## 2AC

### t – restriction

#### NSPS bans coal

Brownell et al 12

F. William Brownell, Henry V. Nickel, Norman W. Fichthorn, Allison D. Wood, Hunton & Williams LLP, 9/6/12, LASBRISASENERGYCENTER,LLC,etal., Petitioners, v. UNITED STATES ENVIRONMENTAL ) PROTECTION AGENCY and LISA PEREZ JACKSON, Administrator, United States Environmental Protection Agency, Respondents, insideEPA database

Here, by contrast, EPA published a proposed CO2 NSPS that cannot be achieved by any new coal-fired EGU to which it applies. By virtue of that standard having becoming “applicable” as of April 13, 2012, it now sets the “floor” for determining BACT for those new units and obligates them to demonstrate that they can comply with a standard that is unachievable, a showing that cannot be made.8

The fundamental “alter[ation]” of the PSD “legal regime” effected by EPA’s publication of the April 13 Notice is much more significant than the impediment to permitting that the Supreme Court in Sackett found sufficient to satisfy the second Bennett criterion. In Sackett, the Supreme Court found that “‘legal consequences . . . flow[ed]’” from EPA’s issuance of a compliance order under section 309 of the Clean Water Act, insofar as such issuance “severely limit[ed] the Sacketts’ ability to obtain a permit for their fill from the Army Corps of Engineers,” in light of the Corps’ regulations. 132 S. Ct. at 1371-72 (quoting Bennett, 520 U.S. at 178) (emphasis added). In contrast, since April 13, 2012, electric generators’ ability to obtain PSD permits for new coal-fired EGUs has been not merely “limited” but eliminated entirely.

#### Counter-interp—restrictions include limiting conditions

Plummer 29 J., Court Justice, MAX ZLOZOWER, Respondent, v. SAM LINDENBAUM et al., Appellants Civ. No. 3724COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT100 Cal. App. 766; 281 P. 102; 1929 Cal. App. LEXIS 404September 26, 1929, Decided, lexis

The word "restriction," when used in connection with the grant of interest in real property, is construed as being the legal equivalent of "condition." Either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The words "terms" and "conditions" are often used synonymously when relating to legal rights. "Conditions and restrictions" are that which limits or modifies the existence or character of something; a restriction or qualification. It is a restriction or limitation modifying or destroying the original act with which it is connected, or defeating, terminating or enlarging an estate granted; something which defeats or qualifies an estate; a modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate may be either defeated, enlarged, or created upon an uncertain event; a quality annexed to land whereby an estate may be defeated; a qualification or restriction annexed to a deed or device, by virtue of which an estate is made to vest, to be enlarged or defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act.

#### This is the middle ground—

LVM Institute 96, Ludwig Von Mises Institute Original Book by Ludwig Von Mises, Austrian Economist in 1940, fourth edition copyright Bettina B. Greaves, Human Action, http://mises.org/pdf/humanaction/pdf/ha\_29.pdf

Restriction of production means that the government either forbids or makes more difficult or more expensive the production, transportation, or distribution of definite articles, or the application of definite modes of production, transportation, or distribution. The authority thus eliminates some of the means available for the satisfaction of human wants. The effect of its interference is that people are prevented from using their knowledge and abilities, their labor and their material means of production in the way in which they would earn the highest returns and satisfy their needs as much as possible. Such interference makes people poorer and less satisfied.

This is the crux of the matter. All the subtlety and hair-splitting wasted in the effort to invalidate this fundamental thesis are vain. On the unhampered market there prevails an irresistible tendency to employ every factor of production for the best possible satisfaction of the most urgent needs of the consumers. If the government interferes with this process, it can only impair satisfaction; it can never improve it.

The correctness of this thesis has been proved in an excellent and irrefutable manner with regard to the historically most important class of government interference with production, the barriers to international trade. In this field the teaching of the classical economists, especially those of Ricardo, are final and settle the issue forever. All that a tariff can achieve is to divert production from those locations in which the output per unit of input is higher to locations in which it is lower. It does not increase production; it curtails it.

#### “On production” means there’s no limits disad

Dictionary.com, http://dictionary.reference.com/browse/on

On

preposition

1.so as to be or remain supported by or suspended from: Put your package down on the table; Hang your coat on the hook.

2.so as to be attached to or unified with: Hang the picture on the wall. Paste the label on the package.

#### Says a restriction isn’t a prohibition, which makes zero sense

Sinha 6

S.B. Sinha is a former judge of the Supreme Court of India. “Union Of India & Ors vs M/S. Asian Food Industries,” Nov 7, http://webcache.googleusercontent.com/search?q=cache:http://www.indiankanoon.org/doc/437310/

