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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

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¹ THE FEDERALIST NO. 45, at 237-38 (James Madison) (Max Beloff ed., 1987).

² C. B. GARTNER, RACHEL CARSON (1983), *reprinted in* PENELOPE REVELLE & CHARLES REVELLE, THE GLOBAL ENVIRONMENT: SECURING A SUSTAINABLE FUTURE 9 (1992).

³ See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1522 (S.D. Ala. 1996).

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).

⁷ See generally *Lopez*, 115 S. Ct. 1624; *New York v. United States*, 505 U.S. 144.

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 law¹¹ 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,

⁹ See ANDREW JAMISON ET AL., *THE MAKING OF THE NEW ENVIRONMENTAL CONSCIOUSNESS: A COMPARATIVE STUDY OF THE ENVIRONMENTAL MOVEMENTS IN SWEDEN, DENMARK AND THE NETHERLANDS* ix-x (1990).

¹⁰ For examples of federal laws, see the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994 & Supp. I 1995); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995); the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994 & Supp. I 1995); the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994 & Supp. I 1995); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995).

¹¹ See U.S. CONST. art. I, § 8.

¹² See *id.* amend. X.

¹³ 927 F. Supp. 1502 (S.D. Ala. 1996).

¹⁴ 81 F.3d 1387 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174).

in light of recent Supreme Court decisions,¹⁵ held that the Comprehensive Environmental Response, Compensation and Liability Act¹⁶ ("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.¹⁷ The *Olin* ruling, which came after both *United States v. New York*¹⁸ and *United States v. Lopez*,¹⁹ is the first court to rule against the application of CERCLA on the basis that Congress lacked Commerce Clause authority.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 systems²¹ was violative of the Tenth Amendment.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

¹⁵ See generally *United States v. Lopez*, 115 S. Ct. 1624 (1995); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *New York v. United States*, 505 U.S. 144 (1992).

¹⁶ 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995).

¹⁷ See *Olin*, 927 F. Supp. at 1503.

¹⁸ 505 U.S. 144.

¹⁹ 115 S. Ct. 1624.

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).

²¹ See 42 U.S.C. § 300j-24 (1994 & Supp. I 1995).

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."²³ 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.²⁴

A. *Federalism*

The Constitution is the product of a people who deliberately constructed the kind of government under which they wished to live.²⁵ 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.²⁶ The granting of certain powers to the central government, with

²³ U.S. CONST. amend. X.

²⁴ See *infra* Part I.A.1-2.

²⁵ See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 183 (1960).

²⁶ See *id.* at 184. Lord Acton pointed out:

Of all checks on democracy, federalism has been the most efficacious and the most congenial The federal system limits and restrains sovereign power by dividing it, and by assigning to Government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found essential for security for

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.

John Emerich Edward Dalberg-Acton, *May's Democracy in Europe*, in *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 98 (John Neville Figgis & Reginald Vere Laurence eds., London, MacMillan 1907).

²⁷ See HAYEK, *supra* note 25, at 184.

²⁸ See DOLBEARE, *supra* note 6, at 97.

²⁹ See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

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.³⁴ Madison feared a tyranny of the majority and felt that this tyranny would be worse on a national level.³⁵ States allow for more liberty because people are able to move between them and choose the state having the laws best suited to them.³⁶ In addition, the separation or diffusion of power between the governments is a check against any government from becoming too strong.³⁷

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.³⁸ 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.³⁹ 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.⁴⁰ The officials elected to Congress from the individual states are supposed to

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.*

⁴⁰ See D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 787 (1982); Vince Lee Farhat, Note, *Term Limits and the Tenth Amendment: The Popular Sovereignty Model of Reserved Powers*, 29 LOY. L.A. L. REV. 1163, 1168 (1996).

act as a check on federal power because their concerns lie with the interests of the state from which they were elected.⁴¹ 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.⁴²

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.⁴³ 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."⁴⁴ Under this approach, two themes have emerged: reverence toward state sovereignty and protectiveness of traditional state functions.⁴⁵ 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*.⁴⁶

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

⁴¹ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954).

