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**Observation 1 – The Status Quo**

***Fracking is inevitable --- Only a question of who regulates***

**Skorton**, 9/24/**12** (David, president of Cornell University, also holds faculty appointments at Weill Cornell Medical College and the College of Engineering. Lifetime member of the council on foreign relations& Glenn Altschuler, Cornell's [Vice President for University Relations](http://www.cornell.edu/administration/)¶ We have spent our adult lives in higher education and write about it.Forbes: “Fracking: A Role for Universities,” http://www.forbes.com/sites/collegeprose/2012/09/24/fracking-a-role-for-universities/)

Last month in a [Washington Post column](http://www.washingtonpost.com/opinions/fracking-is-too-important-to-foul-up/2012/08/23/d320e6ee-ea0e-11e1-a80b-9f898562d010_story.html) **New York City Mayor** [Michael **Bloomberg**](http://www.forbes.com/profile/michael-bloomberg/), founder of Bloomberg Philanthropies, and George P. Mitchell, philanthropist and hydrofracking pioneer, **offered** their foundations’ **support to “organizations that seek to work with states and industries to develop common-sense regulations that will protect the environment—and ensure that the [fracking] industry can thrive.**” We urge other foundations—and government officials—to enlist universities in the development of evidence-based public policy and safer fracking operations.¶ ***We cannot put this genie back in the bottle***. **Fracking is already being carried out across the country.** And **shale basins have been identified on six continents, making fracking a truly global issue**. **The questions before us are not only whether to frack, but how, where and with what safeguards in place**.¶ **With natural gas supplies plentiful** for now **and prices** relatively **low, we have time to make sound decisions about our shale gas resources**. In creative partnership with government and industry, universities can help make sure we get it right.

***This has historically been the role of the States – best empirical models shows they have been extremely effective***

**Entine**, 5/15/**12** (Jon, Senior Fellow at the Center for [Health](http://www.forbes.com/health/) and Risk Communication and at STATS at George Mason University, Forbes, “Fracking Safety Improves Dramatically, Says Independent Study” <http://www.forbes.com/sites/jonentine/2012/05/15/fracking-safety-improves-dramatically-says-independent-study/>, ts)

**A team of researchers from UB,** [***U*niversity of Wyoming**](http://www.forbes.com/colleges/university-of-wyoming/) **and Penn State University examined violations at almost 4,000 natural gas wells in Pennsylvania between January 2008 and August 2011. The *peer-reviewed study* found approximately two-thirds of the 3,000 violations were administrative,** 38 percent were environmental, and only 25 were deemed “major,” defined as site restoration failures, serious contamination of water supplies, major land spills, blowouts and venting and gas migration. The majority were “due to operator error, negligence, or a failure to follow proper procedures when drilling,” according to the report. “This suggests that the industry has room for improvement, and the frequency of environmental events can be reduced,” the authors wrote. **The safety profile of hydraulic fracturing has improved dramatically in Pennsylvania since 2008. Environmental violations as a percentage of wells drilled dropped by more than half over the course of the years examined. The study—the first based on *comprehensive data* rather than on anecdotal claims or selective reports—contradicts claims by anti-fracking groups** that shale gas extraction is poorly regulated in Pennsylvania and that the environmental dangers are increasing. “**This study presents a compelling case that state oversight of oil and gas regulation has been effective**,” said University of Wyoming economics professor Timothy Considine, who was the lead author. “**Regulatory learning and technological progress has been considerable** over the past four years.” “While prior research has anecdotally reviewed state regulations, **now we have comprehensive data that demonstrates, without ambiguity, that state regulation** coupled with improvements in industry **practices results in a low risk of an environmental event** occurring in shale development, and the risks continue to diminish year after year,” Considine added.

**Observation 2 – Federal Crowd-Out**

***New federal emission regulations on fracking issued by the EPA – these will be insufficient to solve***

**Groeger 12** Lena Groeger, Alternet, previously worked at Scientific American, where she wrote about topics in science and health. Prior to that she was at Wired, where she designed infographics and reported on technology and national security, April 19th 2012, http://www.alternet.org/story/155062/epa's\_first\_fracking\_rules\_seen\_as\_limited\_and\_delayed?akid=8636.1080031.EzL73\_&rd=1&t=13&paging=off

**The *E***nvironmental ***P***rotection ***A***gency **issued the first-ever national air pollution regulations for fracking** on Wednesday. First proposed in July 2011, the final rules have been welcomed by environmental groups as a much-needed initial move in reducing pollution and protecting public health from the toxic chemicals involved in the oil and natural gas drilling process. But **many cautioned it was just a first step**. “***It sets a floor*** **for what the industry needs to do**,” said attorney Erik Schlenker-Goodrich of the Western Environmental Law Center. “**The reality *is we can do far better***.” Over the past few years, **more information has come out about fracking’s potential harms to the environment** and human health, **particularly relating to the risk of groundwater contamination**. In addition to the many potentially toxic components of the highly pressurized fluid injected into the ground during the natural gas drilling process, fracking can also release cancer-causing chemicals like benzene and greenhouse gases like methane into the air. The federal government has made moves to tighten regulations, and we’ve chronicled the history of those regulations. **The EPA’s new rules don’t cover most of those issues**. Instead, they address a single problem with natural gas: air pollution. “**These rules do not resolve chronic water, public health and other problems associated with fracking and natural gas**,” Schlenker-Goodrich said. **The agency is *actually barred* from regulating the impact of fracking on groundwater because,** in 2005, **Congress exempted fracking from the Safe Water Drinking Act. Congressional proposals to give the EPA more oversight have so far failed.** With the new rules on air pollution, the EPA rejected an industry request to exempt some wells with low emissions of toxic compounds but did give drilling companies more time to comply. Notably, **the final version provides a two-and-a-half-year transition period** (rather than the 60 days in the original proposal) **that gives drilling companies until 2015 to comply** with the strictest regulations. The industry lobbied hard for the delay, and its reaction to the rules have been mixed. A spokesman for the American Petroleum Institute, the largest oil industry trade group, said it is still reviewing the new rules but said it's happy with changes from the original proposal that will allow companies to “continue reducing emissions while producing the oil and natural gas our country needs.” Another industry group told The New York Times that the rules are too strict and could “make exploring in new areas cost-prohibitive.” **A key rule targets one large source of air pollution** — **the burst of gas released during the first few days after a well is first tapped but before production begins**. **The EPA requires that companies start using “green completions,” a technology that captures the released gas and fumes in tanks and transports them via pipelines to be sold as fuel.** (The Natural Resources Defense Council has a good breakdown of the process). Many drilling companies already use green-completion systems. **One natural-gas company recently told Bloomberg that the system doesn’t cost the company “any more than just venting the gas into the atmosphere**.” The EPA says that once companies buy the necessary equipment to separate and collect the released gas, they could actually make up to $19 million a year selling the captured gas.

***The new EPA rules encourage companies to use outdated technology which increases methane emissions and causes runaway warming***

**Peshek & Millican ‘12**

Adam Peshek, Research Associate Reason Foundation, Robin Millican, Policy Associate Institute for Energy Research, 2-28-12, Reason Foundation, Letter to U.S. Environmental Protection Agency Office of Administrator Lisa Jackson, <http://reason.org/files/oil_and_gas_nsps_and_neshap_comment.pdf>, jj

1) Cost-Benefit Analysis Has Flawed Assumptions EPA estimates the total annualized engineering costs will be $740 million for the proposed NSPS and $16 million for the proposed NESHAP. However, the Agency claims that these costs will be offset by controls mandating the capture of natural gas that industry has been emitting and the subsequent sales of the captured natural gas. Specifically, the Agency claims the capture of 3.4 million tons of recovered natural gas with a benefit of $30 million annually. This approach is flawed for several reasons. First, EPA assumes that only a small percentage of facilities are capturing this vented gas and thus creates an economic benefit on a premise that is likely already occurring in situations where this practice is feasible. Furthermore, **the assumption that a government agency possesses more industry knowledge on how to create profits from technology investments is flawed**. If one believes in efficient markets, one has to then assume that any **profit-inducing technologies would be implemented quickly by industries in an attempt to create higher profits and a larger share of the market**. **It would make no logical sense for companies to ignore technology that allows them to earn higher profits through efficiency**. Second, **these rules divert investments from capital and energy development into regulatory compliance efforts, leading to less energy production in natural gas**. **The notification, record keeping, monitoring, reporting, and performance testing requirements are burdensome to industries and the state regulators required with process the paperwork**. They also do not take into account that **many facilities are in remote and unmanned locations, making paperwork compliance all the more difficult**. **These provisions require significant administrative costs with little impact on actual emissions reductions**. **These costs** – both from diverted resources and administrative costs – **are not figured into the cost-benefit analysis**. Third, EPA’s model is based on an assumed wellhead price of $4/thousand cubic feet (Mcf) for natural gas. EPA’s model shows that “$1/Mcf change in the wellhead price causes a change in estimated engineering compliance costs of about $180 million,” with annualized engineering costs increasing to about $140 million under a $3/Mcf price and decreasing to about -$230 million under a $5/Mcf price. As of September 2011, two months preceding EPA’s analysis, wellhead price fell to $3.70/McF. Based on the Agency’s own analysis, this should result in $125 million in additional cost. Historically, wellhead prices have fluctuated substantially, with decade-averages of $1.92/McF in the 1990s, $5.26/McF in the 2000s, and $4.16/McF today. This includes dramatic price shifts from year to year during the past decade, as seen below: 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 3.68 4.00 2.95 4.88 5.46 7.33 6.39 6.25 7.97 3.67 4.16 %change 8.7% 26.2% 65.4% 11.9% 34.2% 12.8% -2.2% 27.5% -54% 13.4% Given these stark year-to-year changes, placing an accurate estimate on future compliance costs is difficult. With abundant supplies much of these price swings can be mitigated. Therefore it has been argued that stabilization in prices has come with improved technologies in recent years. In some ways this is correct, which is good for consumers. However, regulating on this premise is flawed because it assumes a constant state of production from producers. Many of the resources for the two sectors are exchangeable (equipment and labor) and studies are showing that in recent years natural gas has not met the break-even prices for companies to produce it. If companies are able to obtain greater profits from the exploration of oil, they will pursue that avenue, and indeed we are already observing this shift. Natural gas drilling is down 10% while oil drilling is up 80%, and earlier this year, more companies were drilling for oil than natural gas – the first time since 1995. Moreover, more regulations on the natural gas sector could affect other regulations currently being promulgated by EPA. A recent study of the state of natural gas in the nation found that “the price of natural gas has a very significant impact on the competitiveness of some U.S. manufacturing industries”. This ties directly into EPA regulations aimed at curbing emissions from coal and petroleum based sources, such as Boiler MACT. It has been acknowledged by the Agency, industry, and outsiders that a switch to natural gas may be the only option for plants faced with either adding expensive pollutant capturing technologies, fuel switching, or closure. **More stringent regulations on the natural gas industry could have an unintended consequence of raising residential energy costs** from natural gas by driving up the production of oil, while allowing demand for natural gas to catch up with supply. Lastly, in its cost-benefit analysis, **EPA has overstated the environmental benefit that would be derived from regulation**. Although EPA’s analysis shows that the proposed changes will result in VOC emissions reductions of 540,000 tons, the Agency’s own data indicates that oil and gas production represents just 2.3 percent of VOC emissions—indicating that the sector is already a low source of these pollutants. Furthermore, while the proposed changes would reduce air toxic emissions by 38,000 tons, the Agency itself writes that the **status quo emissions levels are within the acceptable range**. As such, EPA should evaluate whether the stated environmental benefits are appropriately balanced with the cost to industry and new compliance requirements. 2) **Methane Emissions Reductions Should Not Be Cited In Cost Savings** In its cost-benefit analysis, EPA claims that the resulting reduction in methane will yield about $1.6B in public health and environmental benefits; however, because methane is not a VOC or air toxic—the two types of emissions targeted by the proposed revisions—the decision to cite it as a co-benefit is questionable. However, **even if methane emissions reductions were to be cited as a co-benefit, EPA’s analysis of its environmental impact is flawed**. Namely, when detailing the impact of methane on anthropogenic global warming, no sense of proportion or the scope of its impact is provided Instead, EPA lists problems occasioned by anthropogenic global warming such as increasing ocean temperatures, increasing air temperatures, and rising sea levels, with the assumption then being that the methane emissions decrease created by this rule will have an impact on these issues. However, by comparing the claimed methane reductions with proposed greenhouse gas reductions measures of a much greater scale, it is apparent that the proposed rule will have a negligible effect on climate issues. **Methane is a potent *g*reen*h*ouse *g*as and as EPA explains, “Methane**, in addition to other GHG emissions, **contributes to warming of the atmosphere, which, over time, leads to increased air and ocean temperatures**…” EPA however, does not model the temperature impact this rule will have. In calculating any impacts of reduced greenhouse gases, this is an unavoidable step. EPA’s failure to do so is arbitrary and capricious. It is an exceedingly great omission for EPA not to include the temperature impacts of this rule because EPA has access to and has paid for multiple models to aid this very kind of decision. One option is the MAGICC/SCENGEN models and another is the Mini-Climate Assessment Model (MiniCAM). Were one to employ these models, the impact of the proposed rule would be shown to be negligible. The MAGICC model would have shown an exceedingly small temperature impact created by this rule—possibly on the order of a couple thousandth of a degree Celsius by the year 2010. For comparison’s sake, the 2009 Waxman-Markey bill—which would have required an 80 percent reduction in greenhouse gas emission by 2050—would only result in a temperature impact of 0.05 C by 2050 and 0.112 C by 2100. If an 80 percent reduction in total U.S. greenhouse gas emission would only result in 0.112 C of temperature avoided, reducing methane emissions by 65 MMT CO2e1 out of a total of 6,633 MMT CO2e total U.S. annual emissions would be much less. This rule will reduce U.S. GHG emissions by less than one percent, compared to WaxmanMarkey’s 80 percent reduction by 2050. Waxman-Markey’s temperature impact was exceedingly small. It is arguable that a 0.112 C impact would result in climate impacts. But reducing U.S. greenhouse gas emissions by 1 percent would have an even smaller impact, possibly around two-thousandths of a degree Celsius. A two-thousandths of a degree change will not have climate impacts. Instead of using the models it paid to develop to estimate temperature impacts, EPA has opted to use the “social costs of carbon” in its cost-benefit analysis. However, EPA estimates of the social costs of carbon are arbitrary and capricious, because there is no evidence that these values are real. Furthermore, using the social costs of carbon is a misnomer, as not all greenhouse gases contain the element of carbon. Additionally, from a policy standpoint, **overregulation of the natural gas industry can have adverse effects on any efforts to curb CO2 emissions**. Melanie Kenderdine, executive director of the MIT Energy Initiative and a co-author of a recent MIT report on the natural gas industry, noted that **policies supporting the conversion from traditional fossil fuels to cleaner-burning natural gas “should be pursued as the only practical option for near-term, large-scale CO2 emissions reductions.**” 3) EPA Claims of Positive Health Benefits Lack Supportive Data EPA itself admits that the variances in well locations and the localized nature of air quality responses pose difficulties in modeling public health impacts. EPA writes: With the data available, we are not able to provide credible health benefit estimates for the reduction in exposure to HAP, ozone and PM (2.5 microns and less) (PM2.5) for these rules, due to the differences in the locations of oil and natural gas emission points relative to existing information and the highly localized nature of air quality responses associated with HAP and VOC reductions. This is not to imply that there are no benefits of the rules; rather, it is a reflection of the difficulties in modeling the direct and indirect impacts of the reductions in emissions for this industrial sector with the data currently available. In addition to health improvements, there will be improvements in visibility effects, ecosystem effects and climate effects, as well as additional product recovery. Supportive data prior to proposing new regulations should be prerequisite, and the mere assertion that there will be health benefits is insufficient proof. According to EO 12866, “each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation,” while Executive Order 13563 states that the regulatory system must be based on the “best available science.” EPA’s claim of health improvements without credible health benefit estimates violates the spirit of EO 12866 and EO 13563. In EPA’s words, “we do not have sufficient information or modeling available to provide quantitative estimates for this rulemaking…” EPA lists a catalogue of horribles, but that does mean the rule will impact adverse health outcomes in any meaningful way. In fact, because EPA does not quantitatively assess the health effects, it is prima facie evidence that these regulations will not create positive health benefits. 4) Voluntary Programs to Control Emissions Already Exist According to EO 13563, to the extent possible, “each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.” As such, EPA should consider whether the existing programs to control natural gas emissions are sufficient to achieve the desired result without the need for new regulation, or whether existing voluntary programs or incentives could be improved to achieve these results. A prime example is the Natural Gas STAR Program, which EPA has overseen since 1993. Natural Gas STAR is a voluntary partnership that encourages oil and natural gas companies to adopt emissions curbing technologies in a cost-effective and flexible way. EPA touts the programs successes on their website: “Since 1993, the Program's domestic partners have eliminated more than 904 billion cubic feet (Bcf) of methane emissions through the implementation of approximately 150 cost-effective technologies and practices.” Both long- and short-term achievements have been applauded by the Agency: “… for 2009, Natural Gas STAR partners reported domestic emissions reductions of 86 Bcf. These methane emissions reductions, voluntarily undertaken by Natural Gas STAR partner companies, have cross-cutting benefits on domestic energy supply, industrial efficiency, revenue generation, and greenhouse gas emissions reductions. In the 2009 reports, partners reported methane emission reductions resulting from the implementation of 82 technologies and practices, including one new activity.” A stated goal of the regulations is an annual reduction of 3.4 million tons of methane, or the equivalent of 65 million metric tons of carbon dioxide equivalent (CO2e). This goal – equivalent to the annual methane emissions of all forest fires globally – is achievable through voluntary means. Through the voluntary STAR Program, companies have been able to meet more than half of that, with the avoidance of 34.8 million tons CO2 equivalent and the carbon sequestration of 7.4 million acres of forest in 2009 alone. An important point is that year after year improvements are occurring. In 2003, the STAR program avoided a cumulative 350 billion cubic feet (BcF). This number rose to 600 BcF in 2006 and over 900 BcF in 2009. **With reduction and sequestration accomplishments already on the rise through flexible, voluntary programs, the need for command and control style regulations is questionable**. 5) **States are in a Better Position to Regulate** Through both their proximity to the affected facilities and their intimate knowledge of local resources, states are in a better position to regulate toxic **air emissions than a federal agency**. In fact, **the effectiveness of states’ current regulatory efforts have been lauded by a government task force** charged with reviewing the state of the natural gas sector. The Natural Gas Subcommittee of the Secretary of Energy’s Advisory Board has been tasked, and is in the midst of recommendations to improve the safety and environmental performance of hydraulic fracturing. In testimony before the Senate Energy and Natural Resources Committee, all four representatives from the subcommittee on natural gas remarked on the quality of the states’ regulatory process. **Daniel Yergin, Chairman of IHS Cambridge Energy Research Associates and member of the subcommittee noted** that he was “very impressed by the extent and the seriousness of the states [regulations], and as I said before, there is a tendency to assume that this isn’t going on but it’s been going on for decades. **The states are the leader and bring that long experience to it.” When asked if there is any danger in the federal government stepping in to regulate areas that have historically been regulated by states, Yergin commented: “Certainly you can end up having a kind of super structure on top of a superstructure that would make investment more difficult, would take a much longer time to get things done, and move farther away from communities**.” Kathleen McGinty, Former Secretary of the Pennsylvania Department of Environmental Protection and subcommittee member remarked that “there was nothing in the testimony we heard, the substance we focused on, or what needs to be done that lead to a glaring conclusion that there is an actor missing from the [regulatory] scene.” Mark Zoback, Professor of Geophysics at Stanford University noted that the subcommittee recognizes that “the differences geologically from place to place put the states in the right position to do this because we did not see a one size fits all solution. That’s why we endorse **groups like STRONGER** – to ***allow the states to learn from each other***…” STRONGER – the State Review of Oil and Natural Gas Environmental Regulation – is a not-forprofit organization whose mission is the scientific peer-review of state regulations around oil and natural gas. “There are other important mechanisms for improving the availability and usefulness of shale gas information among various constituencies. The Subcommittee believes two such mechanisms to be exceptionally meritorious (and would be relatively inexpensive to expand).” **State reviews are conducted by a state regulators, environmental organizations, and industry representatives and *facilitate the sharing of best practices*** (environmental protections strategies, regulations, technical aspects, etc.) ***among states***. Both the Environmental Protection Agency and the Department of Education have supported STRONGER. ***State***-**focused programs like this should be supported, not superseded, by the federal government.** The kind of emissions controls employed by facilities are dependent on a variety of factors, including the age, location, and size of a facility. In this case, ***flexibility* is warranted and in fact *can yield the same reductions in a more cost-effective fashion.*** Indeed, as enumerated above, **the highly localized nature of air quality responses and the variances in well locations would make states a better candidate to regulate than a federal agency.** 6) ***The NSPS Incentivizes the Use of Outdated Equipment* and Deters Development** **Because the NSPS standards apply only to new or modified facilities, the rule creates the inadvertent economic incentive for owners and operators to continue using outdated, lessefficient equipment rather than incurring new costs and regulations to change.** Furthermore, **because the proposed NSPS revisions would apply to new natural gas wells— approximately 11,400 of which are drilled each year—the rule may cause operators to undertake fewer projects.** 7) **Regulatory Alternatives Should Be Evaluated** Prior To Regulation Although EPA has indicated its openness to making modifications to a handful of provisions in its proposed rule—including evaluating ways to reduce reporting requirement burdens—**no evidence was presented in the proposed rule to indicate that EPA had evaluated the costs and benefits of regulatory alternatives**, such as positive incentives to achieve the desired result. The Agency is obligated to do so under Executive Order 12866 (EO 12866), which states: “**In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating**.” Furthermore, EO 12866 directs that “each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.” 8) Regulations May Adversely Impact Workplace Safety Instead of imposing emissions limits for industry to attain, as the CAA dictates, EPA is attempting to specify a work practice in the form of “green completions” for hydraulic fracturing. However, according to EO 12866 and EO 13563, which reaffirmed the former, regulations should “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.” Furthermore, the Western Energy Alliance indicates that EPA’s proposed rule may have the unintended effect of reducing workplace safety. “Rather than petroleum and environmental engineers making the determination of how best to safely meet emissions reductions standards given the technical situation in the field,” the Alliance notes that the Agency may be prescribing work practices that may not be sanctioned or recommended by industry experts. EPA should consider whether an overly prescriptive approach that places constraints on industry-tested practices is warranted. SUMMARY OF POINTS TO CONSIDER: In summary, we ask EPA to carefully consider these points when finalizing regulations:  The premise of the regulation assumes that markets have failed to properly incentivize industry to contain emissions, yet the cost-benefit analysis predicts that the regulatory change will result in significant cost savings to industry through efficiency. These are incongruous positions.  The agency’s assumed price for natural gas does not reflect the fluctuating nature of that market’s prices.  New regulations on natural gas production and supply could have the unintended effect of incentivizing industry to shift its resources toward oil development, which is a related capability. This shift could have negative consequences for EPA’s other air quality proposals, such as Boiler MACT and greenhouse gas regulations.  **Cost-savings and environmental benefits resulting from claimed methane emissions reductions are overstated** and do not correspond to the stated intent of the proposed rule.  According to the Agency, its analysis of stated public health benefits lacks substantive scientific data.  **Regulating industry now ignores the significant progress toward emissions reductions that have been made** through voluntary programs, such as the Agency’s own Natural Gas STAR program. **State regulatory agencies share EPA’s interest in protecting public health and improving air quality, and in most cases are better endowed to respond to these challenges**. Programs like the State Review of Oil and Natural Gas Environmental Regulations (STRONGER) provide peer-review of state regulatory plans, facilitate continued improvements through the communication of best practices between states, and allows greater collaboration between government, industry, and the public than the federal regulatory process.  **The** proposed **rule**, as written, **may have the unintended consequence of disincentivizing operators from upgrading to new equipment that will be subject to the new maximum attainable control technology**.  Alternatives to the proposed regulation—including providing positive economic incentives to industry—were not evaluated in the cost-benefit analysis.  The proposed rulemaking may have the unintended consequence of reducing workplace safety by specifying behaviors for industry to adopt that may differ from practices recommended by experts.

***EPA regulations will be a ceiling that locks-in current regulations and crowds out state race-to-the-top – Prefer our evidence – it uses empirical models***

**Adler 06** – Jonathan H. Adler, Professor of Law and Co-Director, Center for Business Law and Regulation, Case Western Reserve University School of Law, “WHEN IS TWO A CROWD? THE IMPACT OF FEDERAL ACTION ON STATE ENVIRONMENTAL REGULATION”, Harvard Environmental Law Review, May 1st 2006, http://www.law.harvard.edu/students/orgs/elr/vol31\_1/adler.pdf

Just as federal action may indirectly encourage greater state regulatory activity, **federal action may discourage state regulatory action**. **This can occur in at least two ways. First, the adoption of a federal regulatory standard may “signal” that more stringent state regulations are unnecessary**. **In effect, the federal standard may be seen as evidence that a given level of regulatory protection is sufficient to safeguard relevant public interests, and more stringent measures *are unnecessary*.** As a result, **the adoption of a *federal regulation*** **may induce state policy-makers to adopt** ***comparable*** **state protections. In addition, the adoption of a federal regulation may *crowd out* state regulatory measures by reducing the net benefits of additional state measures.** **As a result, the existence of federal regulation may *discourage* the adoption of additional state-level regulatory protections in the future. The potential for federal regulatory measures to *reduce*** the level of **state regulatory activity is significant because it challenges the prevailing assumption that the adoption of a federal regulatory standard raises, or** at least **maintains, the aggregate level of protection nationwide**. 116 **Many environmental analysts,** for example, **suggest that the federal government should adopt a regulatory floor**, **but allow states to implement federal standards and adopt more stringent measures of their own**. 117 **The general belief is that this will maximize the extent of environmental protection. Yet if the adoption of federal regulatory standards can induce states to adopt *less protective* environmental measures** than they would otherwise have adopted, **the net benefits of a federal floor will be less than traditionally assumed, and in some states it will actually result in *a net reduction* in the aggregate level of environmental protection**. Indeed, it is possible that the net result of a federal regulatory floor, over time, could be the maintenance of lower levels of environmental protection than would otherwise have been adopted. Even if such effects are unlikely, **federal policy-makers should consider these possibilities when assessing the likely costs and benefits of federal action.** 1. Signaling Just as federal attention to a given environmental concern may increase the demand for state-level action, **the adoption of a given federal standard may send a signal that discourages the adoption or maintenance of more protective state regulations. Specifically, the adoption of a given regulatory standard by a federal agency sends a signal that the standard is worthwhile.** 118 **Among** other **reasons for this effect is that federal policy-makers,** particularly federal agencies, **are presumed to have substantial technical expertise**. **Thus, their actions may convince state policy-makers** (or their constituents) **that additional safeguards are “unnecessary” or that the benefits of more stringent regulatory protections are not worth their costs**. The magnitude of this effect is likely to correspond with the magnitude of the difference between the relevant federal and state standards**. In this way, federal standards can discourage state policy-makers from adopting and maintaining more stringent measures of their own, even where such measures could be justified.** **As a practical matter, the federal *“floor”* may become a *“ceiling”* as well. This effect is *not merely hypothetical.* There are *numerous examples* of state legislation designed to prevent state environmental agencies from adopting regulatory standards that are more stringent than federal rules**. 119 Between 1987 and 1995, **nearly twenty states adopted at least one statute limiting the ability of state agencies to adopt regulatory controls more stringent than relevant federal standards**. 120 Some states focus on a given environmental concern, while others have general prohibitions against the adoption of any environmental rules more stringent than applicable federal standards. 121 New Mexico and Colorado, for example, have statutes prohibiting the promulgation of air pollution controls more stringent than those required by federal law. 122 Virginia law bars state regulatory authorities from requiring greater amounts of water treatment than mandated under the federal Clean Water Act (“CWA”). 123 Other states have general prohibitions against agency promulgation of environmental rules more stringent than federal law. 124 The existence of statutes barring state regulatory agencies from adopting more stringent regulations may be evidence of a greater hostility to environmental protection in some state legislatures than in Washington, D.C. Yet such laws may also be a rational response to the signal created by the adoption of a federal standard at a given level, particularly insofar as state policy-makers conclude that their federal counterparts have greater expertise and understanding of relevant environmental concerns. Information is costly, and the knowledge and expertise necessary to determine a given level of protection may tax the resources of state governments. Therefore, deferring to federal policy judgments by responding to the signal of a federal standard may enable state policy-makers to economize on information and policy development costs. 125 On the other hand, **the localized nature of much environmental knowledge and expertise could suggest that signaling *may systematically encourage less optimal state-level regulation to the extent that federal standards fail to take local needs and variation into account.*** 126 Some state laws may address this concern, however, as they allow state agencies to adopt more protective measures where local conditions warrant. 127 There are several reasons why this signaling effect may be of concern. First, and perhaps most important, **the existence of a signaling effect that reduces the level of state regulations below what they would otherwise be could reduce the net benefits provided by federal regulations.** When the federal government adopts a federal regulatory standard, this will increase the level of regulation in states that have lower levels of regulation. At the same time, it will lower the level of regulation in any state that adopts laws barring the promulgation of regulations more stringent than the federal standard. The net effect of such signaling is represented in Figure 2 above. States A and B have regulatory standards (QAReg and QBReg , respectively) less stringent than the federal standard (QFReg ). State C, on the other hand, has a regulatory standard (QCReg ) greater than the relevant federal standard. **Adoption of the federal regulatory standard increases the aggregate level of regulation by a quantity equal to the sum of the difference between the federal standard and the lower state standards** ((QFreg – QAReg ) + (QFreg – QBReg )). The net effect of the federal standard may be lower than this, however. If State C adopts a law prohibiting state standards that exceed relevant federal requirements, the aggregate level of regulation will be reduced by the amount to which State C’s standard exceeded the federal standard (QCreg – QFReg ). Thus, the net effect of the federal standard will be the extent to which the increase in regulation in States A and B exceeds the reduction in State C ((QFReg – QAReg ) + (QFreg – QBReg ) – (QCreg – QFReg )). In the unlikely event that the reduction in regulation in State C exceeds the increase in regulation in States A and B, the adoption of a federal standard could actually result in a net reduction in the aggregate level of regulation. **There are other reasons to be concerned about a signaling effect. Insofar as federal standards are not based upon accurate, up-to-date scientific assessments of environmental problems**, 128 ***and such information is not available to state and local policy-makers, the federal regulation may have an even greater distorting effect on state priorities***. **Such laws may also serve to shift effective control over environmental priorities from the state to the federal level.** 129 Of course, to the extent federal policy-makers are likely to adopt quantitatively or qualitatively superior regulatory standards, the signaling effect may have a positive effect on regulatory policy. Insofar as there are welfare benefits from regulatory uniformity, there could be additional welfare benefits to the extent a signaling effect reduces regulatory variability across states. 130 The importance of signaling is not that it necessarily results in less optimal regulation. Rather, the primary importance of the signaling effect is that it often reduces the net benefit provided by the adoption of a federal regulatory standard. Taking this indirect effect of federal regulation on state regulatory choices into account will likely improve the quality of environmental policy-making. 2. ***Crowding Out*** **A second potential negative indirect effect of federal regulation on state regulatory choices is crowding out**. **This occurs because federal regulation may serve as a substitute for state-level regulation, thereby reducing the benefits of adopting or maintaining state-level protections**. Insofar as voters in a given state demand a certain level of environmental protection, there is no reason to expect states to duplicate federal efforts when a federal program satisfies that demand, particularly if a state has not already created such a program. If the federal floor is greater than or equal to the level of environmental protection demanded by a state’s residents, that state has no reason to adopt environmental regulations of its own once the federal government has acted. To the extent that this effect occurs, **it is separate from—perhaps even in addition to—the signaling effect described above.** The claim here is not simply that states regulate less than they would absent federal regulation—although this claim is almost certainly true. Rather, the claim is that **some states that would adopt regulations more protective than the federal floor, absent the imposition of federal regulation, have not done so due to federal regulation and may not do so in the future. If this hypothesis is correct, the net effect of federal environmental regulation in at least some states *could be less environmental protection than would have been adopted had the federal government not intervened***. To see how this could occur, **recall that the demand for environmental regulation in any given jurisdiction tends to increase over time** as wealth, technical capability, scientific knowledge, and environmental impacts increase. 131 **In any given state** (as in the nation as a whole), **there is an initial period** (“Period A”) **during which the demand for a given type of environmental protection is relatively low. The costs of adopting environmental regulations in this period are greater than the benefits of adopting any such protections**. These costs include the costs of developing, drafting, and passing legislation; the costs of creating a new policy program, drafting and implementing regulations, defending the regulations from any potential legal or administrative challenges, creating a means to monitor and enforce regulatory compliance; and so on. In addition, there are opportunity costs of devoting state resources and political capital to the cause of environmental protection as opposed to some other policy goal. As discussed earlier, **the demand for environmental protection has tended to increase over time along with increases in living standards.** 132 At the same time, **increases in technical knowledge and administrative efficiency may lower the costs of a given regulatory program. Eventually, a state will enter a second period** (“Period B”) **in which the benefits of a given environmental regulatory program are greater than the costs of initiating, implementing, and operating such a program. Absent any federal interference, the hypothetical state will not adopt environmental regulations in Period A, but will adopt such regulations in Period B**. See Figure 3. This is the environmental transition discussed in Part I. In Period A, the demand for environmental protection is insufficient to justify the costs of implementing environmental protection measures. By Period B, however, the demand for environmental protection has risen due to increases in wealth and knowledge, among other factors. At the same time, increases in technical capacity and scientific understanding have reduced the cost of adopting environmental protections. As a result, in Period B a state will adopt QB amount of environmental protection. 133 The timing of Period A and Period B will vary from state to state. **This is clearly the case as different states have enacted different environmental regulatory measures at different times—some before the adoption of federal environmental regulation, some after, and some not at all. Looking at the history of various environmental concerns, such as *air quality,*** water quality, or wetlands, **it is clear that many states moved from Period A to Period B for these environmental concerns at various times prior to the onset of federal regulations in the 1970s. In many other states, however, a federal regulatory floor was adopted before the onset of Period B. For states that went through their environmental transition and entered Period B prior to the enactment of federal environmental protection, whether the adoption of a federal regulatory floor increased the aggregate level of environmental protection in that state depended upon whether preexisting state policies offered greater or lesser levels of protection than the relevant federal policies.** For states in which the onset of Period B begins after the adoption of federal regulations, the enactment of a federal regulatory floor will, at the time of enactment, increase the aggregate level of environmental protection in that state. However, this may not be the case over time. **In states that desire a greater level of protection than that provided by the relevant federal regulations, it is not clear that the existence of the federal regulatory floor will result in an equal or greater level of protection than would be adopted were it not for the federal regulations. This is because federal regulation will, to some extent, act as a substitute for state regulation**. **As a result, the adoption of federal regulation has the potential to reduce the demand for state regulation and, in some instances, even result in less aggregate regulation in a given state than would have been adopted absent federal intervention. In short, federal regulation can crowd out state regulation.** The potential for such a crowding-out effect is illustrated in Figure 4. The existence of federal regulation will reduce the demand for state regulation by an amount equal to the extent to which federal regulation is a substitute for state regulation of the same environmental concern (QFReg ). This substitution effect will reduce the net benefit of adopting state-level environmental regulations from OCQB to OC’Q’B . By reducing the net benefits of state-level environmental regulation in this manner, federal regulation has the potential to crowd out state-level environmental protections, even if the quantity of environmental protection demanded in the state is greater than that provided by the federal government. In such cases, the aggregate level of environmental protection will be lower with federal regulation than it would be without it. A key assumption in this analysis is that there are significant fixed costs to the adoption of environmental protections (or, for that matter, any regulatory program). In some states, the additional benefits of adopting more stringent regulations on top of the federal requirements will more than offset the costs of adopting the new program. In these states the fixed costs of creating a program plus the operating costs are less than the expected marginal benefits from the additional margins of regulation. However, it seems likely that there are at least some states in which the aggregate net benefits of regulation at a level more protective than the federal standard are greater than the costs, but where the net benefits of additional regulation above the federal floor are less than the costs of adopting such additional regulations. In other words, if the net benefits of adopting state regulations alone (OCQB ) are greater than the costs of adopting such regulations (CReg), but the net beneªts of adopting such regulations given federal regulations are already in place (OC’Q’B ) are less than CReg, then the presence of a federal regulatory ºoor will produce a lower level of environmental protection than were that ºoor not to exist. 134 In this latter situation, one would not expect the state to regulate, even though the amount of regulation demanded in the given state is greater than that provided by the federal government. While federal regulation creates a ºoor, raising the regulatory baseline, it does not reduce the ªxed costs of policy change. If anything, it may increase the opportunity costs for state policy-makers who devote their political capital to the environmental resource at issue rather than another environmental concern in which the federal government is not active. Federal regulation does, however, reduce the beneªts of state regulation, and may do so signiªcantly, making state-level initiatives less attractive to state policy-makers. This theory is based on several premises and observations about the political economy of policy-making. First, environmental regulation, like most forms of regulation or other government action, experiences diminishing marginal beneªts and increasing marginal costs. That is, the marginal environmental gains from each additional increment of regulation will tend to be less than the gains from the preceding increment. Thus, when the federal government establishes a ºoor, it has likely displaced those state efforts that would be most cost-beneªcial. (This has the effect of shifting the demand curve for state regulation to the left, reducing the net bene- ªts of state regulation.) Second, the political process imposes substantial transaction costs on the creation (or elimination) of new government programs, and these costs are relatively ªxed such that they do not vary with the size of the program in question. The most obvious example of such transaction costs is the existence of so-called “vetogates” 135 that determined minority interests can use to prevent the adoption of policies that enjoy majority support. 136 The existence of these vetogates means that many policy changes must have supermajority support before they are enacted—or at the very least require the expenditure of substantial amounts of political capital by their proponents (as a means of purchasing supermajority support). 137 The fragmentation of policy-making authority across branches of government adds to the difªculty of adopting new policies. These obstacles may also be particularly large in highly complex policy areas like environmental protection. 138 Third, policy-makers are, to some extent, utility maximizers such that, all else equal, they will invest in policies that provide the greatest beneªts and lowest costs to them. 139 Insofar as state policy-makers “share” responsibility for some environmental concerns with their federal counterparts, it may be difªcult for them to secure the beneªts of their efforts. 140 Relatedly, information about the relative activities of the federal and state governments and their relative merits is costly to the average voter where both the state and federal governments are active. As a result, it may be difªcult for policy-makers to get credit for all of the policies they promote or implement. 141 This is one reason why some argue that cooperative federalism undermines accountability. When both the federal government and the states are involved, it is more difªcult for a voter to know who to credit or blame for a given policy. 142 Because it is easier for a state policy-maker to get credit for a policy when the state does not compete with the federal government in the provision of that policy goal, all else being equal, a state policy-maker will prefer to legislate where the federal government is less active. One implication of the crowding-out effect is that it is possible that the adoption of a federal regulatory ºoor may result in lower aggregate levels of regulatory protection than had the federal government not entered the ªeld at all. This potential is illustrated in Figure 5 below. As in Figure 2, which illustrated the signaling effect, States A and B initially have regulatory standards (QAReg and QBReg , respectively) less stringent than the federal standard (QFReg ), while State C has a regulatory standard (QCReg ) greater than the relevant federal standard. Here, however, the demand for environmental regulation in each state is not static. Rather, the demand for regulation in State B is increasing over time as State B goes through its own environmental transition. Absent federal regulation, State B would eventually adopt a higher level of protection—a level of protection greater than that which would be adopted at the federal level. In this scenario, the adoption of a federal standard has the potential to signal to states to reduce their levels of protection. It may also discourage the adoption of even greater levels of protection in those states that go through their environmental transition after the adoption of the federal standard. This potential opportunity cost of federal regulation is no less important than the more observable effects illustrated in Figure 2. When the crowding-out effect is combined with the signaling effect discussed above, **the likelihood that federal regulation could result in a net decline in the aggregate level of regulatory protection increases.** As before, adoption of the federal regulatory standard increases the aggregate level of regulation by a quantity equal to the sum of the difference between the federal standard and the lower state standards. The net beneªt of the federal standard at any given point in time is this amount (QFReg– QAReg ), less any reduction due to signaling (QCReg– QFReg ), and the extent to which State B would have regulated absent federal action (QBReg– QFReg ). Here the net effect of the federal standard will be the extent to which the increase in regulation in State A varies from the reduction in State C and regulation abandoned in State B. Stated as a formula, the net beneªts of federal regulation equal: (QFReg– QAReg ) – [(QBReg– QFReg ) + (QCReg– QFReg )]. **Even if the adoption of federal regulation initially increased the aggregate level of regulatory protection, over time the level of protection might be less than it would otherwise have been. As more states go through their environmental transitions, the magnitude of this crowding effect could increase,** **unless federal regulatory standards are able to keep pace. Given the slow rate at which existing federal regulatory programs are reviewed and expanded, however, this is a questionable assumption.**

