Motel, Inc. v. United States, the sister case to Katzenbach v. McClung, the Court held that "the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest."226 This standard included local activities that might have a substantial effect upon interstate commerce.227 These last two cases were directed at the relationship between the Commerce Clause and racial discrimination. The Court also found Commerce Clause authority to regulate loan sharking activities.228

An attack on the ever-increasing power of the national government finally came in National League of Cities v. Usery, where the Supreme Court held that there was no Commerce Clause authority in the displacement of traditional governmental functions.229 In Hodel v. Virginia Surface Mining and Reclamation Association, the Court once again looked to the effects on interstate commerce, and it allowed Commerce Clause authority to extend to traditional governmental areas because of the federal government’s right of preemption for legitimate ends under the power and authority of the Commerce Clause.230 Then, in the Garcia v. San Antonio Metropolitan Authority decision, National League of Cities was overruled, and the Court not only found Commerce Clause authority, but dispersed with the traditional

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225 Id. at 302 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).
227 See id. at 258.
229 See Usery, 426 U.S. 833, 852 (1976). Such traditional state functions include, but are not limited to, fire prevention, police protection, sanitation, public health, and parks and recreation. See id. at 851.
governmental activities test.\textsuperscript{231} Up until \textit{Garcia}, the Supreme Court's interpretation of Commerce Clause authority was very broad and very pro-federal government. Certain justices, however, were not so satisfied with the apparent disregard for states' rights and the increasing power of Congress under the auspices of Commerce Clause authority.\textsuperscript{232}

1. \textit{United States v. Lopez}\textsuperscript{233}

\textit{United States v. Lopez} was the first decision, with the exception of \textit{National League of Cities v. Usery}, in which the Court found that Congress had exceeded its Commerce Clause authority. At issue in \textit{Lopez} was the Gun-Free School Zones Act of 1990.\textsuperscript{234} The Act made it a federal offense for any individual to knowingly possess a firearm in a school zone.\textsuperscript{235} The Court held that the Act exceeded Congress' Commerce Clause authority since possession of a firearm is not an economic activity that substantially affects interstate commerce.\textsuperscript{236} Justice Rehnquist began the majority opinion by analyzing the constitutional principles of dual sovereigns.\textsuperscript{237} In doing this, the Court recognized that limitations on Commerce Clause authority not only are inherent in the Clause itself, but in the Constitution as well. While the Court did concede that Commerce Clause authority had been increased greatly by cases such as \textit{United States v. Darby}\textsuperscript{238} and \textit{Wickard v. Filburn},\textsuperscript{239} the Court stated that this increase in power was due to the fact that earlier cases

\begin{itemize}
\item \textsuperscript{231} See \textit{Garcia}, 469 U.S. 528 (1985).
\item \textsuperscript{233} 115 S. Ct. 1624 (1995).
\item \textsuperscript{234} 18 U.S.C. § 922(q) (1994).
\item \textsuperscript{235} See \textit{id.} § 922(q)(2)(A).
\item \textsuperscript{236} See \textit{Lopez}, 115 S. Ct. at 1630-31.
\item \textsuperscript{237} See \textit{id.} at 1626.
\item \textsuperscript{238} 312 U.S. 100 (1941).
\item \textsuperscript{239} 317 U.S. 111 (1942).
\end{itemize}
artificially had constrained the authority granted to Congress.\textsuperscript{240} The Court, however, mitigated this observation with the fact that such Commerce Clause authority is subject to limits and must be considered in light of our dual governments.\textsuperscript{241}

The Court defined three categories of activity that Congress may regulate under its Commerce Clause power: the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities having a substantial relation to interstate commerce.\textsuperscript{242} The focus of the Court was on the third category. The Court gave deference to Congress in requiring only a rational basis for concluding that a regulated activity substantially affected interstate commerce.\textsuperscript{243} Despite this deference, the Court held that the criminal statute was not only unrelated commerce, but that it was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."\textsuperscript{244} This was a regulation that could not be upheld even when viewed in the aggregate.