⁴² See *id.*

⁴³ See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., Norton 1972).

⁴⁴ See Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618 (1995).

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

⁴⁷ H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 693 (1993) (internal footnotes omitted).

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).

⁵⁰ Barry A. Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 109 (1992).

⁵¹ See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 12 (1988).

to judge-made law that attempts to define the limits and the powers of the Tenth Amendment.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.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.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."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.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

⁵² See *id.*

⁵³ See Alan R. Arkin, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TUL. L. REV. 1569, 1569 (1996).

⁵⁴ See generally *United States v. Lopez*, 115 S. Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992).

⁵⁵ U.S. CONST. art. I, § 8, cl. 3.

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."⁵⁷

The view of Justice Thomas is in accord with an early Supreme Court decision focusing on the text of the Constitution.⁵⁸ Justice Thomas explained that "commerce" encompasses commodities and the intercourse of such commodities.⁵⁹ The Commerce Clause is aimed at allowing Congress to regulate trade.⁶⁰ 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.⁶¹

The Commerce Clause, from an originalist viewpoint, "does not, however, contemplate congressional regulation of anything that happens to affect commerce."⁶² If read so broadly, any activity could be seen to affect commerce in some way.⁶³ 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.⁶⁴ 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.⁶⁵

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.

⁶² David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1073 (1996).

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.⁶⁶ Until recently, the Supreme Court's interpretation of the Commerce Clause had become very broad in favor of congressional power.⁶⁷

III. ENVIRONMENTALISM AND THE LAW

"Environmentalism" has become a catchall term when speaking of man's use of and impacts upon the natural world.⁶⁸ 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 goals⁶⁹ and are often a compromise among competing interests.⁷⁰

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."⁷¹ 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

to the execution of its enumerated powers).

⁶⁶ See generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Guy F. Atkinson v. Oklahoma*, 313 U.S. 508 (1941).

⁶⁷ Compare *United States v. Lopez*, 115 S. Ct. 1624 (1995) with *Garcia*, 469 U.S. at 528.

⁶⁸ See THOMAS MORE HOBAN & RICHARD OLIVER BROOKS, *GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS* 1 (2d ed. 1996).

⁶⁹ See *id.* at 12.

⁷⁰ KENNETH A. MANASTER, *ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE* 37-41 (1995).

⁷¹ See REVELLE & REVELLE, *supra* note 2, at 2-10.

wilderness.⁷² 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.⁷³ Preserves were established, along with the bureaucratic institutions necessary to carry out the accompanying responsibilities.⁷⁴ 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.⁷⁵

The next two stages of awakening concerned pollution of drinking water and contamination of food.⁷⁶ 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.⁷⁷ In the middle of this century, the first air pollution emergency in the United States occurred in Donora, Pennsylvania.⁷⁸ A little over a decade later, Rachel Carson alerted the public to the crisis of pesticides and contaminants in the environment.⁷⁹ 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

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 1970.⁸⁰

After each of these "awakenings," the government acted in some way to help ease the problems.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.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.⁸³ The areas covered by the various environmental statutes seem to be

⁸⁰ See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1970-1990: TWENTIETH ANNUAL REPORT 4 (1990) [hereinafter ENVIRONMENTAL QUALITY REPORT], reprinted in WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES AND MATERIALS 20 (1992).

⁸¹ See REVELLE & REVELLE, *supra* note 2, at 2-9.

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.

⁸³ For examples of federal laws, see the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994 & Supp. I 1995); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995); the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994 & Supp. I 1995); the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994 & Supp. I 1995); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1994 &

quite comprehensive. 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.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.⁸⁵

The National Environmental Policy Act of 1969⁸⁶ ("NEPA") is now being seen as the first real step forward as a result of years of activism.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."⁸⁸ NEPA has been heralded as a statement on the United States' environmental ethic.⁸⁹ NEPA sets out a broad range of

Supp. I 1995).