***This is uniquely the case with fracking regulations***

Wyoming brought together geologists, engineers, industry, landowners, citizens, environmental groups and policymakers to develop reg’s

Fed = duplicative, adds cost and time delays

Ceiling – disincentivizes state action

States can address problems more efficiently and quickly

Fed regs deter investment

Not consistent – doesn’t apply to state or private lands

**Mead**, 9/17/**12** (Matthew, Matt Mead was elected last November and sworn in as Wyoming's 32nd governor on January 3, 2011. Born in Jackson, Wyoming, Governor Mead was raised on the family ranch in Teton County. He has a BA degree from Trinity University in San Antonio and a law degree from the University of Wyoming. After law school, the Governor served as a county and federal prosecutor, practiced in a private firm in Cheyenne with now-Attorney General Greg Phillips, and served as United States Attorney for Wyoming from October 2001 to June 2007. After he stepped down as U. S. Attorney, Matt and his wife Carol, the First Lady, returned fulltime to operating their farming and ranching business in southeast Wyoming. Matt and Carol have been married 20 years, with Cheyenne as their home. They have two children, Mary and Pete, who attend Cheyenne public schools. The Washington Times: “MEAD: Hydro-fracking regulations should be left to states” http://www.washingtontimes.com/news/2012/sep/17/hydro-fracking-regulations-should-be-left-to-state/

***States’ rights come with states’ responsibilities***. **Wyoming** time and again **has proved it can promote development, support its economy and protect the environment**. From hydraulic-fracturing rules to air-quality strategies, Wyoming leads in developing solutions that work for people and the future, without compromise on clean air, wildlife, land or water. Those of us who call Wyoming home only want to make the state better. Our environment and natural wonders are among the many reasons we choose to live here. We always have them in mind; we know they are important, and so we balance energy development and environmental protection — **and we regulate accordingly, getting the balance right. Where Wyoming has gotten it right — regulating at the state level in a reasonable and responsible way — regulation should be left to the state.** **Such is the case with hydraulic fracturing**. The [federal government](http://www.washingtontimes.com/topics/federation/) should reward us for our successful regulatory effort, allow us to continue it and put federal regulation aside**. Specifically, in 2010, Wyoming brought together geologists, engineers, industry, landowners, citizens, environmental groups and policymakers to address hydraulic fracturing**. As a result, our state developed pace-setting rules. Wyoming did so well that in 2012, the [federal government](http://www.washingtontimes.com/topics/federation/) attempted to follow our lead**. The** [**Bureau of Land Management**](http://www.washingtontimes.com/topics/bureau-of-land-management/) **(**[**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/)**) began to consider hydraulic-fracturing rules.** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/)**’s proposed rules are based on those Wyoming drafted,** adopted and has followed since 2010. Those proposed **federal rules add unnecessary and often repetitive requirements**, **which add cost and delay projects**. **They would pile on federal rules over existing, effective state rules, with negative consequences.** **Those consequences include inconsistency and uncertainty for operators and drillers, which could result —** albeit unintentionally — **in harm, not benefit.** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/)**’s use of Wyoming’s rules as a foundation has**, perhaps inadvertently, **added steps, twists and even a few locked doors in developing hydraulic-fracturing rules for federal lands. Even discounting factors such as inconsistency and uncertainty, the proposed federal rules do not bring perceptible benefit to the environment or the economy.** They intrude into an area Wyoming already has addressed**. They add new requirements without sound basis. *When the*** [***federal government***](http://www.washingtontimes.com/topics/federation/) **improvidently *steps in, it creates a disincentive for states to implement strategies and programs better left to the states to manage***. **The** [**federal government**](http://www.washingtontimes.com/topics/federation/) **should recognize the states’ leadership role in many arenas — especially when borrowing state work. *Well-run state permitting and regulatory programs achieve results***. **They help industry create jobs and maintain environmental standards.** **Wyoming has a record of success in environmental stewardship, natural-resource development and job generation. We are accountable every day for decisions made and actions taken. We take responsibility.** We want to leave a legacy for future generations that is ever better**. Our state is simply in the best position to get results. Wyoming’s hydraulic-fracturing rules are working. The Wyoming Oil and Gas Conservation Commission is capable of administering these rules well across private, state and federal lands. *State government is nimble. If state rules are a bad fit, they can be changed quickly. In contrast, the*** [***federal government***](http://www.washingtontimes.com/topics/federation/) ***by size alone moves at tortoise speed.*** Examples are plentiful. **Pick one, such as the** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/)**’s well-stimulation regulations, last updated in the 1980s.** **The Wyoming Oil and Gas Conservation Commission has considered changes to its rules 19 times since 1996. Federal hydraulic-fracturing rules will only exacerbate the problem of chronic federal permitting delays. The delays are attributed to federal staffing issues now. New rules will add new burdens.** There are many examples, but well-plugging is a good illustration. **According to the Government Accountability Office, the** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/) **has not managed its liability for non-producing wells that need to be plugged, reclaimed or put back into production. If the agency cannot handle what it has on its plate, it makes no sense to add more.** While the [BLM](http://www.washingtontimes.com/topics/bureau-of-land-management/) hosted public forums in a few locations (North Dakota, Arkansas, Colorado and Washington, D.C.) and consulted with tribes, industry and the environmental community as it explored its hydraulic-fracturing rules**, the** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/) **has not consulted with states.** **This is troubling. States are the primary regulators of oil and gas and are better positioned to meet the challenges presented by constantly developing technologies. State rules apply across jurisdictions.** [**BLM**](http://www.washingtontimes.com/topics/bureau-of-land-management/) **rules, on the other hand, would not apply on state or private land.** If there is no consultation with the states when the proposed rules are developed, what will happen when the rules are implemented? What if federal regulations conflict with state regulations? Which rules take precedence? Rules must be consistent and uniform. Water does not understand boundaries. It flows indiscriminately beneath federal, state and deeded land. We need one consistent rule. **We already have one in Wyoming. Oil and gas operations on public lands have been following state environmental oil and gas laws and regulations for decades. Indeed, oil and gas operators on public lands in Wyoming are following hydraulic-fracturing and environmental laws, including “green completion” air regulations. Oil and gas royalties from drilling on public lands are a significant source of revenue for the** [**federal government**](http://www.washingtontimes.com/topics/federation/) **and for Wyoming.** Affordable domestic energy helps fuel the economy. **Unnecessary regulation on public lands could force operators to shift investment away** from public lands, resulting, among other things, in less oil and gas, fewer jobs, less multiple-use, less revenue and more dependence on foreign sources. **Both the environment and energy are important to us.** Wyoming’s proactive work on hydraulic-fracturing regulation demonstrates our commitment to each. **The** [**federal government**](http://www.washingtontimes.com/topics/federation/) **should show its commitment to sound state regulation by leaving fracturing rules to the state.**

***Methane emissions cause extinction --- CO2 defense doesn’t apply***

**Heinberg 4** (Richard, Award-Winning Author and Core Faculty Member of New College of California, “Power Down: Options and Actions for a Post-Carbon World,” pp.122-4)

Methane hydrates represent an even larger store of hydrocarbons in Earth’s crust; however, in the end, the prospects for exploiting them may be even more discouraging than is the case with tar sands. As marine organisms decompose, they release methane. Under certain conditions, that methane can become trapped on the ocean floor in ice crystals, and can build up over time. The resulting mixture of methane and ice is called methane hydrate. This material is also sometimes found in permanently frozen soil on land: there are, for example, methane hydrate deposits in Siberia and Alaska. Oceanic methane hydrates are so plentiful that, in theory, they could power the world for centuries. Some estimates put the total at more than twice the amount of all other fossil fuels combined. However, the harvesting of the resource constitutes a technical problem of immense proportions. As hydrate material is mined and brought to the ocean surface, it fizzes and bubbles as methane turns to gas and dissolves in the water. Eventually, the methane makes its way into the atmosphere. The problem then is not merely that a potentially valuable substance has been lost, but that a previously stored greenhouse gas has been loosed on the environment. The most frequently discussed greenhouse gas is carbon dioxide, which is released with the burning of fossil fuels. However, ***methane is over twenty times as effective as carbon dioxide at trapping the heat from sunlight***. Thus, ***if a significant quantity of methane were to be freed into the atmosphere, the resulting contribution to global warming could be cataclysmic***. Is there enough methane trapped in hydrates to make much of a difference in this regard? There is, and by a long shot. Altogether, there is roughly 3,000 times more methane locked up as hydrates than is currently found in Earth’s atmosphere. Even without attempts at commercial exploitation, oceanic hydrates are already responsible for between 5 and 10 million tons of methane emissions to the atmosphere each year. Seabed methane hydrates already represent a serious environmental threat in the context of global-warming trends. As the temperature of the oceans rises, hydrate deposits may become unstable**. This could release large amounts of methane into the atmosphere, thus greatly exacerbating the greenhouse effect, which would in turn warm the oceans even further. The result could be a self-reinforcing feedback loop with unimaginably horrific consequences.** Adding commercial extraction procedures to this existing precarious situation hardly seems prudent. Some scientists, including Charles Paull, a researcher with the Monterey Bay Aquarium, say that extracting gas hydrates could disrupt seafloor stability.1 Geologists suspect that the large-scale breakdown of methane hydrate deposits was responsible for huge underwater landslips and the creation of massive tsunami waves earlier in Earth’s history, as well as for sudden periods of intense global warming. If in the future unstable hydrates were dislodged by attempts to extract them, the result could be a modern rerun of those ancient cataclysms, with immense waves sloshing across the oceans, scouring the surfaces of islands and inundating coastal cities, while the entire planet baked under a methane fog. Nonetheless, when the human economic need is great enough, we can be sure that attempts will be made to produce usable energy from methane hydrates. Resource-poor Japan (which imports nearly all of its oil and gas) is already involved in research in hydrate beds along the Nankai Trough, some 3,500 feet (1,100 meters) under water, and at an international test site in the frozen Mackenzie River delta in northern Canada. In 2002, the Japan National Oil Corporation announced some success in the Mackenzie Delta tests. Japan hopes to determine by 2011 whether commercial methane hydrate mining is feasible; if it is, efforts could begin by 2015. In the US, Congress has appropriated $47 million for methane hydrate research over the next few years — though many of the funded projects are mostly academic, with methane deposits on the moons of Jupiter and Saturn envisioned as a fuel source for future space travel. However, as the North American natural gas crisis deepens, there will be increasing incentive to explore the possibility of extracting methane from coastal seabeds or frozen tundras. The US Geological Survey has estimated that the quantity of gas hydrates in the United States is equal to roughly 200 times the conventional natural gas resources remaining in the country; according to the Department of Energy, if only one percent of the deposits could be exploited for domestic consumption, the US could more than double its supply of energy resources. The exploitation of land-based methane hydrates is especially likely to garner increasing interest — but the technical hurdles in this instance are almost as problematic as in the case of seabed deposits. Russian engineers have suggested pumping nuclear waste under the Siberian permafrost to thaw the hydrate fields there so that they can be exploited. Such methods are sure to provoke quite an outcry from environmentalists and native populations if applied in North America. Will methane hydrates be the energy source of the future? Don’t hold your breath. The inevitable efforts in that direction may or may not yield useful net energy; in either case, intense battles will be waged between environmentalists on one hand and government and industry leaders on the other. The stakes will be breathtaking: if the concerns of Earth scientists are well founded, and if a miscalculation were to occur, the damage could be incalculable**.** With the development of the hydrogen bomb, humanity was forced to confront the fact that it had invented a means for its own extinction. If an industry emerges devoted to seabed methane hydrate extraction, **humankind might find itself facing another similarly stark awakening.**

***Methane outweighs Co2 and gas leaks are key***

**Leahy, 1/24/12** (Stephen, lead international science and environment correspondent at IPS, where he writes about climate change, energy, water, biodiversity, development and native peoples. Based in Uxbridge, Canada, near Toronto, Steve has covered environmental issues for nearly two decades for publications around the world. He is a professional member of the International Federation of Journalists, the Society of Environmental Journalists and the International League of Conservation Writers. He also pioneered Community Supported Environmental Journalism to ensure important environmental issues continue to be covered.

IPS: “Shale Gas a Bridge to More Global Warming,” http://www.ipsnews.net/2012/01/shale-gas-a-bridge-to-more-global-warming/

However, those **climate gains are** more than **negated by methane leaks** both at the well **during the fracking process** (called flow-back), and through the gas delivery and distribution system. Howarth and colleagues estimate that **between 3.6 and 7.9 percent of all shale gas produced leaks – called “fugitive emissions” – into the atmosphere, making it worse than burning coal or oil. *Methane has 105 times the warming potential of CO2*** over a 20-year time frame, after which it rapidly loses its warming potential. **If large amounts of methane are released through fracking – as seems likely with hundreds of thousands of new wells forecast in the next two decades** – Howarth says **global temperatures could rocket upward from 0.8C currently to 1.8C in 15 to 35 years, running the risk of triggering a tipping point that could lead to catastrophic climate change**. “**Our primary concern is that methane emissions over the coming two decades will drive the entire climate system past a major tipping point**,” he told IPS.

**Observation 3 – Federalism**

***Current environmental regulations follow a “cooperative federalism” model – but in reality these regs are federal coercion of State sovereignty***

Jonathan H. **Adler**, “JUDICIAL FEDERALISM AND THE FUTURE OF FEDERAL ENVIRONMENTAL REGULATION”, April 19th 20**04**, http://www.endangeredlaws.org/pdf/adlerfederalism.pdf

**Under** several of the aforementioned **environmental statutes, the federal government asserted broad authority to regulate activities that can affect environmental quality. For example**, under the Clean Water Act, the federal government prohibits the addition of any pollutant, defined to include most foreign materials,27 to any waters of the United States, including wetlands, without a permit.28 The Endangered Species Act bars private activities that kill, capture, or otherwise “harm” any animal species listed as endangered by the Fish and Wildlife Service, including those activities that do no more than modify existing species habitat on private land.29 Under **the Clean Air Act**, the Environmental Protection Agency regulates the chemical composition of gasoline30 and diesel fuel,31 the design of vehicle engines,32 and even the contents of some consumer products, including paint33 and hairspray.34 **While federal environmental laws grant expansive regulatory authority to federal agencies, most environmental statutes are implemented following a *“cooperative federalism” model***.35 **The federal government outlines the contours of a given regulatory program**, typically through statutory mandates elaborated upon by regulatory measures.36 **States are then encouraged to implement the program** in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor – albeit a highly prescriptive one – and states remain free to adopt more stringent measures.37 State programs that meet federal standards are typically eligible for federal financial assistance. **States that fail to adopt adequate programs are not only denied the relevant federal funding, they can also be subject to various sanctions and federal preemption of their programs**. That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place. In this system, **the states are “indispensable,” though not “equal partners**.”38 ***While characterized as a “cooperative” structure, the federal-state relationship in environmental policy is often adversarial and ridden with conflict***.39 State officials “resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards,” according to one recent study.40 **The proliferation of additional requirements without corresponding increases in federal financial assistance raises state and local concerns about “unfunded federal mandates.”**41 To some observers, ***the partnership of cooperative federalism is more akin to a feudal relationship between a federal lord and state “vassals.”***42 There are three reasons for adopting the cooperative federalism model in the context of environmental protection.43 First, the federal government does not have the resources or personnel to implement detailed regulatory proscriptions in all fifty states.44 The federal government may set environmental priorities through legislation and regulation, but much of the actual implementation is dependent upon state agencies and personnel.45 Second, the geographic and economic diversity of the nation requires local knowledge and expertise that is often unavailable at the federal level.46 Environmental problems, and their solutions, will vary from place to place, limiting the ability to adopt broad nationwide solutions to environmental concerns.47 Third, enlisting state and local cooperation in the imposition of potentially costly or intrusive environmental controls can blunt local opposition to federal mandates.48 This facilitates the adoption of federal environmental standards, yet it can also blur the lines of political accountability.49 For these reasons, most major environmental statutes adopt some measure of “cooperative federalism,” albeit to differing extents.50 ***Federal environmental regulation arguably represents the most expansive assertion of federal authority***. **Even where federal environmental programs are cooperative in nature, environmental regulation calls upon the federal government to affect, influence, and regulate a wider range of behavior** – economic and otherwise – **than any other area of federal concern*. Only federal environmental regulation***, for example, **could purport to regulate local activities ranging from home construction to recreational behavior on private land**.51 **Despite the ambitious sweep of federal environmental legislation, there was little, if any, thought given to the constitutional justification for such enactments**.52 Congress adopted environmental statutes governing a wide range of activities and phenomena never-before subject to federal regulation without questioning whether any such legislation might exceed the scope of Congress’s enumerated powers.53 **Nearly all the major environmental statutes give a passing nod to the historic state role in addressing pollution concerns**, yet then proceed to expand the federal government’s reach into such terrain.54 **Because federal environmental programs are so expansive, environmental regulation may be particularly vulnerable to *federalism constraints on federal power***. **Insofar as courts restrict the scope of federal regulatory authority due to federalism concerns, this may have a particular effect on environmental regulation.**

***The Clean Air Act is the prime example - The Federal Government justifies conditional spending grants in the Clean Air Act by using the Dole V South Dakota precedent – Using this justification uniquely moots all levels of federalism***

Jonathan H. **Adler**, 6 George Mason Law Review 573, “THE GREEN ASPECTS OF PRINTZ: [1]

THE REVIVAL OF FEDERALISM AND ITS IMPLICATIONS FOR ENVIRONMENTAL LAW”, Spring 19**98**

**For cooperative federalism to be constitutional, it must be truly cooperative**. **The federal government can** bribe states with the promise of federal funds or threaten states with sanctions. However, it can **neither direct state legislatures nor commandeer state executive officials**. A formalistic division between these two types of federal action is possible, but it is likely to be arbitrary in practice. **Conditional spending can be the basis for greater intrusions on state sovereignty** than the administrative burdens struck down in Printz. Though **the Supreme Court has** supported the cooperative federalism model, it has also **acknowledged that “in some circumstance the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.”‘** [298] **It is fairly clear that those environmental programs that are less cooperative in their federalism are constitutionally suspect**. [299] However, >617 insofar as some ostensibly “cooperative” federal environmental programs become coercive in their implementation, they may suffer from constitutional defects as well. In particular, insofar as Congress’ spending power is not subject to constitutional constraints, it threatens to swallow whole the state sovereignty protected by Printz. For just as the dissent’s reasoning in Printz would have blown a hole in the protections offered by New York, an unconstrained conditional spending power can emasculate the federalist protections found by the Court in the past five years. **In 1995, two states filed constitutional challenges to portions of the Clean Air Act in federal court**. [300] Though neither challenge was successful, **these two cases demonstrate that states increasingly question the extent to which their relationship to the federal government is truly “cooperative” in the context of environmental law**. These cases suggest that if the principles underlying the New York, Lopez, and Printz decisions are to be vindicated, the Supreme Court may need to ensure that cooperative federalism lives up to the first part of its name. 1. Court Challenges to the Clean Air Act **The Clean Air Act** [301] **is** arguably the **most contentious environmental law ever enacted**. The Act is sweeping in its scope and has, at times, sought to encourage land use control, restrictions on personal automobile use, and outright bans on new development in urban areas that fail to meet federal standards. Over the past three decades there has been “substantial friction and resistance by states, EPA, and the regulated community to implementing the immensely costly requirements of the Clean Air Act, thereby requiring substantial expenditure of regulatory oversight resources and imposing costly litigation.” [302] The cost and intrusiveness of federal air pollution regulations has sparked fierce criticism. The 1990 Amendments to the Act are widely considered to be the single most expensive piece of environmental legislation ever enacted. [303] The perception that the Act is inflexible and inefficient >618 also fosters political opposition. [304] Since 1970, the Act has impressed states into regulating air quality in line with federal dictates through the State Implementation Plan (SIP) process. Beginning soon thereafter, states have resisted. **All states** with metropolitan areas **that do not attain the National Ambient Air Quality Standards** (NAAQS) **for criteria air pollutants must develop SIPs which they submit to the EPA for its approval.** Among other things, an adequate SIP must include “enforceable emission limitations . . . as well as schedules and timetables for compliance,” [305] monitoring systems, [306] a fee-based permitting system for stationary sources, [307] an enforcement program, [308] and provide for sufficient public participation in the SIP process. [309] The 1990 Amendments also added Title V, which requires states to develop an omnibus permitting program for stationary sources, [310] complete with permit fees deemed sufficient by the EPA to cover the cost of implementation, [311] and outlined numerous specific control measures that non-attainment areas must include in their SIP. [312] “In short, the states’ role, if they accept, is subject to a great deal of federal specification, oversight and approval.” [313] **Failure to submit an adequate SIP by the appropriate deadlines** [314] **results in the imposition of federal sanctions, including the loss of federal highway funds**, increased offset requirements for new development, and the imposition of a Federal Implementation Plan (FIP) that the EPA will enforce. [315] Moreover, local transportation projects cannot receive federal funding unless they conform to an EPA-approved SIP. [316] **Although the Clean Air Act fits the cooperative model in that it offers states the choice of allowing the federal government to take over air** >619 **quality regulation, such a decision would come at tremendous cost. The sponsors of the original legislation clearly intended for the federal government to tell states what to do.** Congressman Staggers, who managed the Clean Air Act on the floor in 1970, explained that: If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the men to do the actual enforcing. [317] However, contemporary legal authority for such impositions was certainly lacking, [318] prompting several states to challenge the law. Indeed, in 1973, several states submitted inadequate or incomplete SIPs, in outright defiance of the EPA’s demands. The EPA responded by including requirements that state officials implement transportation control measures and land-use regulations at state expense as part of the FIP. [319] Several state and local governments took exception to the EPA’s attempts to force them to implement federal regulations. They successfully challenged the EPA’s measures in federal courts. [320] While the states’ victories were on statutory grounds, several courts expressed serious reservations about the constitutional legitimacy of the EPA’s actions. In particular, the courts separated federal efforts to control pollution from industrial sources that impact state-run facilities from federal efforts to directly conscript state officers in the administration of a federal program. Upholding the EPA’s actions, in the Ninth Circuit’s view, would have endorsed “(a) Commerce (Clause) Power so expanded (that it) would reduce the states to puppets of a ventriloquist Congress.” [321] Such a power “would enable Congress to control ever increasing portions of the states’ budgets. The pattern of expenditures by states would increasingly become a Congressional >620 responsibility.” [322] After losing in federal court, the EPA appealed a portion of the rulings to the Supreme Court. The Supreme Court accepted certiorari, but the EPA backed off of its position, and conceded that it had exceeded its statutory authority, if not constitutional limitations, and the cases were declared moot. [323] There is little doubt that if the cases were litigated today, the EPA’s effort to conscript state and local officials would be invalidated under Printz and New York. The 1970 court battles were hardly the last conflicts between the federal and state governments over implementation of the Clean Air Act. After passage of the 1990 Amendments, state and local governments loudly protested EPA regulations on automobile emission inspection programs, [324] carpool regulations, [325] and permitting program requirements. [326] More recently, states took the EPA back to court, raising constitutional objections to its uncooperative approach to “cooperative federalism.” Virginia and Missouri, respectively, challenged the imposition of sanctions under the Clean Air Act. [327] Both states alleged that the EPA’s decision, if not the statutory provisions authorizing sanctions themselves, were unconstitutional infringements upon state sovereignty. According to the states, the Clean Air Act impermissibly authorized the EPA to impose severe sanctions upon those states that fail to comply with the EPA’s interpretation of the Act. [328] In particular, the Clean Air Act authorizes the EPA to withhold federal highway funds, to increase the “offset” requirements that companies wishing to locate in a non-complying area must meet, [329] and to preempt the state regulatory program altogether. [330] Imposition >621 of either of these first two sanctions, Missouri claimed, would produce irreparable harm to the state, due to the magnitude of funding at stake and the impact that heightened offset requirements would have upon private development within the state. [331] Virginia made a similar case. [332] Neither state was successful. According to the Fourth Circuit, the Clean Air Act’s provisions pass constitutional muster “because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than ‘outright coercion.”‘ [333] The District Court in Missouri reached a similar conclusion, relying upon dicta in New York that “conditions (on receipt of federal funds) must . . . bear some relationship to the purpose of federal spending.” [334] For the Missouri court, “the appropriate focus is not on the alleged impact of a statute on a particular state program or economy but whether Congress has ‘directly compel(led)’ the state ‘to enact a federal regulatory program.”‘ [335] While the Missouri court only addressed the question of whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better. [336] 2. Commandeering through Conditional Spending In the wake of Printz, **the key question** raised by the Virginia v. Browner and Missouri litigation **for federal environmental law is whether imposing conditions upon a state’s receipt of federal funds can ever rise to the level of being coercive**. **Both the Fourth Circuit and the Missouri District Court relied upon South Dakota v. Dole** [337] **to uphold making continued disbursement of highway funds conditional upon satisfactory implementation of the *C*lean *A*ir *A*ct**. [338] **This reliance on Dole may be misplaced. As Justice O’Connor noted in her Dole dissent**: **When Congress appropriates money to build a highway, it is entitled to** >622 **insist that the highway be a safe one. But it is not entitled to insist as a condition** of the use of highway funds **that the State impose or change regulations in other areas** of the State’s social and economic life **because of an attenuated or tangential relationship to highway use or safety**. [339] **In Dole, the Court held that “Congress may attach conditions on the receipt of federal funds**, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”‘ [340] In particular, the Supreme Court upheld the constitutionality of Congress’ withholding five percent of highway funds from states which refused to raise the drinking age to twenty-one. **Nonetheless, the Court acknowledged that the spending power “is of course not unlimited,”** [341] **and cannot be used to coerce states into enacting unrelated programs. Conditional spending must “be in pursuit of ‘the general welfare,”‘ and any conditions imposed by Congress *must be unambiguous, and related to the federal interest in the program in question***. [342] Moreover, the Court held that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” [343] **The reasons for limiting the use of conditional spending to affect state policies should be rather clear. One could imagine a situation in which every payment from the federal government to states is conditioned upon acquiescence to every jot and iota of federal dictates**. Well prior to Printz, commentators noted that “**such a broad reading of congressional power would afford Congress a way to exercise the spending power where it is not spending, by drafting grant conditions that reach areas in which the state has accepted no funds.**” [344] The conditional grant of funds could eliminate the element of choice that must remain when the federal government seeks to enlist state assistance and emasculate the Printz decision. **If the holding in Dole is to place any meaningful restraint upon** >623 **Congress’ exercise of the spending power, there must be some *substantive component* to the Dole test**. In an earlier case the Court explained that “the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.” [345] **If Congress is not limited** in this manner, “**the spending power could *render academic the Constitution’s other grants and limits of federal authority***.” [346] However, **because the Supreme Court has yet to invalidate a congressional effort to induce state cooperation through conditional spending, few lower courts have been willing to do so**. [347]

***The NSPS was created out of this overreach***

Amy L. **Stein**, Associate Professor, Tulane University School of Law, “Article: The Tipping Point of Federalism”, 45 Conn. L. Rev. 217, November, 20**12**

**The second outlet for federal influence over the type of power generated is EPA's recent regulations regarding GHGs.** A 2007 Supreme Court decision affirming the ability of EPA to regulate GHGs under the Clean Air Act n295 set the course for a new era of Clean Air Act regulations specific to GHGs. **Over the last five years, EPA has been feeling its way through this unchartered territory**, starting with key regulatory findings that GHGs endanger the public welfare with respect to mobile sources, n296 continuing with reporting regulations, n297 specially tailoring existing regulations for new source controls to account for the unique character of GHGs, n298 tightening fuel efficiency standards for the first time in 30 years, n299 and **most recently, proposing *N*ew *S*ource *P*erformance *S*tandards** for all fossil-fuel boilers. n300 **This most recent proposal may be *the most* indicative of EPA's ability to exert its influence** over the type of electricity generated. **EPA is required to establish emissions standards for industrial categories**. n301 It defined the industrial category as "fossil-fuel-fired boilers," and determined that all fossil- fuel burning plants (whether they be coal, **natural gas**, or oil) **must meet the emissions standard established by combined cycle natural gas plants**. n302 This effectively mandates that all new fossil-fuel (i.e., nonrenewable) plants that will be constructed must be natural gas, resulting in a potential phase-out of coal and oil plants. n303 Although [\*277] not specifically mandating renewable energy, **it reduces the likelihood that state PUCs will approve applications to construct new coal or oil power plants within their state borders.**

***The NSPS is enforced as part of the Clean Air Act***

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**The** federal Environmental Protection Agency (“**EPA**”) **published** in the August 16 Federal Register **a Final Rule establishing *C*lean *A*ir Act** **New Source Performance Standards** (“**NSPS**”) **and** **National Emission Standards for Hazardous Air Pollutants** (“**NESHAPS**”) **for** certain oil and **natural gas sources**. 77 Fed. Reg. 49490.

