Acorn v. Edwards: Did the Fifth Circuit Squirrel Away States' Tenth Amendment Rights at the Cost of National Environmental Welfare

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ACORN v. EDWARDS: DID THE FIFTH CIRCUIT SQUIRREL AWAY STATES' TENTH AMENDMENT RIGHTS AT THE COST OF NATIONAL ENVIRONMENTAL WELFARE?

I. INTRODUCTION

Lead poisoning among children, arguably the United States' most vulnerable population, has reached nearly epidemic proportions over the past several decades. Concerns about lead poisoning stem from the detrimental and irreversible effects exposure has on children's neurological and physical development. Considering the many sources of lead, including paint chips, gasoline, food, water and dust, it is no wonder that lead's ill effects have become so widespread. In enacting the Lead Contamination Control Act of

1. See Diane Cabo Freniere, Comment, Private Causes of Action Against Manufacturers of Lead-Based Paint: A Response to the Lead Paint Manufacturers' Attempt to Limit Their Liability by Seeking Abrogation of Parental Immunity, 18 B.C. ENVTL. AFF. L. REV. 381, 384-85 (1991) (noting children are especially susceptible to effects of lead because their neurological and nervous systems are not yet fully developed); see also Steven Waldman, Lead and Your Kids, NEWSWEEK, July 15, 1991, at 42 (discussing environmental threat lead poses to children). Although adults are not immune to lead's effects, they are able to tolerate greater levels of exposure than are children.

2. See James O. Mason, From the Assistant Secretary for Health, U.S. Public Health Service, 265 JAMA 2049, 2049 (1991). One commentator states, "lead poisoning is the [number one] environmental disease that faces young children . . . ." Id. Emphasizing the magnitude of the lead contamination problem, he adds:

[A]n attack on lead is vitally important to the health of our children. However silently it damages our children's minds and limits their abilities, lead poisoning's impact is real. It has already affected millions of children, and only through bold and persistent action can we prevent it from affecting millions more.

Id.


The United States Environmental Protection Agency (EPA) has estimated that 30-50% of children's exposure to lead is from dust and soil, 25% is from food, 20% is from drinking water and 5% comes directly from inhalation of air contaminated

(479)
1988 (LCCA),\(^5\) Congress demonstrated both its recognition of lead's destructive effects on children as well as a need for legislative intervention to address the lead poisoning problem.\(^6\)

In *ACORN v. Edwards*,\(^7\) the United States Court of Appeals for the Fifth Circuit scrutinized this effort by critically assessing the constitutionality of certain requirements Congress imposed on Louisiana through LCCA.\(^8\) The Fifth Circuit addressed whether Congress exceeded its authority under the Commerce Clause\(^9\) and impermissibly intruded upon Louisiana's state sovereignty in mandating the establishment of remedial programs to assist local educational agencies, schools and day care centers in controlling lead contamination in their drinking water systems.\(^10\) In holding that LCCA violated Louisiana's sovereign authority, the Fifth Circuit reasserted the judiciary's recognition of states' Tenth Amendment rights.\(^11\)

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7. 81 F.3d 1387 (5th Cir. 1996), *cert. denied, 117 S.Ct. 2532 (1997).*

8. *See id.* One group of authors summarizes the requirements of LCCA as follows:

The Lead Contamination Control Act of 1988 required EPA to provide guidance to states and localities on testing for and remediating high levels of lead in a school's drinking water. Testing and correction is voluntary, with the exception that the law requires testing, recall, repair and/or replacement of water coolers with lead-lined storage tanks or with parts containing lead.


10. *See ACORN, 81 F.3d at 1393.* The Fifth Circuit, finding support in the Supreme Court's reasoning in *New York v. United States*, recognized that neither ACORN nor Louisiana understood the relationship between the Tenth Amendment and the Commerce Clause as established by the *New York Court. See id.* at 1392. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *U.S. CONST.* amend. X.

11. *See ACORN, 81 F.3d at 1392-94.* For a discussion of cases involving judicial challenges of congressional power, and the judiciary's recently increased recognition of states' Tenth Amendment rights, see infra notes 57-94 and accompanying text.
This Note addresses the issues considered by the Fifth Circuit in ACORN. Part II sets forth the facts, procedural history and holding of ACORN. Next, Part III includes a discussion of LCCA, the Commerce Clause, the Tenth Amendment and outlines prior judicial treatment of the conflicts between federal and state legislative powers. Then, Part IV reviews the Fifth Circuit’s analysis in ACORN. Subsequently, Part V critiques the Fifth Circuit’s conclusion that Louisiana’s sovereignty under the Tenth Amendment prevented Congress from regulating electric drinking water coolers through invocation of its Commerce Clause power. Finally, Part VI suggests that in light of the judiciary’s inconsistent history regarding the division of federal and state legislative powers, the Fifth Circuit decided ACORN on grounds which, although legally sound, may foster disparate results among the states in the area of environmental policy.

II. FACTS OF ACORN v. EDWARDS

The controversy surrounding ACORN began when the Association of Community Organizations for Reform Now (ACORN) and two concerned parents sent several Louisiana executive officials a “Notice of Intent to File Suit” alleging Louisiana’s violation of sections 1464(c) and 1464(d) of LCCA. Section 1464(c) requires that each state disseminate a guidance document, a testing protocol

12. For a full discussion of the facts, procedural history and holding of ACORN, see infra notes 17-30 and accompanying text.

13. For a comprehensive discussion of the statutory and constitutional underpinnings of the Fifth Circuit’s ACORN decision, as well as the relevant cases which preceded ACORN, see infra notes 31-94 and accompanying text.

14. For a detailed account of the Fifth Circuit’s analysis in ACORN, see infra notes 95-111 and accompanying text.

15. For a critical analysis of the Fifth Circuit’s decision, see infra notes 112-37 and accompanying text.

16. For a proposal of the potential impact of ACORN on future conflicts involving the legislative authority of the federal and state governments, see infra notes 138-43 and accompanying text.

17. See ACORN v. Edwards, 81 F.3d 1387, 1388-89 (5th Cir. 1996), cert. denied, 117 S. Ct. 2532 (1997). The Fifth Circuit, collectively referring to the plaintiffs as “ACORN” for the purposes of simplicity, commented:

Suit was actually filed on behalf of ACORN, Illene Sippio, individually and as the natural tutrix of her minor daughter, and Frank Crosby, individually and as the natural tutor of his minor son. Sippio and Crosby are parents of children attending schools that did not receive the EPA list timely and that employ drinking water coolers contained on the list. . . .

Id. at 1389 n.5. The Sierra Club Legal Defense Fund sent the “Notice of Intent to File Suit” on behalf of ACORN, the children of Frank and Sheryl Crosby, the children of Illene D. Sippio, and all other similarly situated children in Louisiana. See id. at 1389 n.3. The “Notice of Intent to File Suit” was sent to the Louisiana Governor, the Louisiana Secretary of the Department of Health and Hospitals, and the

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and a list of non-lead free drinking water coolers to educational agencies, schools and day care centers.\textsuperscript{18} Section 1464(d) requires that each state establish a remedial action program in the interest of attaining the objectives of LCCA.\textsuperscript{19} In response, the State of Louisiana distributed an Environmental Protection Agency (EPA) Fact Sheet to local educational agencies, schools and day care centers which listed electric drinking water coolers that were not lead-free as of February 1990.\textsuperscript{20}

ACORN then filed suit against Louisiana, alleging its failure to establish a remedial action program as required under section 1464(d).\textsuperscript{21} After concluding that Louisiana's distribution of the EPA Fact Sheet did not satisfy the requirements of section 1464(c), ACORN amended its complaint to also include an allegation of Louisiana's violation of that section.\textsuperscript{22} Following the district court's dismissal of its suit as moot, ACORN successfully moved for an award of attorneys' fees and other expenses pursuant to the citizen suit provision of the Safe Drinking Water Act of 1974 (SDWA).\textsuperscript{23}

On appeal to the United States Court of Appeals for the Fifth Circuit, Louisiana challenged the district court's award of attorneys'

\textsuperscript{18} For the pertinent text of section 1464(c) of LCCA, see infra note 37.
\textsuperscript{19} For the pertinent text of section 1464(d) of LCCA, see infra note 37.
\textsuperscript{20} See ACORN, 81 F.3d at 1389. The Fifth Circuit did not specify the amount of time that elapsed between ACORN's sending the "Notice of Intent to File Suit" and Louisiana's distribution of the Environmental Protection Agency (EPA) Fact Sheet. See id.
\textsuperscript{21} See id. at 1389-90.
\textsuperscript{22} See id. at 1390. In its original complaint, ACORN alleged only Louisiana's violation of section 1464(d) of LCCA. See id. at 1391. When ACORN filed suit, it was unsure whether Louisiana's distribution of the EPA Fact Sheet, rather than the list EPA published in the January 18, 1990 Federal Register, constituted compliance with section 1464(c). See id. After independently determining that Louisiana was not in compliance with section 1464(c), ACORN amended its complaint to include an allegation of Louisiana's violation of that section. See id. Nine months after ACORN instituted suit, Louisiana distributed the list of non-lead free drinking water coolers published in the Federal Register. See id. The EPA Fact Sheet Louisiana originally distributed was actually more comprehensive than the Federal Register list, as it contained all of the brands and models that list included, plus seven others. See id. at n.9.
fees to ACORN on several grounds, including, most significantly, the constitutionality of sections 1464(c) and 1464(d).\(^{24}\)

Noting it was unnecessary to determine the constitutionality of section 1464(c), the Fifth Circuit determined that in distributing the EPA Fact Sheet, Louisiana had complied with the requirements of section 1464(c).\(^ {25}\) Louisiana contended that because it was not in violation of section 1464(c) at the time ACORN instituted suit, it was not liable for ACORN’s attorneys’ fees.\(^ {26}\) ACORN focused on the meaning of the term “publish” in asserting that Louisiana did not comply with that section until it disseminated the Federal Register list over nine months after ACORN instituted suit.\(^ {27}\) ACORN further supported its claim of entitlement to attorneys’ fees by contending that its suit was the catalyst for Louisiana’s compliance with LCCA.\(^ {28}\)

The Fifth Circuit concluded that in promulgating section 1464(d), Congress overstepped its constitutional boundaries under the Tenth Amendment, and therefore section 1464(d) was an impermissible intrusion upon Louisiana’s state sovereignty.\(^ {29}\) Based

\(^{24}\) See ACORN, 81 F.3d at 1390.