⁸⁴ See Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 396 (1995).

⁸⁵ See U.S. CONST. art. VI, § 2.

⁸⁶ 42 U.S.C. §§ 4321-4370d (1994 & Supp. I. 1995).

⁸⁷ See ENVIRONMENTAL QUALITY REPORT at 15, *reprinted in* TABB & MALONE, *supra* note 80, at 211.

⁸⁸ See *id.*

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,"⁹⁰ the responsibility of the federal government to "use all practicable means" to improve federal plans and programs,⁹¹ and the responsibility of the individual.⁹² 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"⁹³

The Endangered Species Act of 1973⁹⁴ ("ESA") was enacted in order to set up a conservation program for the ecosystems of endangered and threatened species.⁹⁵ In order to further this goal, the ESA prohibits all "takings" of endangered species by any person.⁹⁶ As a result of the broad implications of the term "taking," the ESA has become a significant control on land use.⁹⁷

In the areas of water and air, the federal government has responded with the Federal Water Pollution Control Act⁹⁸ ("FWPCA") and the Clean Air Act,⁹⁹ ("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).

⁹⁴ 16 U.S.C. §§ 1531-1544 (1994 & Supp. I 1995).

⁹⁵ *See id.* § 1531(b).

⁹⁶ *See id.* § 1538(a)(1).

⁹⁷ See Craig Anthony (Tony) Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 1 (1991).

⁹⁸ 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995).

⁹⁹ 42 U.S.C. §§ 7401-7671q (1994 & Supp. I 1995).

United States.¹⁰⁰ 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.¹⁰¹ Both of these acts accomplish their purposes through the use of oversight and permit programs.¹⁰²

The goal of the Safe Drinking Water Act¹⁰³ is to provide safe drinking water to the population via public water systems.¹⁰⁴ In order to accomplish this goal, provisions of the Act provide for maximum allowable contamination levels and various other regulations.¹⁰⁵ 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.¹⁰⁶

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹⁰⁷ contains the well-known Superfund provisions. CERCLA's main purpose is to provide remedial action for contaminated hazardous waste sites.¹⁰⁸ The government may clean up sites and then file

¹⁰⁰ See 33 U.S.C. § 1251(a).

¹⁰¹ See 42 U.S.C. § 7401(b)-(c).

¹⁰² See *id.* §§ 7661-7661f; 33 U.S.C. §§ 1341-1345.

¹⁰³ 42 U.S.C. §§ 300f to 300j-26 (1994 & Supp. I 1995).

¹⁰⁴ See *generally id.*

¹⁰⁵ See *id.* §§ 300g-1 to 300h-8.

¹⁰⁶ See *id.* § 300g-2(a)(1)-(6).

¹⁰⁷ 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995).

¹⁰⁸ See REVELLE & REVELLE, *supra* note 2, at 311-12. CERCLA was promulgated as a response to the hazardous waste site at Love Canal in New York. At Love Canal, a chemical company dumped hazardous waste into what was to have been a canal. The chemical company then capped the site with clay soil and sold it to the local school board. Over time, chemicals in the ground leached into the groundwater. Backyards, swimming pools, and playing fields were found to be contaminated by the chemicals. In the area, there was a higher than average incident of birth defects and chromosomal damage. Over 850 families were moved from the area using federal disaster emergency funds. See *id.* What Love Canal showed was how ill-prepared the government was in dealing with hazardous waste emergencies. See Lois Gibbs & Michael Williams, *Grassroots Action Rather than "Top-Down" Solutions*, reprinted in REVELLE & REVELLE, *supra* note 2, at 426.

lawsuits against potentially responsible parties ("PRPs").¹⁰⁹ If PRPs are not found or are insolvent, the Superfund alone pays for the cleanup.¹¹⁰

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.¹¹¹ With the increase in federal regulation, however, many state laws have been preempted.¹¹²

Many states have enacted state environmental quality acts ("SEPA") modeled after NEPA.¹¹³ SEPA's require state or local agencies to prepare environmental impact statements detailing the environmental impacts of projects that agencies approve or carry out.¹¹⁴ One example of this type of state law is the California Environmental Quality Act¹¹⁵ ("CEQA"). This Act

¹⁰⁹ See 42 U.S.C. § 9612.