**The rule finalizes:**

• **NSPS for** the crude oil and **natural gas production and onshore natural gas processing plant source category**. **The EPA reviewed two existing NSPS for** onshore **natural gas processing plant source category under Section 111 (b) of the *C*lean *A*ir *A*ct.** EPA states that the Final Rule improves the existing NSPS and finalizes standards for certain crude oil and natural gas sources that are not covered by NSPS for this sector.

• **NESHAPS for** the oil and **natural gas production** source category and the natural gas transmission and storage source category are established. **EPA states it conducted risk and technology reviews for these rules under Section 112 of the Clean Air Act**. In addition, EPA established emission limits for certain currently uncontrolled emission sources in these source categories. The limits establish Maximum Available Control Technology.

***Cooperative environmental federalism bad – causes regulatory overlapping that crushes environmental oversight and accountability***

Jonathan H. **Adler**, “Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation”, Last date cited July 20**03**, http://law.case.edu/faculty/adler\_jonathan/publications/letting\_fifty\_flowers\_bloom.pdf

In a related fashion, **decentralization will lead to greater accountability in environmental policy.** As Profs. Henry Butler and Jonathan Macey observe: “**Allocation to local governments of regulatory authority over local externalities allows decisions to be made by the representatives of the decisions who benefit the most and pay the most for higher environmental quality.**”38 **If local residents are dissatisfied with the balance struck by their own elected representatives and regulatory officials, they have the ability to seek redress.** Their freedom to alter environmental policies to fit their needs will be less subject to those who do not share the costs and benefits of the policy decision or understand local values and concerns. **When policies are nationalized, addressing the concerns of those communities that suffer disproportionately from policy errors or omissions becomes difficult.** **Local environmental concerns must compete against national political priorities. A small town that needs to devote resources to improving the quality of its drinking water must compete for federal funds and attention with whatever environmental concern is on the evening news. Federal agencies and national politicians are often less responsive to local needs than local institutions and officials.** “**States are closest to their constituents and problems, bringing a necessary sensitivity and perspective to local environmental issues that even EPA’s 10 regional offices, often many hundreds of miles away, can’t have.**”39 Regulating the nation’s environment from Washington is such a massive undertaking that it forces the U.S. Congress to engage in widescale delegation of responsibilities to federal agencies, particularly EPA.40Consequently, key decisions about national environmental policy are made by bureaucrats within regulatory agencies, rather than legislators. While such agencies are under the control of the executive—a political branch—political accountability is attenuated at best. Not only are regulatory officials not themselves directly accountable to voters, but the regulatory process is not as transparent or understandable as the legislative process. Arcane regulatory dictates are easily obscured amidst a pile of notice-and-comment rulemakings, interpretative rules, guidance documents, negotiated rulemakings, and technical amendments. **The lack of accountability is actually compounded by the “cooperative” structure of many environmental regulations. Because the federal government enacts mandates that state and local governments must implement and enforce, the source of regulatory obligations becomes obscured. In practice, cooperative federalism diffuses responsibility and creates opportunities for state and federal officials to engage in blame-shifting and credit-taking**.41 **For a citizen dissatisfied with the existing regime, it is less clear whether redress lies in the state or the federal government. As environmental programs become more complex, the lines of accountability become more attenuated, and it is easier to divert environmental policies toward other ends, such as economic rent-seeking**.**42Environmental rules can be used to stifle competition or lock up national product markets. Thus, ethanol producers seek to manipulate the federal definition of “oxygenated fuel”**43 **while hazardous waste management firms seek to commandeer greater portions of the waste stream**.44 **As the costs of environmental regulations increase, so do the potential gains from manipulating environmental regulations for pecuniary advantage. Seeking regulatory policies that will carve out niche markets or inhibit competitors becomes an increasingly profitable investment of time, money, and other resources, all the while undermining the effectiveness of environmental regulations to achieve environmental goals**.

***This is specifically devastating to the fracking industry – leads to long-term shutdown***

**Walsh, 12** (Time: “Why the Shale Gas Industry Needs Regulations for Fracking” By [Bryan Walsh](http://science.time.com/author/bryanrwalsh/), I'm a senior writer for TIME magazine, covering energy and the environment—and also, occasionally, scary diseases. Previously I was the Tokyo bureau chief for TIME, and reported from Hong Kong on health, the environment and the arts. I live in Brooklyn. May 30, 2012 <http://science.time.com/2012/05/30/why-the-shale-gas-industry-needs-regulations-for-fracking/#ixzz2KzbIgSBc>

You’ll rarely find a business in America—and especially one in the fossil-fuel industry—asking for more regulation. The default mode of industry groups like U.S. Chamber of Commerce and the American Petroleum Institute (API) is that government is always the problem, and that less regulation is always the solution. That’s usually been the position of the shale gas industry in the U.S., as new hydrofracking technology has enabled companies to tap vast new natural gas deposits, transforming the energy picture in the U.S.—and eventually, around the world. Ask any natural gas executive, and they’d tell you that the only thing holding back the industry was the threat of government regulations that would raise the cost of drilling and production. Fracking, as the industry group API [says on its website](http://energytomorrow.org/energy/hydraulic-fracturing/#/type/all), is a “proven and well-regulated technology.” **Green and many locals living in shale gas territory disagree, however, giving birth to an anti-fracking movement that may have more momentum than anything else in environmentalism today. And that movement has had a serious slowing effect on shale gas**, with states like New York and Vermont restricting fracking. Overseas the public opinion of fracking is even worse, with countries like France banning the practice altogether. The International Energy Agency (IEA) has said that the world could be entering a Golden Age of Gas, so plentiful are shale deposits in countries around the world, which means the gas is there. **But environmental concerns—*if unanswered*—could end that age early**. ***That’s why good regulation—far from ~~retarding~~ the growth of the shale gas industry—might be the only thing that ensures it***. Such is the conclusion of a [new study](http://www.worldenergyoutlook.org/goldenrules/#d.en.27023) released by the IEA this week which found that “golden rules” of regulation are needed to usher in the golden age of gas. **Without it, mass opposition could limit fracking altogether.** Here’s [IEA Executive Director Marla van der Hoeven](http://www.iea.org/newsroomandevents/pressreleases/2012/may/name,27266,en.html):

**The technology and the know-how already exist for unconventional gas to be produced in an environmentally acceptable way**. **But if the social and environmental impacts are not addressed properly, there is a very real possibility that public opposition to drilling for shale gas** and other types of unconventional gas **will halt the unconventional gas revolution in its tracks. The industry must win public confidence by demonstrating exemplary performance; governments must ensure that appropriate policies and regulatory regimes are in place.**

***Natural gas revitalizes every industry --- including chemicals***

Steve **Stackhouse**, writer for Area Development, MA in Journalism, “New Natural Gas Technologies Firing Up Manufacturing”, Fall 20**12**, http://www.areadevelopment.com/EnergyEnvironment/Fall2012/natural-gas-technologies--fuel-economic-boom-2223461.shtml

**The economic boom fueled by new natural gas drilling technologies has been stunning** — **some parts of the country barely noticed the Great Recession** as they scrambled to find enough well-paid workers to extract shale gas from the ground. **But what if that boom was just the tip of the economic-development iceberg**? **What if the gas boom turned out to be a catalyst helping to spark a much-needed rejuvenation in North American manufacturing**? That’s a question many business leaders and academics have been asking lately, and **the answer is encouraging.** **One study has projected the addition of a million new jobs in the next dozen years thanks to the availability of more affordable energy**, the need for products involved in extracting gas, as well as new manufacturing operations involving various products and byproducts that come from the ground. **Other studies look forward to an even bigger impact on jobs, and suggest that manufacturing operations that previously fled to overseas locations may turn around and come home.** New Technologies **The boom stems from the increased use of hydraulic fracturing**, or “fracking,” **and horizontal drilling techniques to unlock formerly inaccessible underground oil and gas treasures**. The concept started to catch on in the late 1990s in the Barnett Shale area of Texas and quickly spread to reserves such as Eagle Ford, Marcellus, Utica, and Bakken. **These and other shale reserves are rich enough to make the *U*nited *S*tates one of the world’s top producers of shale gas and all of its various downstream products**. A variety of industries will feel the impact, says Kevin Smith, chief economist for the American Chemistry Council. **The chemical industry** he represents **is already seeing growth, and** he says to also **watch for an impact in such sectors as steel and other metals, plastics and rubber products, glass, paper, and cement — what** he says **could be “a whole manufacturing renaissance in this country.” Take, as just one example,** **the plans from Shell Chemical to build** an ethane “cracker” in the northeast United States. A “cracker” is what the industry calls **a plant that breaks down oil and gas into smaller molecules**, and an ethane cracker creates ethylene, which goes into plastic. **Shell favors a site in Pennsylvania, one of the hot spots for shale gas development**, **and Smith’s organization has projected that the project could create more than 17,000 permanent jobs**, including direct and indirect jobs as well as ripple-effect employment. **Multiply that by the many other kinds of operations fueled by the shale gas boom and you get** what a PricewaterhouseCoopers study also terms “**a renaissance in U.S. manufacturing**.” One of that study’s lead contributors was Bob McCutcheon, PwC’s U.S. industrial products leader and the managing partner in Pittsburgh — a place where both shale gas and the state of manufacturing are on a lot of people’s minds. “We’re in the Marcellus Shale country, and a lot of conversation a year ago was centered on the energy sector — jobs, drilling activity, farmers cashing checks,” he says. “We were talking to a lot of clients in the industrial products sector and started to have a lot of conversations about what this might mean longer-term for manufacturing. So we tried to take a data-driven approach to the question.” **What are the results of this data-driven research? “We believe that the affordable, abundant shale gas that’s available with technology in horizontal drilling and fracking is a game-changer for U.S. manufacturing,”** says McCutcheon. **A report from the American Chemistry Council has similar superlatives: “Natural gas from shale is possibly the most important energy development in 50 years. It has huge potential for the United States.”** Who’s Feeling the Benefits? **Among other things, the PwC study scoured the filings of public companies for evidence of growth or planned expansions resulting from the gas boom**. **Even relatively early in the game, these documents already include numerous mentions**. Some of them point to the cost savings brought about by the drop in natural gas prices. Indeed, **the downward effect on natural gas prices is a goldmine for manufacturing,** according to the PwC analysis. **By 2025, U.S. manufacturers could be saving more than $11 billion a year on natural gas expenses. But probably twice as many of the public company filings on the topic involve firms that expect to make more use of the various byproducts of shale gas production, or whose products are essential to the extraction of shale gas**. According to Smith, **there has been a significant increase in capital investments made by chemical-makers and other manufacturing industries** — **investments that could eventually add up to $75 billion**. Gulf Coast locations and Appalachian areas are already seeing the impact, he notes. **One American Chemistry Council study focused on the projected supply response among eight natural gas-intensive manufacturing industries, and forecast an increased output of about $120 billion, which in turn would support the creation of 1.2 million** direct, indirect, and induced **jobs** — **not to mention the 1.1 million jobs that would be created by construction**. **Even that could be just the beginning of the employment impact, though**. Smith points to a Boston Consulting Group study suggesting that **America could be in for a wave of “re-shoring,” essentially the opposite of offshoring**. **As the cost picture improves, returning manufacturers could generate two to three million jobs. Truth is, many industries benefit from both the lower energy and supply costs as well as the opportunity to expand production.** **Take the metals business. There are plenty of metal tubes and pipes and other components involved in gas drilling itself**, McCutcheon notes. Beyond that, “**steel work is one of the largest consumers of natural gas, so the cost savings could be a significant competitive advantage for manufacturers here**,” he observes**. In addition, newer steel production technologies could carry the benefits a step further, including processes that substitute natural gas for coke in the steelmaking recipe.** Developments Linked to the Boom The American Chemistry Council has compiled lists of developments linked to the natural gas boom. Smith says the original intent was to create a “one-pager” summary, but the list quickly grew into multiple pages (in fact, there’s a page with fairly small type devoted just to chemical manufacturing developments and another full page of plastics-related projects). Here are just a few more examples of developments that observers have linked to the natural gas boom: **Dow Chemical plans to use shale resources along the Gulf Coast to ramp up ethylene production. Earlier this year, the company announced development of a new ethylene production plant in Freeport, Texas, and it plans to restart a Louisiana ethylene cracker and seek additional feedstocks from the Eagle Ford and Marcellus reserves**. In announcing the Texas development, the company’s Chairman and CEO Andrew Liveris noted, “For the first time in over a decade, U.S. natural gas prices are affordable and relatively stable, attracting new industry investments and growth, and putting us on the threshold of an American manufacturing resurgence.” **Research by the American Chemistry Council includes a long list of iron and steel expansions** that can be tied to the natural gas boom in such places as Pennsylvania, Ohio, North Carolina, Minnesota, Texas, Alabama, and Arkansas. **Nucor Steel has plans for a $750 million direct-reduced iron facility in Louisiana**. Like most metals-related plants, it’ll need a strong supply of natural gas, and nearby shale resources are considered likely sources. **Last year, U.S. Steel opened an Ohio mill to make steel pipe for the drilling industry, and a French company named Vallourec & Mannesmann is doing the same. The Eagle Ford Shale in Texas is the catalyst behind a $1.7 billion Formosa Plastics chemical complex expansion nearby.** Cracking units would produce ethylene and propylene gases for use as raw materials at on-site plastics plants. **Old Ocean, Texas, is where Chevron Phillips plans two propylene facilities, part of the company’s U.S. Gulf Coast Petrochemicals Project**. Last year the company announced plans for Gulf Coast ethane cracker and ethylene derivatives facilities. **Aither Chemicals is exploring development of an ethane cracker in West Virginia. The company is exploring the market interest for chemical feedstocks** that its cracking process would produce by tapping into the Marcellus Shale. **Bridgestone, Michelin, and Continental have South Carolina tire manufacturing developments linked to the gas boom, according to the American Chemistry Council**. Where Are the Benefits Most Powerful? The natural gas boom is certainly reflected in Area Development’s 2012 Leading Locations analysis. Many of the U.S. locations revealed by data sources to be the most prosperous are feeling the impact of fracking — from North Dakota to Texas to parts of Louisiana. Indeed, the impact has been so powerful that many of these areas barely experienced the recession and, if anything, had a surplus of job openings. As David Jenkins, vice president at engineering consultant TRC Companies, points out, there’s so much demand for workers that some sites have had to build worker “camps.” **The question is how far does the halo expand beyond those areas where the gas is being extracted from the ground?** “It depends on the nature of the industry and how important it is to have close proximity to gas,” McCutcheon says. “One of the challenges is infrastructure and the ability to transport and store the gas.” Crackers, for example, tend to be in close proximity to the source. And as David Moss of Texas-based Armada Oil observes, end-users may tap right into their producers to trim overhead costs. “Locating manufacturing facilities near the producers is smart if you negotiate direct delivery from them and have or build a pipeline for delivery,” he says. On the other hand, **the boom has pushed natural gas prices down across North America, so** as McCutcheon points out, “**the broader effect is not necessarily going to be as geographically specific**.” It’s no surprise, then, that **chemical and plastics developments on the American Chemistry Council’s project list can be found all over the North American map, not just in the neighborhood of the shale reserves.** But **here’s where the story gets particularly positive for the U.S. economy compared with global competitors. “The market is still very inefficient**,” McCutcheon says, “**and that inefficiency in the market creates a competitive advantage in the United States**.” Three cheers for inefficiency? In this case, yes. A more efficient natural gas market would allow more global pricing, as is the case with oil. But, “**natural gas is still essentially regionally priced, so an abundance of natural gas in North America will benefit prices in North America,”** says McCutcheon. **The price advantage is significant. Natural gas may cost five times as much in some other parts of the world, even six or seven times higher in other places. That erases or at least mitigates a lot of the competitive advantages that have driven manufacturing overseas in recent years. The swing of the pendulum is quite noticeable** when one looks into the nation’s liquefied natural gas (LNG) terminals. As the PwC report points out, companies in the past have built LNG import facilities in America, under the assumption that domestic natural gas supplies would be limited. Now that they seem practically unlimited “that trend has reversed, and there is more interest in conversion to LNG export terminals,” the report states. How long will the U.S. advantage last? And aren’t there opportunities to frack in other countries? **“There are certainly significant shale gas reserves outside the United States, but currently the U.S. has the strategic advantage in technology and the ability to extract the gas,”** McCutcheon says, adding that he expects the American advantage to last for some time. **And that’s why the natural gas boom is potentially amazing news in a lot more sectors than just oil and gas development.** “This is a big part of a bigger story,” McCutcheon says. “**It is a major contributing factor to a competitive environment that could lead to a resurgence of manufacturing.”**

***A competitive chemical industry is key to sustainability, and solves extinction***

**ICCA 2 –** ICCA (International Council of Chemical Associations), June 20, 2002, “SUSTAINABLE DEVELOPMENT AND THE CHEMICAL INDUSTRY,” online: http://www.cefic.be/position/icca/pp\_ic010.htm

Sustainability in economic terms means the efficient management of scarce resources as well as a prospering industry and economy. Sustainability in the environmental sense means not placing an intolerable load on the ecosphere and maintaining the natural basis for life. Seen from society's viewpoint, sustainability means that human beings are the centre of concern. In view, particularly, of the population increase worldwide, there needs to be provided as large a measure of equal opportunities, freedom, social justice and security as possible. ¶ The chemical industry views Sustainable Development as a challenge put before all parts of society. In the advances made in its own operations, its improved performance and in the improvements to the human condition made through its products, the chemical industry sees cause for optimism and believes that Sustainable Development can be the intellectual framework around which the chemical industry, other industries and other sectors of society can reach consensus on how to improve living standards and the environment. ¶ The main challenges facing the world include:- ¶ \* Optimizing the benefits obtained from depleting resources¶ \* Assuring against excessive strains placed on the eco-system¶ \* The dynamic growth of the world population¶ \* Remedying social and economic inequalities¶ These are challenges on a global scale. It follows, therefore, that the attainment of Sustainable Development will call for action on the part of the people, governments, businesses and organisations around the world. The global chemical industry has realized this challenge. ¶ CONTRIBUTION OF THE CHEMICAL INDUSTRY TO SUSTAINABLE DEVELOPMENT¶ The chemical industry is a key industry. Its products and services are instrumental in meeting the needs of mankind. It is present in ***all areas of life***, from food and clothing, housing, communications, transport - right through to leisure activities. In addition, it helps to solve the problems of other sectors of industry, such as the energy sector, information technologies, environmental industries and the waste disposal sector, as examples.¶ Due to its size, the chemical industry is an important supplier to a broad range of downstream industries and is, as well, a customer of a broad range of products and services from other industries. It follows, therefore, that the chemical industry plays a major role in providing/ supporting performance improvements, research and development progress and, last but not least, employment in other industries.¶ In itself, it is a large-scale provider of jobs and makes a significant contribution to wealth creation and, hence, to the financing of both public works and the exercise of public responsibilities. Since living standards are determined to a large degree by material considerations, it is clear that the chemical industry with its ***unique capabilities*** is in a position to make a ***decisive contribution*** to Sustainable Development.¶ Commitment by the world chemical industry to the concept of Sustainable Development requires words to be transposed into company-specific action programmes in order to provide a framework for all those working in the sector. Its "Responsible Care" initiative, self-monitoring systems and other voluntary programmes such as Sustainable Technology (SUSTECH), Education-Industry Partnerships, Energy Efficiency Programmes are also part of this framework. Thereby, companies are also confronted with new challenges and must act responsibly. They must take account of the consequences of their actions upon society and future generations.¶ The global chemical industry believes that the key to improving the performance of the industry is both its commitment to achieving environmentally sound Sustainable Development and improved performance and transparency. Under the concept ¶ environment, to seek continuous improvement in performance, to educate all staff and work with customers and communities regarding product use and overall operation. Through these efforts the industry is improving its efficiency, reducing risks to health and the environment and making better products which, in turn, help individual and industry customers.¶ THE CHEMICAL INDUSTRY's LEADERSHIP IN INNOVATION¶ The very notion of Sustainable Development will require new approaches in a number of areas. Innovation at all levels and in all fields of activity is the most effective instrument for ensuring that the economic, and environmental goals, as well as those of society, are being advanced.¶ The chemical industry's contribution is to continue innovation of new products that meet customer needs and manufacturing processes that reduce risks to health and the environment. This contribution is based upon the knowledge and experience the industry has acquired from applying innovation not only to making, handling and use of chemical compounds, but also to reprocessing, recycling and solving environmental problems. The challenge facing the chemical industry is to maximize innovation, which can contribute to society meeting its goals for Sustainable Development. ¶ The chemical industry is firmly convinced that leadership in innovation represents the best way of attaining Sustainable Development. For the individual company, this means:- ¶ \* a consistent orientation towards products, technologies and solutions which offer the greatest promise for the future¶ \* development of new integrated environmental technologies¶ \* a close cooperation with the customers of the chemical industry¶ \* adaptation to the conditions of global competition¶ \* bringing the most promising products quickly on the market¶ \* strengthening the R&D effort which requires resources which can only be financed from profitable earnings¶ \* actively contributing ideas and suggestions to the policy debates taking place in society¶ \* improving process yield (efficiency).¶ APPROACH TO THE ECONOMIC GOAL OF SUSTAINABLE DEVELOPMENT¶ The internationalization of the economy at large, in conjunction with a growing trend towards global competition, is becoming more and more apparent. This is being manifested by:- ¶ \* an increase of imports and exports of goods as well as services¶ \* growing outward and inward flows of direct investment¶ \* an ever increasing exchange of technology transfers¶ \* globalization of monetary and financial schemes. ¶ The inter-relation of economic systems is complex, with a variety of relationships among countries. Multi-national chemical companies apply common standards in spreading investment capital and stimulating markets around the globe, thus setting the scene for the world market. What they need, in order to play a constructive role in Sustainable Development, is, first and foremost, freedom and fairness in international trade. Trade as an engine of economic growth is essential for Sustainable Development. A climate needs to be fostered within which such growth may take place on the basis of a clear set of rules with predictable consequences, by which investors may be guided in their long-term decision-making process. This includes bringing to a halt the growing intervention by governments in industry and their ever increasing demands to raise income by taxation, thus imposing a disproportionate load on the business community.¶ Wealth creation and **profits are fundamental to Sustainable Development**. They sustain economies (not just the chemical industry), and contribute, via re-investment and R&D, to new technologies and environmental improvements. Profits are needed to create flexible company structures oriented towards economic, environmental and society-related requirements.¶ The chemical industry is a major industrial sector and an essential contributor to welfare and employment on a global scale. In order to ***maintain this position*** under the imperative of Sustainable Development, the long-term ***future of the industry*** must be rooted in a dynamic policy, whereby ***continual innovation*** and re-engineering of companies result in an increase of productivity and, thus, keeping up ***international competitiveness*** as a pre-requisite of sustainable job creation.

***And more broadly – Federalism good***

***Plan’s key to a division of labor that allows the US to effectively manage global security commitments***

**Nivola ’07** – Pietro S. Nivola, Vice ¶ President and Director ¶ of Governance Studies ¶ at The Brookings ¶ Institution. Issues in Governance Studies, July 2007, Rediscovering Federalism, <http://mavdisk.mnsu.edu/parsnk/2011-12/Pol680-fall11/POL%20680%20readings/federalism-wk%202/07governance_nivola.pdf>, jj

This paper stipulates that **federalism can offer** ¶ **government a helpful division of labor**. The essay ¶ argues that **the central government in the United** ¶ **States has grown inordinately preoccupied with concerns** ¶ **better left to local authorities. The result is an** ¶ **overextended government, too often distracted from** ¶ **higher priorities**. To restore some semblance of so-called ¶ “subsidiarity”—that is, a more suitable delineation of ¶ competences among levels of government—the essay ¶ takes up basic principles that ought to guide that quest. ¶ Finally, the paper advances several suggestions for how ¶ particular policy pursuits might be devolved.¶ Whatever else it is supposed to do, a federal system ¶ of government should offer policy-makers a division of ¶ labor.1 Perhaps the first to fully appreciate that benefit was Alexis de ¶ Tocqueville. He admired the federated regime of the United States because, ¶ among other virtues, it enabled its central government to focus on primary ¶ public obligations (“a small number of objects,” he stressed, “sufficiently ¶ prominent to attract its attention”), leaving what he called society’s countless ¶ “secondary affairs” to lower levels of administration.2 **Such a system**, in other ¶ words, **could help officials in Washington keep their priorities straight.** ¶ **It is this potential advantage**, above all others, **that warrants renewed** ¶ **emphasis today**. **America’s national government has its hands full coping with** ¶ **its continental, indeed *global, security responsibilities*, and cannot keep** ¶ **expanding a domestic policy agenda that injudiciously dabbles in too many** ¶ **duties best consigned to local authorities**. Indeed, in the habit of attempting to do ¶ a little of everything, rather than a few important things well, **our overstretched** ¶ **government suffers a kind of** ***a***ttention ***d***eficit ***d***isorder. Although **this state of** ¶ **overload** and distraction obviously **is not a cause of catastrophes such as** the ¶ successful **surprise attacks of September 11**, 2001, the ferocity of the insurgency ¶ in **Iraq**, or the submersion of a historic American city inundated by a hurricane in ¶ 2005, **it may render such tragedies harder to prevent or mitigate**.

***Effective engagement checks global nuclear war***

**Brooks, Ikenberry, and Wohlforth ’13** (Stephen, Associate Professor of Government at Dartmouth College, John Ikenberry is the Albert G. Milbank Professor of Politics and International Affairs at Princeton University in the Department of Politics and the Woodrow Wilson School of Public and International Affairs, William C. Wohlforth is the Daniel Webster Professor in the Department of Government at Dartmouth College “Don’t Come Home America: The Case Against Retrenchment,” International Security, Vol. 37, No. 3 (Winter 2012/13), pp. 7–51)

A core premise of **deep engagement** is that it prevents the **emergence** of a far more dangerous global security environment. For one thing, as noted above, the United States’ overseas presence gives it the **leverage** to restrain partners from taking provocative action. Perhaps more important, its core **alliance commitments** also deter states with aspirations to regional hegemony from contemplating expansion and make its partners more secure, reducing their incentive to adopt solutions to their security problems that threaten others and thus stoke security dilemmas. The contention that engaged **U.S. power dampens the** baleful **effects of anarchy** is consistent with influential variants of realist theory. Indeed, arguably the scariest portrayal of the war-prone world that would emerge absent the “American Pacifier” is provided in the works of John Mearsheimer, who forecasts dangerous multipolar regions replete with security competition, arms races, nuclear proliferation and associated preventive war temptations, regional rivalries, and even runs at regional hegemony and **full-scale great power war.** 72 How do retrenchment advocates, the bulk of whom are realists, discount this benefit? Their arguments are complicated, but two capture most of the variation: (1) U.S. security guarantees are not necessary to prevent dangerous rivalries and conflict in Eurasia; or (2) prevention of rivalry and conflict in Eurasia is not a U.S. interest. Each response is connected to a different theory or set of theories, which makes sense given that the whole debate hinges on a complex future counterfactual (what would happen to Eurasia’s security setting if the United States truly disengaged?). Although a certain answer is impossible, each of these responses is nonetheless a weaker argument for retrenchment than advocates acknowledge. The first response flows from defensive realism as well as other international relations theories that discount the conflict-generating potential of anarchy under contemporary conditions. 73 Defensive realists maintain that the high expected costs of territorial conquest, defense dominance, and an array of policies and practices that can be used credibly to signal benign intent, mean that Eurasia’s major states could manage regional multipolarity peacefully without the American pacifier. Retrenchment would be a bet on this scholarship, particularly in regions where the kinds of stabilizers that nonrealist theories point to—such as democratic governance or dense institutional linkages—are either absent or weakly present. There are three other major bodies of scholarship, however, that might give decisionmakers pause before making this bet. First is regional expertise. Needless to say, there is no consensus on the net security effects of U.S. withdrawal. Regarding each region, there are optimists and pessimists. Few experts expect a return of intense great power competition in a post-American Europe, but many doubt European governments will pay the political costs of increased EU defense cooperation and the budgetary costs of increasing military outlays. 74 The result might be a Europe that is incapable of securing itself from various threats that could be destabilizing within the region and beyond (e.g., a regional conflict akin to the 1990s Balkan wars), lacks capacity for global security missions in which U.S. leaders might want European participation, and is vulnerable to the influence of outside rising powers. What about the other parts of Eurasia where the United States has a substantial military presence? Regarding the Middle East, the balance begins to swing toward pessimists concerned that states currently backed by Washington— notably Israel, Egypt, and Saudi Arabia—might take actions upon U.S. retrenchment that would intensify security dilemmas. And concerning East Asia, pessimism regarding the region’s prospects without the American pacifier is pronounced. Arguably the principal concern expressed by area experts is that Japan and South Korea are likely to obtain a nuclear capacity and increase their military commitments, which could stoke a destabilizing reaction from China. It is notable that during the Cold War, both South Korea and Taiwan moved to obtain a nuclear weapons capacity and were only constrained from doing so by a still-engaged United States. 75 The second body of scholarship casting doubt on the bet on defensive realism’s sanguine portrayal is all of the research that undermines its conception of state preferences. Defensive realism’s optimism about what would happen if the United States retrenched is very much dependent on its particular—and highly restrictive—assumption about state preferences; once we relax this assumption, then much of its basis for optimism vanishes. Specifically, the prediction of post-American tranquility throughout Eurasia rests on the assumption that security is the only relevant state preference, with security defined narrowly in terms of protection from violent external attacks on the homeland. Under that assumption, the security problem is largely solved as soon as offense and defense are clearly distinguishable, and offense is extremely expensive relative to defense. **Burgeoning** research across the social and other sciences, however, undermines that core assumption: states have preferences not only for security but also for prestige, status, and other aims, and they engage in trade-offs among the various objectives. 76 In addition, they define security not just in terms of territorial protection but in view of many and varied milieu goals. It follows that even states that are relatively secure may nevertheless engage in highly competitive behavior. Empirical studies show that this is indeed sometimes the case. 77 In sum, a bet on a benign postretrenchment Eurasia is a bet that leaders of major countries will never allow these nonsecurity preferences to influence their strategic choices. To the degree that these bodies of scholarly knowledge have predictive leverage, U.S. retrenchment would result in a significant deterioration in the security environment in at least some of the world’s key regions. We have already mentioned the third, even more alarming body of scholarship. Offensive realism predicts that **the withdrawal of** the **America**n pacifier **will yield** either a **competitive** regional **multipolarity complete with** associated insecurity, arms racing, **crisis instability, nuclear proliferation, and** the like, or bids for regional hegemony, which may be beyond the capacity of local great powers to contain (and which in any case would generate intensely competitive behavior, possibly including regional **great power war**). Hence it is unsurprising that retrenchment advocates are prone to focus on the second argument noted above: that avoiding wars and security dilemmas in the world’s core regions is not a U.S. national interest. Few doubt that the United States could survive the return of insecurity and conflict among Eurasian powers, but at what cost? Much of the work in this area has focused on the economic externalities of a renewed threat of insecurity and war, which we discuss below. Focusing on the pure security ramifications, there are two main reasons why decisionmakers may be rationally reluctant to run the retrenchment experiment. First, overall higher levels of conflict make the world a more dangerous place. Were Eurasia to return to higher levels of interstate military competition, one would see overall higher levels of military spending and innovation and a higher likelihood of competitive regional **proxy wars and arming of client states**—all of which would be concerning, in part because it would promote a faster diffusion of military power away from the United States. Greater regional insecurity could well feed proliferation cascades, as states such as Egypt, Japan, South Korea, Taiwan, and Saudi Arabia all might choose to create nuclear forces. 78 It is unlikely that proliferation decisions by any of these actors would be the end of the game: they would likely generate pressure locally for more proliferation. Following Kenneth Waltz, many retrenchment advocates are proliferation optimists, assuming that nuclear deterrence solves the security problem. 79 Usually carried out in dyadic terms, the debate over the stability of proliferation changes as the numbers go up. Proliferation optimism rests on assumptions of rationality and narrow security preferences. In social science, however, such assumptions are inevitably probabilistic. Optimists assume that most states are led by rational leaders, most will overcome organizational problems and resist the temptation to preempt before feared neighbors nuclearize, and most pursue only security and are risk averse. Confidence in such probabilistic assumptions declines if the world were to move from nine to twenty, thirty, or forty nuclear states. In addition, many of the other dangers noted by analysts who are concerned about the destabilizing effects of nuclear proliferation—including the risk of accidents and the prospects that some new nuclear powers will not have truly survivable forces—seem prone to go up as the number of nuclear powers grows. 80 Moreover, the risk of “unforeseen crisis dynamics” that could **spin out of control** is also higher as the number of nuclear powers increases. Finally, add to these concerns the enhanced danger of nuclear leakage, and a world with overall higher levels of security competition becomes yet more worrisome. The argument that maintaining Eurasian peace is not a U.S. interest faces a second problem. On widely accepted realist assumptions, acknowledging that U.S. engagement preserves peace dramatically narrows the difference between retrenchment and deep engagement. For many supporters of retrenchment, the optimal strategy for a power such as the United States, which has attained regional hegemony and is separated from other great powers by oceans, is offshore balancing: stay over the horizon and “pass the buck” to local powers to do the dangerous work of counterbalancing any local rising power. The United States should commit to onshore balancing only when local balancing is likely to fail and a great power appears to be a credible contender for regional hegemony, as in the cases of Germany, Japan, and the Soviet Union in the midtwentieth century. The problem is that China’s rise puts the possibility of its attaining regional hegemony on the table, at least in the medium to long term. As Mearsheimer notes, “The United States will have to play a key role in countering China, because its Asian neighbors are not strong enough to do it by themselves.” 81 Therefore, unless China’s rise stalls, “the United States is likely to act toward China similar to the way it behaved toward the Soviet Union during the Cold War.” 82 It follows that the United States should take no action that would compromise its capacity to move to onshore balancing in the future. It will need to maintain key alliance relationships in Asia as well as the formidably expensive military capacity to intervene there. The implication is to get out of Iraq and Afghanistan, reduce the presence in Europe, and pivot to Asia— just what the United States is doing. 83 In sum, **the argument that U.S.** **security commitments are unnecessary for peace is countered by a lot of scholarship**, including highly influential realist scholarship. In addition, the argument that Eurasian peace is unnecessary for U.S. security is weakened by the potential for a large number of nasty security consequences as well as the need to retain a latent onshore balancing capacity that dramatically reduces the savings retrenchment might bring. Moreover, switching between offshore and onshore balancing could well be difªcult. Bringing together the thrust of many of the arguments discussed so far underlines the degree to which **the case for retrenchment misses the** underlying **logic of** the **deep engagement** strategy. By supplying reassurance, deterrence, and active management, the United States lowers security competition in the world’s key regions, thereby preventing the emergence of a hothouse atmosphere for growing new military capabilities. Alliance ties dissuade partners from ramping up and also provide leverage to prevent military transfers to potential rivals. On top of all this, the United States’ formidable military machine may deter entry by potential rivals. Current great power military expenditures as a percentage of GDP are at historical lows, and thus far other major powers have shied away from seeking to match top-end U.S. military capabilities. In addition, they have so far been careful to avoid attracting the “focused enmity” of the United States. 84 All of the world’s most modern militaries are U.S. allies (America’s alliance system of more than sixty countries now accounts for some 80 percent of global military spending), and the gap between the U.S. military capability and that of potential rivals is by many measures growing rather than shrinking. 85