In addition, the Court held that the Act contained no jurisdictional element to ensure, in case-by-case inquiry, that firearm possession affects interstate commerce.\textsuperscript{245} This type of element might have "saved" the Act from a holding of unconstitutionality.\textsuperscript{246} Such a jurisdictional element would have been proper and ensured that Congress had not exceeded its Commerce Clause power. Also, nothing in the legislative history of the Act suggested congressional findings regarding the effects on interstate commerce of firearm possession in a school zone.\textsuperscript{247}

The concurring opinion of Justice Kennedy, with whom Justice

\textsuperscript{240} See Lopez, 115 S. Ct. at 1628.
\textsuperscript{241} See id.
\textsuperscript{242} See id. at 1629-30. In a concurring opinion by Justice Kennedy, joined by Justice O'Connor, areas of "traditional state concern" again were given consideration. See id. at 1638.
\textsuperscript{243} See id. at 1629.
\textsuperscript{244} Id. at 1630-31.
\textsuperscript{245} See id. at 1631.
\textsuperscript{246} See id.
\textsuperscript{247} See id.
O'Connor joined, examined the imprecision with which the Court interpreted the Commerce Clause. In addition, the concurrence looked at the structural elements in the Constitution that provide workable standards for the system of dual sovereigns. Justices Kennedy and O'Connor noted that state sovereignty was violated here as the result of the federal government’s exceeding its Commerce Clause authority. The Justices stated that “[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.”

2. United States v. Olin

Following the lead of the Supreme Court in United States v. Lopez in striking down a congressional act that exceeded the powers delegated to Congress under the Commerce Clause, the Federal District Court in United States v. Olin held that EPA’s attempt to apply CERCLA to the defendant also exceeded Congress’ power under the Commerce Clause. The defendant, Olin Corporation, owned two sites at which there were alleged releases of hazardous substances. The EPA listed the Olin sites on the National Priorities List pursuant to the requirements of CERCLA. When Olin failed to comply with EPA’s enforcement, the United States filed suit. Olin then claimed that CERCLA was inapplicable because, among other

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248 See id. at 1634-37.
249 See id. at 1637.
250 See id. at 1641-42.
251 Id. at 1642.
253 See id. at 1533.
254 See id. at 1504.
things, it was violative of the Commerce Clause. The court in Olin based its decision on the outcome of Lopez. Judge Hand, writing for the court, recognized that until Lopez, almost nothing would have restricted Congress’ exercise of commerce power. The court first looked to the New York v. United States decision and then to general principles of federalism and state sovereignty as validation for its opinion. This approach mirrored the approach in the Lopez decision which focused on the Constitution’s limits on federal power. The court in Olin noted Lopez’s “reassertion that the Constitution’s enumeration of powers limits federal power, that such enumeration ‘[does] not presuppose something not enumerated.’” The court looked at the division of powers between the state and federal governments and how courts have played an important part in maintaining the federal structure of government. Applying the principle of enumerated powers as discussed in Lopez, the court found that the application of CERCLA to this case exceeded the powers granted to Congress under the Commerce Clause. The court recognized that Congress may not expand its enumerated powers; instead, it is bound by the restraints of enumeration and the Tenth Amendment.

Responding to the claim that Lopez was based on a criminal statute and therefore should be interpreted narrowly, the court in Olin pointed out that the Supreme Court could have limited its opinion but chose not to do so. Before Lopez, the Supreme Court had construed narrowly federal