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.

¹¹⁵ CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1996 & Supp. 1997).

was patterned after NEPA but is stricter in its rules and regulations.¹¹⁶ Other states, as well, have instituted statutes that go further than the national standards and guidelines.¹¹⁷

With respect to air and water pollution, many states had regulations already in force prior to the existence of the federal statutes.¹¹⁸ 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").¹¹⁹ In some states, there are more stringent regulations for certain pollutants than under federal law.¹²⁰ State water pollution permit laws are usually in line with the national provisions.¹²¹ In fact, in a number of states, the federal regulations are adopted specifically.¹²²

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 1976¹²³ ("RCRA") and CERCLA.¹²⁴ While states were not the first movers in this area of

¹¹⁶ See Nicholas C. Yost, *Environmental Impact Assessment Laws*, 26 LAND USE & ENV'T FORUM 204, 204 (1995). One way that CEQA is stricter than NEPA is the fact that CEQA applies to private as well as government activities. See *id.* at 205.

¹¹⁷ New York also has a strict environmental policy act. See SELMI & MANASTER, *supra* note 111, at 10-5.

¹¹⁸ See *id.* at 8-16.

¹¹⁹ See *id.* at 8-12.1.

¹²⁰ *Id.* at 8-12.1 & nn.37-38 (citing CAL. CODE REGS. tit. 17, § 70200 (requiring a more stringent ozone standard for California than the federal statute requires) and OR. ADMIN. R. § 340-31-050 (regulating certain air pollutants in Oregon not specifically regulated by federal law)). Compare N.M. STAT. ANN. § 74-2-5(C)(1)(a) (Michie 1978) (disallowing the New Mexico legislature from promulgating regulations more stringent than federal regulations); S.D. CODIFIED LAWS, § 34A-2-34 (Michie Supp. 1996) (disallowing the South Dakota legislature from promulgating regulations more stringent than federal regulations).

¹²¹ See *id.* at 8-14.

¹²² See *id.* at 8-15.

¹²³ 42 U.S.C. §§ 6901-6992k (1994 & Supp. I 1995).

¹²⁴ See SELMI & MANASTER, *supra* note 111, at 8-16.

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.

¹²⁸ See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323 (1819).

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.¹³⁰ 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.¹³¹ 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."¹³² 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.¹³³

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.¹³⁴ In coming to its decision, the Court reasoned that states were regulated as states when federal regulations interfered with "traditional aspects of state sovereignty."¹³⁵ 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.¹³⁶ 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.*

¹³⁴ See *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

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.

system.”¹³⁷

The Court continued on this line of thought, with some modifications, in *Hodel v. Virginia Surface Mining and Reclamation Association*,¹³⁸ 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.’”¹³⁹ 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.¹⁴⁰ Again in *Federal Energy Regulatory Commission v. Mississippi*,¹⁴¹ 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.¹⁴²

Then, the Supreme Court seemed to switch gears with *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁴³ The Court overruled *National League of Cities v. Usery*¹⁴⁴ and dispensed with the rule of drawing boundaries with “traditional governmental functions” of the states.¹⁴⁵ 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

¹³⁷ *Id.* at 852 (quoting *Fry v. United States*, 379 U.S. 542, 547 (1975)).

¹³⁸ 452 U.S. 264 (1981).

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.

¹⁴¹ 456 U.S. 742 (1982).

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.

¹⁴³ 469 U.S. 528 (1985).

¹⁴⁴ 426 U.S. 833 (1976).