There would seem to be no occasion to discuss whether or not the Railroad Commissioners had the power and authority to make the order, requiring the three specified railroads running into the City of Tampa to erect a union passenger station in such city, which is set out in the declaration in the instant case and which we have copied above. [\*\*\*29] It is sufficient to say that under the reasoning and the authorities cited in State v. Atlantic Coast Line R. Co., 67 Fla. 441, 458, 63 South. Rep. 729, 65 South. Rep. 654, and State v. Jacksonville Terminal [\*631] Co., supra, it would seem that HN14the Commissioners had power and authority. The point which we are required to determine is whether or not the Commissioners were given the authority to impose the fine or penalty upon the three railroads for the recovery of which this action is brought. In order to decide this question we must examine Section 2908 of the General Statutes of 1906, which we have copied above, in the light of the authorities which we have cited and from some of which we have quoted. It will be observed that the declaration alleges that the penalty imposed upon the three railroads was for the violation of what is designated as "Order No. 282," which is set out and which required such railroads to erect and complete a union depot at Tampa within a certain specified time. If the Commissioners had the authority to make such order, it necessarily follows that they could enforce a compliance with the same by appropriate proceedings in the courts, but [\*\*\*30] it does not necessarily follow that they had the power and authority to penalize the roads for a failure to comply therewith. That is a different matter. HN15Section 2908 of the General Statutes of 1906, which originally formed Section 12 of Chapter 4700 of the Laws of Florida, (Acts of 1899, p. 86), expressly authorizes the imposition of a penalty by the Commissioners upon "any railroad, railroad company or other common carrier doing business in this State," for "a violation or disregard of any rate, schedule, rule or regulation, provided or prescribed by said commission," or for failure "to make any report required to be made under the provisions of this Chapter," or for the violation of "any provision of this Chapter." It will be observed that the word "Order" is not mentioned in such section. Are the other words used therein sufficiently comprehensive to embrace an order made by the Commissioners, such as the one now under consideration? [\*632] It could not successfully be contended, nor is such contention attempted, that this order is covered by or embraced within the words "rate," "schedule" or "any report,' therefore we may dismiss these terms from our consideration and [\*\*\*31] direct our attention to the words "rule or regulation." As is frankly stated in the brief filed by the defendant in error: "It is admitted that an order for the erection of a depot is not a 'rate' or 'schedule' and if it is not a 'rule' or 'regulation' then there is no power in the Commissioners to enforce it by the imposition of a penalty." It is earnestly insisted that the words "rule or regulation" are sufficiently comprehensive to embrace such an order and to authorize the penalty imposed, and in support of this contention the following authorities are cited: Black's Law Dictionary, defining regulation and order; Rapalje & Lawrence's Law Dictionary, defining rule; Abbott's Law Dictionary, defining rule; Bouvier's Law Dictionary, defining order and rule [\*\*602] of court; Webster's New International Dictionary, defining regulation; Curry v. Marvin, 2 Fla. 411, text 515; In re Leasing of State Lands, 18 Colo. 359, 32 Pac. Rep. 986; Betts v. Commissioners of the Land Office, 27 Okl. 64, 110 Pac. Rep. 766; Carter V. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 S.W. Rep. 6, text 9; 34 Cyc. 1031. We have examined all of these authorities, as well as those cited by the [\*\*\*32] plaintiffs in error and a number of others, but shall not undertake an analysis and discussion of all of them. The Central Government announced its Foreign Trade Policy in exercise of its power conferred upon it under Section 5 of the 1992 Act by a notification dated 7th April, 2006. The said policy was issued in public interest. Chapter 1A of the said policy also provides for legal framework. Clause 1.5 thereof reads as under: "1.5 In case an export or import that is permitted freely under this Policy is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted notwithstanding such restriction or regulation, unless otherwise stipulated, provided that the shipment of the export or import is made within the original validity of an irrevocable letter of credit established before the date of imposition of such restriction." Clause 2.4 of the policy empowers the Director General of Foreign Trade to specify the procedures required to be followed by an exporter in any case or class of cases for the purpose of implementing the provisions of the 1992 Act, the Rules and the Orders made thereunder and the said policy. Such procedures were to be included in the Handbook which would be published by means of a public notice and such procedures may in the like manner be amended from time to time. It was stated: "The Handbook (Vol.1) is a supplement to the Foreign Trade Policy and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol.1)" The Handbook of Procedures which inter alia supplements the Foreign Trade Policy was also issued on 7th April, 2006 upon giving a public notice therefor. It contains nine chapters. Chapter 9 comprises of miscellaneous matters. Paragraph 9.12 lays down the manner in which date of shipment/ dispatch of exports would be reckoned. It inter alia provides: "However, wherever the Policy provisions have been modified to the disadvantage of the exporters, the same shall not be applicable to theconsignments already handed over to the Customs for examination and subsequent exports upto the date of the Public Notice. Similarly, in such cases where the goods are handed over to the customs authorities before the expiry of the export obligation period but actual Exports take place after expiry of the export obligation period, such exports shall be considered within the export obligation period and taken towards fulfillment of export obligation." HIGH COURT JUDGMENTS Whereas the Gujarat High Court invoking Paragraph 9.12 of the Handbook and having regard to the fact that the customs authorities cleared and permitted the loading of the goods and moreover the bill of lading had also been filed, opined that the respondents were entitled to export the goods in terms of the policy decision despite the said notification dated 27.06.2006, the Delhi High Court declared the notification dated 4.07.2006 as ultra vires. SUBMISSIONS Mr. Vikas Singh, learned Additional Solicitor General for Union of India, has raised the following contentions: (i) Clause 1.5 of the Foreign Trade Policy would not apply to a case where the export of goods are totally being prohibited and not merely regulated or restricted. (ii) Having regard to the definition of export and in particular the provision of Section 51 of the 1962 Act, the procedures laid down thereunder as envisaged under Sections 16 and 39 must be complied and they having not been complied with, the impugned judgment of Gujarat High Court cannot be sustained. (iii) Although the notification dated 4.07.2006 was wrongly worded but as thereby benefit was sought to be conferred on those who were not aware of the ban before 22.06.2006 and had opened letters of credit prior thereto were exempted from operation of the said notification, the order of prohibition shall be effective even if a concluded contract had been arrived at for export of goods. The learned counsel for the respondents, on the other hand, submitted: (i) In view of the Foreign Trade Policy issued by the Central Government under Section 5 of the 1992 Act, the amendments carried out therein shall only have a prospective effect and not a retrospective effect. (ii) As the Handbook of Procedures lays down supplemental provisions to the Foreign Trade Policy issued by the Director General of Foreign Trade in exercise of its power under the 1992 Act, the purported prohibition issued under the notification dated 27.06.2006 would not apply to a case where the formalities contained in Section 51 of the 1962 Act had been complied with. (iii) Clause 1.5 of the Foreign Trade Policy having provided for protection to those who were holders of letter of credit, the retrospective effect purported to have been given in terms of the notification dated 4.07.2006 was unconstitutional being hit by Article 14 of the Constitution of India. Would the terms 'restriction' and 'regulation' used in Clause 1.5 of the Foreign Trade Policy include prohibition also, is one of the principal questions involved herein. A citizen of India has a fundamental right to carry out the business of export, subject, of course to the reasonable restrictions which may be imposed by law. Such a reasonable restriction was imposed in terms of the 1992 Act. The purport and object for which the 1992 Act was enacted was to make provision for the development and regulation of foreign trade inter alia by augmenting exports from India. While laying down a policy therefor, the Central Government, however, had been empowered to make provision for prohibiting, restricting or otherwise regulating export of goods. Section 11 of the 1962 Act also provides for prohibition. When an order is issued under Sub-section (3) of Section 3 of the 1992 Act, the export of goods would be deemed to be prohibited