\(^{25}\) See id. at 1391. The Fifth Circuit stated that Louisiana’s failure to comply with the technical publication requirement of section 1464(c) did not amount to non-compliance with the publication requirement of 1464(d). See id. For a discussion of how the Fifth Circuit handled the section 1464(d) publication requirement, see infra note 27.

\(^{26}\) See id.

\(^{27}\) See id. ACORN argued that the term “publish,” as used in sections 1464(a) and 1464(c), required publication in the Federal Register. See id. The Fifth Circuit undertook its own analysis of the term since the legislative history for LCCA is silent on the meaning or potential interpretation of the term “publish.” See id. at 1391-92.

The Fifth Circuit observed that neither section 1463(c) nor section 1464(c) “unambiguously establishes how or where publication is to be made, nor do we think we need attempt to do so.” Id. at 1391. Additionally, the Fifth Circuit noted that even if the term “publish” as used in those sections required publication in the Federal Register, because the list Louisiana disseminated was more comprehensive than that published in the Federal Register, “dissemination of the over-inclusive Fact Sheet did not defile the purpose of the LCCA.” Id. at 1391-92.

\(^{28}\) See id. at 1391. LCCA’s legislative history does not address the meaning or possible interpretations of “catalyst.” For a discussion of courts’ treatment of the “catalyst” issue in the context of litigation surrounding awards of attorneys’ fees, see infra note 46 and accompanying text.

\(^{29}\) See ACORN, 81 F.3d at 1994. In its constitutional assessment of section 1464(d), the Fifth Circuit applied the analysis the United States Supreme Court undertook in New York v. United States. See id. at 1392-94. In New York, by invalidating the “take title” provision of the Low-Level Radioactive Waste Policy Act, the Court effectively limited congressional Commerce Clause power and reaffirmed states’ Tenth Amendment rights. See generally New York v. United States, 505 U.S. 144 (1992). The Fifth Circuit in ACORN determined that in light of the New York Court’s determination that the Commerce Clause does not authorize Congress to
on ACORN’s failure to establish Louisiana’s violation of any lawful requirements of LCCA at the time it instituted its suit, the Fifth Circuit reversed the district court’s ruling and dismissed ACORN’s claims.30

III. BACKGROUND

A. The Lead Contamination Control Act of 1988

Congress’s enactment of LCCA reflected its strong concern for the health of the nation’s children.31 After considering the alarmingly high rate of lead poisoning among children and determining that lead in drinking water posed a substantial risk to children’s health, Congress concluded that legislation regulating electric drinking water coolers would be an effective means of decreasing lead ingestion by children.32 Although Congress had previously

compel states’ enactment or administration of federal regulatory programs, section 1464(d) was unconstitutional. See ACORN, 81 F.3d at 1394.

30. See ACORN, 81 F.3d at 1395.


According to the [EPA], every year more than 241,000 children under age 6 are exposed to lead in drinking water at levels high enough to impair their intellectual development. The National Health and Nutrition Survey, published in 1982, found that 9.1 percent of America’s preschool children — a total of 1.5 million children under age 6 — have lead levels that meet the U.S. Centers for Disease Control’s (CDC) definition of acute lead poisoning.

A 1986 EPA study lists the health problems that could be avoided if lead levels in tap water were reduced to the level of the proposed standard then under consideration (20 parts per billion). The study finds that in addition to the 241,000 children at risk of mental impairment, each year some 680,000 expectant mothers in the United States are exposed to lead levels in drinking water high enough to be associated with miscarriage, low birth weight and retarded growth and development of the fetus.

The EPA also concludes that some 82,000 school children each year are at risk of growth impairment, and another 82,000 are at risk of effects on their blood cell formation.


In particular, Congress asserted its concern for safe drinking water in schools by highlighting the widespread use of electric drinking water coolers in the United States’ schools. See H.R. Rep. No. 100-1041, at 10, reprinted in 1988 U.S.C.C.A.N. 3798. Congress provided three reasons in support of its concern: 1) Water use patterns in schools, which are characterized by long standing periods of non-use; 2) the prevalence of leachable lead sites, such as lead-soldered joints, in electric drinking water coolers and plumbing in schools; and 3) the potential of a single lead contaminated electric drinking water cooler to affect a large number of its users. See id. (citing United States Public Health Service, Agency for Toxic
taken several steps toward reducing the likelihood of individuals' exposure to the harmful effects of lead.\textsuperscript{33} LCCA was the first narrowly focused attempt by Congress to limit children's exposure to lead contaminated drinking water.\textsuperscript{34} Essentially, LCCA provides for comprehensive federal regulation of lead levels in drinking water by: (1) mandating the recall of drinking water coolers with lead-lined reservoir tanks;\textsuperscript{35} (2) banning the manufacture and sale of non-lead free drinking water coolers;\textsuperscript{36} and (3) establishing guide-

\textbf{SUBSTANCES AND DISEASE REGISTRY, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS Vol. 1, at vi-12 (1988)).}


\textsuperscript{35} See LCCA § 1462, 42 U.S.C. § 300j-22 (1994). Under section 1462, "all drinking water coolers identified by the [EPA] Administrator on the list under section 1463 as having a lead-lined tank shall be considered to be imminently hazardous consumer products . . . ." Id.

\textsuperscript{36} See LCCA § 1463, 42 U.S.C. § 300j-23. Section 1463 reads:

(a) Publication of Lists

The Administrator shall, after notice and opportunity for public comment, identify each brand and model of drinking water cooler which is not lead free, including each brand and model of drinking water cooler which has a lead-lined tank. For purposes of identifying the brand and model of drinking water coolers under this subsection, the Administrator shall use the best information available to the [EPA]. Within 100 days after [October 31, 1988], the Administrator shall publish a list of each brand and model of drinking water cooler identified under this subsection. Such list shall separately identify each brand and model of cooler which has a lead-lined tank. The Administrator shall continue to gather information regarding lead in drinking water coolers and shall revise and republish the list from time to time as may be appropriate as new information or analysis becomes available regarding lead contamination in drinking water coolers.

(b) Prohibition

No person may sell in interstate commerce, or manufacture for sale in interstate commerce, any drinking water cooler listed under subsection (a) or any other drinking water cooler which is not lead free, including a lead-lined drinking water cooler.
lines regarding local educational agencies' management of lead contaminated drinking water.37 LCCA's effectiveness in fostering

Id.


37. See LCCA § 1464, 42 U.S.C. § 300j-24. Section 1464 provides:

(a) Distribution of Drinking Water Cooler List.

Within 100 days after [October 31, 1988], the Administrator shall distribute to the States a list of each brand and model of drinking water cooler identified and listed by the Administrator under section 1463 (a).

(b) Guidance Document and Testing Protocol.

The Administrator shall publish a guidance document and a testing protocol to assist schools in determining the source and degree of lead contamination in school drinking water supplies and in remediating such contamination. The guidance document shall include guidelines for sample preservation. The guidance document shall also include guidance to assist States, schools, and the general public in ascertaining the levels of lead contamination in drinking water coolers and in taking appropriate action to reduce or eliminate such contamination. The guidance document shall contain a testing protocol for the identification of drinking water coolers which contribute to lead contamination in drinking water. Such document and protocol may be revised, republished and redistributed as the Administrator deems necessary. The Administrator shall distribute the guidance document and testing protocol to the States within 100 days after [October 31, 1988].

(c) Dissemination to Schools, Etc.

Each State shall provide for the dissemination to local educational agencies, private non-profit elementary or secondary schools and to day care centers of the guidance document and testing protocol published under subsection (b), together with the list of drinking water coolers published under section 1463 (a).

(d) Remedial Action Program

(1) Testing and Remediating Lead Contamination.

Within 9 months after [October 31, 1988], each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remediating, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

(2) Public Availability.

A copy of the results of any testing under paragraph (1) shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such testing results.

(3) Coolers.

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after [October 31, 1988], all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found . . . not to contribute lead to drinking water.