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257 Olin also claimed that the CERCLA liability provisions should not be retroactive because of a lack of clear legislative intent on retroactive application. See id. at 1507. The court agreed and held that CERCLA liability was not retroactive. See id. at 1512-19.
258 See id. at 1521.
261 Id. (citing United States v. Lopez, 115 S. Ct. 1624, 1634 (1995)).
262 See id. at 1522-23.
263 See id. at 1523.
264 See id. at 1524.
265 See id. at 1532-33.
criminal statutes, and thus, it avoided federalism issues.\textsuperscript{266} The Court in \textit{Lopez} directly confronted federalism. As with \textit{Lopez}, \textit{Olin} was concerned with the third category of authorized regulation, activities having a substantial relationship to interstate commerce.\textsuperscript{267} \textit{Lopez}, the District Court noted, "requires that there be a genuine causal connection between the regulated activity and interstate commerce."\textsuperscript{268} The court in \textit{Olin} found no connection.\textsuperscript{269}

Specifically applying \textit{Lopez} to CERCLA, the court in \textit{Olin} recognized that the \textit{Lopez} decision required that the statute regulate activity which substantially affected interstate commerce and that the statute include a jurisdictional element to ensure that it affected interstate commerce.\textsuperscript{270} The District Court decided that the two plants in question had not operated since 1982 and that the outcome could have been different if the government were attempting to regulate an operational plant.\textsuperscript{271} The court went on to state that "[w]hile environmental degradation generally may have an effect on interstate commerce, it is not clear to this court that the degradation at issue in this case is necessarily ‘economic activity’ or that it has a ‘substantial effect’ on interstate commerce."\textsuperscript{272} Because real property was in question, the court felt that this was a state matter falling under the police power of the states.\textsuperscript{273} Additionally, there was no jurisdictional element providing for a case-by-case inquiry into the effect on interstate commerce.\textsuperscript{274} At issue was a discharge on

\textsuperscript{266} See \textit{id.} at 1530.
\textsuperscript{267} See \textit{id.} at 1531.
\textsuperscript{268} \textit{id.} The court pointed out that in so requiring, the Court is more faithful to Chief Justice Marshall's means-ends analysis in \textit{M'Culloch v. Maryland}. In \textit{M'Culloch}, Chief Justice Marshall stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819).
\textsuperscript{269} See \textit{Olin}, 927 F. Supp. at 1532.
\textsuperscript{270} See \textit{id.}
\textsuperscript{271} See \textit{id.} at 1533.
\textsuperscript{272} \textit{id.}
\textsuperscript{273} See \textit{id.}
\textsuperscript{274} See \textit{id.}
real property that allegedly had contaminated a local alluvial aquifer, with no
evidence of migration across state lines.275

C. Linking of the Edwards and Olin Decisions

As with the New York v. United States and United States v. Lopez
decisions of the Supreme Court, the ACORN v. Edwards and United States
v. Olin decisions continued the movement away from a national power
structure into greater concern for states' rights. As noted above, the Lopez
decision was the first decision in over fifty years to hold that, despite strong
national interests to the contrary, Congress exceeded its Commerce Clause
authority. In addition, the earlier New York v. United States decision seemed
to be the first step in the heralding a new era of federalism in the Supreme
Court and elsewhere. New York v. United States was the first decision in
which Justice O'Connor was able to promote and explain her view of
federalism that first, "the federal government must respect state governments
as the sear of autonomous legislative processes . . . , and second, . . . the
judiciary has the duty to police Congressional encroachment . . . ."276

The first element means that Congress must give states a choice; it
must allow states to act as they wish in a particular field or to regulate the
field themselves.277 Because the Commerce Clause and the Tenth
Amendment often are linked together in their treatment of federalism issues,
the concurrence in Lopez referenced the principles of Justice O'Connor's
majority opinion in New York v. United States, a Tenth Amendment case.278
Likewise, the lower court decisions of ACORN v. Edwards and United States
v. Olin relied on these decisions as well. In each of the lower court decisions,
both the Commerce Clause and the Tenth Amendment were discussed by the

275 See id.
276 Powell, supra note 47, at 639.
277 See id. at 641.
278 See United States v. Lopez, 115 S. Ct. 1624, 1637-42 (1995) (Kennedy, J.,
concurring)
judges before they reached conclusions similar to the Supreme Court's.279