also under Section 11 of the 1962 Act and in relation thereto the provisions thereof shall also apply. Indisputably, the power under Section 3 of the 1992 Act is required to be exercised in the manner provided for under Section 5 of the 1992 Act. The Central Government in exercise of the said power announced its Foreign Trade Policy for the years 2004-2009. It also exercised its power of amendment by issuing the notification dated 27.06.2006. Export of all commodities which were not earlier prohibited, therefore, was permissible till the said date. The implementation of the said policy was to be made in terms of the procedures laid down in the Handbook. The provisions of the 1992 Act, the Foreign Trade Policy and the procedures laid down thereunder, thus, provide for a composite scheme. In implementing the said provisions of the scheme, in the event an order of prohibition, restriction or regulation is passed, the provisions of the 1962 Act mutatis mutandis would apply. Section 50 of the 1962 Act provides for entry of goods for exportation. It enjoins a duty upon an exporter to make entry thereof by presenting a shipping bill to the proper officer in a vessel or aircraft. On receipt of the shipping bill, the proper officer has to arrive at its satisfaction that (i) the export of goods is not prohibited; (ii) the exporter has paid the duty assessed thereon and charges payable thereunder in respect of the said goods. Once he arrives at the said satisfaction, he will make an order permitting clearance and loading of the goods for exportation. The scheme of the Foreign Trade Policy postulates that when the policy provisions are amended which are disadvantageous to the exporters, the modification would not be attracted. It furthermore lays down that although actual export had not taken place but in the event goods are handed over to the custom authorities before expiry of the export obligation period but actual export takes place after expiry thereof, the same shall be considered within the export obligation and taken towards fulfillment of such obligation. Section 51 of the 1962 Act, therefore, does not say that unless and until the shipment crosses the international border, the notification imposing prohibition shall be attracted. Different stages for the purpose of the said Act would, therefore, be different. For interpretation of the provisions of the 1992 Act and the policy laid down as also the procedures framed thereunder vis-`-vis the provisions of the 1962 Act, the rate of custom duty has no relevance. What would be relevant for the said purpose would be actual permission of the proper officer granting clearance and loading of the goods for exportation. As soon as such permission is granted, the procedures laid down for export must be held to have been complied with. Strong reliance has been placed by the learned Additional Solicitor General upon a decision of this Court in Principal Appraiser (Exports), Collectorate of Customs and Central Excise and Others v. Esajee Tayabally Kapasi, Calicut [(1995) 6 SCC 536] wherein this Court was concerned with the change in the rate of duty and in that context the construction of Sections 16(1), 39 and 51 of the 1962 Act fell for its consideration. In relation to the rate of duty it was held that the date of "entry outwards" would be the relevant date with reference to which the rate of custom duty on the exported duty is to be worked out. In that case, the goods were cleared for a vessel known as S.S. Neils Maersk. However, for want of space therein goods were shut out. Necessary space for exporting those were secured in another vessel named S.S. P'Xilas wherefor fresh shipping bill was filed on 9.08.1996. It was in the peculiar fact of that case, this Court opined that the rate of export duty prevalent as on 9.08.1996 would be leviable stating: "...It becomes thus clear that the shipping bill as well as the ultimate entry outwards for the goods concerned sought to be exported must have reference to the vessel through which such goods are to be exported. Therefore, before any goods are exported out of Indian territorial waters which vessel is to be utilised for exporting them, becomes a relevant consideration. The shipping bill concerned has to be lodged with reference to a given vessel which is to carry these goods out of the Indian territorial waters and in connection with such a vessel the entry outwards has to be obtained and only thereafter the master of the vessel should allow the loading of the goods for being exported out of India. The rate of duty payable on such exported goods would, therefore, be the rate of duty that was prevalent at the time when entry outwards through a given vessel is obtained. There cannot be an entry outwards in connection with a vessel which does not actually carry such goods for the purpose of export. In the facts of the present case, therefore, conclusion is inevitable that earlier entry outwards for the vessel S.S. Neils Maersk was an ineffective entry outwards for the purpose of computing the rate of customs duty of export on the goods in question. Only the subsequent entry outwards for vessel S.S. PXilas which actually carried these goods out of Indian territorial waters and effected the export of these goods was the only relevant and operative entry outwards and the rate of duty prevalent on the date of the said entry outwards for vessel S.S. PXilas was the only effective rate of duty payable on the export of these goods. Consequently it must be held that the respondent has made out no case for refund of Rs 4444.96 for which he lodged the claim." We may notice that a Constitution Bench of this Court in Gangadhar Narsingdas Agarwal v. P.S. Thrivikraman and Another [(1972) 3 SCC 475] opined that Section 16 of the 1962 Act speaks of the fictional date only in relation to the order of date of entry outwards of the vessel, but the issue with which we are concerned did not arise therein. The fundamental and statutory right of an exporter, in that case, were not sought to be taken away. Esajee Tayabally Kapasi (supra), therefore, has no application in the instant case. Reliance has also been placed on Union of India and Others v. M/s. C. Damani & Co. and Others [1980 (Supp) SCC 707] wherein the vires of Exports (Control) Fifteenth Amendment Order, 1979 prohibiting pre-ban commitments was in question. It was held that there was no ground to discredit the policy. The question raised therein, viz., the effect of failure to honour foreign contracts owing to change in law imposing ban on goods covered thereby whether would attract the plea of frustration of contract was not decided stating: "...This contention may have to be considered here or elsewhere, but, if we may anticipate our conclusion even here, this question is being skirted by us because the kismet of this case can be settled on other principles. The discipline of the judicial process forbids decisional adventures not necessary, even if desirable." **----NU Card starts---**We may, however, notice that M/s. C. Damani (supra) was explained by this Court in State Trading Corporation of India Ltd. v. Union of India and Others [1994 Supp (3) SCC 40]. It is not necessary for us to advert thereto as the said judgment has no application in the instant case. We are, however, not oblivious of the fact that in certain circumstances regulation may amount to prohibition. But, ordinarily the word "regulate" would mean to control or to adjust by rule or to subject to governing principles [See U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association and Others [(2004) 5 SCC 430] whereas the word "prohibit" would mean to forbid by authority or command. The expressions "regulate" and "prohibit" inhere in them elements of restriction but it varies in degree. The element of restriction is inherent both in regulative measures as well as in prohibitive or preventive measures. We may, however, notice that this Court in State of U.P. and Others v. M/s. Hindustan Aluminium Corpn. and others [AIR 1979 SC 1459] stated the law thus: "It appears that a distinction between regulation and restriction or prohibition has always been drawn, ever since Municipal Corporation of the City of Toronto v. Virgo. Regulation promotes the freedom or the facility which is required to be regulated in the interest of all concerned, whereas prohibition obstructs or shuts off, or denies it to those to whom it is applied. The Oxford English Dictionary does not define regulate to include prohibition so that if it had been the intention to prohibit the supply, distribution, consumption or use of energy, the legislature would not have contended itself with the use of the word regulating without using the word prohibiting or some such word, to bring out that effect." **---NU Card ends--**However, in Talcher Municipality v. Talcher Regulated Market Committee and Another [(2004) 6 SCC 178], it was opined that regulation is a term which is capable of being interpreted broadly and it may amount to prohibition. [See also K. Ramanathan v. State of Tamil Nadu and another, AIR 1985 SC 660] The terms, however, indisputably would be construed having regard to the text and context in which they have been used. Section 3(2) of the 1992 Act uses prohibition, restriction and regulation. They are, thus, meant to be applied differently. Section 51 of the 1962 Act also speaks of prohibition. Thus, in terms of the 1992 Act as also the policy and the procedure laid down thereunder, the terms are required to be applied in different situations wherefor different orders have to be made or different provisions in the same order are required therefor.