Id.
the development of a healthier American youth has been contested, and remains debatable.  

B. Judicial Treatment of LCCA

The United States District Court for the District of Colorado heard arguments similar to those raised in ACORN when it decided Colorado Environmental Coalition v. Romer. In Romer, the Colorado Environmental Coalition (CEC) filed suit against the State of Colorado to force its compliance with LCCA sections 1461 through 1465. CEC specifically sought orders and schedules compelling Colorado to distribute certain guidance documents and lists and to establish remedial programs for day care centers within the state. Relying on section 1449(d) of SDWA, CEC also moved for recovery of the attorneys' fees it incurred in its suit against Romer.

The Romer court focused on several factors in assessing CEC's entitlement to recovery under section 1449(d) and in determining an appropriate compensatory award. The court first examined the language of section 1449(d), which allows courts to award attorneys' fees on a discretionary basis. The court made two critical observations.

For EPA's recommended guidelines for implementation of programs in schools to remedy lead contamination in their drinking water systems, see Guidance Document and Testing Protocol To Assist Schools in Determining the Source and Degree of Lead Contamination in School Drinking Water Supplies and Remediating Such Contamination, 54 Fed. Reg. 14,316 (1989).

38. See Reiss, supra note 4, at 293 (observing that LCCA mandates only reporting of testing results, and not testing itself, and asserting that "[i]f lead in drinking water is to be significantly reduced in schools and day care centers, legislation must make testing mandatory and must ensure that local educational agencies and day care centers do in fact test their water").


40. See id. at 458.
41. See id. Pursuant to 1449(d), the Colorado Environmental Coalition (CEC) sent notice on January 30, 1992 to the State of Colorado that it was in violation of LCCA. See id. Following the 60 day mandatory waiting period, CEC filed suit on April 2, 1992. See id. During those 60 days, the parties engaged in extensive negotiations. See id. This led to the formation of a consent decree which, in addition to the exact relief CEC sought in its complaint, imposed duties upon the State of Colorado which were not specified under LCCA. See id. at 458-59.

42. See id. at 458-61. The consent decree the parties had entered into left open the question of attorneys' fees. See id. at 459.

43. See id. at 459-61. The district court specifically considered both whether CEC was the prevailing party as well as whether its institution of suit was the catalyst for Romer's compliance with LCCA. See id. at 459-60. For a discussion of these factors, see infra notes 45 & 46 and accompanying text.

44. See Romer, 796 F. Supp. at 459. For the pertinent text of section 1449(d) of SDWA, see supra note 23. For an outline of how federal courts treat the issue of
observations, namely, that CEC was the prevailing party in the suit, and that CEC's institution of the suit was the catalyst for Colorado's acquiescence. Based on these factors, the court concluded that CEC was entitled to its litigation costs. The court undertook a reasonableness analysis to determine the amount of these costs, and held Colorado liable to CEC for reimbursement of all of its legal fees.


45. See Romer, 796 F. Supp. at 459. The Romer court stated, "[h]ere, plaintiff is clearly the substantially prevailing party. Plaintiff's complaint set out two specific requests for relief, both of which were achieved precisely and completely by the consent decree and order." Id. For a discussion of concepts relevant to the notion of "prevailing parties," see Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978) (holding plaintiffs may be deemed "prevailing" for purposes of awarding attorneys' fees if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"); Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989) (citing Nadeau, 581 F.2d at 275); Ruckelhaus v. Sierra Club, 463 U.S. 680 (1983) (requiring claimant achieve some success before deemed "prevailing," and therefore entitled to award of attorneys' fees); Hensley v. Eckerhart, 461 U.S. 424 (1983) (citing Nadeau, 581 F.2d at 275); Foremaster v. City of St. George, 882 F.2d 1485, 1488 (10th Cir. 1989) (holding "[a] plaintiff may prevail in the absence of a judicial determination on the merits . . . [by showing] ") (1) that [the] lawsuit is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law") (citations omitted).

46. See Romer, 796 F. Supp. at 459. The Romer court commented that the State of Colorado had been in violation of LCCA for close to three years when Romer sent its notice of violations letter. See id. The State of Colorado entered into settlement negotiations upon receiving this letter and learning of Romer's intent to file suit upon expiration of the 60 day period. See id. Regarding the catalyst issue, the Romer court noted that litigation does not begin on the day that a complaint is filed, but when a plaintiff sends the statutorily required letter and threatens to bring a citizen suit. See id.; see also Luethje v. Peavine Sch. Dist., 873 F.2d 352, 353 (10th Cir. 1989) (noting "the sequence of events . . . strongly indicates that the plaintiff's suit was, at the very least, a significant catalyst or substantial factor in causing defendants to change their policy").

47. See Romer, 796 F. Supp. at 460.

48. See id.; see also Hensley, 461 U.S. at 433 (providing formula for computation of "reasonable" attorneys' fees). The Hensley Court stated:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

Id. The Hensley Court added that "the most critical factor is the degree of success obtained. . . . There is no precise rule or formula for making these determinations. . . . The court necessarily has discretion in making this equitable judgment."
C. Constitutional Considerations: The Commerce Clause and the Tenth Amendment

1. The Commerce Clause

The framers of the Constitution created the scheme of enumerated powers which has, in large part, dictated the course of the United States' political evolution. Of paramount importance to this scheme is the Commerce Clause, which authorizes Congress to regulate interstate trade. Initially, the Commerce Clause achieved the necessary reorganization of the interstate commercial infrastructure. The varied judicial interpretations of the Commerce Clause that have emerged since its creation are largely attributable

Id. at 436-37; see also Pennsylvania v. Delaware Valley Citizen’s Council for Clean Air, 478 U.S. 546, 561 (1986) (noting “for the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney’s fee, the work must be ‘useful and of a type ordinarily necessary’ to secure the final result obtained from the litigation”) (quoting Webb v. Board of Educ., 471 U.S. 234, 243 (1985)); see generally Commissioner, INS v. Jean, 496 U.S. 154 (1990) (emphasizing utility of treating case as whole, rather than series of individual issues and events, in determining reasonable attorneys’ fees); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) (outlining process for determination of reasonable attorneys’ fees).

In support of its judgment entitling CEC to all of its legal fees, the Romer court analyzed the timing of CEC’s institution of its suit and Colorado’s reaction to CEC’s claims. See Romer, 796 F. Supp. at 459-60. Concluding that CEC should not be penalized simply because its actions forced Colorado’s compliance with LCCA’s provisions before CEC filed its complaint, the Romer court noted that “plaintiff’s action was the catalyst for defendant’s acquiescence. . . . [A] plaintiff who forces compliance with the mandate of Congress should not be penalized because a defendant bows to the inevitable before the complaint is even filed.” Id.


50. For the pertinent text of the Commerce Clause, see supra note 9. For one commentator’s text-based analysis of the framers’ intent in enacting the Commerce Clause, as well as the Court’s continually changing interpretation of it, see Raoul Berger, Judicial Manipulation of the Commerce Clause, 74 Tex. L. Rev. 695 (1996); Peter A. Lauricella, Comment, The Real “Contract With America”: The Original Intent of the Tenth Amendment and the Commerce Clause, 60 Ala. L. Rev. 1377, 1398-1400 (1997) (discussing significance of Commerce Clause).

51. See Lauricella, supra note 50, at 1397. In the years leading up to the Constitutional Convention, commerce between the states under the Articles of Confederation had become chaotic, as each state had constructed trade barriers to protect their respective citizens’ business interests. See id.
to the limiting effects the Tenth Amendment has on congressional power.\(^{52}\)

2. The Tenth Amendment

Post-Constitutional Convention federalist-antifederalist debates over the delegation of legislative authority among the federal and state governments led to the enactment of the Bill of Rights.\(^{53}\) While the first eight amendments establish many fundamental civil liberties, the Tenth Amendment limits the scope of congressional authority.\(^{54}\) The precise limitations the Tenth Amendment has on the federal government's powers are still undefined after two centu-

\(^{52}\) For the text of the Tenth Amendment, see supra note 10. For a discussion of the Court's varied interpretation of the Commerce Clause in light of the Tenth Amendment, see infra notes 57-94 and accompanying text.

\(^{53}\) See John R. Vile, Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby, 27 CUMB. L. REV. 445, 449 (1996-97). Federalists favored the establishment of a strong national government, while antifederalists sought a greater delegation of power among the states. See id. Expressing federalism's fundamental principles, Alexander Hamilton wrote, "[i]t may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities which it might be judged proper to leave with the States for local purposes . . . ." THE FEDERALIST No. 17 (Alexander Hamilton). For a collection of the documents which supported the Constitutional Convention's major debates, see FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski & Richard Leffler eds., Madison House, 1st ed. 1989).

One author, providing a summary discussion of each of the Bill of Rights, comments:

There are several reasons a bill of rights was not included in the Constitution. The most important was the drafters' belief that additional protections to those provided in the Constitution were not necessary.