¹⁴⁵ *See Garcia*, 469 U.S. at 538.

no such regulation in question.¹⁴⁶

1. *New York v. United States*¹⁴⁷

Garcia, however, was not the end of the Tenth Amendment controversy—enter *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 1985¹⁴⁸ (“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.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.”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.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”¹⁵² because waste could be managed the “most safely and efficiently . . . on a regional basis.”¹⁵³ In order to encourage state compliance, the Act composed three types of incentives: monetary, access, and take title.¹⁵⁴ The monetary incentives consisted of monies collected from surcharges on waste.¹⁵⁵ The

¹⁴⁶ See *id.* at 548-55.

¹⁴⁷ 505 U.S. 144 (1992).

¹⁴⁸ Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified as amended in scattered sections of 42 U.S.C.).

¹⁴⁹ See *New York v. United States*, 505 U.S. at 149.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

¹⁵² 42 U.S.C. § 2021(c)(a)(1).

¹⁵³ *Id.* § 2021(d)(a)(1).

¹⁵⁴ See *New York v. United States*, 505 U.S. at 152-54.

¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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"¹⁵⁸

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.¹⁵⁹ The Court normally has inquired whether an act of Congress is authorized by one of the enumerated powers in Article I.¹⁶⁰ Using the other route, the Court may determine whether an act of Congress invades the powers reserved to the states by the Tenth Amendment.¹⁶¹ 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."¹⁶² 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

¹⁵⁶ See 42 U.S.C. § 2021e(d)(2)(a).

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.

¹⁶⁰ See *id.* Cases utilizing this method of inquiry include *Perez v. United States*, 402 U.S. 146 (1971) and *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁶¹ See *New York v. United States*, 505 U.S. at 155. Cases having this form of inquiry include *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528 (1985) and *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869).

¹⁶² *New York v. United States*, 505 U.S. at 156.

to the states.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.¹⁶⁴ The Court, however, did acknowledge that the language of the Constitution is broad enough to allow for an expansion of federal power.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.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.¹⁶⁷ Therefore, the Court held that Congress did have the power to dispose of low-level radioactive waste.¹⁶⁸ New York and the Court agreed that, indeed, if the federal government wished, it could preempt state regulation of radioactive waste.¹⁶⁹ The problem arose with how the federal government directed the states to regulate.¹⁷⁰

The main issue in *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."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.'"¹⁷² However, Congress does not "commandeer" a state in authorizing the federal government to take over the burdens of implementing

¹⁶³ See *id.* at 156-57.

¹⁶⁴ See *id.* at 157.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* at 158.

¹⁶⁷ See *id.* at 159.

¹⁶⁸ See *id.* at 160.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ *Id.* at 161.

¹⁷² *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 288 (1981)).

an act when the state fails to do so.¹⁷³ The Framers chose a constitutional structure whereby the federal government could regulate individuals directly, not the states.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.¹⁷⁵

Congress has the power to regulate activity by offering the states the choice between either self-regulation or preemption by federal regulation.¹⁷⁶ This situation has been termed by the Court as "cooperative federalism."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.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.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.¹⁸⁰ The majority in *New York v. United States* followed that approach and found the monetary incentives in *New York* constitutional because, in that situation, the states were able to choose whether they would

¹⁷³ See *id.*

¹⁷⁴ See *id.* at 165.

¹⁷⁵ See *id.* at 166.

¹⁷⁶ See *id.* at 167 (citing *Hodel*, 452 U.S. at 288).

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. §§ 1251-1387 (1994 & Supp. I 1995); the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1994); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1994 & Supp. I 1995); and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1994).

¹⁷⁸ See *New York v. United States*, 505 U.S. at 168.

¹⁷⁹ See *id.* at 169.