#### Their precision ev is about Canadian case law

### congress cp

#### The functional implementation of the CP still requires all 3 branches

Neomi Rao, GMU Assistant Law Professor, Spring 2009, "PRESIDENTIAL POWER IN THE 21ST CENTURY SYMPOSIUM: ARTICLE: THE PRESIDENT'S SPHERE OF ACTION," 45 Willamette L. Rev. 527, lexis

By contrast, as discussed above, Congress cannot legislate without concurrence from the President (although it can overrule a veto with two-thirds of each house). Similarly, the Supreme Court cannot decide issues sua sponte, but must wait for an appropriate case in which it has jurisdiction. Both Congress and the Supreme Court  [\*553]  require coordinated majorities before acting. Moreover, they require the executive to fulfill their directives. The legislative and judicial powers are not designed for quick action - rather such "energy" belongs with the executive.

#### Obama will veto

James E. McCarthy, Congressional Research Service, Specialist in Environmental Policy, 1/9/12, EPA’s Utility MACT: Will the Lights Go Out?, www.eenews.net/assets/2012/01/19/document\_gw\_03.pdf

Although it may be easier to obtain congressional approval of a CRA resolution, the path to enactment of such a resolution is still a steep one. The Obama Administration has made a significant commitment to promulgation of the Utility MACT and considers it one of the Administration’s major achievements. As a result, legislation restricting EPA’s authority to act, if passed by Congress, would likely encounter a presidential veto. There are no special procedures for Senate consideration of a CRA veto override. Overriding a veto (whether for a resolution of disapproval or other legislation) requires a two-thirds majority in both the House and Senate, and is seen by many as unlikely.

#### Status quo proves Congress can’t reign in EPA GHG regulations—Court GHG precedent necessary to solve

Marlo Lewis, Competitive Enterprise Institute, 1/7/10, EPA’s Tailoring Rule: Temporary, Dubious, Incomplete Antidote To Massachusetts v. EPA’s Legacy of Absurd Results (Part 1), www.masterresource.org/2010/01/epas-tailoring-rule-temporary-dubious-incomplete-antidote-to-massachusetts-v-epas-legacy-of-absurd-results/

An obvious question arises: Under what authority may EPA deviate so blatantly from the text of the statute? In Chevron v. Natural Resources Defense Council (467 U.S. 837, 843, 1984), the Supreme Court held that administrative agencies have considerable discretion to interpret statutes where the text is “silent or ambiguous with respect to the specific issue.” However, there is nothing ambiguous about 100 tons or 250 tons. EPA repeatedly asserts that it must depart from a “literal” application of the PSD and Title V regulatory thresholds. But “literal” is just a sanitized synonym for “legal,” “lawful,” or “statutory.” To justify this assumption of legislative power, **EPA invokes the judicial doctrines** of “absurd results” and “administrative necessity.” EPA argues that applying the law as written to CO2 sources would produce two kinds of absurd results. First, EPA would be forced to violate other statutory requirements. Specifically: CAA Sec. 165(c) requires that the permitting authority grant or deny any completed PSD permit application for a major emitting facility not later than one year after the date of filing the application. “A literal interpretation of CAA sections 165(a)(1) and 169(1) to apply at the 100/250 TPY levels would render compliance with this provision impossible by requiring far more permit applications than permitting authorities could process under the 12-month deadline” (TR, 55308). Similarly, a lawful application of the Title V 100 TPY threshold in CAA sections 502(a), 501(2)(B), and 302(j) would clash with CAA Sec. 503(c), which imposes a time limit of 18 months after a permit application is filed for permitting authorities to issue or deny the permit. “It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits” (TR, 55310). Applying the PSD and Title V regulatory thresholds to CO2 would also be absurd in the sense that the consequences would undermine congressional intent. The Tailoring Rule provides several examples: The PSD program (CAA Sec. 160) is supposed to “insure that economic growth will occur,” albeit in a manner consistent with preservation of clean air resources. However, because PSD is a preconstruction requirement, “increasing permitting authorities’ workload from 300 to 41,000 permits would severely undermine this purpose of facilitating economic growth . . . Each year, many thousands of sources would face multi-year delays in receiving their permits, and as a result, for all practical purposes, they would be forced to place on hold their plans to construct or modify” (TR, 55308). More fundamentally, applying PSD to CO2 would undermine a core purpose of the Act — to protect the “productive capacity” of the U.S. population (CAA Sec. 101). Congress designed PSD to apply to large industrial facilities, “which due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emissions of the deleterious pollutants that befoul the nation’s air” [quoting Alabama Power v. Costle, 636 F.2d at 353]. Congress wanted to exclude small entities from PSD regulation (TR, 55308-55309). Congress intended through Title V to improve CAA compliance by compiling in a single document all of a major source’s regulatory requirements. However, the vast majority of the 6.1 million CO2 sources that would have to apply for Title V permits have no existing CAA requirements. Compelling them to apply for operating permits “would not improve compliance” (TR, 55311). On the contrary, applying Title V to CO2 would undermine compliance. Many sources that Congress did intend for EPA to regulate would not be regulated due to the enormous backlogs resulting from the application of PSD and Title V to myriad sources Congress did not intend for EPA to regulate (TR, 55311). In sum, the immense volume of permit applications would overload and crash both programs. Clearly, Congress did not intend for the PSD and Title V programs to self-destruct. The Tailoring Rule reviews several court cases in which EPA, the Federal Trade Commission, and the Federal Energy Regulation Commission invoked “administrative necessity” to set aside clear statutory language. In all of these cases, courts rejected the agencies’ attempts to depart from the statute (TR 55312-55314). But, pleads EPA, the “situation we confront is unprecedented”; the burdens EPA would encounter in administering PSD and Title V for CO2 “have no precedent in case law” (TR, 55337, 55318). There is no question that applying the CAA permitting programs to CO2 – the automatic consequence of establishing GHG standards for new motor vehicles – would produce a morass of unprecedented absurdity and administrative impossibility. However, EPA tippy toes around the root of the problem: Mass. v. EPA. IV. Massachusetts v. EPA: Making a Fortress out of a Bowdlerized Dictionary EPA is entirely correct: Congress did not intend to apply PSD and Title V to small entities, did not intend for those programs to implode under their own weight, did not intend for PSD to stop development, and did not intend for Title V to undermine compliance with the Act. However, those are the inexorable consequences of an endangerment finding for greenhouse gases under CAA Sec. 202, which in turn is powerful evidence that Congress did not intend for EPA to regulate GHGs under that provision. Common sense leads to the same conclusion. Congressional support for regulatory climate policy is far stronger today than it was in 1970 and 1977, when Congress enacted and amended CAA Sec. 202. Yet even today, the prospects for cap-and-trade legislation and for U.S. ratification of a legally-binding emission-reduction treaty remain in doubt. The notion that Congress, in 1970 or 1977, implicitly authorized EPA to implement climate policies that recent Congresses have rejected or declined to enact is ludicrous. Only once has Congress enacted legislation directing EPA to reduce GHG emissions – the renewable fuel standard (RFS) established by the Energy Independence and Security Act (EISA). However, this is the exception that proves the rule. Enacted months after Mass v. EPA was decided, the RFS mandates the sale of renewable fuels, which must achieve specified percentage reductions in GHG emissions, based on a life-cycle analysis, compared to petroleum-based fuels. Importantly, EISA Sec. 210(b)(12) clarifies that the RFS does not establish precedent for any additional regulation of CO2 or other greenhouse gases under other CAA provisions: Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165 [i.e., the PSD program] of this Act [i.e., the Clean Air Act]. In the Tailoring Rule, EPA writes as if Congress, when it enacted or amended the CAA in 1970 or 1977, somehow inserted malicious code — the regulatory equivalent of a computer virus — into the text of the statute. This self-destruct program, we are to suppose, was lurking in there all this time. Then all of a sudden, the dormant bug became active, and now the CAA is going haywire, working at cross purposes with itself, subverting congressional intent, and imperiling the nation’s economic future. Therefore, EPA must step in, play lawmaker, and amend the Act. And if anybody at EPA really believes that, I’ve got a bridge I’d like to sell him. When a court decision leads to absurd results and administrative paralysis, there are only two possibilities. Either (1) absurdity and administrative impossibility were embedded in the statute from the beginning, and the court just brought the statute’s flaws to light. Or (2) the court manufactured the bizarre malfunctioning of the statute by misreading it. The impending PSD/Title V red-tape nightmare is entirely a product of the Massachusetts Court’s agenda-driven decision. The core issue in Mass. v. EPA, which the Court never addressed, is whether Congress, when it enacted and amended CAA Sec. 202 in 1970 and 1977, intended for EPA to apply the Act as a whole, including PSD and Title V and the NAAQS program, to CO2 for global warming purposes. To ask this question is to answer it. To justify the Amending Rule, EPA quotes Judge Learned Hand’s famous injunction “not to make a fortress out of the dictionary” when interpreting a statute (TR, 55306). But that is what the Court majority did in Mass. v. EPA. More precisely, the majority made a fortress out of their own bowdlerized version of the CAA definition of “air pollutant.” To reach the conclusion that CO2 is an “air pollutant” for regulatory purposes, the Court majority had to withhold Chevron deference from respondent EPA’s reasonable reading of CAA Sec. 302(g). EPA argued that emitted substances are “air pollutants” only if they are “air pollution agents.” The majority, following petitioners, held that anything emitted per se is an “air pollutant.” This was in fact the lynchpin of petitioners’ argument and the majority’s conclusion. Obviously, if anything emitted into the ambient air is ipso facto an “air pollutant,” then GHGs are within EPA‘s regulatory reach. But to affirm this conclusion, the majority had to read Sec. 302(g) selectively — no mean feat, since the provision is only two sentences long. Here it is, in full: The term “air pollutant” means any air pollution agent or combination of such agents, including any physical, chemical, biological, or radioactive (including source material, special nuclear material, and by-product material) substance or matter, which is emitted into, or otherwise enters, the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used. If Congress had meant that any substance emitted into or otherwise entering the ambient air is an “air pollutant,” it could have easily said so. Instead, the text says that any “air pollution agent” or “combination of such agents” emitted into or otherwise entering is an “air pollutant.” An air pollution “agent” is something that causes air pollution — something that dirties, fouls, or contaminates the air. Carbon dioxide emissions do not fit that description. The Court majority read “air pollution agent” as a synonym for “air pollutant” rather than as a criterion for distinguishing pollutants from non-pollutants. This reading makes the first sentence of Sec. 302(g) hopelessly circular. It might as well say: “The term ‘air pollutant’ means any air pollutant or combination of such pollutants…” **This is not what Congress wrote and is not likely what Congress meant**, because circular definitions define nothing. Worse, treating “air pollutant” and “air pollution agent” as interchangeable terms turns the first sentence into a formalism whereby a thing can be an “air pollutant” even if it does not pollute the air. As Justice Scalia quipped in dissent, the majority effectively held that “anything airborne, from Frisbees to flatulence, qualifies as an ‘air pollutant’” (Mass. v. EPA, 558). Indeed, under the majority‘s reading, even completely clean air — air that is 100% pollution-free — is an “air pollutant” if it is “emitted” or “otherwise enters.” That is absurd. From absurd premises come absurd results. The majority not only gave short shrift to “air pollution agent” and “combination of such agents” — key terms in the first sentence — they totally ignored the second sentence. The second sentence of Sec. 302(g) says that a “precursor” of a previously designated air pollutant is also an air pollutant. This sentence would be utterly superfluous if, as the majority held, anything “emitted” or “otherwise entering” is automatically an “air pollutant,” because precursors form air pollutants only by being emitted into or otherwise entering the air. **Courts are not supposed to assume that lawmakers pad statutes with superfluous verbiage**. Rather, they are supposed to make a good faith effort to determine the meaning and implications of each sentence of each provision bearing on the case. Ignoring half the provision in dispute without explanation is not kosher.