The Bill of Rights was born in controversy and continues to be the primary legal battleground for some of the most emotional social, political, and legal issues of our time because it is a statement of the most fundamental personal rights of mankind. Chief Justice Thomas J. Moyer, The Bill of Rights — Its Origins and Its Keepers, 18 OHIO N.U. L. REV. 187, 188-92 (1991). For commentary on the Bill of Rights playing three roles, including securing passage of the Constitution, redefining American federalism over the past century, and restructuring modern society through redefinition of the contemporary limits of community power, see Richard G. Wilkins, The Structural Role of the Bill of Rights, 6 BYU J. PUB. L. 525 (1992); Kermit L. Hall, The Bill of Rights, Liberty, and Original Intent, in CRUCIBLE OF LIBERTY, 8 (Raymond Arsenault ed., The Free Press 1991) (arguing tensions historically surrounding interpretation of Bill of Rights are exactly what framers intended); Maeva Marcus, The Adoption of the Bill of Rights, 1 WM. & MARY BILL RTS. J. 115 (1992) (detailing formation, adoption and importance of Bill of Rights).

ries. Constitutional scholars agree, however, that the Tenth Amendment establishes a degree of complementarity between federal and state legislative authority.

D. Judicial Treatment of the Commerce Clause-Tenth Amendment Conflict

The dual existence of the Commerce Clause and the Tenth Amendment illustrates the framers' intention that the Constitution create a balance between the conflicting interests of forming a strong national government and protecting state sovereignty. The historical interplay between these two provisions comports with the theoretical debates which have long surrounded the notion of "federalism." Additionally, the relationship between the Com-


55. See Ching, supra note 54, at 140. "The United States Constitution was drafted by people of diverse beliefs. . . . The Tenth Amendment, which was thought to ensure the protection of the states' rights, is itself dependent on the interpretation of the original Constitution . . . ." Id. For examples of different interpretations of the Tenth Amendment, see Kathryn Abrams, Comment, On Reading and Using the Tenth Amendment, 93 Yale L.J. 723 (1984) (supporting structural analysis of Tenth Amendment); Lauricella, supra note 50 (supporting interpretation of Tenth Amendment based on framers' original intent); Vile, supra note 53 (arguing against literal reading of Tenth Amendment).

56. See Abrams, supra note 55, at 737. "The states may not exercise the powers delegated to the federal government . . . . Moreover, the federal government may not exercise the powers properly reserved to the states." Id.

57. See Ching, supra note 54, at 102. One commentator describes the evolution of the Commerce Clause and the Tenth Amendment as nearly symbiotic, observing that "[s]ince much of the early expansion of the national government's powers dealt with the Commerce Clause, which delegated to the national government broad power to regulate commerce among the states, the evolution of Commerce Clause jurisprudence is, in many ways, the evolution of Tenth Amendment jurisprudence." Id. at 103. For an illustration of Justice O'Connor's comparable view on the relationship between the Commerce Clause and the Tenth Amendment, see infra note 59.

58. One author defines federalism as "relationships [which] emphasize partnership between individuals, groups and governments; cooperative relationships that make the partnership real; and negotiations among the partners as the basis for sharing power." Daniel J. Elazar, Cooperative Federalism, in Competition Among States and Local Governments: Efficiency and Equity in American Federalism 65, 69 (Daphne A. Kenyon & John Kincaid eds., 1991). A second author highlights four values of federalism: (1) states' ability to check the oppressive power of a strong central government; (2) states' ability to draw citizens into the political process; (3) the political and cultural diversity independent state governments provide; and (4) the states' existence as "[laboratories] that may 'try novel social and economic experiments without risk to the rest of the country.'" Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88
merce Clause and the Tenth Amendment has been a constant and controversial subject of court decisions.\textsuperscript{59} Although policy-based approaches to silencing these debates have developed, such as centralization and decentralization, "the task of ascertaining the constitutional line between the federal and states' power has given rise to many of the Court's most difficult and celebrated cases."\textsuperscript{60}

\begin{flushleft}
\textsuperscript{59} COLUM. L. REV. 1, 4-9 (1988) (quoting New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932)); but see Edward L. Rubin \\& Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903 (1994) (criticizing federalism proponents' support of states as self-governing units and promoting centralization of power in federal government). Two authors comment: We Americans love [our] federalism . . . . It conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard. . . . In fact, federalism is America's neurosis. . . . But our political culture is essentially healthy, and we do not let our neuroses control us. Instead, we have been trying to extricate ourselves from federalism for at least the past 130 years.

\textsuperscript{60} For a discussion and history of federalism as it relates specifically to environmental issues, see Robert J. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. REV. 1141, 1141-71 (1995) (observing growth of federal environmental regulation has brought national environmental policy to forefront of recent federalism debates).

59. For a discussion of the cases leading up to \textit{ACORN} which involved the resolution of conflicts between the Commerce Clause and the Tenth Amendment, see infra notes 61-94 and accompanying text.

Justice O'Connor, noting the intertwined nature of the relationship between the Tenth Amendment and the Commerce Clause, commented in \textit{New York v. United States}:

In a case like [this], involving the division between federal and state governments, the two inquiries are mirror images of each other. 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.

\textsuperscript{59} 505 U.S. 144, 156 (1992). Again referring to the conflict between the Commerce Clause and Tenth Amendment, Justice O'Connor similarly commented:

[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether [a provision] . . . oversteps the boundary between federal and state authority.

\textsuperscript{60} \textit{Id.} at 159.

60. \textit{Id.} at 155. For a detailed discussion of centralization and decentralization in the context of environmental policy, as well as a proposal that centralization is the optimal means of resolving the longstanding conflict surrounding federal and state governments' respective rights, see infra notes 126-43 and accompanying text. For a discussion of the difficulty of delineating the authority of the federal and state governments, see Ann Marie Bereschak, Note, New York v. United States: \textit{Breathing Life Back Into the Tenth Amendment}? 3 WIDENER J. PUB. L. 509 (1993).
1. The Early Years of the Commerce Clause-Tenth Amendment Conflict

McCulloch v. Maryland\textsuperscript{51} was the first, and arguably the most important, of the Court’s decisions regarding the Constitution’s division of power between the federal government and the states.\textsuperscript{62} In \textit{McCulloch}, the Court addressed Maryland’s power to impose a tax on the Baltimore branch of the federally unchartered Bank of the United States.\textsuperscript{63} The Court rejected Maryland’s argument that Congress unconstitutionally created a national bank, and unanimously declared that Maryland’s imposition of a tax infringed upon congressional power.\textsuperscript{64}

Five years later in \textit{Gibbons v. Ogden},\textsuperscript{65} the Court reinforced and expanded \textit{McCulloch}’s notion of a strong national government.\textsuperscript{66} After examining the conflict between New York’s grant of an exclusive navigation license to certain ships and an existing federal law

\textsuperscript{51} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{52} See Vile, \textit{supra} note 53, at 452. “Of all the cases that have affected subsequent understandings of the Tenth Amendment, none has been more important than the decision in \textit{McCulloch v. Maryland}. Appropriately, it has been called ‘the first in importance and in the place it holds in the development of the American Constitution.’” \textit{Id.} (quoting \textit{ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 282 (1916)}); see also Kerry Bagnall, Comment, \textit{Regulatory Federalism and Its Impact on State Sovereignty}, 15 \textit{CAP. U. L. REV.} 561, 564 (1986) (describing \textit{McCulloch} as Court’s seminal statement on federal power). Three years prior to \textit{McCulloch}, in \textit{Martin v. Hunter’s Lessee}, the Court described constitutional questions as being “of great importance and delicacy.” 14 U.S. (1 Wheat.) 304, 324 (1816).

\textsuperscript{53} See \textit{McCulloch}, 17 U.S. (4 Wheat.) at 317-21. The \textit{McCulloch} Court posed the question of “whether, if the bank be constitutionally created, the State governments have power to tax it?” \textit{Id.} at 326. The Court continued by observing that “the constitution itself, and the laws passed in pursuance of its provisions, shall be the \textit{supreme law of the land}, and shall control all State legislation and State constitutions, which may be incompatible therewith . . . .” \textit{Id.} at 326-27 (emphasis added).

\textsuperscript{64} See \textit{id.} at 421-26. The \textit{McCulloch} Court stated:

\begin{quote}
We admit . . . that the powers of the [federal] government are limited . . . . But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . are constitutional.
\end{quote}

\textit{Id.} In holding that Maryland’s imposition of a tax infringed on congressional power, the \textit{McCulloch} Court reasoned that although the Constitution empowers both state and federal governments to impose taxes, “such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted.” \textit{Id.} at 425.

\textsuperscript{65} 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{66} See \textit{id.} at 105. For a discussion of federalism, the emphasis of which is a strong national government, see \textit{supra} note 58.
on the licensing of coastal trade, the Gibbons Court held that federal law preempts state law in the area of interstate commerce.⁶⁷

After several decades of inconsistent holdings, the Court in Hammer v. Dagenhart⁶⁸ began a shift toward recognition of states' rights by invalidating a federal act which prohibited the interstate transportation of goods produced through child labor.⁶⁹ Following a decision signaling a return to a broad construction of congressional Commerce Clause power,⁷⁰ however, the Court overruled Hammer in United States v. Darby.⁷¹ Holding that certain minimum wage and maximum hours requirements of the Fair Labor Standards Act of 1938 (FLSA) were valid, the Darby Court virtually eliminated states' Tenth Amendment rights.⁷²

⁶⁷. See id. at 182. Following a description of the facts of Gibbons, the Court posed the following:

On these pleadings the substantial question is raised: Are these laws such as the Legislature of New York had a right to pass? If so, do they, secondly, in their operation, interfere with any right enjoyed under the constitution [sic] and laws of the United States, and are they, therefore, void, as far as such interference extends?