D. Effect on Environmental Law

The effect these decisions will have on environmental law is questionable. It seems that under Tenth Amendment analysis, as in the New York v. United States and ACORN v. Edwards decisions, so long as states are not forced to abide by federal law with no real alternative to not following it, the law seems to be safe from challenge. Consequently, state encouragement is allowed even though regulation is not. Justice O'Connor, writing for the Court in New York v. United States, stated that Congress may not simply "commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."280

After New York v. United States, the federal government was left with traditional constitutional enticements, such as monetary incentives, to encourage state compliance. Under its spending power authority, for instance, Congress may attach conditions on the receipt of federal funds so long as the conditions "bear some relationship to the purpose of the federal spending."281 In addition, Congress is free to regulate private activity by offering "[s]tates the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."282 This is in harmony with the federal design in which states may not be regulated by the national government, but individuals may be.283

The types of incentives that the federal government is allowed to

279 See generally Edwards, 81 F.3d 1387 (5th Cir. 1996); Olin, 927 F. Supp. 1502.
280 505 U.S. 144, 170 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 288 (1981)). The problem with the statute in New York v. United States was that its take title provision directly compelled states to regulate pursuant to national command. See Percival, supra note 195, at 1166.
282 Id. at 145.
283 See id. at 165.
impose have been used widely in federal environmental laws with no infringement on states’ rights.\textsuperscript{284} As a result, both the states and national governments have retained control consistent with the ideal of a separation of powers. Any effects a \textit{New York v. United States} type of Tenth Amendment analysis may have on environmental law should be minimal. The federal government is free to impose monetary, access, and other types of incentives to encourage the states to follow the wishes of the national government, but the states remain free to choose their own paths. In the context of environmental law, \textit{New York v. United States} signaled a “greater willingness on the part of the Court to assert judicially enforceable limits on federal authority . . .”\textsuperscript{285}

The Commerce Clause decisions are more problematic with regard to current environmental laws, particularly in light of \textit{United States v. Lopez}. One area of concern are statutes regulating hazardous waste sites, specifically CERCLA. The problem with CERCLA is that it, at times, seeks to regulate hazardous waste sites entirely within the individual states.\textsuperscript{286} While even local activities may be regulated if they have a substantial effect on interstate commerce, the question is, how do hazardous waste sites affect commerce? Hazardous waste, itself, can be moved in interstate commerce, but the sites themselves cannot. In determining whether hazardous waste site contamination could affect commerce, the outcome may depend on whether one examines the site alone or together with the possible far-reaching effects of the site.

The main problem that emerges for courts after \textit{United States v. Lopez} is how to distinguish between commercial and non-commercial activity.\textsuperscript{287} In looking to \textit{Lopez} for guidance, the test suggested by the Court is whether the statute, in this case CERCLA, regulates the use of channels of interstate commerce, instrumentalities of interstate commerce, or activities with a substantial relation to interstate commerce.\textsuperscript{288} CERCLA arguably fits into the

\textsuperscript{284} See Percival, \textit{supra} note 195, at 1166.
\textsuperscript{285} \textit{Id.} at 1167.
\textsuperscript{287} See Percival, \textit{supra} note 195, at 1170.
third category. CERCLA, like the act at issue in *Lopez,* by its terms has nothing to do with commerce or any other kind of economic enterprise.\(^{289}\) Therefore, it appears that Congress lacks the constitutional power to regulate wholly intrastate activities, at least absent some sort of jurisdictional element. To allow Congress the power to regulate something that *may* affect commerce would venture back to the pre-*Lopez* decisions of the Court which grant Congress broad authority while disregarding states' rights.\(^{290}\)