### reverse ptx

#### Visa’s not key to reverse brain drain

Wadhwa 9

Vivek Wadhwa, executive in residence/adjunct professor at the Pratt School of Engineering at Duke University and a senior research associate with the Labor and Worklife Program at Harvard Law School, Spring 2009, “A Reverse Brain Drain,” Issues in Science and Technology, <http://www.issues.org/25.3/wadhwa.html>

To our surprise, visa status was not the most important factor determining their decision to return home. Three of four indicated that considerations regarding their visa or residency permit status did not contribute to their decision to return to their home country. In fact, 27% of Indian respondents and 34% of Chinese held permanent resident status or were U.S. citizens. For this highly select group of returnees, career opportunities and quality-of-life concerns were the main reasons for returning home. Family considerations are also strong magnets pulling immigrants back to their home countries. The ability to better care for aging parents and the desire to be closer to friends and family were strong incentives for returning home. Indians in particular perceived the social situation in their home country to be significantly superior. The move home also appeared to be something of a career catalyst. Respondents reported that they have moved up the organization chart by returning home. Only 10% of the Indian returnees held senior management positions in the United States, but 44% found jobs at this level in India. Chinese returnees went from 9% in senior management in the United States to 36% in China. Opportunities for professional advancement were considered to be better at home than in the United States for 61% of Indians and 70% of Chinese. These groups also felt that opportunities to launch their own business were significantly better in their home countries.

#### Aviation’s key to Asia-Pacific interdependence

IATA, 11/9/12, Infrastructure to Support Asian Growth, www.iata.org/pressroom/pr/pages/2012-11-09-01.aspx