Id. at 8.

⁶⁸. 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100 (1941).

⁶⁹. See id. at 277. The holding in Hammer has been described as the "zenith of states' rights" because it effectively halted the expansion of congressional Commerce Clause power. See Ching, supra note 54, at 107.

⁷⁰. See National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936). In NLRB, the Court upheld the National Labor Relations Act, which regulates unfair labor practices, reasoning that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce . . . Congress cannot be denied the power to exercise that control." Id. at 37. One author describes the Court's opinion in NLRB as the beginning of a four-decade long period of deference to Congress. See Karol L. Kahalley, Note, State Sovereignty — Back to the Future: The Supreme Court Reaffirms State Sovereignty in Cooperative Federalism Solutions to Environmental Problems, 29 LAND & WATER L. REV. 117, 123 (1994).

⁷¹. 312 U.S. 100 (1941).

⁷². See Vile, supra note 53, at 458. The Darby Court clearly expressed its view regarding the significance of the Tenth Amendment, noting that it "states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established. . . ." Darby, 312 U.S. at 124 (emphasis added).

In Fry v. United States, where the validity of federal wage and salary freezes was at issue, the Court once again endorsed congressional intrusion into state activities supported by its Commerce Clause power. See Fry v. United States, 421 U.S. 542, 544-47 (1975). In his dissenting opinion in Fry, Justice Rehnquist extracted from a line of preceding cases a trend of increased congressional Commerce Clause power and surmised that "the danger to our federal system which is emphasized by these [cases] . . . seems to me quite manifest. The Tenth Amendment, the Court's opinion in this case insists, does have meaning; but the critical question is how

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Thirty-five years later, however, the Court in *National League of Cities v. Usery*[^73] again addressing FLSA, set forth a contrary view regarding state sovereignty.[^74] The Court in *National League of Cities* reverted to a broad interpretation of states' Tenth Amendment rights by holding the 1974 amendments to FLSA unconstitutional on the grounds that they would impermissibly interfere with the integral functions of state and local governments.[^75] The *National League of Cities* decision, reading the Tenth Amendment as an affirmative limit on congressional power, "jolted congressional complacency and has been largely responsible for the rebirth of modern Tenth Amendment jurisprudence."[^76] For example, drawing upon its decision in *National League of Cities*, the Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*[^77] affirmed Congress's Commerce Clause power and established a three-part test to determine the constitutionality of congressional actions.[^78]


[^74]: See id.

[^75]: See id. at 851. The *National League of Cities* Court described the areas the FLSA amendments targeted as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* In addition, the Court stated, "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' [independent existence]." *Id.* (footnote and citation omitted).


[^78]: See id. 277-78. The *Hodel* Court held that requiring states to either adopt minimum federal standards governing strip mining or to submit to a federal plan was permissible under the Commerce Clause and did not violate states' Tenth Amendment rights. *See id.* at 293. The *Hodel* Court drew upon the *National League of Cities* decision in establishing a test for determining the constitutionality of congressional actions. *See* Jeffrey B. Teichert, *Note, New York v. United States: Constitutional Order or Commerce Clause Chaos?* 7 BYU J. PUB. L. 577, 378 (1993). *Hodel* requires the following to show that congressional commerce power legislation is invalid: 1) a showing that the statute at issue attempts to regulate the States as states; 2) that the statute address matters regarding state sovereignty; and 3) that it be apparent that states' compliance with the statute would hinder their abilities to perform traditional governmental functions. *See* *Hodel*, 452 U.S. at 287-88. The *Hodel* Court added that even if a party satisfies these three requirements, "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission" *Id.* at 288 n.29 (citing *National League of Cities*, 426 U.S. at 852-53; *Fry v. United States*, 421 U.S. 542 (1975)).

In *Federal Energy Regulatory Commission v. Mississippi* (FERC), the Court expanded its *Hodel* decision by expressly deferring to a congressional finding in its consideration of whether Congress enacted legislation within the confines of its Commerce Clause power. *See* 456 U.S. 742, 755 (1982). In *FERC*, Mississippi challenged the Public Utility Regulatory Policies Act of 1978 as an unconstitutional...
Several years later, however, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* abandoned the broad construction of federal legislative authority it had adopted in *National League of Cities*. The *Garcia* Court questioned whether the minimum wage and overtime provisions of FLSA applied to a public mass-transit authority. Holding the provisions applicable, the *Garcia* Court reasoned that state interests were fairly represented at the federal level through the states’ selection of individuals to fulfill the responsibilities the Constitution bestows upon both the executive and legislative branches of the federal government. The Court expressly disapproved of the *National League of Cities* Court’s attempt to define the scope of state regulatory authority through consideration of “‘areas of traditional [state] functions.’” Instead, the Court extension of congressional Commerce Clause power, arguing that it infringed upon an area traditionally controlled by the states. See id. at 752. Justice O’Connor, concurring in part and dissenting in part in *FERC*, voiced her concern over the Court’s treatment of states’ Tenth Amendment rights, observing:

State legislative and administrative bodies are not field offices of the national bureaucracy . . . . Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state powers for national purposes.

*Id.* at 777; see also United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 687 (1982) (noting “[j]ust as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation”); see also Equal Employment Opportunity Comm’n v. Wyoming, 460 U.S. 226, 239 (1983) (holding provision of 1974 amendments to Age Discrimination Act of 1957 invalid because although “the Act [required] the State to achieve its goals in a more individualized and careful manner than would otherwise be the case . . . . it does not require the State to abandon these goals, or to abandon the public policy decisions underlying them”).

79. See *Garcia* v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530-31. The *Garcia* Court stated, “[a]lthough *National League of Cities* supplied some examples of ‘traditional government functions,’ it did not offer a general explanation of how a ‘traditional’ function is to be distinguished from a ‘nontraditional’ one.” *Id.*

80. See *id.* at 533. The conflict in *Garcia* arose after the Wage and Hour Administration of the Department of Labor issued an opinion stating that San Antonio Metropolitan Transit Association’s (SAMTA) operations were subject to the FLSA’s minimum wage and overtime requirements. See *id.* at 534. SAMTA sought preclusion of FLSA’s provisions under the Court’s *National League of Cities* decision. See *id.*

81. See *id.* at 551. For the Constitution’s delegation of electoral and representative powers to the states, see U.S. Const. art. I, §§ 2-3; art. II, § 1; art. V. Discussing the qualities of a federal government, James Madison stated, “[i]t is sufficient to such a government that the persons administering it be appointed, either directly, or indirectly, by the people . . . .” *The Federalist* No. 59 (James Madison).

82. *Garcia*, 469 U.S. at 539 (quoting *National League of Cities*, 426 U.S. at 852). The *Garcia* Court criticized this criterion by noting that “[t]hus far, this Court itself has made little headway in defining the scope of governmental functions deemed protected under *National League of Cities.*” *Id.* at 539. The *Garcia* Court further
identified the national political process, rather than the courtroom, as the proper forum for determining states’ rights. Following Garcia, the Court made a preliminary shift back to a confirmation of states’ Tenth Amendment rights. Then, in New York v. United States, the Court limited Congress’s Commerce Clause power to the direct regulation of interstate commerce, as opposed to the regulation of state governments’ oversight of interstate commerce.

2. From New York v. United States to the Present

In New York, the Court addressed New York State’s challenge of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Waste Amendments) as unconstitutional under both the Constitution’s Guarantee Clause and the Tenth Amend-

noted that “[a]ny rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental function inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes.” Id. at 546.

In a dissenting opinion, Justice O’Connor expressed her fundamental disagreement with the majority opinion in Garcia, and stressed the need for a reconsideration of the Court’s treatment of federalism. See id. at 581 (O’Connor, J., dissenting). Justice O’Connor stated, “[i]f federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government’s compliance with its duty to respect the legitimate interests of the States.” Id. Justice O’Connor opined that federalism ought to be based on the notion that “the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.” Id. Echoing this point, one author observes that “[t]he majority in Garcia, again, temporarily relegated the Tenth Amendment to the status of mere window dressing.” Ching, supra note 54, at 114.

83. See Garcia, 469 U.S. at 552. Several years after its Garcia decision, the Court reiterated that the Tenth Amendment imposes structural, not substantive, limits on states. See South Carolina v. Baker, 485 U.S. 505 (1988).

84. See Gregory v. Ashcroft, 501 U.S. 452 (1991). In Gregory, a state constitutional provision mandating the retirement of state court judges at age 70 conflicted with the federal Age Discrimination in Employment Act (AEDA) as applied to the states. See id. Justice O’Connor, writing for the majority, stressed the dual system of state sovereignty created under the Constitution when rationalizing the Court’s decision that the AEDA did not apply to state court judges. See id. at 455-66. Justice O’Connor noted that the “federalist structure of joint sovereigns preserves to the people numerous advantages. . . . Perhaps the principal benefit of [which] is a check on abuses of government power.” Id. at 458. For a critical discussion of the Court’s rationale in Gregory, see Rubin & Feeley, supra note 58, at 104-07.