¹⁸⁰ See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

be eligible for federal funds or not.¹⁸¹ 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.¹⁸² The states were not “compelled” by Congress to regulate because if they did not act, the federal government would.¹⁸³

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.¹⁸⁴ Here, “Congress ha[d] crossed the line distinguishing encouragement from coercion.”¹⁸⁵ 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.¹⁸⁶ To offer a choice between two options which Congress lacks the power to offer was no choice at all.¹⁸⁷ “Either way, ‘the Act commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”¹⁸⁸ Under this provision, no matter which “choice” the state made, the state still would be subject to the direction of Congress.¹⁸⁹ 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.¹⁹⁰ While the Constitution does not allow Congress to require the states to regulate, Congress can regulate matters directly, and it may preempt state regulation.¹⁹¹

The Court stated further that the Constitution protects the sovereignty

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 Assn.*, 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.¹⁹² In addition, where Congress exceeds its authority, such a departure from the Constitution is not allowed, even if the states consent.¹⁹³ 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.¹⁹⁴

The *New York v. United States* decision has reaffirmed the federal structure of government and reinvigorated the idea of states' rights.¹⁹⁵ 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*¹⁹⁶

The main issue in *ACORN v. Edwards* concerned the Lead Contamination Control Act of 1988¹⁹⁷ ("LCCA"). The LCCA amended the Safe Drinking Water Act¹⁹⁸ 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.¹⁹⁹ Under the amendment, the EPA and the states shared the responsibility for rectifying this problem.²⁰⁰ The states had responsibilities under only two provisions of the LCCA. The

¹⁹² See *id.* at 181.

¹⁹³ See *id.* at 182.

¹⁹⁴ See *id.* at 188.

¹⁹⁵ See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1141-42 (1995).

¹⁹⁶ 81 F.3d 1387 (5th Cir. 1996).

¹⁹⁷ Pub. L. No. 100-572, 102 Stat. 2885 (1988) (codified as amended at 42 U.S.C. §§ 300j-21 to -26 (1994 & Supp. I 1995)).

¹⁹⁸ 42 U.S.C. §§ 300f to 300j-26.

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.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”²⁰² A separate section provided that the EPA Administrator make grants to the states to assist them in complying with their mandates.²⁰³ The main legal issue was whether the mandates to the states violated the Tenth Amendment.²⁰⁴ The *ACORN v. Edwards* decision followed the teachings of *New York v. United States*.²⁰⁵

The court in *Edwards* stated that:

[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.²⁰⁶

This rationale was basically a restatement of *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.²⁰⁷

²⁰¹ 42 U.S.C. § 300j-24(c).

²⁰² *Id.* § 300j-24(d).

²⁰³ *See id.* § 220j-25.

²⁰⁴ *See Edwards*, 81 F.3d at 1393.

²⁰⁵ *See id.* at 1393-95.

²⁰⁶ *Id.* at 1393.

²⁰⁷ *See New York v. United States*, 505 U.S. at 155; *Edwards*, 81 F.3d at 1393.

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.²⁰⁸ Thus, the focus turned to the method of regulation.²⁰⁹ The court stated that the LCCA provisions in question fell squarely within the ambit of *New York v. United States*.²¹⁰ A state's failure to establish the mandated program subjected the state to civil enforcement proceedings.²¹¹ 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.²¹² This court, like the Supreme Court in *New York v. United States*, held this to be "no choice at all."²¹³ 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."²¹⁴ In *Edwards*, despite valid Commerce Clause authority to regulate, the states could not be forced to administer federal programs.²¹⁵ 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.²¹⁶ The Court attempted to confine

²⁰⁸ See *Edwards*, 81 F.3d at 1393.

²⁰⁹ See *id.*

²¹⁰ See *id.* at 1394.

²¹¹ See 42 U.S.C. § 300j-8(a).

²¹² See *Edwards*, 81 F.3d at 1394.