The International Air Transport Association (IATA) urged **Asia-Pacific aviation leaders** to **focus on airport and air traffic management infrastructure** as the region’s demand for connectivity continues to grow. “Aviation is a vital part of Asia’s economy, supporting 24 million jobs and nearly half-a-trillion dollars of GDP. Connectivity, facilitated by aviation, is a critical link to markets and a generator of wealth—both material and of the human spirit. **Ensuring the timely development of sufficient and cost-efficient infrastructure capacity is a priority for the continued successful growth of air transport in Asia-Pacific**,” said Tony Tyler, IATA’s Director General and CEO. Tyler was speaking to delegates at the Association of Asia Pacific Airlines (AAPA) Assembly of Presidents in Kuala Lumpur. Airports: IATA advocated for a prudent approach to private investment in the development of airport infrastructure to support demand growth in the Asia-Pacific region. The comments come as a trend is emerging across the region with governments in Vietnam, Indonesia and the Philippines all considering the participation of private investors as they plan for the development of airport infrastructure. The Korean government is considering private equity participation in Incheon airport. “I am not advocating for or against private participation. But there have been enough mistakes made when engaging the private sector in airport development. These should not be repeated. When governments work with private investors to develop infrastructure they must establish an effective economic and service-level regulatory framework to ensure that the national interest is well protected. That means ensuring that air connectivity is both cost-effective and efficient,” said Tyler. Tyler cited the example of Delhi Airport, where the 46% concession fee is making the airport unaffordable for airlines. Despite several appeals from the industry, the Airport Economic Regulatory Authority approved an increase of 346%. “Private sector participation was able to build a great hub facility. But the framework for economic regulation is not sufficiently supporting the long-term need for cost-efficient connectivity to fuel economic growth,” said Tyler. He also noted that when the Hong Kong government looked at airport privatization in 2003-4, the conclusion was to keep Hong Kong International Airport fully under government ownership as the best way to ensure that it delivered maximum benefit to the Hong Kong economy. Air Traffic Management (ATM): IATA urged cross-border regional thinking for the development of Asia-Pacific’s ATM infrastructure. “Asia-Pacific is not immune to air traffic congestion issues, and these will grow acute if they are not well-managed with a regional perspective. The Seamless **Asian Sky initiative is helping to define the way forward by harmonizing procedures and interoperable technology between states**, bearing in mind it needs to be cost efficient at the same time. We must not repeat the mistakes made in Europe where efforts to implement a Single European Sky are stalled because states are not delivering,” said Tyler. The annual cost of airspace fragmentation to the European economy is estimated at over EUR 5 billion annually and the cost to the environment is 16 million tonnes of CO2 emissions.

#### Courts link to politics

Lindsay Harrison, Lecturer in Law at the University of Miami School of Law, 11/18/2005, Does the Court Act As "Political Cover" for the Other Branches?, http://legaldebate.blogspot.com/2005/11/does-court-act-as-political-cover-for.html

Does the Court Act as "Political Cover" for the Other Branches? While the Supreme Court may have historically been able to act as political cover for the President and/or Congress, that is not true in a world post-Bush v. Gore. The Court is seen today as a politicized body, and especially now that we are in the era of the Roberts Court, with a Chief Justice hand picked by the President and approved by the Congress, it is highly unlikely that Court action will not, at least to some extent, be blamed on and/or credited to the President and Congress. The Court can still get away with a lot more than the elected branches since people don't understand the technicalities of legal doctrine like they understand the actions of the elected branches; this is, in part, because the media does such a poor job of covering legal news. Nevertheless, it is preposterous to argue that the Court is entirely insulated from politics, and equally preposterous to argue that Bush and the Congress would not receive at least a large portion of the blame for a Court ruling that, for whatever reason, received the attention of the public.

#### Labor fight kills the bill

Anna Palmer, 3/22/13, Immigration deal in limbo as business, labor clash, dyn.politico.com/printstory.cfm?uuid=1B5B052A-9CA3-4105-8BBE-B24B22287C3E

The Senate’s “Gang of Eight” is preparing to leave town with a deal on immigration reform in limbo, stalled by a fight between Big Labor and Big Business.

On Thursday morning, it had appeared that a deal was in hand over the major remaining sticking point: the outlines of a broad new visa program aimed at balancing the need for foreign workers in low-skilled jobs with the desires of American workers competing for those same jobs.

So much for optimism.

In a closed-door session that stretched late into Thursday night, **things got heated**. Sources said negotiations grew extremely tense after business groups balked. There were more talks on Friday — but no more progress, even though negotiations continued in a rare Friday night session of the Senate.

Now, the Gang of Eight faces a quandary. If senators can’t win the endorsement of labor and business, they must soon decide whether to go their own way — absent the support of the U.S. Chamber of Commerce and AFL-CIO — and hope the powerful interest groups stay neutral when a bill eventually emerges.

The senators said they would continue to negotiate with the interest groups during their two-week recess, with the goal of narrowing their differences, winning their backing and rolling out a proposal in the second week of April. That would set up a Senate Judiciary Committee vote before the end of the month, with floor votes by early summer.

“People have a lot at stake here,” said Sen. John McCain (R-Ariz.). “This is a huge deal. Talking about the lives of 11 million people just to start with, so I understand why passions are high, and sentiments are high."

Late Friday night, tensions were still at a boil. Labor officials accused Republicans and business groups of proposing “congressionally sanctioned poverty” for low-skilled workers. And Chamber officials attacked labor groups for preventing a deal from taking shape.

“The unions have jeopardized the entire immigration reform effort, which would provide a pathway to legalization and citizenship for the 10-11 million undocumented workers, because of their refusal to take a responsible stance on a small temporary worker program,” Randy Johnson, the Chamber’s senior vice president of Labor, Immigration, and Employee Benefits, said in a late Friday night statement. “These types of programs have always been considered a key part of comprehensive immigration reform.”

#### Obama’s not involved

Julie Pace, Associated press whtie house correspondent, 3/27/13, Obama: Immigration bill could pass by summer, www.timesunion.com/news/politics/article/Obama-back-at-forefront-of-immigration-debate-4389183.php

While overhauling the nation's patchwork immigration laws is a top second term priority for the president, he has ceded the negotiations almost entirely to Congress. He and his advisers have calculated that a bill crafted by Capitol Hill stands a better chance of winning Republican support than one overtly influenced by the president. In his interviews Wednesday, Obama tried to **stay out of the prickly policy issues** that remain unfinished in the Senate talks, though he said a split between business and labor on wages for new low-skilled workers was unlikely to "doom" the legislation.

#### No issue spillover

Judson Berger, 3/4/13, Recurring budget crises could put squeeze on Obama's second-term priorities, www.foxnews.com/politics/2013/03/04/recurring-budget-crises-could-put-squeeze-on-obama-second-term-priorities/

Rep. Luis Gutierrez, D-Ill., a vocal advocate for immigration reform, voiced confidence Monday that the administration and Congress could handle the busy agenda.

"The spirit of bipartisan cooperation that is keeping the immigration issue moving forward has not been poisoned by the sequester and budget stalemate, so far," he said in a statement. "The two sets of issues seem to exist in parallel universes where I can disagree with my Republican colleagues strenuously on budget matters, but still work with them effectively to eventually reach an immigration compromise. ... I remain extremely optimistic that immigration reform is going to happen this year."

Immigration reform efforts are still marching along despite the budget drama. Obama met last week on the issue with Sens. John McCain, R-Ariz., and Lindsey Graham, R-S.C., who both are part of a bipartisan group crafting legislation.