86. See id. at 166. One critic comments that “[g]iven the close division of the Court in Garcia and the stridency of the dissenting opinions, few observers could have expected . . . [Garcia] to be the Court’s final word either on the subject of the Tenth Amendment (and more general issues of federalism) or on federal commerce powers.” Vile, supra note 53, at 499.
The Court relied upon its decisions in *Hodel* and *Federal Energy Regulatory Commission v. Mississippi* in response to New York's allegation that Congress had exceeded its Commerce Clause power in enacting these provisions. The *New York* Court upheld the first two Waste Amendments provisions, but held the third provision invalid under the Tenth Amendment. The Court concluded that


Each of the three Waste Amendments provisions New York challenged uses certain incentives to encourage the states to comply with their statutory obligation to arrange for the disposal of waste generated within their borders. See *New York*, 505 U.S. at 152. Under the Waste Amendments, “[e]ach State shall be responsible for providing, either by itself, or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State . . . .” *Id.* at 151. The first of the challenged provisions offers the states monetary incentives, the second offers access incentives and the third provision obligates the states to either comply with their statutory obligations to properly dispose of the waste or to take title to it. See *id.* at 152-54. These three provisions of the Waste Act have been described as having “classified states as either good or bad depending on their actions in developing waste disposal sites.” Ching, *supra* note 54, at 116. One commentator also criticizes *New York* as encouraging disunity among the states and therefore contravening the framers' intent that the Commerce Clause preserve the Union. See *id.* For a full discussion of *New York*, including the legislative history of the Waste Amendments, see Bereschak, *supra* note 60.

88. See *New York*, 505 U.S. at 161-62. The *New York* Court commented that the decisions in *FERC* and *Hodel* “were not innovations. While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to require the States to govern according to Congress' instructions.” *Id.* (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)). The *New York* Court distinguished New York’s argument that the manner in which Congress attempted to regulate was unconstitutional from a potential argument based on congressional authority to regulate in the field of low-level radioactive waste. See *id.* at 159-60. In establishing the direction of its opinion and pinpointing the crux of the *New York* controversy, the Court described the “litigation [as] concern[ing] the circumstances under which 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 in a particular way.” *Id.* at 161.

89. See *id.* at 161-88. Emphasizing that the Constitution does not confer upon Congress the ability to regulate the activities of the states as states, the Court supported the unconstitutionality of the take-title provision of the Waste Amendments by observing that Congress “crossed the line distinguishing encouragement from coercion.” *Id.* at 175.

The *New York* Court rejected the United States' argument that the Waste Amendments gave the states wide latitude in implementing its provisions by concluding that regardless of the number of alternative means of implementation available to the states, the Waste Amendments did not allow states to decline ad-
although the federal government has constitutional authority to preempt state regulations that are contrary to federal interests and provide incentives that encourage states' adoption of suggested regulatory schemes, Congress may not direct states to undertake specific actions within their own borders.⁹⁰

Several years later, the Court similarly ruled in favor of state rights in United States v. Lopez.⁹¹ At issue in Lopez was whether the Commerce Clause authorized Congress to enact the Gun-Free School Zones Act of 1990, which made possession of a firearm in a school zone illegal.⁹² The Lopez Court reasoned that Congress exceeded its Commerce Clause power because the Act neither regulated a commercial activity nor required that possession of a firearm be connected to interstate commerce.⁹³ Lopez, therefore,
represents the Court's implementation of definite limits on Congress's power to legislate in the area of interstate commerce.\textsuperscript{94}

IV. NARRATIVE ANALYSIS

In \textit{ACORN}, the Fifth Circuit focused on two issues raised on appeal that the District Court for the Eastern District of Louisiana had decided in \textit{ACORN}'s favor.\textsuperscript{95} First, the Fifth Circuit considered whether Louisiana's distribution of the EPA Fact Sheet sufficed to constitute compliance with section 1464(c).\textsuperscript{96} The Fifth Circuit then focused on the constitutionality of section 1464(d), which requires states to establish programs "to assist local educational agencies, schools, and day care centers in remediying potential lead contamination in their drinking water systems."\textsuperscript{97} Holding that Louisiana complied with section 1464(c) and that the requirements section 1464(d) imposed were an unconstitutional infringement upon Louisiana's Tenth Amendment sovereignty, the Fifth Circuit reversed the district court's decision to award attorneys' fees to \textit{ACORN} and dismissed \textit{ACORN}'s claims.\textsuperscript{98}


\textsuperscript{96} See id. at 1390-92. The Fifth Circuit noted that:

[Although] [t]here has never been any contention by \textit{ACORN} that the Defendants failed to properly disseminate the EPA's guidance document and testing protocol . . . the [EPA] Administrator, having generated [a guidance document and testing protocol], has never published more than a notice of their availability in the Federal Register. Thus, the "published" documents distributed by the State in compliance with this requirement were not documents "published in the Federal Register."

\textit{Id.} at 1391 n.10 (citations omitted).

\textsuperscript{97} \textit{Id.} at 1392-94. For a discussion of cases involving the adjudication of disputes over the respective limits on the Commerce Clause powers of the state and federal governments, see \textit{supra} notes 57-94 and accompanying text.

\textsuperscript{98} See \textit{id.} at 1392-95. Before concluding that Louisiana complied with the LCCA section 1464(c) distribution requirement, the \textit{ACORN} court observed that Louisiana's "error, if any . . . was inconsequential, in that the entities receiving the
The Fifth Circuit began its analysis with a discussion of LCCA. The Fifth Circuit noted that under LCCA states share with the EPA Administrator the responsibility of remediing the problem of lead contamination in their drinking water. The Fifth Circuit also described that Congress enacted LCCA as an amendment to SDWA, specifically intending to diminish the prevalence of lead in electric drinking water coolers used in schools. The Fifth Circuit then outlined each of the provisions of LCCA that were relevant to the ACORN dispute and summarized ACORN's procedural history. The court next focused on Louisiana's argument that because both sections 1464(c) and 1464(d) unconstitutionally infringed upon Louisiana's Tenth Amendment sovereign rights, the district court improperly awarded ACORN its attorneys' fees.

The Fifth Circuit prefaced its discussion of the constitutionality of the relevant LCCA provisions by noting its obligation to avoid undertaking unnecessary constitutional analyses. The Fifth Circuit then addressed ACORN's argument that Louisiana failed to comply with LCCA's publication requirements, determined that Louisiana's distribution of the EPA Fact Sheet constituted compliance with section 1464(c)'s obligations and concluded that ACORN was therefore not entitled to recovery of attorneys' fees for that portion of its claim. The Fifth Circuit then found that although it

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100. See ACORN, 81 F.3d at 1388. For the pertinent text of LCCA section 1463(a), which defines the EPA Administrator's duties of identifying non-lead free electric drinking water coolers and publishing those findings, see supra note 36.

101. See id. at 1388. For a discussion of the historical prevalence of lead contamination in the United States, as well as congressional attempts to address the problem, see supra notes 1-6 and accompanying text.

102. See id. at 1389-92. For the text of the relevant provisions of LCCA, see supra notes 36 & 37. For the procedural history of ACORN, see supra notes 21-30 and accompanying text.

103. See id. at 1390-95.

104. See id. at 1390-91.

105. See ACORN, 81 F.3d at 1390-92. For a summary of the Fifth Circuit's discussion of the publication requirements of section 1464(c), see supra note 27.
was able to avoid undertaking a constitutional analysis of section 1464(c), section 1464(d) warranted constitutional scrutiny.106

The Fifth Circuit applied the reasoning the Court set forth in New York v. United States in assessing the constitutionality of section 1464(d).107 Outlining the New York Court's establishment of guidelines for states' Tenth Amendment challenges of congressional actions, the Fifth Circuit noted its dual obligation to evaluate Congress's regulatory power under the Commerce Clause and to consider whether the measures Congress employed violated states' Tenth Amendment rights.108 The Fifth Circuit highlighted the underpinning of the New York decision, stating "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."109 Observing that states' options under section 1464(d) consisted of either establishing the federally mandated programs or being subjected to civil enforcement proceedings under section 1449(a) of SDWA,110 the Fifth Circuit determined that section 1464(d) was a "[c]ongressional conscription of

106. See id. at 1392. The Fifth Circuit commented that "[h]eeding the Supreme Court's admonition to avoid unnecessary resolution of constitutional questions, we have foregone determining whether [section 1464(c)] breaches the Tenth Amendment. Section [1464(d)], however, does not escape such inquiry." Id.

107. See id. at 1392-94. In establishing the applicability of the Supreme Court's analysis in New York, the Fifth Circuit referenced the brief the United States submitted in intervention in ACORN. See id. at 1392. The United States observed:

As recognized by the Supreme Court, the Tenth Amendment does not bar federal requirements that states provide limited assistance in implementing federal law. The Supreme Court's decision in New York v. United States did not change this well-established principle. New York is best read as holding that the federal government may not coerce states into legislating according to the dictates of the federal government. It leaves in place the well-established principle that the federal government can call upon states to assist in the implementation of a federal law.

Brief for the United States in Intervention at 15-16, ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996) (No. 94-30714) (citation omitted).