²¹³ See *id.*

²¹⁴ *Id.*

²¹⁵ See *id.*

²¹⁶ 295 U.S. 495, 544 (1935).

this expansion to areas that “directly” affect interstate commerce.²¹⁷ In *United States v. Darby*, the Court further expanded Commerce Clause authority to include those activities that are *intrastate* “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.”²¹⁸ In addition, the Court introduced the “substantial effects” test whereby Congress may regulate activities that have a substantial effect on interstate commerce.²¹⁹

Perhaps one of the best known examples of broad Commerce Clause authority is depicted in *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.²²⁰ Commerce Clause authority was said to extend to those intrastate activities that so affect interstate commerce so as to make regulation permissible.²²¹ The Supreme Court in *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.”²²² A further expansion of Commerce Clause power was the decision in *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.²²³ In addition, the Court held that Congress could even take “reasonable preventive measures” in regulating commerce under the auspices of Commerce Clause authority.²²⁴ This congressional power of prevention was tempered, however, by the

²¹⁷ See *id.* at 546.

²¹⁸ 312 U.S. 100, 118 (1941).

²¹⁹ See *id.* at 119; see also *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

²²⁰ See 317 U.S. 111 (1942).

²²¹ See *id.* at 125.

²²² *Guy F. Atkinson*, 313 U.S. at 527.

²²³ 379 U.S. 294, 299 (1964).

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

²²⁵ *Id.* at 302 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

²²⁶ 379 U.S. 241, 255 (1964).

²²⁷ *See id.* at 258.

²²⁸ *See Perez v. United States*, 402 U.S. 146, 154-57 (1971).

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.

²³⁰ *See Hodel*, 452 U.S. 264 (1981); *see also* *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982).

governmental activities test.²³¹ Up until *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.²³²

1. *United States v. Lopez*²³³

United States v. Lopez was the first decision, with the exception of *National League of Cities v. Usery*, in which the Court found that Congress had exceeded its Commerce Clause authority. At issue in *Lopez* was the Gun-Free School Zones Act of 1990.²³⁴ The Act made it a federal offense for any individual to knowingly possess a firearm in a school zone.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.²³⁶ Justice Rehnquist began the majority opinion by analyzing the constitutional principles of dual sovereigns.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 *United States v. Darby*²³⁸ and *Wickard v. Filburn*,²³⁹ the Court stated that this increase in power was due to the fact that earlier cases

²³¹ See *Garcia*, 469 U.S. 528 (1985).

²³² See e.g., *Maryland v. Wirtz*, 392 U.S. 183, 201-05 (1968) (Douglas, J., dissenting); *Perez v. United States*, 402 U.S. 146, 157-58 (1971) (Stewart, J., dissenting); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 774-97 (1982) (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 579-80 (Rehnquist, J., dissenting); *id.* at 580-89 (O'Connor, J., dissenting).

²³³ 115 S. Ct. 1624 (1995).

²³⁴ 18 U.S.C. § 922(q) (1994).

²³⁵ See *id.* § 922(q)(2)(A).

²³⁶ See *Lopez*, 115 S. Ct. at 1630-31.

²³⁷ See *id.* at 1626.

²³⁸ 312 U.S. 100 (1941).

²³⁹ 317 U.S. 111 (1942).

artificially had constrained the authority granted to Congress.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.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.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.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.”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.²⁴⁵ This type of element might have “saved” the Act from a holding of unconstitutionality.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.²⁴⁷

The concurring opinion of Justice Kennedy, with whom Justice

²⁴⁰ See *Lopez*, 115 S. Ct. at 1628.

²⁴¹ See *id.*

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.

²⁴³ See *id.* at 1629.

²⁴⁴ *Id.* at 1630-31.

²⁴⁵ See *id.* at 1631.