**Plan**

***The United States federal judiciary should rule that the Environmental Protection Agency’s New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews on natural gas production are an unconstitutional expansion of the Commerce Clause and Spending Clause of the US constitution.***

**Observation 4 is Solvency**

***Courts can strike down natural gas regulations as an expansion of the Commerce Clause – This is key to reverse expanding federal jurisdiction in environmental regulations***

Jonathan H. **Adler**, Associate Professor of Law and Associate Director. Center for Business Law & Regulation, Case Western Reserve University School of Law, 90 Iowa L. Rev. 377, January 20**05**

III. Judicial Federalism & Federal Environmental Regulation These fears have a reasonable foundation. There is no doubt that **the doctrinal logic underpinning some of the federalism decisions challenges the traditional environmental paradigm** and threatens at least some existing environmental programs. Most of these statutes were adopted when there was little consideration of constitutional limits on federal power. n178 **These laws are vulnerable to a more restrictive federalism jurisprudence.** Despite the risks to federal environmental statutes, federal appellate courts have [\*404] resisted most opportunities to impose federalism constraints on federal environmental regulation. **While federal power has been clipped on the margin, federalism principles have not had a particularly significant impact on the scope of federal environmental regulation to date**. A. Enumerated Powers **Enumerated powers claims represent the most direct challenge to federal environmental regulatory power**. **Such claims strike not at the specific regulatory means employed** by the government to reach a particular end, **but at the federal government's ability to regulate a given subject matter at all**. As such, **insofar as the doctrine of enumerated powers affirmatively limits federal environmental regulatory authority, it could threaten to limit significantly the federal government's ability to regulate environmental concerns directly**. 1. Commerce Clause The scope of federal power under the Commerce Clause is of particular importance because most federal environmental statutes are premised upon Congress's power to regulate "commerce ... among the several States." n179 Indeed, **when** the **various environmental statutes were adopted, the underlying assumption was that the Commerce Clause "grants virtually carte blanche authority to Congress to legislate for environmental protection."** n180 **Judicially imposed limits on the scope of the commerce power will constrain the federal government's ability to regulate environmental concerns directly. Although most** activities subject to f**ederal environmental regulations can be considered** "commercial" or **"economic**," in some sense, **it is not clear that all such activities fall within the scope of the commerce power. Academic commentators were immediately aware that Lopez and Morrison, if applied aggressively to environmental statutes, could shake the foundations of federal environmental law**. n181 Many environmental laws [\*405] regulate intrastate activities irrespective of their economic nature or impact on interstate commerce. **Few environmental statutes contain jurisdictional elements or other provisions to keep their jurisdiction within constitutional limits**. n182 Thus far, federal appellate courts have uniformly rejected Commerce Clause challenges to the scope of federal environmental regulation. **Constitutional challenges to the application of the Clean Air Act**; n183 Clean Water Act; n184 Endangered Species Act; n185 and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") n186 to intrastate activities **have all failed thus far. In many of these cases, federal regulatory authority was upheld because the statute or regulations in question regulated explicitly industrial or commercial activity**. n187 In United States v. Ho, n188 for example, the U.S. Court of Appeals for the Fifth Circuit upheld provisions of the Clean Air Act establishing work practice standards for asbestos removal. Considering the four factors identified in Lopez and Morrison, n189 the court held that the rules in question satisfied the Commerce Clause requirement as "the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy." n190 For the most part, **the result in district courts has been the same, upholding federal environmental statutes and regulations in the face of Commerce Clause** [\*406] **challenges**. n191 This phenomenon is not isolated to environmental law. Federal courts, generally, have been reluctant to apply Lopez and Morrison so as to curtail the reach of federal Commerce Clause authority. n192 **Despite this pattern, it seems likely that some environmental statutes exceed the scope of the Commerce Clause power delineated in Lopez and Morrison**. Most vulnerable are the Endangered Species Act ("ESA") n193 and portions of the Clean Water Act ("CWA"). n194 Neither the ESA nor the CWA explicitly regulate commercial activities, as such. Under the ESA, any and all activities that harm endangered species, including modest habitat modification, are potentially subject to federal regulation. Regulation under the CWA is confined to "navigable waters," which the federal government has defined to include all waters and wetlands irrespective of their navigability or relationship to interstate commerce. n195 In each case, the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause. a. Endangered Species Act Several circuit courts have considered Commerce Clause challenges to the ESA's prohibition on the "taking" of listed species on private land. n196 The Commerce Clause claim has been rejected each time, yet the rationales adopted by the courts have varied a great deal and are fundamentally mutually inconsistent - a point noted by dissenting judges in several circuits. There is substantial tension between the logic of Lopez and Morrison, on the one hand, and the appellate holdings in these cases on the other. [\*407] The first federal appellate court to address the constitutionality of the ESA's prohibition on "taking" endangered species post-Lopez was the U.S. Court of Appeals for the D.C. Circuit in National Ass'n of Home Builders v. Babbitt. n197 A sharply divided court upheld the application of the ESA to the Delhi Sands flower-loving fly, an endangered insect of negligible commercial value n198 found only in a handful of counties in a single state. The first three judges to consider the constitutionality of ESA regulations post-Lopez adopted three different rationales. The two judges in the majority adopted quite different rationales, n199 while the third judge wrote a powerful dissent. Judge Wald found that taking the endangered fly substantially affected interstate commerce because the regulation of such activity "prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it" and "controls adverse effects of interstate competition." n200 Specifically, Judge Wald reasoned that while the loss of any single species might have a negligible or indeterminate effect on interstate commerce, the loss of multiple species, in the aggregate, is certain to have some effect on commerce as biodiversity declines and the natural resource base that it represents dwindles. n201 Additionally, relying upon the 1981 Hodel cases upholding the Surface Mining Control and Reclamation Act, n202 Judge Wald found the ESA take prohibition to be a reasonable congressional response to concerns that interstate competition for economic activity would result in a "race-to-the-bottom" and suboptimal levels of environmental protection. n203 Such regulation is constitutional, Judge Wald found, because "Congress has the power under the Commerce Clause to prevent destructive interstate commerce similar to that at issue in this case." n204 Judge Henderson, while concurring in the result in National Ass'n of Home Builders, embraced somewhat different rationales for upholding the application of the ESA's take prohibition to activities threatening the Delhi fly. Whereas Judge Wald focused on the aggregate impact of species loss on [\*408] interstate commerce, Judge Henderson stressed that "the loss of biodiversity itself has a substantial effect on our ecosystem" and therefore has a substantial effect on interstate commerce. n205 For Judge Henderson, the key factor was not the aggregate impact of species loss so much as it was the "interconnectedness of the various species and the ecosystems" and that the loss of any one species necessarily has broader ecological impacts that will, in turn, have a ripple effect upon "land and objects that are involved in interstate commerce." n206 Judge Henderson also noted that the regulations themselves, insofar as they regulate economic activity, have a substantial effect on interstate commerce. n207 Judge Sentelle dissented on the grounds that Congress's power to regulate interstate commerce cannot extend to those activities - in this case disturbing the habitat of an intrastate species - that are neither interstate nor commerce. n208 Noting the divisions among his colleagues, n209 Judge Sentelle stressed that the actual regulated activities - killing or otherwise disturbing flies - was not commercial in nature. n210 He further noted that the underlying logic of his colleagues' opinions would grant Congress near-unlimited power to regulate any activity that could potentially affect some item that could conceivably affect land or things involved in interstate commerce, either alone or in the aggregate, or to adopt any regulation that would, itself, have a substantial effect on commerce. n211 This sort of power without limits is precisely the sort of commerce power the Supreme Court rejected in Lopez. After Morrison, the D.C. Circuit again upheld the ESA's constitutionality against a Commerce Clause challenge in Rancho Viejo v. Norton, a case [\*409] involving the Arroyo toad, a species found in parts of Southern California and Mexico. n212 Here the D.C. Circuit settled on the rationale, drawn from Judge Henderson's concurrence in National Ass'n of Home Builders, that the regulation was constitutional because the protection of the Arroyo toad itself "regulates and substantially affects commercial development activity which is plainly interstate." n213 Specifically, Judge Garland's opinion for the court noted that the regulated activity in question - "the construction of a 202 acre commercial housing development" - was "plainly an economic enterprise" and could therefore be regulated despite its intrastate character. n214 Because the ESA take prohibition, as applied to Rancho Viejo's development activities, "regulates and substantially affects commercial development activity," the regulation substantially affects commerce, and is therefore constitutional. n215 **A fundamental problem** with the D.C. Circuit's analysis in Rancho Viejo **is that it focuses on the economic effect of the government regulation itself, rather than that of the regulated activity. This suggests that any federal regulatory statute of broad sweep will be constitutional because of the range of activity it regulates**; the more activity a regulation covers, the more likely it is that the regulation itself will have an economic impact, even if the regulated activities are themselves non-economic. In application, this holding produces the perverse result that more expansive federal regulatory statutes are less constitutionally suspect than those of more modest reach. n216 The Rancho Viejo analysis is also in severe tension with Lopez. Under the D.C. Circuit's reasoning, Alfonso Lopez's conviction should have been upheld under the Gun Free School Zones Act ("GFSZA") as he had brought [\*410] the gun to school as a courier in order to complete a commercial transaction. n217 Lopez's possession was commercial, yet the Supreme Court struck down the statute because the regulated activity - gun possession - was not and had no more than an attenuated connection to interstate commerce. As the Court noted, the GFSZA "by its terms has nothing to do with "commerce' or any sort of economic enterprise, however broadly one might define those terms," n218 and this was true regardless of whether Lopez possessed the gun for commercial purposes. Judge Garland's majority opinion in Rancho Viejo noted that the undisputed commercial nature of Lopez's gun possession was not referenced **in the Supreme Court's Lopez opinion**; and therefore, "the Supreme Court attached no significance to it." n219 That is precisely the point. **The Supreme Court attached no significance to the commercial nature of the individual activity in question in Lopez when evaluating whether the GFSZA was a valid exercise of Congress's Commerce Clause power. As noted in Morrison, the regulated conduct - gun possession in a school zone - was not commercial in character.** n220 **This was true regardless of the commercial nature of Alfonso Lopez's specific conduct.** As in Lopez, the actual regulated activities in National Ass'n of Home Builders or Rancho Viejo - the take of a Delhi Sands flower-loving fly and an Arroyo toad - are non-economic in nature, and it is unclear that such activities, in themselves, substantially affect commerce. The regulated conduct is that identified by the federal prohibition - possession of a gun in a school zone, gender-motivated violence, taking an endangered species - not the specific character of the individual activity subject to government sanction in a given case. n221 In other words, it was not Rancho Viejo's decision to develop property that subjected its actions to the ESA's limitations, but its alleged take of the Arroyo toad. Non-development-related activity that threatens Arroyo toads would remain within the Act's explicit prohibition on unpermitted takes of endangered species. Commercial property development on land not occupied by Arroyo toads, no matter how large, costly, or connected to interstate commerce, would not. The Rancho Viejo court seemed to recognize the nature of the regulated activity when characterizing the statutes at issue in Lopez and Morrison, but was unable to remain consistent when assessing the constitutionality of the [\*411] ESA, where the regulated conduct morphs from that controlled by the ESA, endangered species takes, to Rancho Viejo's commercial construction project. n222 As it is not Rancho Viejo's construction activities that trigger the applicability of the ESA, but the take of an endangered species, so it is the latter that is the regulated activity, and it is that activity that should form the basis of the Commerce Clause analysis. n223 As the Rancho Viejo majority acknowledged, "The ESA regulates takings, not toads." n224 The court could just as easily have said, "The ESA regulates takings, not commercial activity as such." That is to say that the ESA, by its express terms, regulates any activity that results in the take of an endangered species, regardless of whether the given activity in a given case can be characterized as "commercial." The Act applies equally to a child who catches an Arroyo toad as a pet as it does to the commercial developer who wishes to build houses in endangered toad habitat. The rationale adopted in Rancho Viejo was considered, and explicitly rejected, by the Fifth Circuit in GDF Realty Investments, Ltd. v. Norton. n225 The court noted that there is no basis in the Supreme Court's Commerce Clause jurisprudence, let alone the Clause itself, for holding that Congress may regulate an activity - the taking of an endangered species - "solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce." n226 Such an approach "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" and would eviscerate any constitutional limit on Congress's authority to regulate intrastate activities, "so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." n227 It also mischaracterizes the nature of Congress's regulatory action. By adopting the ESA, Congress "is not directly regulating commercial development" as such, but rather the taking of species. n228 And, as already [\*412] noted, had the Supreme Court adopted such an approach in Lopez, the GFSZA would have been upheld. n229 **The inconsistency between the D.C. and Fifth Circuits' rationales - and their tension with the Supreme Court's Commerce Clause decisions - was noted** by the dissenters from the denial of rehearing en banc in both Rancho Viejo n230 and GDF Realty. n231 **Lopez and Morrison upheld facial challenges to the statutes in question. Under the Supreme Court's test for facial challenges, this means there is no set of facts upon which the statutes could have been upheld**. n232 The GFSZA would have been no less unconstitutional if Alfonso Lopez had been a part of a vast interstate gun-dealing ring that happened to sell guns in schools. n233 Yet the Rancho Viejo court implied, and Judge Ginsburg's concurrence made explicit, that the holding should be construed such that Congress may constitutionally regulate the take of endangered species by commercial developers, such as Rancho Viejo itself, but not by a solitary homeowner landscaping his own property or a "lone hiker in the woods." n234 This is flatly inconsistent with the Supreme Court's approach in Lopez. n235 The Fifth Circuit's analysis in GDF Realty is not without problems of its own, however - a point noted by the six judges who dissented from the denial of en banc review. Rejecting the D.C. Circuit's focus on the economic impact of the regulation itself and whether the plaintiff itself is engaged in economic activity, the Fifth Circuit focused on whether the expressly regulated activity - species takes - has a substantial effect on interstate commerce, either in isolation or in aggregate. n236 Acknowledging that any relationship between commerce and the several cave-dwelling species at [\*413] issue in GDF Realty was highly attenuated, n237 the Fifth Circuit focused on the commercial effect of species takes generally, aggregating the economic effect of all species takes as a class. n238 The court characterized the regulation of cave-dwelling species as "part of a larger regulation of activity" - species takes - that Congress could reasonably conclude are economic in nature. n239 Further, the regulation of the cave species is an "essential" part of the overall regulatory scheme, insofar as the ESA's purpose - the preservation of species diversity - can only be achieved if its protections extend to all endangered species. n240 On this basis, the Fifth Circuit concluded the "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes." n241 This rationale, while possibly more consistent with Lopez and Morrison than Rancho Viejo, nonetheless suggests a near unlimited federal authority to regulate environmental concerns under the Commerce Clause. Yet it is an essential part of Lopez and Morrison that any viable Commerce Clause rationale must have a stopping point. n242 The same reasoning relied upon by the Rancho Viejo court would justify an omnibus ecosystem protection act regulating any and all activity with potentially significant ecological impact. n243 It is, after all, a basic ecological postulate, noted by Judge Henderson in National Ass'n of Home Building, that all activities have ecological impacts and that due to such effects and interconnections, everything is connected to everything else. n244 The same can be said of economic interrelationships. Small changes in economic conditions, no matter how small, can ripple through the sea of interrelationships and [\*414] exchanges that make up the modern economy. Yet this fact did not justify a broader Commerce Clause power under Lopez. n245 If some economic relationships - such as that between school safety and education, on the one hand, and future productivity, on the other n246 - are too attenuated to satisfy the requirements of the Commerce Clause, similarly attenuated ecological connections - such as that between the disturbance or even extinction of a marginal, intrastate species and broader economic impacts - are that much farther beyond Congress's reach. It is incongruous that threats to nearly extinct species have a greater relationship to interstate commerce than threats to human life. n247 Yet that is the net result of GDF Realty. **The Commerce Clause does not authorize such an all-encompassing regulatory power**. n248 **There is no doubt that ecological conditions can affect commerce substantially and that many** (if not most) **activities that have a significant ecological impact are motivated by economic considerations. Such an all-encompassing statute could be viewed as an "economic regulatory scheme"** as easily as the ESA. **Regulation of even relatively small, isolated and intrastate activities would be just as "essential" to the overall regulatory scheme** as the regulation of isolated, intrastate species is to the ESA**. Yet the Commerce Clause does not reach that far.** Although the Fifth Circuit denied the reasoning of its opinion would "allow Congress to regulate general land use or wildlife preservation," it offered no rationale for why endangered species regulation is somehow more commercial or related to interstate commerce. n249 Given the substantial interstate markets in wildlife and wildlife-related activities, n250 it would seem [\*415] that regulation of wildlife preservation generally would fit more easily within the bounds of the Commerce Clause, post-Lopez, than the regulation of species for which such markets do not exist. n251 If "the link between species loss and a substantial commercial effect is not attenuated," n252 then neither is the link between the taking commercially valuable, but non-endangered, wildlife and a substantial commercial effect, nor is the link between ecological degradation generally and a substantial commercial effect. As in Rancho Viejo, the logic of the court's opinion either obliterates the limited nature of Congress's commerce power, or it creates an implicit environmental exception for the Clause's otherwise justiciable limits. The opinion of the U.S. Court of Appeals for the Fourth Circuit in Gibbs v. Babbitt n253 can similarly be read to justify an ecological exception to the limits of Congress's enumerated power to regulate commerce "among the several states." From the outset, Judge Wilkinson's majority opinion framed the question as "whether the national government can act to conserve scarce natural resources of value to our entire country," rather than as whether a given regulatory measure - in this case the ESA's take prohibition as applied to experimental populations of red wolves reintroduced into North Carolina - is authorized by the Commerce Clause. n254 Gibbs held that "the regulated activity substantially affects interstate commerce and ... the regulation is part of a comprehensive federal program," n255 but the decision also repeatedly emphasized the need for federal environmental regulation - to the point of wrongly suggesting that to invalidate the ESA take prohibition would limit federal species-protection efforts to the management of federal lands and leave other environmental concerns to state tort law. n256 On the one hand, Gibbs can be read narrowly, standing only for the proposition that the prohibition against taking red wolves was within Congress's Commerce Clause power because red wolves have a substantial [\*416] relationship to interstate commerce. n257 Wolves are the subject of substantial scientific research and tourism, wolf pelts are a valuable commodity (at least when trade in pelts is permitted), and the motivation for taking wolves - the protection of livestock - is economic. n258 On the other hand, Judge Wilkinson's Gibbs opinion repeatedly suggests that environmental regulation itself necessarily meets the Commerce Clause requirements n259 and that the alternative is to sap "the national ability to safeguard natural resources." n260 It is certainly true that "the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation," n261 but this observation does not, by itself, support the conclusion that all such regulation is authorized by the interstate Commerce Clause. The implications of such a doctrine are far-reaching, even if not acknowledged in Gibbs. Responding to Judge Luttig's dissent, Judge Wilkinson wrote that the regulation in question "applies only to a single limited area - endangered species;" and therefore, the opinion should not be read to grant Congress near-unlimited regulatory authority. n262 This limitation is due to Congress's failure to adopt a more expansive statute, however, and not any constitutional limit identified in the Gibbs opinion. Like the Fifth Circuit, Judge Wilkinson offers no reason why the rationale upon which Gibbs relies would not justify more far-reaching federal regulatory measures. n263 While there is no doubt that the conservation of endangered species is an important and popular public policy goal, one can reasonably conclude that the appellate decisions upholding the ESA's take prohibition as against Commerce Clause challenges have shied from a strict application of Lopez and Morrison. n264 This problem is particularly acute in the context of [\*417] endangered species because those species that are most endangered are more likely to subsist in only one state and are least likely to be the objects of commerce. n265 The rationales set forth by the various courts, while appealing, are inconsistent with the Supreme Court's stated approach. At a minimum they suggest that Commerce Clause limitations should be enforced less stringently in the context of environmental protection. **For these decisions to stand, the Court would either need to identify an additional, and more compelling, basis for finding such regulations within the bounds of the Commerce Clause, or else retreat from the essential holdings of Lopez and Morrison, even if only to create a de facto Commerce Clause exception for environmental concerns. There is some reason to believe the Court might just take such a course**. Justice Kennedy, concurring in Lopez with Justice O'Connor, stressed that the Court should be sensitive to how a more stringent application of Commerce Clause limitations could upset settled expectations. n266 He further paid substantial attention to the potential practical effects of striking down the GFSZA. n267 **While there is reason to believe that the environmental impacts of judicial curtailment of the federal commerce power would be less significant than commonly supposed**, n268 **this argument might not be sufficient to assuage the concerns of at least some of the justices that have, thus far, signed onto a reinvigoration of the Commerce Clause.** As it would take only one defector from the Lopez majority to limit the environmental reach of the Court's current Commerce Clause doctrine, **it would be premature to predict any broader impact on environmental policy, regardless of the doctrine's underlying force.** b. Clean Water Act Jurisdiction While the Supreme Court has yet to address the implications of its modern Commerce Clause jurisprudence on environmental regulation directly, that jurisprudence has caused the court to curtail federal jurisdiction under the Clean Water Act by adopting a narrow construction of the statute itself. n269 In Solid Waste Agency v. United States Army Corps of [\*418] Engineers, n270 a regional waste management agency challenged the extension of federal regulatory authority over land containing permanent and seasonal ponds. Because the waters in question were isolated, and neither adjacent to nor hydrologically connected to navigable waters, the Solid Waste Agency of Northern Cook County ("SWANCC") contended that the land in question lay beyond the reach of federal regulation. The petitioners pressed their case on both constitutional and statutory grounds. The Court only reached the latter, citing federalism concerns - specifically the concern that a broad interpretation of the CWA would "push the limit of congressional authority" under the Commerce Clause n271 - to hold that the Act did not reach isolated, intrastate waters. The Court refused to adopt a more expansive interpretation of the Act absent a "clear indication that Congress intended that result." n272 By resolving the issue on statutory grounds, the Court avoided the need to address the extent to which Congress could regulate the use of isolated waters were it to adopt legislation explicitly for that purpose. n273 The impact of Solid Waste Agency on federal regulation is potentially significant. n274 At the very least the decision frees isolated, intrastate waters from federal jurisdiction, particularly where the only basis for asserting such jurisdiction is the actual or potential presence of migratory birds. Consequently many prairie potholes and other isolated wetlands and waters will no longer be subject to federal permitting requirements under 404 of the Clean Water Act. n275 Yet the precise limits Solid Waste Agency imposed on federal jurisdiction under the CWA are unclear. In January 2003, the Army Corps and the EPA issued an advance notice of proposed rulemaking to clarify the scope of regulatory jurisdiction under the CWA. n276 They issued a [\*419] joint memorandum containing advance notice prohibiting the assertion of regulatory jurisdiction over isolated waters based upon the presence of migratory birds. n277 This announcement came under heavy criticism from environmental organizations, which asserted that no rulemaking on the extent of CWA jurisdiction was necessary. n278 In December 2003, the Army Corps and EPA announced they would not issue a new rulemaking. n279 In the meantime, there has been substantial uncertainty as to the current scope of federal regulatory jurisdiction under the CWA. n280 A study by the General Accounting Office found that Army Corps district offices' jurisdictional determinations have varied significantly since Solid Waste Agency. n281 Due to Solid Waste Agency's ambiguous reach, a circuit split over the meaning of the case rapidly emerged. Several circuits, including the Fourth, n282 Sixth, n283 and Seventh, n284 have read Solid Waste Agency narrowly to preclude only federal regulation of isolated, intrastate, non-navigable waters. This is also the view adopted by the EPA and the Army Corps of Engineers. n285 The [\*420] Fifth Circuit, on the other hand, has read Solid Waste Agency more broadly to exclude waters that are neither navigable themselves nor adjacent to navigable waters. n286 Specifically, in the Fifth Circuit, federal jurisdiction under the CWA does not extend to wetlands, "puddles, sewers, roadside ditches and the like," if such waters are not truly adjacent to navigable waters. n287 According to the Fifth Circuit, the interpretation adopted by the other circuits "is unsustainable under [Solid Waste Agency]" as the CWA is "not so broad as to permit the federal government to impose regulations over "tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." n288 While it is too early to evaluate the full impact of Solid Waste Agency on federal regulatory jurisdiction, some things are clear. Solid Waste Agency reaffirms the principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise," such as whether Congress can regulate a given activity under the Commerce Clause, "and by the other of which such questions are avoided," a court's "duty is to adopt the latter." n289 Whereas courts once adopted expansive interpretations of federal jurisdiction so as to effectuate the broad purposes of federal environmental statutes, now such laws are to be construed in a narrower fashion. Applying Solid Waste Agency to statutes that contain a jurisdictional element - such as a requirement that the specific activity to be regulated substantially affect interstate commerce - should result in narrowing the scope of such statutes without questioning their constitutionality. An explicit jurisdictional requirement can expressly limit a statute's reach to those activities clearly within Congress's authority, thereby insulating a statute from a potential Commerce Clause challenge. c. Summary **Congress retains substantial Commerce Clause authority to regulate economic activities and their environmental impacts. Recent precedents do not undermine federal statutes** that explicitly regulate commercial or industrial activity, such as mining or asbestos removal, as such. **While the logic of Lopez and Morrison suggests limitations on Congress's ability to authorize the regulation of non-economic activity and the environmental impacts of such activity, lower courts have not been eager to enforce such** [\*421] **limits. There is no indication that the Commerce Clause opinions will be read to curtail federal ability to regulate documented interstate environmental impacts**, such as pollution spillovers. The Commerce Clause opinions have resulted in a narrowing of Clean Water Act jurisdiction, however, and may result in similar narrowing interpretations of other federal statutes with commerce-based jurisdictional requirements - though few environmental statutes fall into this category. This would result in the exclusion of some non-economic, intrastate activity from congressional regulation, but is unlikely to impact efforts to directly regulate the environmental impacts of industrial and commercial activity, as such. 2. Section 5 of the Fourteenth Amendment Judicial limits on the scope of Congress's power under section 5 of the Fourteenth Amendment have had no impact on existing environmental regulation and should not have much impact in the future. To date, Congress has not relied upon section 5 as the constitutional basis for any significant environmental legislation. Environmental laws are generally not conceived as efforts to enforce the Fourteenth Amendment's equal protection and due process guarantees. Yet even **if Congress was to adopt environmental laws predicated on the section 5 power, the substantive limitations on this power articulated in Boerne and subsequent cases could well constrain future efforts to enact federal environmental legislation pursuant to the Fourteenth Amendment, including efforts to abrogate state sovereign immunity.** Boerne and its progeny make the Fourteenth Amendment an unsuitable home for existing environmental measures. n290 Perhaps the greatest potential impact of the narrowing of Congress's section 5 power is that Congress could be less able to adopt legislation to address "environmental justice" concerns, such as allegations that pollution and environmentally damaging activities disproportionately affect communities of color. n291 No private plaintiff has brought a successful [\*422] environmental justice claim under the Fourteenth Amendment, as it is exceedingly difficult to demonstrate discriminatory intent. n292 Prior to the Supreme Court's recent federalism cases - and parallel cases limiting private causes of action under Title VI of the Civil Rights Act n293 - it was conceivable that Congress, or perhaps even a federal agency, could adopt environmental justice measures under the Fourteenth Amendment. For example, Congress could have prohibited state facility siting and environmental permitting decisions that have a disproportionate harm on minority communities or that exacerbate existing imbalances in the environmental burden of industrial development. The Supreme Court does not recognize the disparate impact of a government action on minority communities, in itself, as a violation of the Fourteenth Amendment's equal protection guarantee, however. n294 For this reason, the Court would likely strike down such legislation as in excess of Congress's section 5 power. Insofar as section 5 of the Fourteenth Amendment provides the only enumerated power authorizing Congress to abrogate state sovereign immunity, judicially enforced limits on the section 5 power will curtail Congress's ability to subject states to suits for environmental violations. n295 It is possible that only those environmental violations, or actions taken on environmentally related matters, that could themselves be construed as violations of rights protected by the Fourteenth Amendment itself could be subject to such suits. Although Congress may adopt prophylactic legislation to prevent potential Fourteenth Amendment violations by state actors, under Boerne such measures must be proportional and congruent.