### k

#### Forecasting hypothetical impact scenarios based on energy trajectories is critical to effective energy policy

Paul P. Craig 2, Professor of Engineering Emeritus at the University of California, Davis, What Can History Teach Us? A Retrospective Examination of Long-Term Energy Forecasts for the United States, Annu. Rev. Energy Environ. 2002. 27:83–118

The applicable measure of success here is the degree to which the forecast can prompt learning and induce desired changes in behavior. The Limits to Growth model (discussed below) has been widely used to help students understand the counterintuitive nature of dynamical systems (11). Simulations and role-playing games have also been used to teach executives in the utility industry how new markets for SO2 emissions permits or electric power might behave. Experience with exercising these types of models can improve intuition for the behavior of complex systems (12–14).

2.4. Use 4: In Automatic Management Systems Whose Efﬁcacy Does Not Require the Model to be a True Representation

Hodges & Dewar use the example of the Kalman ﬁlter, which can be used to control (for example) the trafﬁc on freeway on-ramps. These ﬁlters can model trafﬁc ﬂow, but only in a stochastic representation that does not pretend to be exact and validated, just useful. Similar ﬁlters can also be embedded in management systems controlling power systems or factory processes. As long as the model cost-effectively controls the process in question, the issue of whether it is an exact representation of reality is not of concern. Neural networks fall into this category (15).

2.5. Use 5: As Aids in Communication and Education

By forcing analysts to discuss data and analysis results in a systematic way, forecasting models can facilitate communication between various stakeholders. The measure of success for this use is the degree to which the model improves understanding and communication, both for individuals and between groups with different mindsets and vocabularies.

For example, the population of a developing country at some future time might depend on childhood survival rates, longevity, female literacy, afﬂuence, income distribution, health care, and nutrition. Modeling these inﬂuences could permit better understanding of interlinkages between them and improve communication between expert groups with diverse backgrounds. Such a model could inform, for instance, a government’s long-term plans. Another example is the U.S. DOE’s Energy Information Administration (EIA) Annual Energy Outlook forecast (16). This widely used forecast, based on the EIA’s latest analysis of the current data and industry expectations, provides a baseline that others can and do use for their own explorations of the future.

When a problem is being analyzed, word leaks out and leads to suggestions, ideas, and information from outside parties. This can add to the analysis directly, or stimulate helpful complementary work by others. A politician facing a thorny problem might commission a study to locate knowledgeable people. Thus, studies can identify talent as a by-product. The National Academy of Sciences Committee on Nuclear and Alternative Energy Systems (CONAES) study, one of those assessed in the DOE review of forecasts from the 1970s (Figure 1) (5), was directly or indirectly responsible for many career shifts. The American Physical Society “Princeton Study” held during the summer of 1973 was explicitly designed with this intent (17). The oil embargos of the 1970s had led many physicists to think about making career shifts. The study gave them an opportunity to learn about energy issues, to meet and get to know experts, and to ﬁnd jobs.

2.6. Use 6: To Understand the Bounds or Limits on the Range of Possible Outcomes

Models can enhance conﬁdence through limiting or bounding cases. The Princeton Study referred to in Use 5 includes many examples (17). This study emphasized energy efﬁciency, with a focus on physical constraints to energy use. The cornerstone of the analysis was the concept of fundamental physical limits such as the ﬁrst and second laws of thermodynamics. This work showed that great potential existed for improving efﬁciency by engineering change. Energy efﬁciency became a major theme of energy policy and remains so to this day.

2.7. Use 7: As Aids to Thinking and Hypothesizing

Forecasts can help people and institutions think through the consequences of their actions. Researchers often begin their exercises with baseline or “business-as usual” forecasts, which attempt to predict how the world will evolve assuming current trends continue. Alternative forecasts are then created to assess the potential effects of changes in key factors on the results. For example, an economic forecaster might use such an analysis to assess the likely effects of a change in property taxes on economic growth in a particular state.

Computer forecasting is an excellent tool to teach people the dynamics of complex systems (12, 13). The behavior of these systems is often counterintuitive, so such forecasting games can help people learn to manage them better. For example, systems dynamics models (described below) were used in the 1960s to explain why building premium housing in urban areas can under some plausible circumstances accelerate, rather than slow, migration to suburbs (14, p. 5)2.

Some forecasts are generated as part of scenario exploration exercises, which can be helpful any time a person or institution faces a critical choice. Oil companies, for example, are well aware that at some point the transportation sector may have to switch to some other fuel. Even though this switch may be a long time in the future, the prospect needs to be part of current contingency planning. Considering a wide range of scenarios can help institutions prepare for the many different ways the future can evolve. Institutions use forecasts to allocate physical and personnel resources. Some businesses have massive infrastructures with long time constants and ﬁnd it useful to forecast over decades (18).

#### Psychoanalysis can’t explain international politics

Sharpe, lecturer, philosophy and psychoanalytic studies, and Goucher, senior lecturer, literary and psychoanalytic studies – Deakin University, ‘10

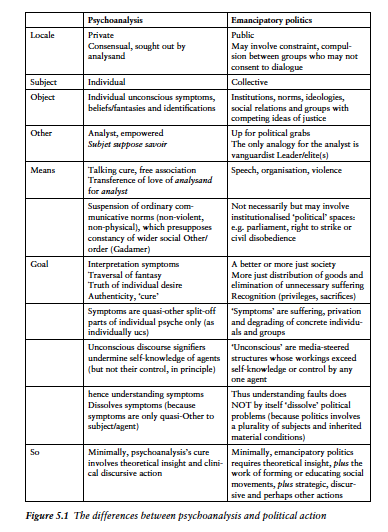
(Matthew and Geoff, Žižek and Politics: An Introduction, p. 182 – 185, Figure 1.5 included)

Can we bring some order to this host of criticisms? It is remarkable that, for all the criticisms of Žižek’s political Romanticism, no one has argued that the ultra- extremism of Žižek’s political position might reflect his untenable attempt to shape his model for political action on the curative final moment in clinical psychoanalysis. The differences between these two realms, listed in Figure 5.1, are nearly too many and too great to restate – which has perhaps caused the theoretical oversight. The key thing is this. Lacan’s notion of traversing the fantasy involves the radical transformation of people’s subjective structure: a refounding of their most elementary beliefs about themselves, the world, and sexual difference. This is undertaken in the security of the clinic, on the basis of the analysands’ voluntary desire to overcome their inhibitions, symptoms and anxieties.