108. See ACORN, 81 F.3d at 1393. The Fifth Circuit noted its dual obligation upon challenge of a congressional act to both consider whether Article I of the Constitution authorizes Congress to enact that particular act as well as to discern whether Congress's chosen regulatory method accords with states' rights under the Tenth Amendment. See id. at 1393 (citing New York v. United States, 505 U.S. 144, 157-61 (1992)).

109. Id. at 1394 (citing New York, 505 U.S. at 188).

110. Section 300j of SDWA provides in pertinent part that "any person may commence a civil action on his own behalf— (1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency . . . ) who is alleged to be in violation of any requirement prescribed by or under this title . . . ." SDWA § 1449(a), 42 U.S.C. § 300j (1994).
state legislative functions . . . clearly prohibited under New York's interpretation of the limits imposed upon Congress by the Tenth Amendment.”

V. CRITICAL ANALYSIS

In ACORN, the Fifth Circuit invalidated as unconstitutional section 1464(d) of LCCA, which mandated that states establish programs “to assist local educational agencies, schools, and day care centers in remedying potential lead contamination in their drinking water systems.” Finding the provision to be both an over-extension of congressional Commerce Clause power as well as an infringement upon Louisiana's Tenth Amendment sovereign rights, the Fifth Circuit applied the Court’s New York analysis. Although both the statutory analysis as well as the constitutional analysis the Fifth Circuit made were legally sound, its ACORN decision represents a poor policy choice, and one which is likely to adversely affect the existence of the states as a unified and commonly-focused federal body in the environmental policy arena.

A. Statutory Analysis

Before reaching a constitutional analysis of section 1464(d), the Fifth Circuit correctly decided that Louisiana’s dissemination of the EPA Fact Sheet constituted compliance with section 1464(c) and that ACORN was therefore barred from recovering attorneys’ fees under section 1449(d). The Fifth Circuit thoroughly supported its dismissal of ACORN’s argument that the term “publish” as used in section 1464(d) requires publication in the Federal Register. In keeping with Colorado Environmental Coalition v. Romer, in which the district court established as pre-requisites to recovery of attorneys’ fees under section 1449(d) both the claiming party’s status as a prevailing party as well as a showing that its action was the

111. ACORN, 81 F.3d at 1394. The Fifth Circuit, in reaching this conclusion, also observed that under LCCA, states “face a choice between succumbing to Congressional direction and regulating according to Congressional instruction, or being forced to do so through civil action in the federal courts.” Id.
112. Id.
113. See id. at 1392-94. For a discussion of New York, see supra notes 87-90 and accompanying text.
114. For discussion of the impact of the Fifth Circuit’s decision in ACORN, see infra notes 138-43 and accompanying text.
115. For a narrative analysis of the Fifth Circuit’s ACORN decision, see supra notes 95-111 and accompanying text.
116. See id. at 1391-92. For a discussion of the ACORN court’s treatment of the conflict surrounding the meaning of the term “publish,” see supra note 27.
catalyst for the opposing party's acquiescence to its claim, the Fifth Circuit correctly concluded that ACORN's failure to satisfy these requirements eliminated its potential for recovery of attorneys' fees.117

B. Constitutional and Policy Analyses

I. ACORN: A Sound Constitutional Decision

In assessing the constitutionality of section 1464(d), the Fifth Circuit correctly relied upon and applied the Court's New York analysis.118 New York is one of the Court's most recent decisions in a long line of cases involving the dispute between the respective limits of congressional Commerce Clause power and state sovereignty under the Tenth Amendment.119 The continued confusion and debate over these limits has resulted in what can at best be described as an ambiguous set of judicial standards.120 By defining the states as autonomous entities, the New York Court brought some resolution to this debate and provided the Fifth Circuit with a firm basis for its conclusion that Congress exceeded its Commerce Clause power in promulgating section 1464(d).121

117. See id. at 1395. For a discussion of Colorado Environmental Coalition v. Romer, see supra notes 39-48 and accompanying text.

118. See id. For a discussion of the Fifth Circuit's application of the New York analysis to ACORN, see supra notes 107-11 and accompanying text.

119. See New York v. United States, 505 U.S. 144 (1992). For a discussion of cases leading up to the Court's New York decision, see supra notes 61-86 and accompanying text.

120. See generally H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993) (discussing debates which have historically surrounded federalism, as well as Justice O'Connor's consistent emphasis on appropriateness of undertaking federalism approach when resolving constitutionally based conflicts). One author comments, "Congress' attempt to employ state administrative tools to dispose of the country's radioactive waste is a symptom of the tensions between the federal government and the states." Lyle Deborah Griffin, Comment, A Glimmer of Hope for State Sovereignty: The Supreme Court Limits Federal Regulation of Radioactive Waste Disposal, 23 CUMB. L. REV. 655, 657 (1993). This author adds that as of its New York decision, the Court had not yet firmly defined its role in preserving federalism. See id. at 686.

121. See Evan H. Caminker, State Sovereignty and Subordinency: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001, 1015 (1995). One commentator compares the New York Court's depiction of state autonomy to that of preceding decisions, commenting that "New York's autonomy model, with its strict differentiation of permissible inducement and impermissible coercion, paints a very different picture [than cases which preceded it] of the role of states within the realm of federal legislative authority. . . ." Id. at 1015. For one commentator's argument that Justice O'Connor has continually evinced an inclination toward federalism in the line of cases in which she has been involved, see Powell, supra note 120, at 638-39. See also Powell, supra note 120, at 689 (commenting "[i]f some form of federalism ultimately does come to have a 'basis in firm constitutional law,' New York v. United States is likely to be seen as its judicial gene-

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When the Fifth Circuit ruled in favor of Louisiana’s Tenth Amendment sovereign rights, it abided by the principles the New York Court established. The Fifth Circuit held consistently with the New York Court’s recognition of the merits of federalism and conformed with the framers’ intent that the Constitution govern a unified, yet sovereign, group of states. Continuing the trend of increased recognition of states’ rights, the Fifth Circuit accurately assessed section 1464(d) as an unconstitutional extension of Congress’s Commerce Clause power. Although the Fifth Circuit undertook an appropriate constitutional analysis in ACORN, the decision’s unfavorable environmental policy implications undermine its soundness.

2. ACORN: A Poor Policy Decision

Debate over the proper methods and avenues for environmental policy-making is largely attributable to the historical uncertainty surrounding the delegation of legislative authority to the federal and state governments by the Constitution. This debate has fos-

122. See ACORN, 81 F.3d at 1394. The Fifth Circuit noted that “LCCA gives the States no alternative but to enact the federal regulatory plan as prescribed in [section 1464(d)], and such Congressional conscription of state legislative functions is clearly prohibited under New York’s interpretation of the limits imposed upon Congress by the Tenth Amendment.” Id.

123. See id. at 1392-95 (discussing both Tenth Amendment and New York, and applying New York analysis to ACORN); see also Kahalley, supra note 70, at 134 (noting “[t]he Constitution’s framers intended that state sovereignty be protected by something more than the political process, and the Court acknowledged this in New York”). For evidence of the framers’ intent as provided in the Federalist Papers, see supra note 53. For a discussion of New York’s impact on cases involving the Tenth Amendment and federalism, see Pohlenz, supra note 87, at 236-58; John G. Schmidt, Jr., The Tenth Amendment: A “New” Limitation on Congressional Commerce Power, 45 Rutgers L. Rev. 417, 453-55 (1993).

124. For the Fifth Circuit’s application of the New York Court’s reasoning to the ACORN conflict, see ACORN, 81 F.3d at 1394-95.

125. For a critical discussion of ACORN as a poor environmental policy decision, see infra notes 126-37 and accompanying text.

126. See generally Percival, supra note 58 (commenting that national environmental policy has virtually taken over contemporary federalism debates); see also Joshua D. Sarnoff, The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection, 7 Duke Envtl. L. & Pol’y F. 225, 227 (1997) (discussing historical debate surrounding federal and state legislative authority). For an overview of the historical uncertainty surrounding the Constitution’s delegation
tered the development of two theoretical approaches to evaluating and determining environmental policy, namely, decentralization and centralization. ¹²⁷ In ACORN, the Fifth Circuit employed the decentralist approach, which resulted in strengthening the New York Court’s endorsement of the states’ attenuation from their existence as part of a unified, national body. ¹²⁸ Considering this decision’s unfavorable environmental policy implications, however, the Fifth Circuit might have arrived at a more desirable conclusion in ACORN had it assumed a more centralist approach. ¹²⁹ Appreciation of this proposal requires examination of the rationales of decentralization and centralization.

The decentralists view the states as the optimal crafters of individual, interest-based environmental policies. ¹³⁰ Decentralization’s focal theoretical points are the benefits of regulatory diversity and competition among states, the importance of public choice claims of powers to the federal and state governments, see supra notes 49-52 and accompanying text.