***The Courts can rule on Spending Clause grounds – This ruling is key to state sovereignty and environmental federalism***

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B. State Sovereignty Whereas **limits on Congress's enumerated powers constrain Congress's ability to regulate** certain types of **environmental harms, the Supreme Court's state sovereignty decisions largely affect the means Congress may use to address specific environmental concerns**. At one level, **these restrictions are significant in that they represent strict prohibitions against the adoption of certain types of environmental measures.** On the other hand, the formal nature of these rules makes it easier for Congress to adopt alternative means of addressing a given environmental concern. Whereas **a Supreme Court decision substantially curtailing Congress's commerce power could leave** [\*423] certain **activities completely beyond Congress's regulatory reach**, there are relatively few environmental programs that are threatened by the Court's recent efforts to protect state sovereignty against federal encroachment. 1. Commandeering The potential commandeering of state government officials by federal environmental regulation is not new. In the 1970s, **the EPA directed states to adopt specific air pollution control measures under the Clean Air Act.** n296 The EPA maintained that it could obtain injunctive relief ordering uncooperative state officials to adopt a particular type of vehicle emission inspection program and other emission control measures. n297 This claim was generally rejected in the courts of appeals, however. n298 The courts ultimately relied on statutory language to reject the EPA's claims, but noted the serious constitutional questions about the EPA's position. n299 In particular, the courts separated federal efforts to control pollution from industrial sources that impact state-run facilities from federal efforts to directly conscript state officers in the administration of a federal program. As the D.C. Circuit noted, the EPA was "attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles." n300 Upholding such an assertion of federal regulatory authority, the Ninth Circuit noted, would have endorsed "[a] Commerce Clause power so expanded [that it] would reduce the states to puppets of a ventriloquist Congress." n301 Such a power "would enable Congress to control ever increasing portions of the states' budgets. The pattern of expenditures would increasingly become a congressional responsibility." n302 [\*424] **The Supreme Court accepted petitions for certiorari to consider whether the EPA could constitutionally commandeer state regulatory officials pursuant to the Clean Air Act**. Yet before the Court ruled on the question, the federal government acknowledged that its regulations were invalid and the decisions were vacated. n303 **There is little doubt that if the cases were litigated today, the EPA's effort to conscript state and local officials would constitute unconstitutional commandeering**. The Supreme Court next considered the constitutional limits on commandeering in New York v. United States, n304 a challenge to the Low Level Radioactive Waste Policy Amendments Act in which the Court clearly articulated the anti-commandeering principle. Since New York, state and local governments have raised Tenth Amendment claims with some frequency. Although New York is the principal commandeering case, and it concerned environmental matters, the anti-commandeering principle it announced has had a minimal effect on federal environmental regulation. The federal government rarely issues direct commands requiring state and local government officials to implement federal regulatory programs. Rather, state cooperation with and participation in federal regulatory efforts is induced through promises of funding and threats of preemption - measures that the Court explicitly endorsed in New York. Such measures may place substantial pressure on state and local officials to follow the federal government's lead in environmental policy, but they are not, in themselves, commandeering. n305 For this reason, most commandeering-based challenges to environmental regulations have failed. Since New York, there have been only two successful commandeering claims brought against federal environmental regulations, both involving exceedingly peripheral federal regulations. n306 In 1993, the U.S. Court of Appeals for the Ninth Circuit invalidated provisions of the Forest Resources Conservation and Shortage Relief Act ("FRCSRA"). n307 This law sought to limit the export of unprocessed logs from forests in the western United States. n308 Yet rather than impose direct restrictions on timber exports, the FRCSRA ordered states to adopt their own regulations restricting exports. In [\*425] Board of Natural Resources v. Brown, the Ninth Circuit held that these provisions were "direct commands to the states to regulate according to Congress's instructions" and thus constituted unconstitutional commandeering under New York. n309 Brown did not have a significant impact, environmental or otherwise. Following the Ninth Circuit's decision, Congress amended the FRCSRA to require the Secretary of Commerce to issue federal regulations directly limiting the export of unprocessed logs. n310 Even if Congress had not responded to Brown in this manner, the environmental effect would have been minimal. While styled as a "conservation" measure, it is doubtful that Congress enacted FRCSRA to conserve western state forests. n311 Rather, the FRCSRA's export provisions appear designed to protect domestic lumber mills from foreign competition. By restricting the export of unprocessed logs, the FRCSRA effectively mandated that local timber be processed in local mills, even if the timber were bound for foreign markets and overseas mills were more efficient. n312 In 1996, the U.S. Court of Appeals for the Fifth Circuit invalidated another rather minor federal environmental provision on anti-commandeering grounds. n313 The Lead Contamination Control Act ("LCCA") n314 required each state to "establish a program ... to assist local educational agencies in testing for, and remedying, lead contamination in drinking water." n315 The Fifth Circuit held that this provision fell "squarely within the ambit of New York" and was therefore unconstitutional. n316 If Congress sought to ensure the regulation of potential lead contamination in school water coolers, it would have to adopt legislation implementing such a [\*426] program at the federal level, or else provide states with a financial or other incentive to adopt such programs themselves. n317 All other commandeering challenges to federal environmental laws have failed. n318 In 1997, the U.S. Court of Appeals for the Second Circuit questioned the constitutionality of a CERCLA provision setting a "federally required commencement date" ("FRCD") for the running of the applicable state statute of limitations governing personal injury claims arising from the improper storage or disposal of hazardous wastes. n319 Although not deciding the question, in dicta, the court observed that the CERCLA provision was of "questionable constitutionality" because it "appears to purport to change state law" and might therefore violate anti-commandeering principles. n320 In a subsequent case, however, this claim was raised and rejected. n321 The FRCD does not conscript the state legislature or executive officials to implement a federal regulatory program. n322 Rather, it simply requires state courts to recognize that state-law toxic tort claims do not accrue before a plaintiff knows, or reasonably should know, of her injury. n323 This is a "modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution." n324 **While the FRCSRA and the LCCA are the only federal environmental statutes to be successfully challenged on commandeering grounds** since New [\*427] York, **there are a handful of other environmental provisions that appear to be quite vulnerable to similar challenges**. Dissenting in Printz, Justice Stevens identified sections of two **environmental laws that mandate state participation in federal regulatory schemes**. n325 In addition, the interpretation of federal environmental statutesto **impose affirmative regulatory obligations on states could also raise commandeering concerns.** n326 In this context, the Emergency Planning and Community Right-to-Know Act ("EPCRA") n327 is perhaps the most vulnerable federal environmental statute. n328 This law is designed to inform local communities about the use, storage, and disposal of various chemical substances and potentially hazardous materials, as well as to ensure that local governments engage in emergency planning to reduce the environmental risks that such materials and industrial facilities may pose to local communities. Unlike most federal environmental statutes that enlist state and local governments, however, EPCRA does not follow the cooperative federalism model. Rather, it explicitly commands each state's governor to create a "state emergency response commission" and then imposes a series of duties upon such commissions, including the creation of local emergency planning committees and the development of emergency response plans. n329 These requirements contravene the principle that "the Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." n330 In 1986, Congress added provisions to the underground storage tank ("UST") provisions of the federal Resource Conservation and Recovery Act of 1976 ("RCRA"). n331 These provisions are also vulnerable to challenge. Whereas most of the RCRA, including the bulk of the UST provisions, adopt a traditional cooperative federalism model, the 1986 amendments dictate to the states. Specifically, they include a provision requiring every state to develop inventories "of all underground storage tanks ... containing regulated substances" n332 and to submit these inventories to the federal EPA. n333 Unlike the other requirements of state UST programs, these [\*428] provisions are not discretionary. n334 Because they commandeer state officials to implement federal regulatory requirements, they are unconstitutional. Without a doubt, the relevant EPCRA provisions and RCRA's UST inventory requirement impose no more than an incidental burden upon state governments - and therefore it is unlikely that a state will challenge either provision in federal court. n335 Yet the relative unobtrusiveness of a federal requirement does not insulate a federal provision from the anti-commandeering principle. The Printz majority held that "no case-by-case weighing of the burdens or benefits is necessary" when adjudging the constitutionality of a federal command to a state government as it struck down the background check provisions of the Brady Act. n336 This does not bar Congress from pursuing these policy objectives, however. As with the provisions struck down in Ass'n of Community Organizations for Reform Now and Brown, it would be relatively easy for Congress to amend the relevant statutes to achieve the same objectives, either by mandating direct federal regulation or providing incentives for state cooperation. In some circumstances, the application of the Endangered Species Act ("ESA") to state regulatory programs may also be vulnerable to challenge on commandeering grounds, particularly insofar as the ESA is read to impose affirmative regulatory obligations on state agencies. In Strahan v. Coxe, a federal district court issued an injunction requiring the State of Massachusetts to regulate gillnet and lobster pot fishing in state waters so as to prevent the incidental taking of an endangered species. n337 The court accepted the plaintiff's claim that the state's licensing of gillnet and lobster pot fishing resulted in illegal "takes" of Northern Right whales in violation of the ESA. According to the court, insofar as the state exercised "control over the use of gillnets and lobster gear in Massachusetts waters," it could be liable for the taking of whales by private fishers with state-issued licenses. n338 [\*429] On appeal, the U.S. Court of Appeals for the First Circuit upheld the injunction against a federalism challenge. n339 Although this order could be viewed as requiring state regulatory officials to enforce a federal regulation - the prohibition on taking endangered species - the lower court's ruling did "not impose positive obligations on the [state] by converting its regulation of commercial fishing operations into a tool of the federal ESA regulatory scheme." n340 Rather, the court was merely preventing the state from allegedly taking endangered whales - albeit indirectly - by licensing fishing activities that entail an inevitable risk of such taking. The First Circuit's ruling is only plausible insofar as a state can be held liable for taking an endangered species because it licenses (or refuses to prohibit) activity that could result in a take of endangered species - activity which is itself illegal under the ESA insofar as it results in the take of listed species. n341 In effect, Strahan holds that states have an obligation to administer state regulatory programs so as to implement the federal ESA, even though the activities to be regulated are themselves already illegal under federal law. This seems to contravene the holding of New York that "**even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts**." n342 The First Circuit characterized the state's decision to issue licenses as a cause of illegal takes because the state licenses allowed the fishing to occur. Yet this presumes that absent a state-licensing scheme there would be no illegal takes from gillnet and lobster pot fishing. Precisely the opposite is the case. Were there no state licensing regime for gillnet and lobsterpot fishing, such activities could occur, at least within state waters. Therefore, the licensing of such activities should not be viewed as even a "but for" cause of the endangered species takes. Insofar as fishing activities threaten Northern Right whales, those activities are themselves illegal under the ESA and subject to federal enforcement. It is not clear upon what basis the legal obligation to enforce such a prohibition can be transposed onto a state merely because it elects to adopt a licensing scheme for state waters. If the state refrained from regulating gillnet and lobsterpot fishing altogether, the only way to mandate state enforcement of an anti-take prohibition would be to commandeer state officials. **The First Circuit rejected** these **federalism concerns on several grounds, none of which are particularly convincing.** First, as noted above, the court maintained that the state itself violated the take prohibition by issuing licenses to activities that posed an inherent risk of taking endangered [\*430] species. Second, the court suggested that the holding was justified by the Supremacy Clause and the undisputed federal power to preempt conflicting state laws. n343 Yet in this case state law was not preempted - that is, federal law did not displace state law by imposing different standards upon the regulated entities. Rather it acted directly upon the state entity itself in its sovereign capacity as the regulator of state waters. The court correctly noted that Congress may offer states the choice of regulating a given activity in conformity with federal wishes or preempt state regulation with federal rules. n344 Yet here the state was given no such choice. The district court injunction specifically required Massachusetts to bring its state regulations into conformity with federal law, and the federal take prohibition remains applicable to gillnet and lobsterpot fishers irrespective of what actions the state opts to take. Acknowledging that New York and Printz prohibit the federal government from directing state officials to adopt a given regulatory regime, the court nonetheless concluded that ordering revisions in the state-licensing regime was permissible because the court did not "direct[] the state to enact a particular regulatory regime that enforces and furthers a federal policy." n345 Yet the fact that the state has an array of options to comply with the federal requirement does not lessen the constitutional problem if each option, standing alone, could not be imposed. n346 Strahan violates the commandeering prohibition announced in New York and augmented in Printz. A federal requirement that a state must revise its method of regulating private activities seems to be precisely the sort of dictate that New York and Printz are meant to prohibit. Applying this principle in the ESA context would not result in significant changes in ESA enforcement. The take prohibition at issue in Strahan would continue to apply to private and state actors alike. The only limitation would be on using this prohibition as a justification for requiring states to alter or reform preexisting state regulatory regimes to make them more consonant with the ESA's requirements. 2. Sovereign Immunity **The Supreme Court's decisions upholding state sovereign immunity will have an identifiable impact on the scope of federal environmental regulation. Virtually every major environmental law contains citizen suit provisions authorizing private actors to seek enforcement of environmental** [\*431] **regulations in federal court**. n347 Other statutes contain provisions authorizing the payment of damages for environmental harms or penalties for other offenses, such as violations of whistleblower protection laws. Insofar as the Court's sovereign immunity holdings prevent the initiation of suits against states for money damages, private citizens will be unable to invoke these provisions against state entities. IV. The Next Federalism Battleground? To date, **the Supreme Court's federalism jurisprudence has had relatively little impact on federal environmental regulation**, let alone a multiple "whammy." n369 **Even where federalism principles would counsel curtailing federal regulatory authority, as with the Commerce Clause**, n370 **federal appellate courts have been reluctant to travel down this path, and** [\*434] **the Supreme Court, thus far, has rejected opportunities to lead the way**. n371 Where the Court's federalism holdings do constrain existing environmental laws, by and large the limitations have been minor, and Congress is able to circumvent most such restrictions should it choose to do so. **That the revival of federalism has not yet transformed federal environmental policy does not ensure that it will not do so in the future**. Looming on the legal horizon is at least one question of federalism that could cause substantial change in federal environmental law - constitutional limits on Congress's spending power, particularly Congress's authority to induce state action through the use of conditional spending. n372 **Because conditional spending is used in many environmental laws to encourage, or otherwise induce, state cooperation with federal regulatory efforts, the scope of the spending power is important for federal environmental law**. As the spending power is used to supplement, or extend, existing federal authority over state governments, legal challenges to such use of the spending power become more likely. **By limiting federal regulatory authority, the Court increased the pressure on Congress to use the spending power to achieve desired regulatory ends. The federal government can neither direct state legislatures nor commandeer state executive officials, but it can induce state cooperation with the promise of federal funds or the threat of direct federal action**. Pressure and encouragement are constitutional; direct commands are not. n373 The distinction between the two is not always clear, however. Even the use of conditional spending can, at some point, become "so coercive as to pass the point at which pressure turns into compulsion." n374 Under existing precedent, it nonetheless appears Congress has ample authority to circumvent the Court's federalism holdings through the use of conditional spending. n375 Indeed, some commentators have encouraged Congress to do just that. n376 [\*435] **Insofar as Congress's spending power is not subject to constitutional constraints, it threatens to swallow the state sovereignty protected by the Court's sovereignty decisions and could be used to emasculate the limitations on federal power established by the enumerated powers decisions**. n377 Indeed, to Professor Baker, the spending power "is, and has long been" the "greatest threat to state autonomy" of all Congress's powers. n378 Whereas states may have substantial incentive to resist commandeering or regulatory intrusions into areas of traditional state concern, states may be more accepting of federal requirements accompanied by federal funds. n379 **There is no particular reason to believe that coercive use of conditional spending is any less justiciable than other intrusions upon federalist norms. As the Court noted in Lopez, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [judges] to admit inability to intervene when one or the other level of Government has tipped the scales too far.**" n380 Much as it reiterated the need for constitutional limits while upholding broad assertions of the commerce power, the Court's most recent statement on the scope of the spending power, South Dakota v. Dole, n381 upheld the use of conditional spending to induce state cooperation while reiterating that the spending power, however broad, has some limit. n382 If the Court revisits the scope of the Spending [\*436] Clause, and delineates the federalism limitations on Congress's conditional spending power, the impacts on environmental law could be substantial. **Much of federal environmental law is implemented and enforced by state governments in accordance with federal guidelines and restrictions. States are not commandeered to implement federal environmental regulatory programs. Rather, under the cooperative federalism model, Congress induces state cooperation by offering funding - and threatening preemption - of state environmental programs.** n383 In some cases, however, the spending power is not used so much to fund qualifying state environmental programs, as it is to threaten states with the loss of substantial federal assistance if states do not fall into line. **Under the Clean Air Act, for example, states risk losing highway funds if they fail to adopt air pollution control plans that meet with Congress's and the Environmental Protection Agency's requirements**. This is effective because highway moneys are an "irresistible lure to the states, even with substantial conditions attached." n384 **Yet as the federal government imposes increasingly stringent air pollution control requirements on states, it is increasingly likely that states will rebel**. Two states challenged the use of conditional spending under the Clean Air Act in the 1990s. n385 In 1997, the EPA tightened federal air quality standards, triggering an additional round of air pollution controls by state and local governments, including many areas that were not previously required to adopt federally mandated measures. n386 The required controls will be even more expensive, and controversial, than existing air pollution control measures. n387 According to EPA Administrator Michael Leavitt, [\*437] "There are counties that could take all their cars off the roads, close their factories and clean up their power plants and still not be in attainment." n388 For this reason, litigation challenging the loss of highway funds would seem likely. **The Clean Air Act sanction regime could be vulnerable even under existing spending power doctrine. Should the Court tighten enforcement of constitutional limits on conditional spending, perhaps along the lines suggested by some commentators, the impact on environmental law could be quite far-reaching.** n389 **A more rigorous conditional spending doctrine could both restrict existing environmental laws and limit Congress's ability to get around other federalism limitations on federal regulatory authority.** A. The Spending Power Article I, section 8 of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States." n390 At the time of the founding, there was substantial debate as to the breadth of the power authorized by this clause. As with other enumerated powers, leading founders disagreed as to its precise scope. James Madison, for example, argued that the clause only empowered Congress to pursue those ends specifically identified in Article I. To Madison, the phrase "general welfare" did not license Congress to pursue any end it thought in the public interest. n391 The alternative interpretation would grant Congress a "general power of legislation, instead of the defined and limited one hitherto understood to belong to them." n392 Alexander Hamilton, on the other hand, contended that there were few, if any, substantive limitations on the spending power. n393 The power to raise money was "plenary, and indefinite" and the range of purposes for which money could be spent "no less comprehensive," so long as appropriations were "general and not local." n394 In Hamilton's view, the clause conferred an independent and distinct power [\*438] not limited by the other affirmative grants of power enumerated in Article I, section 8. n395 There are reasons to suspect Madison's interpretation of the spending power was more representative of the original understanding of the clause. n396 Among other things, federal grants to the states are a modern development. There were few such programs prior to the Progressive Era and the New Deal. n397 Nonetheless, the Hamiltonian view is dominant today. n398 Since United States v. Butler n399 in 1936, the Supreme Court has explicitly embraced a Hamiltonian interpretation of the spending power as "the correct one." n400 According to the Butler Court, "The power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." n401 Similarly, in Helvering v. Davis, n402 the Court held that Congress has broad discretion to determine whether a given incident of taxation or spending is within the "general welfare." n403 Madison's definition, on the other hand, was rejected in Butler as a "mere tautology." n404 The spending power is not merely the power to appropriate federal money for federal purposes. As interpreted by the courts, it is also the power to induce private or state action by attaching conditions to the expenditure of federal money. As the Court noted in Fullilove v. Klutznick, n405 the clause empowers Congress to impose conditions on the use of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." n406 In Butler, the Court struck down portions of the Agricultural Adjustment Act that imposed a tax on processors of agricultural commodities in order to subsidize reductions in farm production. The Court invalidated this use of the spending power because it sought "to regulate [\*439] and control agricultural production, a matter beyond the powers delegated to the federal government." n407 The spending power, while broad and far-reaching, could not be used to regulate matters beyond Congress's regulatory authority. Assuming this part of Butler's holding remains good law, it does not substantially limit congressional authority insofar as the scope of Congress's regulatory powers under the Commerce Clause has expanded dramatically since the 1930s, Lopez and Morrison notwithstanding. n408 At the very least, Congress may use the spending power to regulate or influence any activity that is within the scope of Congress's other enumerated powers. The spending power is unquestionably broad, but it is not unlimited. In 1987, in South Dakota v. Dole, n409 the Supreme Court identified five restraints upon Congress's use of conditional federal spending. First, the appropriation of funds must be for the "general welfare" and not for a narrow special interest. n410 In making this determination, however, courts are "to defer substantially to the judgment of Congress." n411 Second, **there can be no independent constitutional bar to the condition imposed upon the federal spending**. n412 **In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional.** Third, any conditions imposed upon the receipt of federal funds must be clear and unambiguous. n413 Recipients of federal funds must have notice of any conditions with which they must comply and the scope of their obligation. n414 As the Court noted in Pennhurst, **"The legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the "contract.'**" n415 Fourth, and most significant, the conditions themselves must be related to the federal interest that the exercise of the spending power is itself supposed to advance. In the Court's words, "The condition imposed by Congress is directly related to one of the main purposes for which ... funds are expended." n416 As reaffirmed in New York, the "conditions must ... [\*440] bear some relationship to the purpose of the federal spending, ... otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." n417 Dole also suggested a fifth limitation on the use of conditional spending - "coercion." Specifically, the Court noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion.'" n418 This point has been reiterated in subsequent cases. n419 While not explaining what amount or degree of financial inducement would be necessary for an exercise of the spending power to become coercive, the Dole majority noted that here Congress only conditioned "a relatively small percentage of certain federal highway funds" n420 - specifically five percent of the funds from specific highway grant programs. Such an imposition represents "relatively mild encouragement to the States," thereby leaving states with the ultimate decision as to whether to conform to federal dictates and is therefore not coercive. n421 Alternatively, the coercion inquiry could turn not on the amount of money at stake, but on whether the manner in which the conditions were imposed "interferes with a state's sovereign accountability." n422 The Court has long recognized that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof." n423 The problem occurs when Congress adopts "unreasonable" conditions. One could imagine a situation in which every payment from the federal government to states is conditioned upon acquiescence to every jot and tittle of every mandate contained in every federal statute. Well before the Supreme Court's reinvigoration of federalism principles, Professor Richard Stewart warned that "such a broad reading of congressional power would afford Congress a way to exercise the spending power where it is not spending, by drafting grant conditions that reach areas in which the state has accepted no [\*441] funds." **n424 If Congress is not limited in this manner, "the spending power could render academic the Constitution's other grants and limits of federal authority**." n425 **At such an extreme, the spending power would eliminate the judicial safeguards of federalism embodied in the Court's federalism jurisprudence.** Although the Dole Court clearly stated that Congress's power to impose conditions on the receipt of federal funds is limited, federal appellate courts have been extremely reluctant to strike down federal programs for exceeding the scope of the spending power. n426 The "general welfare" prong is treated as a "complete throw away," n427 and most of the other prongs have not fared much better. n428 Perhaps the relatedness prong of the Dole test has the greatest potential for constraining the use of conditional spending. It is repeatedly referenced by the lower courts, but rarely examined in any detail. n429 The concept of "coercive" uses of federal spending has attracted some attention as well, but "the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application." n430 **The doctrinal limits on the spending power are** admittedly **unclear**. **Yet in their rush to dismiss Spending Clause claims, some federal courts have almost certainly gone too far**. In Nevada v. Skinner, n431 for example, the Ninth Circuit held that Congress could make ninety-five percent of a state's highway funds conditional upon that state's setting of a fifty-five miles-per-hour highway speed limit. According to Judge Reinhardt's opinion for the panel, the conditional grant of funds did not amount to "coercion" that would "leave the state with no practical alternative but to comply with federal restrictions." n432 Key to the holding was the court's determination that "Congress has the authority" under the Commerce Clause "to compel the [\*442] States through direct regulation to change its practices." n433 As Skinner was decided in 1989, years prior to New York and Printz, this may have been a reasonable conclusion for the court to draw at the time. n434 In the wake of the anti-commandeering decisions, however, this rationale is unsustainable. There is little doubt that Congress could directly impose a fifty-five mile-per-hour speed limit on federal highways under the Commerce Clause. Such a law would require federal enforcement, however. This makes such a law unlikely, as Congress would only enact such a law if it concluded that the benefits of a uniform federal speed limit were greater than the costs of creating a federal highway patrol or otherwise diverting federal law enforcement resources to policing the nation's highways. The Skinner court, however, found that Congress could compel the states to impose a federal speed limit to be enforced by state officials. n435 Unlike a true federal speed limit, such a law would lie beyond the scope of federal power. Under New York and Printz, Congress has power neither to compel a state legislature to adopt such a rule nor to commandeer state law enforcement officials to implement the federal rule. Insofar as Skinner stands for the proposition that there is no coercion if Congress is using conditional spending to encourage the adoption and enforcement of state laws that Congress could impose on the states directly, it can no longer be good law after New York and Printz. **Not every federal appellate court has dismissed arguments for limiting the scope of Congress's spending power.** In 1997, an en banc panel of the U.S. Court of Appeals for the Fourth Circuit held, in Virginia Department of Education v. Riley, that the Department of Education could not condition state receipt of federal funds under the Individuals with Disabilities Education Act ("IDEA") on compliance with terms not explicit in the statute itself. n436 The Department of Education had sought to withhold all of Virginia's IDEA grants for two fiscal years - some $ 60 million - because Virginia did not provide free education to disabled students who were expelled or suspended for behavior unrelated to their disabilities. n437 According to the Department, this policy contravened the statutory requirement that state recipients of IDEA funds must, among other things, "assure[] all children with disabilities the right to a free appropriate public education." n438 The en banc Fourth Circuit rejected, by a vote of 11-2, the Department's position on the ground that the language of the IDEA did not clearly [\*443] manifest Congress's intention to prohibit a state recipient from adopting the policy at issue. According to the court's majority, n439 "Language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought." n440 Since, "at most," the IDEA "only implicitly conditions the States' receipt of funds upon the continued provision of educational services to students expelled for misconduct unrelated to their handicaps," the condition could not be imposed on an unconsenting state. n441 Particularly in an area of traditional state concern, such as education, courts must insist on "a clear, unambiguous statutory expression of congressional intent to condition the States' receipt of federal funds in a particular manner." n442 While the en banc court rested its decision on Congress's failure to impose an unambiguous condition on the receipt of IDEA money, six judges went further, noting a "substantial ... question" whether the Department's policy would have constituted unconstitutional "coercion" under Dole even if explicitly authorized by Congress. n443 For the federal government to withhold $ 60 million in IDEA funds because of Virginia's failure to provide a free education to 126 of the 128,000 handicapped students for whose benefit Virginia was to receive IDEA funds would be "considerably more pernicious than the "relatively mild encouragement' at issue in Dole." n444 Whereas in Dole states only risked losing a small portion of federal funding for failing to adopt a higher drinking age, in Riley the Department sought to withhold "the entirety of a substantial federal grant" because Virginia refused "to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states." n445 Six judges suggested that if anything could be considered unduly coercive under Dole, the Department's policy at issue in Riley would be it. To date, however, no federal appellate court has so held. [\*444] The scope of the relatedness inquiry has also recently divided a federal appellate court. In Barbour v. Washington Metropolitan Area Transit Authority, n446 a divided panel of the D.C. Circuit found that Congress could condition a state transit agency's receipt of federal funds on the waiver of sovereign immunity under the Rehabilitation Act, a federal statute that prohibits disability discrimination. The panel majority joined several other circuits n447 in finding that Congress could impose such a condition to ensure that federal funds were not "used to facilitate disability discrimination" and to ensure "that federal money is used for the provision of public transportation, and nothing else." n448 Just as Congress has authority, pursuant to the Necessary and Proper Clause, "to see to it that taxpayer dollars appropriated under [the spending] power are in fact spent for the general welfare and not frittered away in graft," as the Supreme Court recently held in United States v. Sabri, n449 the majority in Barbour reasoned that Congress could ensure that federal monies do not subsidize disability discrimination. n450 Judge Sentelle, in his dissent, denied that the conditions at issue in Barbour complied with Dole. n451 While preventing discrimination may be a valid federal interest, it is not the purpose of federal support for state transit agencies. n452 Congress can impose conditions to prevent the likelihood of corruption because such corruption could prevent the expenditure of federal funds for the congressionally determined purpose. Money "frittered away in graft" is not available to fund mass transit. Yet whether or not transit agencies discriminate against the disabled has no bearing on the availability of funds for mass transit services. n453 According to the dissent, "the proper test under Dole and New York is whether the condition is germane to the interest in the "particular national project[] or program[]," not whether Congress has a generalized "interest' in imposing the condition." n454 This division in the D.C. Circuit highlights the tension between the Supreme [\*445] Court's federalism holdings and an unconstrained power to impose conditions on federal grants. It additionally illustrates that a broad spending power could nonetheless be subject to significant, judicially enforceable limits. Commentators have noted several ways in which the Supreme Court could police the limits of the spending power. For starters, the Court could simply apply the existing elements of the Dole test with more rigor. n455 For instance, the relatedness prong could be read to require that the federal spending and the imposed condition both directly advance the same interest. n456 The conditional spending in Dole might pass this test depending on how directly the interest must be advanced. One could argue that federal highway funding and a reduced drinking age both improve highway safety. n457 Other conditions, however, such as that a state adopt regulations for coal-fired power plants as a condition of receiving federal highway money, would not. The Court could also define precisely what it means for the federal government to "coerce" state action through conditional spending. n458 Through either approach, the Court "could maintain at least nominal fidelity to the Dole test," even as it applied the test in a manner suggesting the precise outcome in Dole was incorrect. n459 Professor Baker proposes that those conditions on the receipt of federal funds that seek to regulate the states in a manner in which the federal government could not directly regulate state activity should be presumed invalid. n460 The federal government could overcome this presumption only by demonstrating that the funding constitutes "reimbursement spending," as opposed to "regulatory spending." n461 Under Professor Baker's formulation, **the federal government may specify how a given state is to spend federal grants and may condition receipt of the federal money on meeting such conditions, so long as the money to which the conditions are attached is only that money which is to be used to implement the program in question**. n462 Such "reimbursement spending" is permissible under Professor Baker's test. **Spending conditions which otherwise seek to regulate the states** [\*446] **in a manner otherwise beyond the scope of Congress's powers would be impermissible**. n463 Professor Berman proposes an alternative test, focusing on the "coercion" element of the Dole test. Specifically, Professor Berman proposes that a conditional offer of federal funds should be deemed unconstitutional if withholding some or all of the federal funds at issue would be unconstitutional. n464 Whereas Congress may opt, in isolation, to provide states with federal funds or not, Professor Berman suggests that Congress cannot withhold money from the states for an impermissible or "improper" reason if doing so would effectively penalize a state for failing to concede its sovereign authority to set a given policy. n465 Where the withholding of federal funds can be justified on the grounds that it serves a legitimate federal purpose, perhaps that withholding the funds in itself will advance the purpose of the federal program, the state is not being penalized, and the condition may be imposed. n466 In effect, Berman hinges the coercion inquiry on the congressional purpose behind withholding the federal funds and not on the magnitude of the funds at issue or the "pressure" that the funding condition appears to impose on the states. Either of the tests put forward by Professors Baker and Berman would be more restrictive than the Dole test, particularly as it is currently applied in the lower courts. So, too, would proposals to reinvigorate the "general welfare" requirement so as to limit the sorts of projects for which Congress could appropriate funds, n467 or to otherwise limit federal grants to states across the board. n468 If the Court is less aggressive in its initial efforts to reign in the spending power, as seems most likely, it would simply tighten the test articulated in Dole, much as in Lopez it tightened the limitations on the commerce power within the framework laid out in prior cases. While simultaneously upholding ever-broader assertions of federal authority under the Commerce Clause, the Court nonetheless reiterated that the power was limited, providing the doctrinal hook for the Court to use in Lopez. n469 The limiting language in Dole could well be used to the same effect, and this may [\*447] well yet occur as the Court's federalism cases would suggest that some tightening of the Congress's conditional spending power is in order. Left unrestrained, Congress may use the conditional grant of federal funds to achieve those ends that would otherwise be barred by the holdings of New York, Lopez, and Printz. States receive federal grants for welfare, environmental programs, highways, police, and many other purposes, and are therefore quite reliant upon the national fisc. **A federal recommendation that states implement a desired program or risk losing federal support could be quite coercive. Thus, the ultimate import of the Court's recent federalism cases may depend upon whether it opts to limit Congress's ability to use conditional spending to bribe and compel state actions.** B. Conditional Spending in Environmental Law **Among all federal environmental statutes, *the Clean Air Act ("CAA") is the source of the greatest state-federal conflict*.** n470 **It also represents Congress's most aggressive effort to induce state regulation through the use of conditional spending and is therefore the most vulnerable to spending power challenge**. **Whereas many federal environmental statutes attach conditions on the use of federal funding of state environmental programs, the CAA relies upon the threat of withholding federal highway funds to ensure state cooperation. Under the CAA, the Environmental Protection Agency ("EPA") sets National Ambient Air Quality Standards** ("NAAQS") for criteria air pollutants, such as ozone ("smog") and particulate matter ("soot"). States with metropolitan areas that fail to attain **NAAQS are required to draft State Implementation Plans ("SIPs"), which they submit to the EPA for its approval**. Among other things, an adequate SIP must include "enforceable emission limitations ... as well as schedules and timetables for compliance," n471 monitoring systems, n472 a fee-based permitting system for stationary sources, n473 an enforcement program, n474 and provide for sufficient public participation in the SIP process. n475 The 1990 Clean Air Act amendments added additional requirements for state-permitting programs for stationary sources. n476 The SIP process is the "heart" of the CAA. n477 [\*448] **Failure to submit a fully adequate SIP by the appropriate deadlines results in the imposition of one or more federal sanctions, including the loss of federal highway funds, increased offset requirements for new development, and the imposition of a Federal Implementation Plan ("FIP") that the EPA will enforce**. n478 **The imposition of such sanctions is not solely, or even primarily, within the EPA's discretion,** as individual citizens and activist groups may force the EPA's hands through citizen suits seeking to enforce the express requirements of the CAA and regulations promulgated pursuant to it. n479 Thus, **short of legislation, states have little political ability to seek compromise over the CAA's enforcement**. n480 Moreover, local transportation projects cannot receive federal funding unless they conform to an EPA-approved SIP. n481 **In 1995, two states, Missouri and Virginia, challenged the imposition of sanctions under the CAA**. n482 Each alleged that the EPA's decision, if not the statutory provisions authorizing sanctions themselves, were unconstitutional infringements upon state sovereignty. According to the states, the CAA impermissibly authorized the EPA to impose severe sanctions upon those states failing to comply with the EPA's interpretation of the Act. n483 Both claimed that the highway fund sanction was an unconstitutional use of the federal spending power. Neither state was successful. **According to the Fourth Circuit, the CAA's provisions passed constitutional muster "because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than "outright coercion.'"** n484 The district court in Missouri reached a similar conclusion, relying upon dicta in New York that "conditions [on receipt of federal funds] must ... bear some relationship to the purpose of federal spending." n485 For the Missouri court, "the appropriate focus is not on the alleged impact of a statute on a particular state program but whether Congress has "directly compelled' the state "to enact a federal regulatory program.'" n486 While the Missouri court only addressed the question of [\*449] whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better. n487 **Both courts based their decisions on Dole**. n488 **This reliance may be misplaced, however. It is not clear that threatening federal highway moneys falls squarely within Dole's holding**. n489 **Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund.** n490 For many states, federal highway funds represent the lion's share of their transportation budget. n491 These moneys are explicitly earmarked for transportation projects. n492 Conditioning the receipt of such funds on compliance with myriad federal environmental requirements seems to strain the Dole test, particularly when viewed against the background of the Court's broader federalism jurisprudence. **Federal highway legislation suggests many reasons why federal funding of highway construction supports the "general welfare," but environmental protection is not one of them**. On the other hand, both the highway legislation and the drinking age increase at issue in Dole were explicitly enacted to improve highway safety. n493 **The connection between the CAA's purpose and transportation is also ambiguous, as states can lose their highway funding for failing to meet any of the CAA's myriad SIP requirements**. n494 Nothing in the CAA requires any connection to highways, mobile sources, or even the specific pollutants most associated with vehicular traffic. **Failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries and other "area" sources, or even failure to provide adequate** [\*450] **citizen suit access to state courts can provide the basis for rejecting an SIP and imposing sanctions.** n495 **Congress has sought to connect highway construction to environmental protection, but it has still stopped short of claiming highway construction serves the purpose of environmental protection**. The Federal-Aid Highway Act of 1970 instructed the Secretary of Transportation to ensure that federal highway programs were "consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act." n496 Similarly, in 1991 Congress sought to create an environmentally sound interstate highway system with the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"). n497 In 1998, Congress reauthorized ISTEA with the Transportation Equity Act for the 21[su'st'] Century ("TEA-21"), n498 again reiterating its intent to "minimize transportation-related fuel consumption and air pollution." n499 While Congress repeatedly noted the potential environmental impacts of highway construction, none of these statutes establishes that a purpose of the federal highway programs is environmental protection. Yet it is the purpose of federal funding that controls whether a given condition is sufficiently related for purposes of Dole. n500 These statutory provisions provide an indication of the sort of highways Congress sought to fund; they do not establish environmental protection as a purpose of highway funding. In contrast, the federal statute calling upon states to raise the drinking age echoed the explicit purposes of the federal highway programs - safe highways. n501 The conditions on receipt of federal highway funds imposed by the CAA are more expansive than the conditions upheld in either Sabri or Barbour. In Sabri, the Court based its holding on the conclusion that Congress could impose conditions on the receipt of federal money that would prevent the funds from being diverted to other purposes. n502 **Requiring states to adopt various pollution control measures, however, does not prevent the diversion of highway monies to other purposes**. In Barbour, the D.C. Circuit joined other circuits in holding that Congress could prevent the use of federal funds for injurious purposes. n503 This reasoning supports [\*451] **imposing conditions on the receipt of highway funds under the CAA to prevent the use of highway funds on projects that could increase air pollution. Yet, as noted above, the relevant provisions of the CAA are far more expansive. Not only must states refrain from spending federal money on projects that could increase air pollution, they must also comply with numerous conditions that have absolutely nothing to do with transportation, let alone those projects and programs funded with federal highway monies. Another important distinction is the severity of the financial penalty to which states would be subjected for failing to abide by congressional dictates.** Dole involved a modest loss of highway funds, only five percent. Yet under the CAA, virtually all highway funds are at risk, with only minor exceptions for special purposes. n504 In this respect, the CAA creates a situation more like Skinner or Riley than Dole. Thus, even if the CAA's sanctions are not facially suspect, the imposition of sanctions could nonetheless cross the line from inducement to coercion if enough unrelated funds were at stake. n505 Finally, there is some reason to question whether the imposition of sanctions under the CAA satisfies the notice prong of the Dole test. While the CAA itself outlines broad requirements for state implementation plans, many of the details are left to the regulatory process. The text of the CAA may place a given state on notice that a given air quality determination will require the adoption of an "enhanced" vehicle inspection and maintenance program, but the precise contours and costs of such a program are left to the EPA. n506 Whether a given metropolitan area must adopt pollution control measures at all is, in part, a function of subsequent agency decisions. Under the CAA, the EPA is authorized - indeed, required - to reconsider the national ambient air quality standards periodically. n507 In recent years, the EPA has tightened air quality standards, thereby requiring states to adopt more stringent air pollution control measures than they may have anticipated. n508 At the same time, the EPA has adjusted SIP requirements [\*452] midstream to account for changes in atmospheric modeling or revised estimates of upwind state contributions to downwind state pollution problems. In combination, this level of fluidity in SIP requirements, and therefore the conditions imposed on the receipt of state highway funds, could make the highway fund sanction particularly suspect under Dole. The Second Circuit concluded that "Pennhurst cannot be read as broadly prohibiting amendments which add retroactive conditions to funding statutes: at most, Pennhurst simply requires a clear indication of congressional intent to impose such conditions." n509 Yet subsequent changes made by Congress may be substantively different than such changes made by a regulatory agency. Particularly, if it is assumed that the states are protected by the "political safeguards of federalism" in the legislative process n510 - at least as concerns the imposition of conditions on the receipt of federal funds - it would follow that unambiguous statutory amendments to existing conditions would be more acceptable than the imposition of new conditions through the regulatory process. n511 **If the CAA sanction regime is potentially suspect under Dole, it would be even more so under the various alternative tests for conditional spending proposed by some commentators, such as Professors Baker and Berman**. Conditional spending under other federal environmental statutes would be far less vulnerable, however. At the present time, most other federal environmental statutes impose conditions on the use of funds for specific programs. Thus, the Clean Water Act and Safe Drinking Water Act provide funds for state water quality and drinking water programs, respectively, that are to be used in support of related programs that meet specific federal requirements. n512 This sort of "reimbursement" spending does not raise the same constitutional questions as does the use of other monies to induce cooperation in an environmental program.