²⁴⁶ See *id.*

²⁴⁷ See *id.*

O'Connor joined, examined the imprecision with which the Court interpreted the Commerce Clause.²⁴⁸ In addition, the concurrence looked at the structural elements in the Constitution that provide workable standards for the system of dual sovereigns.²⁴⁹ 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.²⁵⁰ 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."²⁵¹

2. *United States v. Olin*²⁵²

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.²⁵³ The defendant, Olin Corporation, owned two sites at which there were alleged releases of hazardous substances.²⁵⁴ The EPA listed the Olin sites on the National Priorities List pursuant to the requirements of CERCLA.²⁵⁵ When Olin failed to comply with EPA's enforcement, the United States filed suit.²⁵⁶ Olin then claimed that CERCLA was inapplicable because, among other

²⁴⁸ See *id.* at 1634-37.

²⁴⁹ See *id.* at 1637.

²⁵⁰ See *id.* at 1641-42.

²⁵¹ *Id.* at 1642.

²⁵² 927 F. Supp. 1502 (S.D. Ala. 1996).

²⁵³ See *id.* at 1533.

²⁵⁴ See *id.* at 1504.

²⁵⁵ See 42 U.S.C. § 9605 (1994).

²⁵⁶ See *Olin*, 927 F. Supp. at 1503.

things, it was violative of the Commerce Clause.²⁵⁷

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.²⁵⁸ The court first looked to the *New York v. United States*²⁵⁹ decision and then to general principles of federalism and state sovereignty as validation for its opinion.²⁶⁰ 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.'"²⁶¹ 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.²⁶² 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.²⁶³ The court recognized that Congress may not expand its enumerated powers; instead, it is bound by the restraints of enumeration and the Tenth Amendment.²⁶⁴

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.²⁶⁵ Before *Lopez*, the Supreme Court had construed narrowly federal

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.

²⁵⁹ 505 U.S. 144 (1992).

²⁶⁰ See *Olin*, 927 F. Supp. at 1521-22 (noting that *New York v. United States* applied Tenth Amendment limitation principles to the Commerce Clause power).

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.²⁶⁶ The Court in *Lopez* directly confronted federalism. As with *Lopez*, *Olin* was concerned with the third category of authorized regulation, activities having a substantial relationship to interstate commerce.²⁶⁷ *Lopez*, the District Court noted, "requires that there be a genuine causal connection between the regulated activity and interstate commerce."²⁶⁸ The court in *Olin* found no connection.²⁶⁹

Specifically applying *Lopez* to CERCLA, the court in *Olin* recognized that the *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.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.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."²⁷² Because real property was in question, the court felt that this was a state matter falling under the police power of the states.²⁷³ Additionally, there was no jurisdictional element providing for a case-by-case inquiry into the effect on interstate commerce.²⁷⁴ At issue was a discharge on

²⁶⁶ See *id.* at 1530.

²⁶⁷ See *id.* at 1531.

²⁶⁸ *Id.* The court pointed out that in so requiring, the Court is more faithful to Chief Justice Marshall's means-ends analysis in *M'Culloch v. Maryland*. In *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).

²⁶⁹ See *Olin*, 927 F. Supp. at 1532.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 1533.

²⁷² *Id.*

²⁷³ See *id.*

²⁷⁴ See *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.

²⁸¹ *New York v. United States*, 505 U.S. at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

²⁸² *Id.* at 145.

²⁸³ See *id.* at 165.

impose have been used widely in federal environmental laws with no infringement on states' rights.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 *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, *New York v. United States* signaled a "greater willingness on the part of the Court to assert judicially enforceable limits on federal authority"²⁸⁵

The Commerce Clause decisions are more problematic with regard to current environmental laws, particularly in light of *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.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 *United States v. Lopez* is how to distinguish between commercial and non-commercial activity.²⁸⁷ In looking to *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.²⁸⁸ CERCLA arguably fits into the

²⁸⁴ See Percival, *supra* note 195, at 1166.

²⁸⁵ *Id.* at 1167.

²⁸⁶ See generally *United States v. Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996).

²⁸⁷ See Percival, *supra* note 195, at 1170.

²⁸⁸ See *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995).

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).

sense. 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.²⁹⁷ 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 State 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).