If Congress lacks the power to enforce CERCLA because it may not regulate commerce, then the states are left to regulate themselves. As noted in the discussion in Part III, states have been active in pursuing environmental laws on their own, in many cases before the federal government began enacting environmental statutes.\(^{291}\) However, state hazardous waste regulations are generally byproducts of federal laws.\(^{292}\) Still, this does not indicate necessarily that without application of CERCLA to wholly intrastate activities, there would be severe environmental degradation. In fact, the majority of states have enacted legislation that supplements CERCLA in order to respond faster and to clean-up sites more thoroughly.\(^{293}\) So, at least with regard to hazardous waste, refusal to apply CERCLA to wholly intrastate sites does not indicate that states would engage in a "race to the bottom" in enacting and enforcing environmental protection laws.\(^{294}\)

E. Environmental Goals

In advancing the goals of environmentalism and promoting any type of environmental ethic, however, it does seem that federal laws make more

\(^{289}\) See id. at 1631.

\(^{290}\) See supra text accompanying notes 216-32.

\(^{291}\) See supra Part III.B.3.

\(^{292}\) See SELMI & MANASTER, supra note 111, at 8-16.

\(^{293}\) See id. at 9-4, 9-6.

\(^{294}\) In the air quality context, the states' "race to the bottom" to attract polluting—albeit revenue producing—businesses was Congresses frequently invoked justification for preempting less stringent state air quality standards. See John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1195 (1995).
Federal laws allow for a unification of standards while leaving states free to adopt stricter standards than are provided at the national level. Federal laws allow for uniformity of approach and consistency in application. To require a jurisdictional element in federal laws such as CERCLA in order to determine whether the contaminated site at issue is wholly intrastate would be both costly and time-consuming. One could imagine the emergence of battling experts trying to determine if waste had contaminated the groundwater and then whether the groundwater is confined solely to one particular state. In addition, from an environmental perspective, site contamination could be considered to substantially affect commerce in that such contamination could affect immigration, emigration, and tourism. If states are free to regulate themselves, then while it may be true that each state may not engage in a “race to the bottom,” if certain states do, that could be harmful enough from an environmental perspective.

In addition, if the true stated values of American society—that is, following the will of the people—are to be adhered to, federal environmental laws are the best approach to preventing and remedying environmental problems. The majority of “Americans continue to believe that the federal government should have more responsibility for environmental protection than the states.”295 If the United States is to act as a unified body, promoting a national environmental ethic, reversing national laws would be more detrimental to such a feat than productive. The federal laws serve to promote nationally important interests.296

V. CONCLUSION

Recently, the Supreme Court has moved away from allowing federal government power to ever-increase. It has been accomplishing this goal via the enumerated powers in Article I of the Constitution. The Court supports a states’ rights movement to bring power back to the local governments and

295 Percival, supra note 195, at 1144.
296 See id. at 1181.
away from the federal government. The Supreme Court has looked to the Federalist Papers and to the origin of the federal structure of government in order to determine just how far Congress may go in regulating vis-à-vis the enumerated powers granted by the Constitution. Environmentalism seems secure in that, so long as states are not mandated by the federal government, the Tenth Amendment will not apply and oust federal law from state domain. The Commerce Clause cases, however, present a problem for environmentalism and environmental laws. Since United States v. Lopez, the Court appears intent on limiting congressional regulation unless there is really "commerce" or activities that substantially affect interstate commerce. Therefore, from a constitutional and legal standpoint, laws such as CERCLA may be in trouble in this regard. From an environmental standpoint, however, this could be tragic. If states alone are to legislate and determine laws, what will happen?

While Americans do tend to be very aware of environmental problems, the fact is that, as with other problems, such as poverty, lack of adequate housing, education, and work, environmental problems often are pushed aside in favor of more pressing day-to-day concerns. If states are to act and protect the environment, citizens need to take a more active part in demanding that local governments hear and respond to their demands for environmental regulation and protection. Apart from state laws, federal laws need jurisdictional requirements, or the Court needs to swing back to an earlier Commerce Clause analysis, reading commerce more broadly than the Court in United States v. Lopez.

297 See generally Jesse H. Choper, Did Last Term Reveal "A Revolutionary States' Rights Movement within the Supreme Court?," 46 CASE W. RES. L. REV. 663 (1996).