***State regulations are specifically better for natural gas production***

**Willie ‘12**

Matt Willie, J.D. candidate, April 2012, J. Reuben Clark Law School, Brigham Young University, Brigham Young University Law Review, 2011 B.Y.U.L. Rev. 1743, Hydraulic Fracturing and "Spotty" Regulation: Why the Federal Government Should Let States Control Unconventional Onshore Drilling, Lexis, jj

**What is conspicuously missing from many of these groups' arguments, however, is an explanation of how and why federal regulation will actually diminish fracking's environmental risks**. In fact, a closer look at much of the rhetoric against a state-centric regulatory system reveals not so much a push for federal regulation, but rather for federal prohibition of hydraulic fracturing. n122 Perhaps [\*1762] this is because, by and large, **state control of hydrofracking is already relatively expansive. As fracking has become more widespread, state regulation of the practice has intensified**, although specific rules vary widely. n123 Some see this variation as a reason for more federal control. n124 But as the following discussion illustrates, **every producing state has promulgated a considerable amount of fracking regulation, whether through general permitting processes or more directly**. n125 **Wyoming**, for example, **was the first state to require companies to fully disclose the chemicals used in their fracking fluids.** n126 **The state also requires drillers to give notice to surface owners of planned oil and gas operations on their lands and make good faith efforts to enter into "surface use agreements" that will protect surface resources, provide for reclamation of disturbed areas, and determine a payment for any** damages caused by the operations. n127 **Developers must show that they have complied with this requirement before the** [\*1763] **Wyoming Oil and Gas Commission will grant a permit to drill** n128 or a permit to construct a pit for retaining fluids. n129 Moreover, before any well can be used for injection activities, **an operator must demonstrate to the Commission that its casing is leak-proof and able to withstand pressures of at least 300 pounds per square inch**. n130 **New York has perhaps the nation's strictest fracking controls**. Shortly before leaving office in late 2010, former governor David Paterson "issued an executive order imposing a moratorium on permits for horizontal wells and instructed the [Department of Environmental Conservation] to revise its draft of standards governing the use of high-volume fracking." n131 In July of 2011, the Agency released a revised Draft Supplemental Generic Environmental Impact Statement (SGEIS) which recommended that the moratorium be kept in place in certain areas and lifted in others, subject to strict regulation. n132 Even without the moratorium, the state's rules are far from lenient. An operator seeking to drill needs to submit an application for a permit, pay a permit fee, offer a description of the planned drilling project, provide three copies of a plat, and complete an Environmental Assessment Form. n133 This form "provides information about the physical setting of the proposed project, the general character of the land and land use, the projected size of the area that will be disturbed and the length of time the drilling rig will be on the [\*1764] site." n134 A Supplemental Environmental Impact Statement and additional permits may also be necessary. n135 Even **Professor Wiseman calls the state's fracking rules "relatively comprehensive**." n136 **She says the same about Pennsylvania**, even though the state uses general oil and gas rules to regulate fracking. n137 Strong permitting requirements compel operators to account for any water sources or coal seams near drilling sites, n138 and the Department of Environmental Protection may deny permits that would violate any applicable environmental law. n139 The state also has separate rules for exploration activities in the Marcellus Shale. n140 Likewise, **Colorado has adopted comprehensive fracking regulations**. In 2009, the state overhauled its rules, providing more protections against methane contamination. n141 Even before the overhaul, the Colorado Oil and Gas Conservation Commission (COGCC) instituted a "mitigation program" to seal improperly abandoned wells. The program resulted in a reduction of methane concentrations in close to 30% of all sampled water wells. n142 More recently, the Commission has begun investigating the use of diesel fuel in fracking operations and regularly testing groundwater wells for contamination. n143 The COGCC also requires operators to maintain a "Chemical Inventory" of all chemicals used in drilling and completion, including fracturing, at each well site. n144 **The Alabama Oil and Gas Board claims that it "investigates every complaint it receives**." n145 A unique feature of its investigations is that each one includes research regarding "historical water quality [\*1765] data." n146 As the EPA explains, this "information is important because the coal-bearing Pottsville Formation often contains high concentrations of iron." n147 The symptoms of iron staining, which can occur suddenly and "in water with a history of good quality," are apparently similar to those of methane contamination. n148 Such observations show the importance of accounting for regional characteristics in fracking regulations. Perhaps more than any other state, **Texas has been criticized for its fracking regulations**, primarily because until recently no rule addressed the practice specifically. n149 **That changed** in June of 2011, **when** Texas governor **Rick Perry** **signed into law H.B. 3328, which requires operators to publicly disclose chemicals used in fracturing applications**. n150 Even without the legislation, much of the criticism of Texas is misplaced, since, as Professor Wiseman herself admits, **many of the state's general oil and gas regulations "apply to various components of the fracking process.**" n151 Like other states, **operators cannot drill without a permit**, n152 **and they must obtain a Water Board Letter from the state Commission on Environmental Quality setting out "the depth to which fresh water must be protected" for each well**. n153 **No operator in the state "may dispose of any oil and gas wastes [which would include fracking fluids] by any method without obtaining a permit**." n154 In addition, **the state has extensive casing and cementing regulations, including requirements that all casing be** [\*1766] **made of steel and "hydrostatically pressure tested," and that "all usable-quality water zones be isolated and sealed off to effectively prevent contamination or harm."** n155 Despite the peculiarities of each state's regulatory system, **almost all share several common features. Every producing state, for example, has "permitting requirements governing the locating, drilling, completion, and operations of wells."** **n156 Almost all have casing and cementing requirements designed to isolate ground water from production zones**. n157 **Every state but one requires regulatory authorization before operators can leave a well idle**. n158 **And all twenty-seven producing states have regulations regarding the proper plugging of wells**. n159 **Given the level of scrutiny most states are already applying to hydraulic fracturing, it is difficult to see how federal agencies could significantly curb any of the few environmental effects left unaddressed**. Congress's decision in 2005 to exempt most aspects of fracking from federal regulation has been criticized as a "loophole" for developers. n160 But as the Independent Petroleum Association of America states, "This characterization is entirely inaccurate; **Congress' action merely keeps in place a system that has worked for half a century**." n161

***States solve the multiple warrants for why federal regulations are insufficient***

Fed is unconcerned with production benefits --- states better able to forge agreement between environmental groups while working with production companies. Also better able to respond to emerging situations. Uncertainity about fed reg’s already slowing down fracking on federal lands – dropped 14% in past two years.

**Maddox, 12/1/12** (Mark, has held a variety of senior strategic policy, communications, and political positions during his 25-year career, and currently serves as the Senior Vice President of Government Affairs for Arcadian Networks, where he serves as chief strategist on government policy and as a member of the executive team. He is currently a member of the Gridwise Alliance Board of Directors.¶ Previously, he served as Assistant Secretary (acting) and head of the U.S. Department of Energy’s Fossil Energy program from 2004 to 2006. ¶ Maddox oversaw the development of many of the critical technologies that will be essential to controlling future green house gas emissions. He also managed a $750 million budget, and high profile initiatives including the FutureGen Zero Emissions Power Plant, He also served as a Senior Policy Advisor to the Secretary on fossil energy, environmental management, and budget issues. ¶ Additionally, Maddox worked in the Government and Public Affairs offices at Lockheed Martin as a director for the Integrated Management Systems division, Maddox received a Masters of Business Administration from George Washington University and earned an undergraduate degree from Bowling Green State University, OH. ¶ the Washington Examiner: “Let the States Regulate the Natural Gas Boom,” <http://americanactionnetwork.org/topic/let-states-regulate-natural-gas-boom>, ts)

One example in the 2012 presidential election was the shale gas critics justifying the Environmental Protection Agency's relentless push for a single, overarching federal law to regulate the entire industry. **They made *the dubious claim that one law is superior to a patchwork of 50 state regulations.¶ This language holds out hope for regulatory simplicity. But this approach, at least for natural gas, is misguided*.** It perpetuates the myth that there isn't already federal regulation of the oil and gas industry. In reality, **various parts of the drilling process are regulated under the Safe Drinking Water Act, Clean Water Act, Clean Air Act and others**.¶ Additionally, the **U.S. Department of Energy and the EPA fund the State Review of Oil & Natural Gas Environmental Regulations program and the Ground Water Protection Program, which audit state regulatory programs and share best practices.** **In fact, the Secretary of Energy Advisory Board's report on fracking supported continued state oversight through these programs and called for additional funding of these programs in its report last year**.¶ Though broad, simple campaign declarations sound great, they fail to take into consideration that **each company -- in whatever industry a policy regulates -- is very different. Even the shale fields themselves differ greatly in terms of geology, topography and hydrology from state to state. Shale gas deposits are different in Pennsylvania's Marcellus, Ohio's Utica, and Texas' Barnett deposits**. Because of this, **drilling strategies need to be tailored to individual circumstances**.¶ So the question is, **how do you create a master set of federal regulations that can efficiently and effectively balance safety and resource development when every case is different? *The simple truth is you can't*.¶ A one-size-fits-all approach would probably require a federal waiver for every shale gas field permit. Even in a perfect world, getting a permit under any federal rule is time-consuming and expensive**. **But to obtain a federal permit through a waiver process only compounds the difficulty.¶** In practice, ***states are also usually more sensitive to overregulation*. At the federal level, the benefits of production are of secondary concern, and no federal regulator is accountable for the impact of decreased production.** In contrast, ***state legislatures from both parties in places as different as Ohio, Pennsylvania, Colorado and Texas have effectively engaged stakeholders, from the environmental community to the producing community, to craft effective laws*.** **In each of those states, lawmakers identified the need to set rules for shale gas exploration early in the process, and to address in legislation chemical disclosure requirements that balance the need for public transparency and protection of trade-sensitive information**.¶ ***Another benefit of state over federal regulation is the states' ability to respond to emerging issues***. **As Washington still wrestled with what role government should play, state governments had already established well-engineering standards, cleanup requirements, water guidelines, local government revenue sharing and clear guidelines in the permitting process**.¶ **The growth in natural gas production occurring under state regulation contrasts dramatically with the trend on federal lands. According to the U.S. Energy Information Administration, onshore federal natural gas production has dropped the past two years as its share of our natural gas production has dropped from 35 percent to 21 percent, a track record that is hardly comforting for federal regulation skeptics**.¶ Ultimately, **if the EPA continues to limit coal** generation **and pursues an "all in" strategy with natural gas** generation, **it must stop working at cross purposes with itself. The best way is drop out of this debate and let individual states do what the federal government cannot.**

***Race-to-the-bottom doesn’t apply to state fracking regulations***

The states can’t race to the bottom --- there necessarily has to be different regs in different states ---the gas cant move

**Spence ‘12**

David B. Spence, Prof. of Law, Politics & Regulation, University of Texas at Austin, Northwestern Law School's Searle Center Conference, Federalism, Regulatory Lags, and Energy Production,

<http://www.law.northwestern.edu/searlecenter/papers/Spence_Federalism_Energy_3-4.pdf>, jj

**Decisions governing** shale **gas regulation are unlike the typical race to the bottom scenario, such as a decision to locate a new manufacturing plant in one of several candidate states. In the latter case, multiple states compete for a single** (or small number of) **large and long-lived capital investments**. **One** (or a few **can win**), **most will lose**. **While the manufacturing plant can be constructed** (absence legal impediments) almost **anywhere, hydraulic fracturing occurs only where shale gas deposits are found**, and companies will invest in natural gas production wherever gas can be profitably produced. **Investment in production in one state does not preclude simultaneous investment in another**; to the contrary, companies will invest simultaneously in hundreds or thousands of wells. **States are not chasing limited investment capital**, as in the usual race to the bottom scenario; rather, in shale gas production, investment capital is chasing production opportunities. Thus, **a state does not risk losing the economic benefits of shale gas development unless the regulatory costs it imposes on production are sufficient to render otherwise profitable production unprofitable. Even then, the state does not lose that capital to another state** forevermore; **that capital may yet return** when and **if natural gas prices increase** sufficiently to make production profitable within the state. **Thus, state regulation of natural gas production ought not to be characterized by a race to the bottom.** On the other hand, there is at least a theoretical argument that unless the costs and benefits of shale gas production are evenly distributed throughout the state, state regulators may tend to under-regulate because those who bear the costs of fracking are outnumbered by those who do not. Consider Figure 1, which depicts a potentially productive shale gas area within the hypothetical "ABC State." Consistent with the discussion in the previous section, most of the external costs of shale gas production will fall primarily on the residents of Alphaville, though we might imagine some costs falling beyond the boundaries of Alphaville. Of course, Alphaville will capture some of the benefits of shale gas development as well, in the form of royalty payments to landowners, jobs, and the indirect economic benefits of production. The residents of Betavilla, Gammaville, and Deltaville may also capture some of the benefits of production, including some of the ripple effects (secondary economic effects and state budgetary effects) of shale gas production. If the costs are more closely concentrated near the shale gas production area (in Alphaville) than the benefits, it may be that the more numerous residents of Betavilla, Gammaville, and Deltaville will cast their vote in favor of relatively light regulation, outvoting their Alphaville counterparts. In that case, the residents of Alphaville may be forced to suffer externalities that would have been outlawed or more closely regulated if they had fallen upon a majority of the residents of ABC State. One solution would be to permit local governments to retain a veto over shale gas production within their borders. That way, those closest to the costs and benefits will be able to dominate the policy decision. Indeed, the countless local debates taking place nationwide over whether to permit shale gas development, while heated, seem to reflect the very sort of political conflict (over the relative merits of development versus environmental protection) that one might expect to see in a well functioning local democracy. 268 On the other hand, providing local jurisdictions with a veto over shale gas production creates the potential for overregulation, because it creates the possibility that development with positive social net benefits can be vetoed by locals who bear most of the costs of development. The real problem is that the distribution of the costs and benefits of production will never fall neatly within the boundaries of any political jurisdiction. 269 How, then, to address the risks of under- or over-regulation caused by geographically mismatched costs and benefits? One possible solution to the problem of under-regulation is for the winners (those who benefit from development) to compensate the losers) those who bear the external costs). However, compensation is a much neater solution theoretically than practically, in part because of moral hazard problems and political distortions. 270 **We might resolve this question by asking whether under-regulation or over-regulation is the bigger problem**? **If shale gas development is left to states** and their political subdivisions to sort out, **the danger of overregulation appears to be fairly remote**, **because most of the costs and benefits of production will be experienced by voters within the** (potentially) **regulating jurisdiction**. Despite some states’ home rule provisions, states can preempt local law, and it seems unlikely that local vetoes will prevent positive net benefit shale gas development for long. **If under-regulation is likely to be the more common problem, it is difficult to see how federal regulation can help, since the mismatch between the set of people who bear the costs and those who reap the benefits is even greater at the national level**. 271 Moreover, in some shale gas producing states (like those of the Marcellus Shale), producing areas are fairly widely distributed, reducing the intrastate geographic mismatches between the relative distributions of costs and benefits pictured in Figure 1. For all of these reasons, **a race to the bottom rationale for federal regulation of hydraulic fracturing is not a persuasive one.**

***State regs are qualitatively better***

Jonathan H. **Adler**, Professor of Law and Co-Director, Center for Business Law and Regulation, Case Western Reserve University School of Law, “WHEN IS TWO A CROWD? THE IMPACT OF FEDERAL ACTION ON STATE ENVIRONMENTAL REGULATION”, Harvard Environmental Law Review, May 1st 20**06**, http://www.law.harvard.edu/students/orgs/elr/vol31\_1/adler.pdf

Up until this point, this Article has discussed environmental protection in a two-dimensional fashion, focusing on quantitative changes in regulatory protection. This vastly oversimplifies the relevant analysis, as various regulatory programs will vary in both quantitative and qualitative terms. 143 Two programs that appear to adopt the same quantitative level of environmental protection, such as the same ambient standard or emission limit, may vary quite significantly in cost, effectiveness, equitableness, and external effects on other media. Conversely, two programs that adopt superficially disparate goals may, in fact, offer qualitatively similar environmental protection. For these reasons, any complete analysis must acknowledge that environmental measures vary in both qualitative and quantitative ways. **There are several factors that may cause state-level environmental regulations to be more** cost-effective, or otherwise **qualitatively superior, than federal regulations of equivalent cost or scope**. 144 **First,** and perhaps most important, **state policy-makers and regulators may have access to knowledge of local problems and conditions**. 145 **Consideration of such knowledge in the development and implementation of state regulatory programs may increase the protectiveness of existing programs without increasing their cost or scope**. **Second, state policy-makers, because they are closer both to the environmental problems they seek to address and the regulated community, may be more responsive to local needs and concerns**. Third, **insofar as environmental problems vary from place to place, state policy-makers may be able to focus state resources on environmental problems that exist in a given state**. **Federal standards, on the other hand, tend to impose broad *one-size-fits-all* requirements that, in actuality, often fit no state particularly well**. 146 **A regulatory requirement that makes perfect sense in one state may not provide much environmental protection in another**. Fourth, **the existence of a federal standard may inhibit the ability of (or incentive for) state policy-makers to innovate or experiment with different approaches to meeting a given environmental goal**. 147 **There is *empirical evidence* that**, at least in some areas, **state regulation may do a better job of addressing local environmental concerns in a cost-effective manner**. Several **states clean up abandoned hazardous waste sites at lower cost and more rapidly than the federal Superfund program**. 148 Similarly, federal regulations may hinder the adoption of more effective pollution control or resource conservation strategies, and state policy-makers may be more sensitive to such concerns. **The federal CAA requires many states to adopt suboptimal pollution control strategies when equally stringent—but differently targeted—measures would produce better results**. 149 In the wetlands context, states took the lead in evaluating wetland functions and incorporating the ecological value of particular wetlands into the regulatory process when there was no evidence that similar considerations entered the federal permitting process. 150 In other words, **at a given level of stringency, some states were beginning to incorporate ecological considerations so as to maximize the environmental value of regulations** on wetland development **when the federal government was doing no such thing. States need not regulate “more” than the federal government to provide greater levels of environmental protection. Better regulation**—that is, environmental protection measures that are qualitatively different—**may be sufficient in some instances to improve the level of environmental protection. Insofar as federal regulation encourages states to adopt a particular approach to environmental protection,** or discourages states from adopting programs more suited to specific state conditions, **it can reduce aggregate environmental protection**. **Just as the federal government’s regulatory programs may discourage more extensive state regulatory efforts, these programs may also discourage the adoption of qualitatively preferable state level programs that may differ more in kind than in their degree of stringency.**

***State regulations are better for the environment***

**Willie ‘12**

Matt Willie, J.D. candidate, April 2012, J. Reuben Clark Law School, Brigham Young University, Brigham Young University Law Review, 2011 B.Y.U.L. Rev. 1743, Hydraulic Fracturing and "Spotty" Regulation: Why the Federal Government Should Let States Control Unconventional Onshore Drilling, Lexis, jj

B. Federal v. State: Why "Spotty" Regulation is Better Regulation **The push for more federal control of hydraulic fracturing** seems at least partly motivated by differences in state approaches to the issue. Professor Wiseman, for example, argues that "the varying complexity and breadth of state oil and gas regulation suggests that some states are not adequately protecting underground sources of drinking water." n198 The flaw in such arguments, however, is that they [\*1772] **ignore the fact that the depth, accessibility, extraction techniques, and characteristics of oil and gas reserves vary from state to state**. In fact, **that fracking regulation in the United States has been "spotty**" n199 **may actually be a good thing.** 1. Regional differences In many respects, ***the more local and specialized the regulation, the better***. This is true primarily because **oil and gas extraction methods**, and therefore hydrofracking techniques, **are** almost **always geologic-and region-specific**. n200 **This fact makes additional federal regulation unnecessary at best and** potentially ***extremely problematic*** **if it conflicts with local and state land use controls.** The Texas Supreme Court hinted at this idea in the Coastal Oil opinion. n201 A major basis for the court's decision was the desirability of deferring to the Texas Railroad Commission on oil and gas matters, especially where they involve questions of property boundaries and extraction techniques within specific reserves. n202 The Commission has the luxury of focusing all its time and manpower on oil and gas regulation (something the court lacks) and has sufficient remedial authority to enforce its rules in a way that both protects landowners n203 and promotes "the state's goals of preventing waste and conserving natural resources." n204 Such realities make the Commission, not the court, the appropriate entity for formulating effective regulatory provisions. For similar reasons, **federal intervention into state regulation of fracking seems unnecessary**. Just as a commission's staff of experts is better equipped than judges to promulgate rules for state oil and gas development, **state officials are** generally **more informed about local and regional production techniques than federal regulators**. n205 Not [\*1773] only do many energy-producing states operate under somewhat conflicting theories of oil and gas law, n206 but **the state commissions that design rules that conform to those theories must be aware of the location, form, and accessibility of their hydrocarbon reserves in order to effectively regulate.** Of course, federal agencies can set up regional offices, and federal regulators can familiarize themselves with local industry realities, but **federal employees will never be subject to the same kind of political accountability as state officials, and this may make them less receptive to local concerns**. Perhaps more importantly, **federal officials remain bound by federal directives drawn up by bureaucrats who reside far from most of the reserves their regulations affect.** Ironically, **even proponents of federal regulation acknowledge the need for region-specific fracking rules**. Professor Wiseman notes that, "**invariably, effects will differ by region, by the type of operation and disposal methods used, and the type of formation fracked**." n207 **State officials are arguably more familiar with these variables than federal employees, yet she promotes an additional, potentially burdensome layer of federal control**. n208 This seems shortsighted simply because **what works well in one state may work poorly in another**. This reality has long been a burr in the side of would-be federal mining regulators. Despite widespread expansion of national environmental protections throughout the twentieth century, n209 Congress struggled to craft effective mining legislation. This was primarily because geological and regional differences encouraged a [\*1774] state-centric regulatory scheme. n210 A former government attorney who helped draft the Surface Mining Control and Reclamation Act of 1977 pointed out that coal regulation "differs significantly from other federal environmental regulatory statutes" primarily because of "the "diversity' in coal mining areas." n211 This concern eventually resulted in Congress admitting that "**the primary governmental authority for developing, authorizing, issuing, and enforcing [mining] regulations ... should rest with the States**." n212 Such **diversity is** even more **apparent among** oil and **gas formations**. A comparison of operations in the Bakken Shale with those in the Barnett Shale is illustrative. Bakken companies primarily drill for oil, n213 while Barnett operators produce gas. n214 **Typical spacing in the Bakken can be as much as 1280 acres per well**, n215 **as opposed to Barnett spacing, which rarely exceeds 100 acres**. n216 **This, of course, creates far fewer wells in the Bakken states and thus a better opportunity to avoid drilling near communities. Likewise, Bakken states** (Montana and North Dakota) **are largely rural to begin with, making land use decisions simpler and disputes regarding property lines and leasehold interests less common. Even the use of fracking fluids varies widely by field and formation. As the EPA noted, "on any one fracturing job, different fluids may be used in combination or alone at different stages in the fracturing process**. **Experienced service company engineers will devise the most effective fracturing scheme, based on formation** [\*1775] **characteristics, using the fracturing fluid combination they deem most effective**." n217 Fracking companies in Montana, for example, "have been using relatively non-intrusive fluids - mostly a gel water sand frack, with the gel consisting of a drilling mud or a polymer." n218 In Pennsylvania's Marcellus Shale, on the other hand, there have been reports of higher than expected levels of radiation in wastewater from fracked wells. n219 **Arguments for more federal intervention consistently fail to account for these realities**. Professor Wiseman writes, for example, that an "absence of regulation [would] not [be] of great concern if fracking [were] a relatively benign practice that could be sufficiently controlled through the general permitting process; but if fracking has significant environmental and public health impacts, the lack of regulation is problematic." n220 The problem with such an all-or-nothing analysis is that **fracking is both benign and environmentally hazardous - depending on its location**. n221 **In some states, the general permitting process provides adequate environmental protections; in others, more stringent rules are justified**. n222 But **these are decisions that ought to be left to state policymakers and state regulatory agencies, not federal employees who may be ignorant to specific local and regional practices and** may **thus** rely on articles like Wiseman's, which **downplay the importance of geological dissimilarities and variations in fracking technique. With state regulations already providing extensive environmental protections, additional federal fracking controls**, in all likelihood, **can** [\*1776] **have only one of two effects: either (1) they will "have little impact," representing "no more than ideological tinkering with state law";** n223 **or (2) they will alter the entire state-centric system, essentially voiding many workable state rules, creating overlapping controls that slow down domestic oil and gas production, and producing uniform standards for fracking techniques that ought to vary by field and region.** Should Congress opt for such a uniform system, the safest route would be to force all states to adopt stringent fracking rules. The problem is that while **such regulations** might be appropriate and welcomed in New York, they **could be unnecessarily restrictive in states like Montana and North Dakota.** At the same time, ***crafting a middle-of-the-road national standard could send the message that stricter requirements are unnecessary*.** n224 2. Federal regulatory failures Obviously, only a shortsighted system would fail to account for at least some regional and geological differences. But **even if each state's reserves were identical, *no evidence suggests* that federal fracking regulation would be superior to state control**. In fact, **the BP spill and other recent energy industry problems have created concerns that the entire federal energy regulatory machine is simply too large, and too politically dominated, to be effective**. n225 As **the National Commission on the BP Deepwater Horizon Spill** and Offshore Drilling **described, from its outset "federal regulation of offshore drilling awkwardly combined" two competing priorities - environmental protection and energy independence - which were often difficult to reconcile "as a series of Congresses,** [\*1777] **Presidents, and Secretaries of the Interior" moved in and out of power**. n226 **The result was an odd**, and **often *irrational*, set of rules**. "**In some offshore regions**," for example, "oil **drilling was essentially banned in response to environmental concerns. Elsewhere**, **most notably in the Gulf, some environmental protections and safety oversight were formally relaxed or informally diminished so as to render them ineffective**." n227 **As drilling moved further offshore and more money poured into federal coffers, safety and environmental risks increased**. Unfortunately, **these risks "were not matched by greater, more sophisticated regulatory oversight**." n228 Some problems were due to the fact that **the same federal agency, the** Minerals Management Service (**MMS**), **was "responsible for regulatory oversight of offshore drilling - and for collecting revenue from that drilling**." n229 **A 2008 study by the Interior Department revealed numerous ethical scandals involving MMS employees**, "including allegations of financial self-dealing, accepting gifts from energy companies, cocaine use and sexual misconduct." n230 **Another Interior Department report prepared after the BP spill cited communication problems at the Agency as well as unevenly staffed offices and inadequate training.** n231 As the National Commission put it: **The overall picture of MMS that has emerged since [the spill] is distressing. MMS became an agency systematically lacking the resources, technical training, or experience in petroleum engineering that is absolutely critical to ensuring that offshore** [\*1778] **drilling is being conducted in a safe and responsible manner. For a regulatory agency to fall so short of its essential safety mission is inexcusable**. n232 **In light of such failures, it is puzzling that critics of fracking believe so adamantly in the superiority of national controls over a state-centric system that has worked with relatively few problems for six decades.**

## 2ac

### Court stripping

#### No court stripping

Gibson ’12 – James L. Gibson\*\*¶ Sidney W. Souers Professor of Government¶ Department of Political Science¶ Professor of African and African American Studies¶ Director, Program on Citizenship and Democratic Values¶ Weidenbaum Center on the Economy, Government, and Public Policy¶ Washington University in St. Louis¶ Fellow, Centre for Comparative and International Politics¶ Professor Extraordinary in Political Science¶ Stellenbosch University (South Africa)¶ “Public Reverence for the United States Supreme Court: Is the Court Invincible?\*” Prepared for delivery at the Countermajoritarian Conference,¶ University of Texas Law School, March 29 – 30, 2012. ONLINE, jj

● Some threats to the legitimacy of the Supreme Court do exist. Some members of Congress routinely introduce “court-curbing” legislation, often focusing on the Court’s soft underbelly, its dependence on Congress for its case jurisdiction. Yet such efforts typically draw the support of only the most radical members of Congress and legislation of this ilk is rarely even brought to the floor for debate. Generally, with the possible exception of the failure to raise the salaries of federal judges, few serious threats to the institutional integrity of the Supreme Court have surfaced. And there is no evidence that such proposals by gadflies have any degree of support among the American people.