Observing increasing congressional regulatory activity in the environmental arena, one author notes:

A groundswell of public and political reaction to pollution and unrestrained growth led to the "environmental decade" of the 1970's. Ushered in by the National Environmental Policy Act of 1969, the decade witnessed the creation of the United States Environmental Protection Agency (EPA) as well as the enactment of nearly a dozen laws addressing air and water pollution, noise, solid waste and land use. Jeffrey T. Renz, The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters? 48 Mont. L. Rev. 197, 202 (1982) (citations omitted); see also Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1196 (1977) (discussing balance of power between state and federal governments). One critic attributes the federalization of environmental law to the existence of federal law as the most effective approach to overcoming localities’ overemphasis on their individual concerns and the utility of federal law in ensuring minimum levels of protection to citizens regardless of their place of residence. See Percival, supra note 58, at 1171.

¹²⁸ See ACORN, 81 F.3d 1387.

¹²⁹ For a proposal of a potential outcome of the Fifth Circuit’s decision had it assumed a centralist approach, see infra notes 138-43 and accompanying text.

¹³⁰ See Rubin & Feeley, supra note 58, at 910 (commenting “the main reason to decentralize is to achieve effective management”). The benefits of decentralization have been defined as: 1) state and local governments are better able than the federal government to reflect geographical variation in preferences regarding environmental quality and the cost of preserving that quality; 2) facilitating experimentation with varied governmental policies; and 3) encouraging self-reliance and self-determination among state and local governments. See Stewart, supra note 127, at 1210-11.
regarding equality of states' decision-making power and the weakness of morality-based arguments for federal regulation.\textsuperscript{131} Alternatively, in their support of the federal government as the best source of environmental policy, centralists emphasize the desirability of national economies of scale.\textsuperscript{132} Centralization also highlights the ability of the federal legislature to overcome disparities in states' effective political representation, correct market failures arising from pollution externalities such as spill-overs and pursue moral ideals on a national plane.\textsuperscript{133}

The Fifth Circuit assumed a decentralist approach in deciding \textit{ACORN}.\textsuperscript{134} By holding section 1464(d) invalid on the grounds that it violated Louisiana's Tenth Amendment sovereign rights, the Fifth Circuit negated an attempt by Congress to regulate states' establishment of remedial action programs for the removal of lead from the drinking water systems in schools, thereby granting Louisiana the power to determine its own environmental policy regarding lead

\textsuperscript{131} See Esty, \textit{supra} note 127, at 606-07. Two main benefits of regulatory diversity and competition among states are: 1) it allows states to act as laboratories and testing grounds in the formation of policies; and 2) regulations tailored to local interests have proven to be economically more beneficial than those which sweep broadly across all jurisdictions. \textit{See id.}; \textit{see also} Stewart, \textit{supra} note 127 at 1210-11. “Decisions about environmental quality have far-reaching implications for economic activity, transportation patterns, land use, and other matters of profound concern to local citizens. Federal dictation of environmental policies depreciates the opportunity for and value of participation in local decisions on such matters.” Stewart, \textit{supra} note 127, at 1220. Two arguments commonly advanced against centralization are that: 1) decisions made at the level of the federal government do not accurately reflect the interests of states and localities; and 2) interest groups are more likely to affect political decision making at the federal level than at the state and local levels. \textit{See Esty, supra} note 127 at 609-10.

\textsuperscript{132} See Stewart, \textit{supra} note 127, at 1211. One commentator observes that although noncentralized decision making has traditionally been favored in the United States, in recent years Congress has defeated that inclination through its enactment of environmental measures and standards. \textit{See id.} He also asserts an economic based need for national environmental policy by arguing that allowing state and local governments to adopt lower environmental standards might potentially lead to loss of industry and development. \textit{See id.} at 1211-12; \textit{see also} Esty, \textit{supra} note 127, at 600-05 (outlining historical development of centralization).

\textsuperscript{133} See Stewart, \textit{supra} note 127, at 1213-17. One critic notes his absence of surprise at both environmental groups' favoring federal environmental regulation over that of state and local governments as well as the correlation between increased public support for environmental protection and increased federal regulation. \textit{See id.} at 1213. He also comments that decentralization is ill-equipped to address the conflicts and welfare losses jurisdictions suffer because of the effects their individual decisions have on neighboring areas. \textit{See id.} at 1215. Finally, he notes a connection between the moral content of heightened environmental concern and increased resort to centralized decision-making. \textit{See id.} at 1217.

contaminated drinking water.\textsuperscript{135} \textit{ACORN} therefore represents the Fifth Circuit's fragmentation of environmental legislative authority between the federal and state governments, an action which contravenes the framers' specific intent that the states coexist as part of a union valuing the common interests and general welfare of its citizens.\textsuperscript{136} Had the Fifth Circuit assumed a centralist approach, it might have held section 1464(d) constitutional and decided \textit{ACORN} in a manner more consistent with the framers' ideals and current national environmental policy objectives.\textsuperscript{137}

VI. IMPACT OF \textit{ACORN v. EDWARDS}: BALANCING LEGAL AND POLICY CONSIDERATIONS

The Fifth Circuit's decision in \textit{ACORN} will hinder the states' collective pursuit of common environmental policy objectives. By tipping the balance between state sovereignty under the Tenth Amendment and congressional Commerce Clause power in favor of Louisiana, the Fifth Circuit demonstrated its express indifference to national environmental interests.\textsuperscript{138} Although the Fifth Circuit undertook sound statutory and constitutional analyses in deciding \textit{ACORN}, its disregard of the paramount importance of environmental policy interests significantly diminishes the value of its decision.\textsuperscript{139} If those courts that oversee future litigation involving a state's assertion of an over-reading of the legislative authority of the federal government accord with the standards the Fifth Circuit in

\begin{footnotesize}
\begin{enumerate}
  \item See id. For a discussion of the Fifth Circuit's application of a constitutional analysis in \textit{ACORN}, see supra notes 107-11 and accompanying text.
  \item For a discussion of the framers' intent as expressed in the Constitution, see supra notes 49-51 and accompanying text.
  \item One commentator observes that "[r]egulatory theory in the environmental domain must rest on an understanding of the \textit{unique nature} of environmental problems and environmental regulation." Esty, supra note 127, at 652 (emphasis added). Other critics further emphasize the desirability of centralization by challenging the necessity of the states as independent legislative bodies. See Rubin & Feeley, supra note 58, at 951. Also in support of centralization, one author argues that adoption of a decentralized approach will lead to states' enactment of minimally protective environmental policies, commonly known as the "race-to-the-bottom" phenomenon. See Sarnoff, supra note 126, at 278-85; but see Richard L. Revesz, \textit{Rehabilitating Interstate Competition: Rethinking the Race-to-the-Base Rationale for Federal Environmental Regulation}, 67 N.Y.U. L. Rev. 1210 (1992) (arguing theoretical unsoundness of "race-to-the-bottom" theory). For a comprehensive discussion of the "race-to-the-bottom" theory, see Kirsten H. Engel, \textit{State Environmental Standard-Setting: Is There A "Race" and Is It "To The Bottom"?}, 48 HASTINGS L.J. 271 (1997).
  \item See Sarnoff, supra note 126, at 232 (noting [w]hen national evaluative norms are employed, federal regulation is more likely than state or local regulation to increase social welfare").
  \item For a critical analysis of the Fifth Circuit's \textit{ACORN} decision, see supra notes 112-37 and accompanying text.
\end{enumerate}
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ACORN set forth, it is likely that state legislative and policy-making power will grow exponentially. This will drastically diminish Congress's authority to regulate matters of interstate interest and cause national environmental policy objectives to suffer.\textsuperscript{140}

Rather than focus on the powers of either the federal or state governments, courts should consider as an alternative the adoption of a balancing, or middle-of-the-road, approach.\textsuperscript{141} This approach would afford comprehensive consideration of the particular interests of the state and federal governments. Moreover, this approach would both better serve national environmental policy objectives as well as avoid the extreme results that employment of either a centralist or decentralist approach guarantees.\textsuperscript{142} By conforming with courts' historical employment of constitutional analysis, the Fifth Circuit failed to establish either a sound environmental decision or any definite standard for resolution of conflicts involving the respective powers of the federal and state governments under the Commerce Clause and Tenth Amendment. Therefore, the judiciary should focus more on policy in its reconciliation of environmental issues.\textsuperscript{143} Because the environmental arena is becoming an increasingly national concern, now is an optimal time for courts to establish a sound policy-based approach to resolving disputes likely to affect national environmental welfare.

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\textsuperscript{140} For a discussion of the potential ramifications of allowing the growth of states' environmental legislative authority, or decentralization, see \textit{supra} note 130.

\textsuperscript{141} See Esty, \textit{supra} note 127, at 653 (seeking "a middle road between the centralizers and the localizers in favor of a spectrum of regulatory entities"); see also Bagnall, \textit{supra} note 62, at 576 (noting "[a]lthough there are no immediate solutions to the problem of federal mandates, a balance is needed").

\textsuperscript{142} See Percival, \textit{supra} note 58, at 1178-79. The "focus should be on what works best in promoting national interests in environmental protection in a manner that is sensitive to state sovereignty." \textit{Id.} at 1179. Before realizing this national objective, however, "[o]ver the next few years, we must face the challenge of sorting the appropriate roles of federal, state, and local governments in protecting human health and the environment . . . ." \textit{Steinzer, supra} note 34, at 225.

\textsuperscript{143} For a discussion of courts' efforts to define federal and states governments' respective Commerce Clause and Tenth Amendment powers, see \textit{supra} notes 57-94 and accompanying text.