#### Congress won’t strip the Courts—bills to limit the Court’s jurisdiction don’t pass even when Congress is angry:

Lawrence Baum, 2003 Department of Political Science, Ohio State University, June **2003**

[“The Supreme Court in American Politics,” <http://arjournals.annualreviews.org/doi/full/10.1146/annurev.polisci.6.121901.085526;jsessionid=n1HzQqZJALRe>, rwg]

For Dahl, of course, the challenge stems partly from the sheer volume of intervention in the current era. Just as important, the Court's active participation in policy making has continued for a long period. Dahl suggested that significant interventions occur chiefly in transitional periods, similar to what other scholars have labeled realignments.The several decades since 1960 are too long to be labeled a transitional period. On the other hand, this is an era in which partisan control of House, Senate, and presidency has been divided most of the time. In such an era, it is difficult even to identify a law-making majority, let alone characterize the Court's interventions in relation to that majority. Congress can do more damage when it attacks the Court itself. **But** Congress seldom uses its institutional powers against the Court in significant ways. For example, the Court's size has not been changed since the 1860s. Over that period, its jurisdiction has never been cut back as a negative response to its policies despite a long list of bills with that purpose.

***No impact to overpop***

**Hubbard, ’11** (Jeff, Director of New Media at the Institute for Energy Research and graduate of the University of Chicago with a Master of Arts in political philosophy, Malthus Lives on With Peak Oil Alarmists, 3/8, http://www.instituteforenergyresearch.org/2011/03/08/malthus-lives-on-with-peak-oil-alarmists/, bgm)

The 18th century British scholar Thomas Malthus believed human population growth was unsustainable because he thought that population growth was exponential (2-4-16) while the food supply only grew arithmetically (2-3-4). Malthus argued that this relationship between population and food supply was a recipe for social catastrophe. History has shown time and time again that Malthus was wrong. The population growth has not outstripped the food supply. Malthus’ predicted social catastrophe never happened because necessity is the mother of all inventions — when more food was needed to feed a growing population, there were innovations or alternatives discovered. When it comes to energy, Malthus lives on with those who believe in peak oil. Peak oil is the idea that humans have reached the point of maximum oil production, and that proven reserves will be depleted. Despite these claims by peak oil alarmists, world proven reserves have doubled since 1980. Some peak oilers point to the U.S. and note that U.S. proved oil reserves are down slightly from their 1980 levels. This is true. It’s also true that in 1980 the U.S. had oil reserves of 29.81 billion barrels. From 1980 through 2009, we produced 75.36 billion barrels of oil. In other words, we produced 250% of our proved reserves over the last 30 years.

### Courts aff – A2: improve states,keep fed

#### Those federal loopholes kill solvency

Schwartz ’06 – Joel Schwartz is a visiting fellow at AEI. July 01, 2006, American Enterprise Institute, Finding Better Ways to Achieve Cleaner Air, <http://www.aei.org/article/energy-and-the-environment/finding-better-ways-to-achieve-cleaner-air/>, jj

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Currently, the incongruity of fracking laws, the redundancy of regulations, and the wide, unrestrained range of federal and state authority create "inefficiency and confusion when a company seeks to capitalize on a new source of natural gas such as the Marcellus Shale formation." n134 The present statutory framework is not conducive for efficient oversight or effective protection of natural resources. n135 Such poor framework slows development and even risks [\*207] rendering natural gas extraction economically infeasible. n136 Industry officials, public interest groups, and government representatives have all called for realignment of regulatory powers to avoid the potential loss of this newly tapped natural resource. n137 Failing to tap the Marcellus Shale formation would mean "that the biggest natural gas find in the world, in the most stable political environment in the world, closest to the sources of constant need for reasonably priced and reasonably stable energy sources in the United States, will not be developed ... ." n138 Under the United States' present regulatory framework, the federal government regulates local concerns, while the state and local governments have begun to reach into arenas that traditionally fall under federal jurisdiction. n139 The coextensive federal and state jurisdictions and overlapping federal and state regulations can produce ~~crippling~~ inefficiency. n140 This type of intermingled, inefficient framework "is simply unacceptable as a long-term environmental protection strategy for a large and diverse nation committed to the market and decentralized ordering." n141 Such a scheme fails to stimulate investment and innovation while simultaneously encouraging costly litigation to solve the resulting disputes. n142 Moreover, it does not fully realize advantages that accompany a competitive system. n143 The system also severely delays operations and hampers the expansion of private choice. n144 In response, both government representatives and industry officials advocate for the [\*208] realignment of regulatory powers to better address these issues; specifically, both recommend that states take on a more prominent role in governing the natural gas industry. n145 Water quality, water quantity, and fracking fluid regulations could be the best place to start regulatory realignment. n146 The town of Dimock, Pennsylvania, best illustrates the need for regulatory realignment. n147 A regulatory war is currently brewing in this rural town. n148 In Dimock, a water well spontaneously combusted, causing drinking water to turn brown and animals to lose their hair - allegedly due to fracking. n149 Recently, sixty-three individuals sued Cabot Oil & Gas Corporation (Cabot), alleging that the corporation's nearby fracking operations contaminated their drinking water wells with methane. n150 In September of 2009, nearly eight thousand gallons of Cabot's fracking fluid leaked into a nearby creek, contaminating the plaintiffs' groundwater with methane, natural gas, and other toxins. n151 The Commonwealth quickly responded to the release. n152 The DEP investigated the spill and found the potentially harmful chemicals were sufficiently diluted [\*209] and therefore, not harmful to the nearby residents. n153 Despite these findings, Cabot and the DEP signed a consent order and agreement in November 2009 in which Cabot was presumed to be responsible for the contamination of ten water sources. n154 Under the consent order, the DEP forced Cabot to deliver potable water to ten affected households, improve its drilling procedures, and develop a plan to restore clean water sources to the affected residents. n155 Furthermore, the DEP fined Cabot more than $ 360,000 and ordered Cabot to suspend drilling as punishment for contaminating Dimock's groundwater and failing to fix the leaks that caused the problem. n156 Notwithstanding the DEP's close involvement, the EPA stepped into the Dimock investigation, accusing the DEP of mishandling the situation. n157 The EPA reviewed test results taken by Cabot after the incident. n158 Initially, the federal agency found that the releases from the gas wells posed no health threat. n159 Even after arriving at this conclusion, the EPA continued reviewing Cabot's test results. n160 In the later tests, the EPA found the water contained elevated levels of barium, arsenic, and other hazardous substances. n161 The DEP and Cabot both disagreed with the results. n162 This was the first of several battles waged between the EPA and the DEP over water management in Dimock. n163 Another disagreement between the DEP and the EPA in Dimock stemmed from the DEP's decision to terminate Cabot's consent order requirement to provide water to affected Dimock residents. n164 [\*210] Following the decision, several Dimock residents turned to the EPA for assistance. n165 The EPA informed sixty Dimock residents that it would provide them with potable water. n166 The EPA did not fulfill this promise at first, but reasserted the promise within a week. n167 The DEP responded to this inconsistency with a sternly written letter to the EPA. n168 DEP Secretary Krancer called the EPA's knowledge of Dimock "rudimentary" and stressed the DEP's familiarity with the situation. n169 The EPA's sporadic involvement in Dimock has been problematic. n170 The EPA's response to Dimock demonstrates the need for a solution to the conflicting state and federal authorities. n171 Consequently, the regulatory powers must be definitively allocated and federal and state roles must be better defined. n172

#### One size fits all fails --- cant tailor to local conditions --- turns the environment net benefit and kills production

Katusa 12 Marin Katusa, an accomplished investment analyst, is the senior editor of Casey Energy Dividends, Casey Energy Confidential, and Casey Energy Report. He left a successful teaching career to pursue analyzing and investing in junior resource companies. In addition, he is a regular commentator on BNN and he is a member of the Vancouver Angel Forum where he and his colleagues evaluate early seed investment opportunities. Marin also manages a portfolio of international real estate projects. Using advanced mathematical skills, he has created a diagnostic resource market tool that analyzes and compares hundreds of investment variables. Through his own investments, Marin has established a network of relationships with many of the key players in the junior resource sector in Vancouver. Marin has the connections, the mathematical and analytical acumen to bring the best investment ideas and most promising private placement offerings to Casey Research subscribers. 11-6-12, Oil Price, Bureaucracy could Kill the U.S. Shale Gas Industry, <http://oilprice.com/Energy/Natural-Gas/Bureaucracy-could-Kill-the-U.S.-Shale-Gas-Industry.html>

First, a central, federal, one-size-fits-all approach does not work. The reserves that the oil and gas industry wants to access using hydraulic fracturing occur in areas with different geographic, topographic, hydrological, population, precipitation and umpteen other characteristics. The oil and gas deposits are found at different depths; the water table is at different depths. The surface and subsurface vary dramatically, ranging from the Marcellus Shale Formation in the Northeast to the San Juan Basin in the Southwest. States and tribes have long ago stepped up to the plate with sensible regulations suitable to their individual conditions. They are way ahead of BLM.Second, even if states and tribes did not already have this under control, BLM's proposed regulations are inappropriate. The BLM regs are based on inaccurate assumptions, flawed economics and a perceived but actually nonexistent need."[I]t is assumed" (by BLM for its base case) "that a certain number of well stimulation events may result in contamination and thus pose a cost to society." This is the foundation of the agency's flawed estimation of "social benefits" ranging from $11.7 million to $50.3 million per year. We are left to guess what those social benefits might be. Despite hysteria about fracking causing earthquakes, contaminating aquifers and about explosive gases coming from kitchen sink faucets, there is actually no evidence that fracking causes such problems. Indeed, the Association of American State Geologists (AASG) "recognizes that the environmental record of hydraulic fracturing activities over the past 60 years has been overwhelmingly positive."

### Avoidance CP

***Perm do cp --- Reducing restrictions can mean not enforcing them***

**Berger 1** Justice Opinion, INDUSTRIAL RENTALS, INC., ISAAC BUDOVITCH and FLORENCE BUDOVITCH, Appellants Below, Appellants, v. NEW CASTLE COUNTY BOARD OF ADJUSTMENT and NEW CASTLE COUNTY DEPARTMENT OF LAND USE, Appellees Below, Appellees. No. 233, 2000SUPREME COURT OF DELAWARE776 A.2d 528; 2001 Del. LEXIS 300April 10, 2001, Submitted July 17, 2001, Decided lexis

We disagree. Statutes must be read as a whole and all the words must be given effect. 3 The word "restriction" means "a limitation (esp. in a deed) placed on the use or enjoyment of property." 4 If a deed restriction has been satisfied, and no longer limits the use or enjoyment of the property, then **it no longer is a deed restriction** -- **even though the paper on which it was written remains**. [\*\*6] Thus, the phrase "projects containing deed restrictions requiring phasing…," in Section 11.130(A)(7) means presently existing deed restrictions. As of June 1988, the Acierno/Marta Declaration contained no remaining deed restrictions requiring phasing to coincide with improvements to the transportation system. As

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#### Zero chance for neg uniqueness post Citizens United

Richard L. Hasen, professor of law and political science at the U.C. Irvine School of Law, “Money Grubbers”, Jan 21st 2010, http://www.slate.com/articles/news\_and\_politics/jurisprudence/2010/01/money\_grubbers.single.html

It is time for everyone to drop all the talk about the Roberts court's "judicial minimalism," with Chief Justice Roberts as an "umpire" who just calls balls and strikes. Make no mistake, this is an activist court that is well on its way to recrafting constitutional law in its image. The best example of that is this morning's transformative opinion in Citizens United v. FEC. Today the court struck down decades-old limits on corporate and union spending in elections (including judicial elections) and opened up our political system to a money free-for-all. Back in June, I explained to Slatereaders the basics of this case. Citizens United is an ideological group, like the NRA or Planned Parenthood, except that it takes for-profit corporate funding. It produced an anti-Hillary Clinton documentary. The group wanted to air the documentary during the 2008 presidential primary season through a cable television video-on-demand service and to advertise for it on television. In exchange for a $1.2 million fee, a cable-television-operator consortium would have made the documentary available to subscribers to download free on demand. The McCain-Feingold campaign-finance law passed in 2002 bars certain corporate-funded television broadcasts, such as this documentary, in the 60 days before a general election (or the 30 days before a primary). And the law requires disclosure by the funders of election-related broadcast advertising, such as these ads. Citizens United argued against the corporate-spending ban. Citizens United's broadest argument was that the court should overrule its 1990 case Austin v. Michigan Chamber of Commerce, which upheld limits on corporate spending in candidate elections. Before argument, I expected the court to take a different course by deciding this case narrowly. The court could have done that by saying that McCain-Feingold's statutory rules barring corporate-funded television broadcasts don't apply to video-on-demand broadcasts. That would be in line with some of the past decisions of the Roberts court, when it had preferred to chip away at existing precedent rather than dramatically move the law rightward. But, as Dahlia Lithwick explained, at oral argument the government's lawyer got into some trouble in suggesting that the government would have the constitutional power to ban corporate-published books just before the election. The exchange made it seem like the court could well be poised to overrule Austin. All bets were off at the end of the last term, when the court announced the case would be rescheduled for a second round of oral argument last September specifically to reconsider the overruling of Austin case and a second case, McConnell. We've been waiting ever since. Today Justice Kennedy wrote for a court majority of the five conservative justices. He effectively wiped out a key provision of Congress' 2002 campaign finance reform. He also did indeed strike down Austin and parts of McConnell. To Justice Kennedy, any limits on the independent spending of money in elections smack of government censorship. The limits Congress enacted in 2002 remind him of old English laws requiring licensing for speech. He talked about the byzantine sets of federal laws and regulations involved—genuinely confusing, it's true—and said that none of it was permissible under the First Amendment. He talked of the rise of the Internet and blogs and how the government could soon come in and start regulating political blogging if the court did not step in. Though the decision deals with federal elections, expect state and local corporate and union spending limits to be challenged, and to fall, throughout the country. There are many responses to Justice Kennedy's reasoning. He wrongly assumes that corporations or unions can throw money at public officials without corrupting them. Could a candidate for judicial office, for example, be swayed to rule in favor of a contributor who donated $3 million to an independent campaign to get the candidate elected to the state supreme court? Justice Kennedy himself thought so in last year's Caperton case. And yet he runs away from that decision in today's ruling. Justice Kennedy acknowledges that with the "soft money" limits on political parties still in place, third-party groups (which tend to run more negative and irresponsible ads) will increase in strength relative to political parties. And that possibility raises the real chance Congress will repeal the "soft money" limits, thereby increasing the risks of quid pro quo corruption. There's more to criticize in the opinion. Should the American people, through Congress, be able to decide that the vast economic inequality that comes with our wonderful capitalist system should not translate into vast political inequality? Justice Kennedy seems to believe that this would lead to the imminent decline of our democracy. Money is speech; speech may not be suppressed. But the last time I checked, the U.K. and Canada were vibrant, functioning democracies, despite the far more stringent limits they place on spending in their elections. Finally, Justice Kennedy's single horrible—his specter of blog censorship—sounds more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism. What is so striking today is how avoidable this political tsunami was. The court has long adhered to a doctrine of "constitutional avoidance," by which it avoids deciding tough constitutional questions when there is a plausible way to make a narrower ruling based on a plain old statute. That's what the court did in last term's voting-rights case—in fact, going so far as to adopt an implausible statutory interpretation to avoid overturning a crown jewel of the civil rights movement. What we have in Citizens United is anti-avoidance. Kennedy's majority had to go out and grab this one. Justice Stevens' dissent lists three ways the majority could have skirted the constitutional question. One of them would have been to say that McCain-Feingold does not apply to video-on-demand. This and the Stevens' other options are all plausible interpretations, certainly more plausible than the tricky footwork in the voting rights case. Instead, here the court went out of its way to overturn its own precedent, in violation of its usual rule of stare decisis, which calls for respecting past rulings for the good of reliable law-making. And it did so violating its usual rule, which it cited even yesterday, that it does not generally reach issues not raised in the initial petition to the court. In short, the court did not have to do what it did today. The chief justice issued a brief concurrence apparently solely to defend himself (and Justice Alito, who signed it) against charges of judicial activism. Roberts wrote that the alternative interpretations were not plausible, and that exceptions to stare decisis apply. Opponents of the decision today are likely to be unconvinced. This is a court that has taken a giant leap toward deregulation of the electoral process.

#### 2) The ACA ruling means the plan entirely follows precedent – they have zero link evidence post the ACA in the context of the CAA – we do

Lawrence Hurley, E&E reporter Greenwire: “Will Supreme Court's health care ruling imperil Clean Air Act?”, Friday, June 29, 2012, http://eenews.net/public/Greenwire/2012/06/29/1

Within hours of yesterday's monumental Supreme Court ruling upholding the 2010 health care reform law, environmental law scholars were already pondering whether it could have an impact on the Clean Air Act. Their answer? A qualified "yes." They focused on two elements of the decision. First was the court's ruling on a 7-2 vote that the federal government cannot take away all of a state's Medicaid funding if it declines to implement new provisions that were introduced under the reform law. The second was the conservative majority's finding on a 5-4 vote that the Affordable Care Act's "individual mandate" requiring people to buy health insurance was unconstitutional under the Commerce Clause of the Constitution (the court ultimately upheld the individual mandate, but only on the basis that the penalty faced by nonparticipants is a tax). Some see similarities between the Medicaid provisions in the health care law and how the federal government interacts with states over of their role in enforcing the Clean Air Act via so-called state implementation plans, known in U.S. EPA lingo as SIPs. The federal government has in the past sought to withhold highway funding unless a state plays ball, although disputes have always been settled, according to environmental law experts. Chief Justice John Roberts wrote in his majority opinion that the Medicaid section of the law was unconstitutional if existing funding was withdrawn if a state didn't want to expand its Medicaid program as part of the 2010 reforms. "Congress has no authority to order the states to regulate according to its instructions," he wrote. "Congress may offer the states grants and require the states to comply with accompanying conditions, but the states must have a genuine choice whether to accept the offer." Congress cannot "penalize states that choose not to participate in that new program by taking away their existing Medicaid funding," Roberts concluded. Jonathan Adler, a law professor at Case Western Reserve University School of Law, was quick to see a link to the Clean Air Act. He wrote a blog post within an hour of the ruling in which he noted that parts of the Clean Air Act "are likely to be challenged on these grounds." In a follow-up email, Adler wrote that Roberts had "put some teeth" into a previous ruling, South Dakota v. Dole, that touched on the question in the context of a federal law that withheld highway funding from states that lowered the legal drinking age. In that case, the court upheld the law but concluded that there were limits on what kinds of coercion the federal government could use. In the health care case, Congress' message to the states was not an inducement but rather "a gun to the head," Roberts wrote in his opinion. As Adler noted, he has always thought that "the use of conditional spending as an enforcement/inducement measure in some environmental statutes was potentially problematic under South Dakota v. Dole." After yesterday's ruling, "there's a good chance we'll find out whether I'm correct," he added, partly in reference to the willingness of some state attorneys general, including Greg Abbott (R) of Texas, to challenge EPA authority. Ann Carlson, a professor at the University of California, Los Angeles, School of Law, also raised the Medicaid issue in the Clean Air Act context yesterday. "The question now is whether that condition -- enact a comprehensive and legitimate SIP or lose highway funds -- is constitutional in the wake of the health care case," Carlson noted in her own blog post. Some states are currently battling EPA over SIPs. For example, Texas and Wyoming have challenged EPA's move to take over their greenhouse gas permitting authority. That case is currently before the U.S. Court of Appeals for the District of Columbia Circuit (E&ENews PM, June 5). John Elwood, an attorney with Vinson & Elkins in Washington, said legal challenges citing the Medicaid section of the health care decision in relation to the Clean Air Act are only a matter of time. The only question is "how soon the suits are brought," he added. Lower courts will then have to "draw the lines of where acceptable incentives become unconstitutional coercion," Elwood said. Commerce Clause debate What's less clear at this point is whether the court's discussion of the Constitution's Commerce Clause, which is often used as the underpinning of acts of Congress, has any bearing on environmental law. The majority held on that point that the health care law was in fact unconstitutional under the Commerce Clause, which allows Congress to regulate interstate commerce. Roberts raised in his opinion the distinction between regulating existing economic activity and forcing people to enter the market, which is how the chief justice viewed the individual mandate. In the future, the debate over what kind of activity can be regulated under the Commerce Clause will only intensify, legal scholars predict. In the environmental context, David Driesen, a professor at Syracuse University College of Law, posed a hypothetical question in yet another blog post: "Under the Clean Air Act, the government has the authority to order a company to install a pollution control device. Does use of this authority compel a firm inactive in the market to become a market participant against their will in violation of the health care ruling?" Driesen, however, concluded that there is plenty of evidence the Supreme Court decision "will not invalidate all of the many regulations that compel action." Pollution controls regulate "an ongoing activity ... even if it does so by ordering a product purchase," he added. This is only the beginning of the analysis of the health care decision as it relates to environmental law, a point that Jonathan Zasloff, another UCLA law professor, made in a blog post responding to Carlson's. "This is all very preliminary, of course," he wrote. "And have no fear: oceans of ink will be spilled on this stuff."

#### 3) There is zero link to the disad if we win the plan follows precedent

**Gentithes, ’09** (Michael, Research Attorney, Illinois Appellate Court, First District; J.D. DePaul University College of Law 2008; B.A. Colgate University 2005., “IN DEFENSE OF STARE DECISIS,” WILLAMETTE LAW REVIEW, 45 Willamette L. Rev. 799, lexis, bgm)

**The argument for a rule of stare decisis that frequently controls Supreme Court jurisprudence is often entangled with the controversial issues the Court faces when it must choose to either invoke or ignore the doctrine. But those issues distract attention from the centrality of stare decisis to democratic governments' vitality.** By taking a unique, systemic perspective this article demonstrates that **stare decisis**, though not a strict rule of constitutional construction, **plays a vital role in the preservation of democracy. Respect for the Supreme Court's prior decisions lends legitimacy to a body with a transitory membership. It assures citizens that the Court's decisions are not merely the whims of Justices' personalities, and renders the Court "strong" in the sense that it can issue decisions in the country's most pressing controversies that both the parties and society at large consider final.** I will apply this new perspective to the Court's current stare decisis doctrine and analyze its effectiveness. Finally, I will suggest original factors that the Court should consider when applying stare decisis by looking not just backward to the decision potentially being overruled, but also forward to the decision which may replace it.

#### 4) Turn – Conservative Backlash:

#### A) Courts lack legitimacy from conservatives now – ACA ruling

The Week 2012 (“5 cringe-worthy GOP reactions to the ObamaCare Ruling”. June 29, 2012. http://theweek.com/article/index/230055/5-cringe-worthy-gop-reactions-to-the-obamacare-ruling

In upholding ObamaCare, the Supreme Court dropped a [bombshell](http://theweek.com/article/index/230033/repealing-obamacare-gop-fantasy-or-near-certainty) on the conservative movement, which made historic gains in the 2010 congressional elections thanks to a Tea Party-fueled backlash to the health-care overhaul. To add insult to injury, the deciding vote came from [Chief Justice John Roberts](http://theweek.com/article/index/229998/obamacare-survives-why-did-john-roberts-vote-with-the-liberals), an erstwhile conservative hero who has since [fallen from grace](http://www.politico.com/news/stories/0612/77962.html). The conservative reaction was swift and, in some cases, unhinged, with many vowing to move to [Canada](http://www.buzzfeed.com/daves4/people-moving-to-canada-because-of-obamacare), perhaps forgetting that Canada's top-notch [health care](http://theweek.com/article/index/230055/5-cringe-worthy-gop-reactions-to-the-obamacare-ruling) system is a bastion of socialized medicine. While liberals have also reacted to the ruling in embarrassing ways — "It's constitutional. Bitches," [tweeted](http://thehill.com/blogs/twitter-room/other-news/235397-dnc-staffers-go-off-script-celebrating-healthcare-ruling%20%20) a high-ranking yet childish DNC official — their peers on the far right have arguably outdone them. Here, five cringe-worthy reactions from conservatives to the Supreme Court's landmark decision: 1. Comparing the ruling to 9/11 Rep. Mike Pence (R-Ind.), a stalwart of the conservative movement, reportedly [compared](http://thinkprogress.org/security/2012/06/28/508450/mike-pence-obamacare/) the Supreme Court's decision to 9/11 in a closed-door meeting with other GOP lawmakers. Pence later apologized, saying his remark had been "thoughtless." 2. Comparing Obama to an America-hating vampire Pam Geller, a popular fringe conservative commentator, took her criticism of Obama's post-ruling speech to Transylvanian extremes. "Obama yapping' [again](http://theweek.com/article/index/230055/5-cringe-worthy-gop-reactions-to-the-obamacare-ruling) — why aren't there American flags in the frame?" she [tweeted](https://twitter.com/Atlasshrugs/status/218378336236339200). "The flag to Obama is like the [silver] cross to Dracula." Meanwhile, former vice presidential candidate Sarah Palin chose to [villainize](http://www.mediaite.com/online/sarah-palin-on-obamacare-ruling-obama-lies-freedom-dies/) the president in verse, tweeting, "Obama lies; freedom dies." 3. Offering over-the-top predictions of doom Republicans also [dabbled in](http://www.humanevents.com/2012/06/28/republican-reactions-supreme-courts-obamacare-decision/) apocalyptic forecasts. "Today America is threatened with a stage three cancer of socialism," declared Rep. Todd Akin (R-Mo.). "When they look back on the American system of once-limited government," said Rep. Tim Huelskamp (R-Kan.), "June 28, 2012, will stand as a definitive date in the advance of government tyranny." Dean Clancy, of the Tea Party group Freedomworks, [warned](http://www.salon.com/2012/06/28/conservatives_turn_on_roberts/), "The power to tax is the power to destroy." 4. Delegitimizing the Supreme Court Sen. [Rand Paul](http://theweek.com/article/index/230055/5-cringe-worthy-gop-reactions-to-the-obamacare-ruling) (R-Ky.) simply [chose denial](http://www.politico.com/blogs/on-congress/2012/06/rand-paul-obamacare-is-still-unconstitutional-127574.html). "Just because a couple people on the Supreme Court declare something to be 'constitutional' does not make it so," he proclaimed. However, it actually does. 5. Eviscerating John Roberts Roberts bore the brunt of conservative criticism, with many railing against his seeming betrayal. "I feel like I just lost two great friends," [tweeted](https://twitter.com/JackKingston/status/218359574539943937) Rep. Jack Kingston (R-Ga.) grandly: "America and Justice Roberts." Meanwhile, conservative leader Brent Bozell [termed](http://dailycaller.com/2012/06/28/romney-website-mitt-will-nominate-judges-in-the-mold-of-chief-justice-roberts/) Roberts a "traitor," and dozens of conservatives called for his [impeachment](http://www.politico.com/news/stories/0612/77947.html). Bryan Fischer, a Christian activist, [said](http://www.salon.com/2012/06/28/conservatives_turn_on_roberts/) Roberts "is going down in history as the justice that shredded the Constitution and turned it into a worthless piece of parchment." Some conservatives, including right-wing radio host Michael Savage, [blamed](http://theweek.com/article/index/230055/%20http:/www.businessinsider.com/conservative-radio-host-blames-roberts-epilepsy-for-health-care-ruling-2012-6) Roberts' decision on his medical history with seizures, noting that epilepsy medication can "introduce mental slowing, forgetfulness, and other cognitive problems." Roberts, his faculties still apparently intact, has [joked](http://hosted.ap.org/dynamic/stories/U/US_HEALTH_CARE_CHIEF_JUSTICE?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2012-06-29-11-54-34) that he plans to spend his summer in an "impregnable fortress."

#### Supreme Court legitimacy is tied to ideology – The plan would boost the image of the Court for conservatives – Preserves legitimacy

Brandon L. Bartels is Assistant Professor of Political Science, George Washington University, Christopher D. Johnston is Assistant Professor of Political Science, Duke University, “On the Ideological Foundations of Supreme Court Legitimacy in the American Public”, American Journal of Political Science,Vol. 57, No. 1, January 2013, http://home.gwu.edu/~bartels/BartelsJohnstonAJPS.pdf

Our examination of the ideological foundations of Supreme Court legitimacy in the American public has produced the following important substantive conclusions and implications that contribute to the broader literature on institutional evaluation and legitimacy. The Supreme Court should not be assumed to be objectively conservative in its contemporary policymaking. Even when tracking the full range of its policy outputs, the contemporary Court can be characterized as moderate or slightly right-of-center. And when examining the contemporary Court’s policymaking in salient decisions, the contemporary Court has actually rendered more liberal than conservative decisions. Thus, as we have emphasized, there are rational bases for citizens perceiving the contemporary Court as a conservative, moderate, and even liberal policymaker. Moreover, as data from a national survey show, significant proportions of liberals, moderates, and conservatives perceive the contemporary Court as being liberal, moderate, or conservative; ideological disagreement with the Court comes from all points on the ideological spectrum. These findings underscore the need to assess individuals’ subjective ideological disagreement with the Court’s policymaking, which requires matching up one’s own ideological preferences with his or her perceptions of the ideological tenor of the Court’s policymaking. Contrary to conventional wisdom, a potent ideological foundation underlies Supreme Court legitimacy vis-a-vis ` subjective ideological disagreement with the Court’s policymaking. Our work responds to extant puzzles and some nonfindings about the role of ideological preferences in legitimacy orientations. When accounting for the fact that individuals maintain different perceptions of the Court’s ideological tenor that may depart from researchers’ assumptions about the objective tone of the Court’s policymaking, the evidence supports a strong ideological foundation to the Court’s legitimacy. When individuals perceive that they are in ideological disagreement with the Court’s policymaking, they ascribe lower legitimacy to the Court compared to individuals who perceive that they are in agreement with the Court (Hypothesis 1). This suggests that the Court’s legitimacy is significantly influenced by what the Court does in policymaking terms and whether individuals believe that what the Court is doing diverges from their own ideological preferences. Ideology exhibits a sensible relationship with legitimacy when conditioning on how individuals perceive the Court’s ideological tenor. In line with the subjective approach, the results supporting Hypothesis 2 provide more nuance as to the ideological foundations of legitimacy. When accounting for individuals’ perceptions of the ideological tenor of the Court, people map their ideologies onto legitimacy orientations in highly sensible, rational ways. For those who believe the Court is liberal or conservative, ideology exhibits sensible impacts in ways one would expect (e.g., for a perceived liberal Court, legitimacy significantly decreases as one moves from very liberal to very conservative). For those who believe the Court proceeds on a case-by-case basis, legitimacy is quite high and is not as strongly rooted in ideological preferences. And as we noted, from a legitimacy standpoint, it is in the Court’s best interest to convey this type of approach and perception to the public. For the roughly half of the public that sees the Court as issuing rulings on a case by-case basis, legitimacy is quite high and ideology has a modest impact. For the other half of the public that sees the Court as liberal or conservative, legitimacy is strongly rooted in ideological preferences, with those who disagree with the Court’s policymaking registering the lowest legitimacy. The results also respond to extant puzzles for why liberals might be more supportive of the Court than conservatives (e.g., Hetherington and Smith 2007). Our work shows that conservatives who believe the Court is liberal hold very low legitimacy levels, while conservatives who believe the Court is conservative possess very high Supreme Court legitimacy. The effects of ideology on legitimacy orientations run in two different directions depending on whether one is examining individuals who believe the Court is liberal or conservative. In short, ideology’s impact on legitimacy depends on one’s perception of the ideological tenor of the Court’s policymaking. Importantly, results from a survey experiment provide compelling evidence in favor of the causal mechanism underlying these effects. Is the Supreme Court a “political” institution? We close with this overarching question, which we believe is crucial for understanding the public’s relationship with the Court. Does the public believe the Court is “just another political institution,” like Congress or the presidency? An institution for which legitimacy is granted or withheld on the basis of ideological preferences vis-a-vis perceptions of ` the Court’s policymaking can certainly be considered “political.” While a good share of the public shows ideological agreement with the Court, resulting in sizable levels of legitimacy, as times change, that agreement could turn into disagreement, resulting in lower legitimacy among those who had previously shown high legitimacy. As the results of this study make clear, the Court’s legitimacy in the mass public is significantly influenced by individuals’ perceived ideological disagreement with the Court’s policymaking. Legitimacy, in this sense, is “politicized” in the mass public, which questions many of the core tenets of the legitimacy concept. There are certainly many more questions to ask regarding the political and ideological foundations of legitimacy. For instance, what other political and ideological factors shape legitimacy orientations? We believe our study has produced a significant contribution that will hopefully provide a basis for future work regarding the extent to which Supreme Court legitimacy rests on ideological and political foundations.

#### C) Only a risk of a link turn – Liberals always respect the legitimacy of the Courts even after a conservative ruling

Patrick J. Egan Assistant Professor of Politics and Public Policy New York University, Jack Citrin Heller Professor of Political Science University of California, Berkeley, “The Limits of Judicial Persuasion and the Fragility of Judicial Legitimacy”, July 2011, http://politics.as.nyu.edu/docs/IO/4819/egancitrin.pdf

Our other main finding reveals an important difference in the ways liberals and conservatives view the institution of the Supreme Court in contemporary American politics. Conservatives react to Court decisions they dislike by questioning the legitimacy of judicial power, while liberals—even when they are unhappy with a specific decision—continue to value the authority of an institution that can act in a counter-majoritarian fashion. The size of the delegitimation effects among conservatives—some 15 percentage points on average—dwarfs the extent of the persuasion effects identified in Table 1 (which ranged between one and ten points and were generally statistically and substantively insignificant). The implication is that in contemporary American politics, the faint persuasive effects of any unpopular Court ruling are less consequential than the substantial loss of legitimacy such a ruling may cause among conservatives. In the context of American political history, this conservative suspicion of the judiciary is unusual. Until the Court reluctantly gave way to the New Deal, it was rightly perceived as a bulwark against mass democracy and populist sentiment. The historical reversal reached its apotheosis in the Warren Court, as the defender of individual rights and group equality. Decades later, liberals appear to continue to embrace the notion of a counter-majoritarian judiciary even when they disagree with its rulings. Given the Republican domination of the judicial nominations process at the federal level for nearly 30 years (Schiavoni 2009) and the conservative turn of the Rehnquist and Roberts Courts, some may regard this faith as misplaced. But while judicial rulings may have moved to the right, it is worth noting that many important legal institutions continue to send signals that they are firmly in the liberal camp. The American Bar Association—the legal profession’s largest and most influential interest group—routinely takes liberal official stances on issues like abortion, the death penalty and gay rights (American Bar Association 2010). The nation’s most prominent professional association of law school faculty has promoted law school clinics that champion liberal causes such as providing representation to defendants in criminal cases, illegal immigrants, and communities suffering environmental harms (Association of American Law Schools 2002). Recently these clinics have been accused by conservative and business interests as being more likely to pursue cases of interest to liberals than conservatives (Urbina 2010). Even those who work in the legal profession are today much more liberal than the general public. Our analysis of data on occupation and ideology from the General Social Survey cumulative file indicate that a plurality (44 percent) of attorneys10 interviewed from 2000 through 2010 identified as liberal, compared to only 26 percent of American adults—a gap that has grown over time and which reflects the general movement of those in professional occupations toward identification as liberals and as Democrats (Manza and Brooks 1999).

### Aff 1 – 2ac – immigration

#### No pass – border security

Sink, 3/28/13 (Justin, staff writer for the Hill “Cantor: Comprehensive bill on immigration reform will be 'tall order'” The Hill, <http://thehill.com/video/house/290773-cantor-i-think-we-can-come-to-some-agreement-on-immigration-reform>)

House Majority Leader Eric Cantor (R-Va.) said Thursday he believed lawmakers could strike a deal on immigration reform, although he cautioned that the comprehensive bill that President Obama is advocating could be "tough to come by." ¶ "In some way, I believe we can work together to do something on this matter," Cantor said during an appearance on Fox News, while cautioning that broad legislation could face a tough road through Congress. "That is a tall order… Comprehensive things are tough to come by," Cantor said. But the Virginia lawmaker said there was "a lot of interest" in reaching a deal. Earlier this week, President Obama said he expects the Senate to begin debate on a bill in April, and on Wednesday told Telemundo he believes a bill could be passed by the end of summer. Cantor offered a more cautious outlook, saying Republicans still had significant reservations about border security. Some in the GOP have said that a pathway to citizenship for the country's 11 million illegal immigrants should be tied to quantifiable border security metrics. "We've got to make sure border security is being implemented — that the law does start at our borders, and in weighing these two things, I think we can come to some agreement," Cantor said.

#### Pushing tons of stuff – gun, CIR, deficit, tax code, and Medicare

Bloomberg 3/28/2013 (Jay Berkowicz and Julie Lerer, “Stalled Obama Campaign Machine Restarted for New Agenda”. <http://www.bloomberg.com/news/2013-03-28/stalled-obama-campaign-machine-restarted-for-new-agenda.html>) [nagel]

With the president facing the final opportunity to cement his legacy in his second term, Team Obama is trying [anew](http://www.bloomberg.com/news/2013-03-28/stalled-obama-campaign-machine-restarted-for-new-agenda.html). Top former campaign and White House aides have once [again](http://www.bloomberg.com/news/2013-03-28/stalled-obama-campaign-machine-restarted-for-new-agenda.html) converted his campaign machine -- the political juggernaut of 2012 with 20 million e-mail addresses and 4 million volunteers - - into a policy-advocacy organization, renamed Organizing for Action. Just as it did four years ago, the group has tapped as leaders the president’s closest allies, including 2012 campaign manager [Jim Messina](http://topics.bloomberg.com/jim-messina/) and field organizer Jon Carson. At stake are Obama’s closing legislative priorities, ranging from gun safety to a historic revision of immigration laws. The group also plans to engage in the [deficit](http://www.bloomberg.com/quote/DEGRFED:IND)-reduction debate, which may provide the president with an opportunity to strike an agreement with U.S. [House Republicans](http://topics.bloomberg.com/house-republicans/) on changes to the [tax code](http://topics.bloomberg.com/tax-code/) and such entitlements as [Medicare (USBOMDCA)](http://www.bloomberg.com/quote/USBOMDCA:IND) that would influence the nation’s financial picture for decades.

#### Obama will approve keystone – takes out the link

German, 3/13/13 (Ben, staff writer, The Hill, “Obama: Pipeline decision coming soon,” ¶ <http://thehill.com/blogs/e2-wire/e2-wire/287967-obama-tells-gop-that-keystone-pipeline-decision-coming-soon>)

President Obama told House Republicans that a decision on the Keystone XL oil sands pipeline will arrive soon, but lawmakers emerged from their meeting with Obama split over whether or not he suggested that he’s leaning toward approval. “[He] said that there was going to be a decision made soon, I think he said a couple of weeks,” said Rep. Andy Harris (R-Md.) after the House GOP conference had a wide-ranging meeting with Obama in the Capitol on Wednesday. “I think he said there will be an announcement relatively soon,” said Rep. John Shimkus (R-Ill.). “He didn’t tell us what that decision would be.” Several members told The Hill that Obama made comments that indicated that he was likely to approve the controversial pipeline that would bring Canadian oil sands to Gulf Coast refineries.¶ “My guess is that he will approve it, at least to some extent,” said Rep. John Duncan (R-Tenn.). “That is the impression that I got, but he did not say one way or the other specifically.”

#### Moniz thumps --- no environmentalist links – and fracking debates in congress now

Nelson, 3/26/13 (Robert H. is a professor of environmental policy in the School of Public Policy at the University of Maryland and a senior fellow with The Independent Institute, Oakland, CA, Forbes: “Ernest Moniz And Fracking Drive Environmentalists Off Of The Rails,” http://www.forbes.com/sites/realspin/2013/03/26/ernest-moniz-and-fracking-drive-environmentalists-off-of-the-rails/)

Many environmentalists are unhappy about President Barack Obama’s nomination of Ernest Moniz, a professor of physics and engineering at MIT, to be Secretary of Energy. As Director of the MIT Energy Initiative, Moniz assembled an all-star cast of MIT physical and social scientists to produce a June 2011 report that pointed to natural gas as an abundant, low-cost energy source that could sustain much of the world’s energy needs over the next several decades while we transition to wind, solar, tidal, geothermal and other carbon-free energy sources. It would also offer large environmental benefits because gas emits few conventional pollutants, and only about half as much carbon dioxide as the main transitional alternative: continued coal burning.¶ Implicit in the MIT vision was an understanding that shale gas development, using the technology known as “fracking,” should and will occur on a global scale. While a few groups such as the Environmental Defense Fund have been supportive, this is unacceptable to many others in the environmental movement. So they are striking out to discredit Professor Moniz, his views, and the additional large body of academic research and practical experience proving the efficacy and safety of fracking.¶ In the environmentalist blogosphere, for example, the discussions of natural gas and fracking take on a decidedly hostile tone. “Fracking is madness, a sign of a society gone completely insane and bent on self-destruction,” one blogger wrote recently. Said another: “The more we learn about a gas-drilling practice called hydraulic fracturing—or ‘fracking’—the more we see it as a zenith of violence and disconnect” in our world.¶ Although not nearly as extreme, related sentiments also are being expressed by many “mainstream” environmentalists. At a July 2012 “Stop the Frack Attack” rally, Sierra Club president Allison Chin described the thinking behind her organization’s new “Beyond Gas” campaign, warning against the “out-of-control rush to drill [that] has put oil and gas industry profits ahead of our health, our families, our property, our communities, and our futures. If drillers can’t extract natural gas without destroying landscapes and endangering the health of families, then we should not drill for natural gas.”

#### No Link:

#### A) Courts shield

Rosenberg 91 (Gerald, professor of Political Science at the University of Chicago, “Hollow Hope”, *University of Chicago Press*, p. 34-35)

Finally, court orders can simply provide a shield or cover for administrators fearful of political reaction. This is particularly helpful for elected officials who can implement required reforms and protest against them at the same time. This pattern is often seen in the school desegregation era. Writing in 1967 - one author noted that "court order is useful in that it leaves the official no choice and a perfect excuse". While the history of court-ordered desegregation unfortunately shows that officials often had many choices other than implementing court orders, a review of school desegregation cases did find that "many school boards pursue from the outset a course designed to shift the entire political burden of desegregation on the courts". This was also the case in the Alabama mental health litigation where "the mental health administrators wanted judge Johnson to take all the political heat associated with specific orders while they enjoyed the benefits of his action. Thus, Condition IV; Courts may effectively produce significant social reform by providing leverage, or a shield cover, or excuse for persons crucial to implementation who-are willing to act.

#### B) decision not announced right away

**Ward 10** (Jake, “Bilski Decision Tomorrow (Thursday, June 17th)? Maybe?”, Anticipate This! (Patent and Trademark Law Blog), 6-17, http://anticipatethis.wordpress.com/2010/06/16/bilski-decision-tomorrow-thursday-june-17th-maybe/)

**In *mid-May* until the *end of June*, the Supreme Court of the *U***nited ***S***tates (**SCOTUS) releases orders and opinions.  SCOTUS has yet to issue a number of decisions this term**, however, **and it is rapidly moving toward summer recess.**  Most notable from a patent law perspective is that the decision in [Bilski v. Kappos](http://anticipatethis.wordpress.com/?s=bilski), which was argued in November 2009, has yet to be decided.

**Obama loves fracking – no flip flop links**

Politico, 2-12-13, “Obama to Congress in State of the Union: Act on climate or I will”

<http://www.politico.com/story/2013/02/obama-to-congress-act-on-climate-or-i-will-87555_Page3.html>

The president also outlined several other energy-related proposals Tuesday as part of his “all-of-the-above” energy strategy. For example, he vowed to continue expanding domestic oil and gas production, while working to reduce pollution.¶ “That’s why my administration will keep cutting red tape and speeding up new oil and gas permits,” he said. “That’s got to be a part of an all-of-the-above plan. But I also want to work with this Congress to encourage the research and technology that helps natural gas burn even cleaner and protects our air and our water.”

**( ) Fracking lobby shields Obama’s capital**

**Thill ‘11**

Scott Thill runs the online mag Morphizm.com. His writing has appeared on Salon, XLR8R, All Music Guide, Wired and others. 12-16-11, Alter Net, The Fracking Industry Has Bought Off Congress: Here Are the Worst Offenders <http://www.alternet.org/story/153467/the_fracking_industry_has_bought_off_congress%3A_here_are_the_worst_offenders?paging=off>, jj

Environmentalists and other well-adjusted citizens of Earth, I've got some good news and some bad news. The good news is that, thanks to illuminating documentaries like Josh Fox's Gasland and determined pressure from activists in and out of the mainstream, the toxic ravages of hydraulic fracturing , known as fracking, are no longer the shale gas sector's dirty secret. The bad news is that, **thanks to** the United States' morally bankrupt political system and its Supreme Court's reality-defying ruling on **Citizens United** v. Federal Election Commission , **the fracking lobby's power of the purse is greater than it has ever been.** That power was depressingly dissected in Common Cause's recent report, Deep Drilling, Deep Pockets, which explained that **earnings junkies like Exxon, Koch and more have paid House and Senate politicians on select energy and commerce committees nearly $750 million** over the last decade to smother regulatory oversight of the expanding fracking practice, whose complete chemical components still remain a relative mystery. **It was** evidently **money well spent**. During that lobbying stretch, the Environmental Protection Agency scientifically linked fracking with water poisoning in Wyoming, and probably isn't far from siding with the increasing ranks of those who blame fracking for earthquakes from Oklahoma to Ohio to England. And yet beyond manageable fines and stock devaluations, no one from the industry has yet to seriously face the music for groundwater contamination and worse. For that, you can thank the industry's "Halliburton loophole," so named for former Vice-President Dick Cheney's insistence that his former company's fracking be stripped of EPA regulation. Years and billions later, **money still talks** and safety still walks in our peak oil century tapping, like veins, what fossil fuel deposits we have left, from natural gas to tar sands. **And they do so in a decidedly nonpartisan fashion.** "**The natural gas industry has spent billions on lobbying and advertising to convince Americans that natural gas is a cleaner, cheaper alternative to oil,"** Common Cause regional director James Browning, co-author with Alex Kaplan of Deep Drilling, Deep Pockets, told AlterNet. "**They've also tried to rebut environmental concerns by pitching natural gas as a 'transition fuel'** that will help America move from fossil fuels to primarily clean forms of energy by the next century. "But while fracking's exemption from the Safe Drinking Water Act is rightly called the 'Halliburton loophole' and the vast majority of our top 100 recipients of fracking money are Republicans, **it's important to note the extent of the industry's influence among Democrats,"** he added. "In Pennsylvania, the only state without a severance tax on natural gas extraction, previous Democratic governor Ed Rendell only made an issue of imposing a tax during his last year in office, too late to make it a reality. President **Obama is very pro-fracking and it's important to note that the FRAC Act languished in the Democratic 111th Congress."** Currently, the FRAC Act, which would repeal fracking's exemption from the Safe Water Drinking Act, also languishes in the 112th Congress, where it is still taking its first legislative steps while sponsored by Colorado's Democratic congresswoman Diana DeGette. DeGette and Delaware Republican Michael N. Castle coauthored the 2005 Stem Cell Research Enhancement Act, an opportunity that provided former president George W. Bush with his first veto. Yet it is respective Bush Republicans like Joe Barton ($514,945) and John Cornyn ($417,556) who crown Common Cause's top 100 congressional hoarders of campaign cash from the fracking industry. As Browning explained, they're followed in fourth by Louisiana Democrat Mary Landrieu ($328,300), who's accompanied by House Democrats Dan Boren ($328,300), Jim Matheson ($223,79), and even Gene Green ($186,300). More importantly, and **across party lines, the fracking industry has lavished millions on crucial members of the House Committee on Energy and Commerce and Senate Committee on Environment and Public Works**. Yet it was only DeGette who continued to beat the lonely regulation drum after the EPA's report on Wyoming.

#### ( ) Plan’s popular with the GOP and spun as job creation

**Bluey ‘12**

Rob Bluey is a journalist and blogger who leads The Heritage Foundation's investigative reporting unit.

6-21-12, Heritage, North Dakota’s Oil Boom in Pictures <http://blog.heritage.org/2012/06/21/north-dakotas-oil-boom-in-pictures/>, jj

**The combination of energy production and job creation is potent force**. **It’s one reason a bipartisan majority in the U.S. House** today **approved the Domestic Energy and Jobs Act**, **legislation that would increase access to America’s resources and spur job creation**. **With the national unemployment rate still stuck above 8 percent, congressional Republicans hit the road** in May **to highlight how energy initiatives could cure America’s economic** **woes**. One of the stops was in North Dakota — a state that Heritage and the Institute for Energy Research recently visited.

#### House GOP k2 CIR

Altman, 3/20/13 (Alex, Alex Altman is a Washington correspondent for TIME. He previously worked as a writer and editor for TIME's Briefing section. A native of New York City, he has degrees from Colgate University and Northwestern University's Medill School of Journalism. Time, “Four Hurdles That Could Block Immigration Reform,” http://swampland.time.com/2013/03/20/four-hurdles-that-could-block-immigration-reform/

Problem #3: House Republicans¶ Even if Senate negotiators can come up with a package to get 60 votes in the upper chamber, “the question continues to be, how does it get through the House?” says Frank Sharry, an expert on immigration reform. As in the Senate, a bipartisan cluster of eight representatives from across the ideological spectrum have been secretly meeting for months. Congressman Luis Gutierrez, an Illinois Democrat who has long been a leader on immigration reform, is full of praise for the new tack taken by his Republican counterparts. But, he acknowledges, “You still have to put those votes on the board, and that’s going to be a real, real test in the House of Representatives.”¶ For their part, Republicans say the party’s old dogma, which held that illegal immigrants should self-deport and then go to the back of the line, is not viable policy. Even many immigration hard-liners say they want to help shape comprehensive reform. “It’s time for us to belly up to the bar,” says Ted Poe, the Texas Republican who chairs the House immigration reform caucus. But for conservatives, amnesty remains a dirty word. “A bill that’s basically amnesty, that says you’re here and you’re going to be a citizen — those two things are not going to come out of this conservative House,” says Poe. Even citizenship is charged enough that Republican Senator Rand Paul, who gave a speech March 19 backing a path to legalization for undocumented immigrants, avoided using the term. Many House Republicans, including several in the Judiciary Committee through which a bill must pass, have a long history of antipathy to amnesty, and only a grassroots rebellion to fear as next year’s primaries approach.¶ Then there is the reality that even if Republicans were to be widely supportive of amnesty, very few of those new citizens are likely to abandon the Democratic Party anytime soon. “Republicans face a choice: do they ditch their principles and go all out in a failing attempt to outpander Democrats?” asks Rosemary Jenks, director of government relations at NumbersUSA, which advocates for lower immigration levels. “It’s becoming very clear to Republicans in Congress that this is not going to get them the Hispanic vote.”¶

***( ) Current political climate makes plan a win***

Laurance **Geri &** David **McNabb** 20**11**, Laurance (Larry) Geri is a member of the faculty of The Evergreen State College, where he teaches in the Masters Program in Public Administration; David E. McNabb is business administration professor emeritus at Pacific Lutheran University and currently a member of the adjunct faculty of Olympic College; Energy Policy in the U.S.: Politics, Challenges, and Prospects for Change, electronic copy of book, KEL)

A new approach to energy politics was evident in President **Obama’s 2011 State of the Union**¶ **address**, in which he **set a national goal of producing 80 percent of U.S. electricity from “clean**”¶ **sources by 2035** (Obama 2011). “**Clean” was defined as** renewables, nuclear, clean coal and **natural**¶ **gas**. Although **this** stretches the **definition** of “clean” beyond recognition, it **might be broad**¶ **enough to attract bipartisan support** for a bill supporting R&D and incentives for such production¶ that will also generate green jobs. Biofuels and support for electric vehicles could be included in¶ this policy proposal, as **actions to lower U.S. reliance on imported oil and generate jobs may be a**¶ **winning formula at a time of slow growth and high geopolitical tension.**

#### Immigration will pass without Obama PC – he is toxic to the debate

Chris Stirewalt is digital politics editor for Fox News, “Will Obama Blow Up Immigration Deal?”, Jan 28th 2013, http://www.foxnews.com/politics/2013/01/28/will-obama-blow-up-immigration-deal/#ixzz2JnY0chGl

A group of four Republican senators including two moderates, John McCain and Lindsey Graham, and two conservatives, Marco Rubio and Jeff Flake, are teaming up with four Democrats, Chuck Schumer, Dick Durbin, Bob Menendez and Michael Bennet, to end the standoff over illegal immigration. It includes a broad amnesty but has a strengthening of national identification laws for job-seekers, tighter rules for visa abusers and requires those illegal immigrants already here to “go to the back of the line” for citizenship or face deportation. There’s more to like for the right than in McCain’s 2007 proposal, but it still represents a major compromise. Republicans are sick to death about talking about illegal immigration, an issue that makes them often sound like the xenophobes Obama accuses them of being and helps to alienate Hispanic voters who would line up with the GOP on many other issues if it were not for the perception that the party is anti-immigrant. But under Obama’s thesis, this compromise would be shouted down by Limbaugh, opinion mavens at FOX News and other outlets and the establishment press will refuse to report on how Republicans ruined the chances for progress because of this cynical dyspatriotism. But how does Obama himself factor in to all this? The president says that Republicans are punished for being too chummy with him, but what about when goes out and attacks Republicans? What about when he made a fiscal cliff deal all but impossible by hectoring and goading conservatives into opposition. In his own unified theory of media destruction, wouldn’t the president acknowledge that his own attacks, including the accusation that Republicans are working against what they know to be the best interests of the nation, would have some effect? Wouldn’t Obama have done better to reach a deal on taxes and spending if he had given John Boehner some cover rather than hitting the campaign trail? If Obama stands silent on the immigration deal or even complains that he will have to sign it even though it represents a painful sacrifice, then we will know he actually believes his own spin on the double bias of media. If Obama presses for more or revels in victory, he would be blowing up the deal under his own stated view of how the right operates. If the political world is constituted as he claims it is, wouldn’t the patriotic thing for Obama to do be staying out of it except to briefly wince at the concessions he is making before signing a law?

**( ) Issues are compartmentalized – no reason the plan will change peoples’ votes on a separate bill. And, PC irrelevant to the agenda**

**Silver, 1/26/11** – political statistician and all-around baller (Nate. “Obama’s paradox of choice.” http://fivethirtyeight.blogs.nytimes.com/2011/01/26/obamas-paradox-of-choice/)

Now, however, the stakes are probably much lower for him. With Democrats no longer in control of the House of Representatives, Mr. Obama will not be able to pass any major Democratic policy initiatives now, no matter how much political capital he might be willing to stake on them. Meanwhile, the Republicans control only the House, not the Senate. In contrast to Bill Clinton — who faced opposition control of both houses of Congress after his first midterm election — Mr. Obama may never have to use his veto pen. This is not to suggest, exactly, that Mr. Obama’s job has become easy (the president’s job never is). But surely it has become easier in one regard: he has far fewer choices to make.

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### Solvency

***No retaliation***

**Gibson ’12** – James L. Gibson\*\*¶ Sidney W. Souers Professor of Government¶ Department of Political Science¶ Professor of African and African American Studies¶ Director, Program on Citizenship and Democratic Values¶ Weidenbaum Center on the Economy, Government, and Public Policy¶ Washington University in St. Louis¶ Fellow, Centre for Comparative and International Politics¶ Professor Extraordinary in Political Science¶ Stellenbosch University (South Africa)¶ “Public Reverence for the United States Supreme Court: Is the Court Invincible?\*” Prepared for delivery at the Countermajoritarian Conference,¶ University of Texas Law School, March 29 – 30, 2012. ONLINE, jj

At the same time, Pildes also observes, “**Though the decision has been intensely criticized** in some quarters, **there has been virtually no suggestion of any legislative effort to retaliate against the Court or bring it to account, nor to challenge the ruling directly by enacting new legislation that tests the Court’s commitment to the decision.**”65 Understanding why broad and deep disagreement with the Court did not generate some sort of institutional backlash is crucial for understanding the Court’s role in contemporary American politics.¶ A. The New Arithmetic of Institutional Legitimacy¶ Let us assume that people do not question the legitimacy of decisions made by courts when they agree with those decisions. Legitimacy only comes into play when there is an objection precondition. So I will assume that the twenty-seven percent of the American people who agree with the Court’s decision are satisfied with the Court.¶ Nearly two-thirds (sixty-four percent) of the American people oppose the ruling. But let us assume that about half of this two-thirds extends legitimacy to the Supreme Court and is therefore willing to accept decisions with which they disagree. If we add this thirty-two percent to the twenty-seven percent supporting the decision, then a fairly sizeable fifty-nine percent is unlikely to be willing to support schemes to attack the Court or to try to overrule its decision. Thus, **the constituency for curbing the Court on most decisions is the fairly small minority who oppose the decision and who do not extend legitimacy to the Court**. **These calculations explain why a coalition for attacking the Court is difficult to assemble, and, in conjunction with the evidence that the Court today is issuing both liberal and conservative opinions, may provide a clue as to why the Court’s legitimacy is currently so stable.**

### States CP

***Leads to extinction***

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Jim, Globalization and Its Losers:, 9 Minn. J. Global Trade 157’ LexisNexis Legal

Conscious **decisions to allow** the **extinction of a species or** the **destruction of an** entire **ecosystem epitomize the "irreversible and irretrievable commitments of resources"** that NEPA is designed to retard.312 The original Endangered Species Act gave such decisions no quarter whatsoever;313 since 1979, such decisions have rested in the hands of a solemnly convened "God Squad."314 In its permanence and gravity, natural extinction provides the baseline by which all other types of extinction should be judged. The Endangered Species Act explicitly acknowledges the "esthetic, ecological, educational, historical, recreational, and scientific value" of endangered species and the biodiversity they represent.315 Allied bodies of international law confirm this view:316 global biological diversity is part of the commonly owned heritage of all humanity and deserves full legal protec-tion.317 Rather remarkably, these broad assertions understate the value of biodiversity and the urgency of its protection. A Sand County Almanac, the eloquent bible of the modern environmental movement, contains only two demonstrable bio- logical errors. It opens with one and closes with another. We can forgive Aldo Leopold's decision to close with that elegant but erroneous epigram, "ontogeny repeats phylogeny."318 What concerns erns us is his opening gambit: "There are some who can live without wild things, and some . **None of us can live without wild things**. Insects are so essential to life as we know it that **if they** "and other land dwelling anthropods ... **were to disappear, humanity probably could not last more than a few months**."320 months."320 "Most of the amphibians, reptiles, birds, and mammals," along with "the bulk of the flowering plants and ... the physical structure of most forests and other terrestrial habitats" would disappear in turn.321 "The land would return to" something resembling its Cambrian condition, "covered by mats of recumbent wind-pollinated vegetation, sprinkled with clumps of small trees and bushes here and there, largely devoid of animal life."322 From this perspective, the mere thought of valuing biodiver- sity is absurd, much as any attempt to quantify all of earth's planetary amenities as some trillions of dollars per year is ab- surd. But the frustration inherent in enforcing the Convention on International Trade in Endangered Species (CITES) has shown that conservation cannot work without appeasing Homo economicus, the profit-seeking ape. Efforts to ban the interna- tional ivory trade through CITES have Fortunately, defending biodiversity preservation in human- ity's self-interest is an easy task. As yet unexploited species might give a hungry world a larger larder than the storehouse of twenty plant species that provide nine-tenths of humanity's cur- rent food supply.324 "Waiting in the wings are tens of thousands of unused plant species, many demonstrably superior to those in favor."325 As genetic warehouses, many plants enhance the pro- ductivity of crops already in use. In the United States alone, the lates phylogeny" means that the life history of any individual organism replays the entire evolutionary history of that organism's species. genes of wild plants have accounted for much of "the explosive growth in farm production since the 1930s."326 The contribution is worth $1 billion each year.327 Nature's pharmacy demonstrates even more dramatic gains than nature's farm.328 Aspirin and penicillin, our star analgesic and antibiotic, had humble origins in the meadowsweet plant and in cheese mold.329 Leeches, vampire bats, and pit vipers all contribute anticoagulant drugs that reduce blood pressure, pre- vent heart attacks, and facilitate skin transplants.330 Merck & Co., the multinational pharmaceutical company, is helping Costa Rica assay failed to stem the slaugh- ter of African elephants.323 The preservation of biodiversity must therefore begin with a cold, calculating inventory of its benefits. its rich biota.33' A single commercially viable product derived "from, say, any one species among... 12,000 plants and 300,000 insects ... could handsomely repay Merck's entire investment" of $1 million in 1991 dollars.332 Wild 333 The Supreme Court has lauded the pes- ticidal talents of migratory birds.334 Numerous organisms process the air we breathe, the water we drink, the ground we stroll.335 Other species serve as sentries. Just as canaries warned coal miners of lethal gases, the decline or disappearance of indicator species provides advance warning against deeper environmental threats.336 Species conservation yields the great- est environmental amenity of all: ecosystem protection. Saving discrete species indirectly protects the ecosystems in which they live.337 Some larger animals may not carry great utilitarian value in themselves, but the human urge to protect these charis- matic "flagship species" helps protect their ecosystems.338 In- deed, to save any species, we must protect their ecosystems.339 Defenders of biodiversity can measure the "tangible eco- nomic value" of the pleasure derived from "visiting, photograph- ing, painting, and just looking at wildlife."340 In the United States alone, and 766,000 jobs.341 Ecotourism gives tropical countries, home to most of the world's species, a valuable alternative to subsis- tence agriculture. Costa Rican rainforests preserved for ecotour- ism "have become many times more profitable per hectare than land cleared for pastures and fields," while the endangered go- rilla has turned ecotourism into "the third most important source of income in Rwanda."342 In a globalized economy where commodities can be cultivated almost anywhere, environmen- tally sensitive locales can maximize their wealth by exploiting the "boutique" uses of their natural should the law do to preserve it? There are those that invoke the story of Noah's Ark as a moral basis for biodiversity preser- vation.344 Others regard the entire Judeo-Christian tradition, especially the biblical stories of Creation and the Flood, as the root of the West's deplorable environmental we should let Charles Darwin and evolutionary biology determine the imperatives of our moment in natural "history."346 **The loss of biological diversity is** quite **arguably the gravest problem facing humanity**. If we cast the question as the contemporary phenomenon that "our descend- ants [will] most regret," **the "loss of genetic and species diversity by the destruction of natural habitats" is worse than** even "energy depletion, **economic collapse, limited nuclear war, or con- quest by a totalitarian government**."347 **Natural evolution may** in due course **renew the earth with a diversity of species** approximating that of a world unspoiled by Homo sapiens - in ten mil- lion years, perhaps a hundred million.348

***Err on the side of precaution***

**ScienceDaily 11**

Biodiversity Critical for Maintaining Multiple 'Ecosystem Services'

<http://www.sciencedaily.com/releases/2011/08/110819155422.htm>

**By combining data from 17 of the largest and longest-running biodiversity experiments, scientists from universities across North America and Europe have found that previous studies have *underestimated* the importance of biodiversity for maintaining multiple ecosystem services across many years and places**. "Most previous studies considered only the number of species needed to provide one service under one set of environmental conditions," says Prof. Michel Loreau from McGill University's biology department who supervised the study. "These studies found that many species appeared redundant. That is, it appeared that the extinction of many species would not affect the functioning of the ecosystem because other species could compensate for their loss." Now, by looking at grassland plant species, investigators have found that most of the studied species were important at least once for the maintenance of ecosystem services, because different sets of species were important during different years, at different places, for different services, and under different global change (e.g., climate or land-use change) scenarios. Furthermore, the species needed to provide one service during multiple years were not the same as those needed to provide multiple services during one year. "**This means that biodiversity is even more important for maintaining ecosystem services than was previously thought**," says Dr. Forest Isbell, the lead author and investigator of this study. "Our results indicate that many species are needed to maintain ecosystem services at multiple times and places in a changing world, and that species are less redundant than was previously thought." The scientists involved in the study also offer recommendations for using these results to prioritize conservation efforts and predict consequences of species extinctions. "It is nice to know which groups of species promoted ecosystem functioning under hundreds of sets of environmental conditions," says Isbell, "because this will allow us to determine whether some species often provide ecosystem services under environmental conditions that are currently common, or under conditions that will become increasingly common in the future." But Michel Loreau, of McGill, adds au cautionary note: "We should be careful when making predictions. The uncertainty over future environmental changes means that **conserving as much biodiversity as possible could be a good precautionary approach**."

### Avoidance CP

#### EPA will keep regulating

Binder, 2001 (Denis, Professor Binder's career teaching [currently at Chapman U] Antitrust, Environmental Law, Torts, and Toxic Torts at law schools nationwide spans 4 decades. He has served as a consultant to a variety of organizations, ranging from the Army Corps of Engineers to Cesar Chavez and the United Farm Workers. In September 1996, Professor Binder received the National Award of Merit from the Association of State Dam Safety Officials for his contributions to promoting dam safety over the preceding two decades. He graduated first in his class at the University of San Francisco School of Law and received his LL.M. and S.J.D. degrees from the University of Michigan Law School. Professor Binder served as the President of the Chapman University Faculty Senate during the 2006-2007 academic year and as chair of the Environmental Law Section of The Association of American Law Schools for 2011-2012, Chapman Law Review¶ Spring, 2001¶ 4 Chap. L. Rev. 147,

SPENDING CLAUSE SYMPOSIUM: The Spending Clause as a Positive Source of Environmental Protection: A Primer, LexisNexis)

The coercion theory was tested by the Ninth Circuit in Nevada v. Skinner, [n43](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n43) which involved a challenge to the federally mandated speed limit of fifty-five miles per hour. [n44](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n44) Nevada claimed the potential loss of ninety-five percent of its highway funds deprived it of any choice, forcing it to adhere to the national speed limit.¶ The Skinner court felt the difficulty of assessing a state's financial capabilities "renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments." [n45](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n45) This approach has been followed by other courts. [n46](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n46) As a practical matter, federal courts have been reluctant to invalidate funding conditions. [n47](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n47)¶ However, the court did not base its opinion on the coercion theory. Instead, it held the Congressional statute could be independently supported by another enumerated power, the Commerce Clause. [n48](http://www.lexisnexis.com.proxy.lib.wayne.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1364159358395&returnToKey=20_T16998206575&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.478831.20393122116" \l "n48) Congress clearly has the power to enact a uniform speed limit pursuant to the Commerce Clause. The threatened withholding of substantial highway funds is in fact a lesser form of coercion than the direct, federal enactment of a flat mandate.