As a clinical and existential process, it has its own independent importance and authenticity. The analysands, in transforming their subjective world, change the way they regard the objective, shared social reality outside the clinic. But they do not transform the world. The political relevance of the clinic can only be (a) as a supporting moment in ideology critique or (b) as a fully- fl edged model of politics, provided that the political subject and its social object are ultimately identical. Option (*b*), Žižek’s option, rests on the idea, not only of a subject who becomes who he is only through his (mis) recognition of the objective sociopolitical order, but whose ‘traversal of the fantasy’ is immediately identical with his transformation of the socio- political system or Other. Hence, according to Žižek, we can analyse the institutional embodiments of this Other using psychoanalytic categories. In Chapter 4, we saw Žižek’s resulting elision of the distinction between the (subjective) Ego Ideal and the (objective) Symbolic Order. This leads him to analyse our entire culture as a single subject–object, whose perverse (or perhaps even psychotic) structure is expressed in every manifestation of contemporary life. Žižek’s decisive political- theoretic errors, one substantive and the other methodological, are different (see Figure 5.1)

The *substantive problem* is to equate any political change worth the name with the total change of the subject–object that is, today, global capitalism. This is a type of change that can only mean equating politics with violent regime change, and ultimately embracing dictatorial government, as Žižek now frankly avows (*IDLC* 412–19). We have seen that the ultra- political form of Žižek’s criticism of everyone else, the theoretical Left and the wider politics, is that no one is sufficiently radical for him – even, we will discover, Chairman Mao. We now see that this is because Žižek’s model of politics proper is modelled on a pre- critical analogy with the total transformation of a subject’s entire subjective structure, at the end of the talking cure. For what could the concrete consequences of this governing analogy be?

We have seen that Žižek equates the individual fantasy with the collective identity of an entire people. The social fantasy, he says, structures the regime’s ‘inherent transgressions’: at once subjects’ habitual ways of living the letter of the law, and the regime’s myths of origin and of identity. If political action is modelled on the Lacanian cure, it must involve the complete ‘traversal’ – in Hegel’s terms, the abstract versus the determinate negation – of all these lived myths, practices and habits. Politics must involve the periodic founding of



entire new subject–objects. Providing the model for this set of ideas, the fi rst Žižekian political subject was Schelling’s divided God, who gave birth to the entire Symbolic Order before the beginning of time (*IDLC* 153; *OB* 144–8).

But can the political theorist reasonably hope or expect that subjects will simply give up on all their inherited ways, myths and beliefs, all in one world- creating moment? And can they be legitimately asked or expected to, on the basis of a set of ideals whose legitimacy they will only retrospectively see, after they have acceded to the Great Leap Forward? And if they do not – for Žižek laments that today subjects are politically disengaged in unprecedented ways – what means can the theorist and his allies use to move them to do so?

#### Even if they’re right about drives, the repression-lashout link has been disproven

Havi Carel 6, Senior Lecturer in Philosophy at the University of the West of England, “Life and Death in Freud and Heidegger”, googlebooks

Secondly, the constancy principle on which these ideas are based is incompatible with observational data. Once the passive model of the nervous system has been discarded, there was no need for external excitation in order for discharge to take place, and more generally, "the behavioural picture seemed to negate the notion of drive, as a separate energizer of behaviour" {Hcbb. 1982. p.35). According to Holt, the nervous system is not passive; it does not take in and conduct out energy from the environment, and it shows no tendency to discharge its impulses. 'The principle of constancy is quite without any biological basis" (1965, p. 109). He goes on to present the difficulties that arise from the pleasure principle as linked to a tension-reduction theory. The notion of tension is "conveniently ambiguous": it has phenomenological, physiological and abstract meaning. But empirical evidence against the theory of tension reduction has been "mounting steadily" and any further attempts to link pleasure with a reduction of physiological tension are "decisively refuted" (1965, pp. 1102). Additionally, the organism and the mental system are no longer considered closed systems. So the main arguments for the economic view collapse, as does the entropic argument for the death drive (1965, p. 114). A final, more general criticism of Freud's economic theory is sounded by Compton, who argues, "Freud fills in psychological discontinuities with neurological hypotheses" (1981, p. 195). The Nirvana principle is part and parcel of the economic view and the incomplete and erroneous assumptions about the nervous system (Hobson, 1988, p.277). It is an extension ad extremis of the pleasure principle, and as such is vulnerable to all the above criticisms. The overall contemporary view provides strong support for discarding the Nirvana principle and reconstructing the death drive as aggression.

#### Simulation allows us to influence state policy AND is key to agency

**Eijkman 12**

The role of simulations in the authentic learning for national security policy development: Implications for Practice / Dr. Henk Simon Eijkman. [electronic resource] <http://nsc.anu.edu.au/test/documents/Sims_in_authentic_learning_report.pdf>. Dr Henk Eijkman is currently an independent consultant as well as visiting fellow at the University of New South Wales at the Australian Defence Force Academy and is Visiting Professor of Academic Development, Annasaheb Dange College of Engineering and Technology in India. As a sociologist he developed an active interest in tertiary learning and teaching with a focus on socially inclusive innovation and culture change. He has taught at various institutions in the social sciences and his work as an adult learning specialist has taken him to South Africa, Malaysia, Palestine, and India. He publishes widely in international journals, serves on Conference Committees and editorial boards of edited books and international journal

However, whether as an approach to learning, innovation, persuasion or culture shift, policy simulations derive their power from two central features: their combination of simulation and gaming (Geurts et al. 2007). 1. The simulation element: the unique combination of simulation with role-playing.The unique simulation/role-play mix enables participants to create **possible futures** relevant to the topic being studied. This is diametrically opposed to the more traditional, teacher-centric approaches in which a future is produced for them. In policy simulations, possible futures are much more than an object of tabletop discussion and verbal speculation. ‘**No other technique** allows a group of participants to engage in collective action in a safe environment to create and analyse the futures they want to explore’ (Geurts et al. 2007: 536). 2. **The game element:** the interactive and tailor-made modelling and design of the policy game. The actual run of the policy simulation is only one step, though a most important and visible one, in a collective process of investigation, communication, and evaluation of performance. In the context of a post-graduate course in public policy development, for example, a policy simulation is a dedicated game constructed in collaboration with practitioners to achieve a high level of proficiency in relevant aspects of the policy development process. To drill down to a level of finer detail, **policy** development simulations—as forms of interactive or participatory modelling— are particularly effective in developing participant knowledge and skills in the five key areas of the policy development process (and success criteria), namely: Complexity, Communication, Creativity, Consensus, and Commitment to action (‘the five Cs’). The capacity to provide effective learning support in these five categories has proved to be particularly helpful in strategic decision-making (Geurts et al. 2007). Annexure 2.5 contains a detailed description, in table format, of the synopsis below.

#### No impact to crisis-opportunism – that’s when all change happens

Jonathan Chait 8, senior editor at the New Republic, Dead Left, July 30, <http://www.newrepublic.com/article/books/dead-left>

Klein repeatedly implies that there is something immoral about using crises to advance the right-wing agenda without explaining why this is so. After all, Friedman wanted to overhaul the New Orleans public education system because he believed, rightly or wrongly, that vouchers would work better. If you thought your house was horribly designed, and a tornado flattened it, would you rebuild it exactly as before?

The notion that crises create fertile terrain for political change, far from being a ghoulish doctrine unique to free-market radicals, is a banal and ideologically universal fact. (Indeed, it began its dubious modern career in the orbit of Marxism, where it was known as “sharpening the contradictions.”) Entrenched interests and public opinion tend to run against sweeping reform, good or bad, during times of peace and prosperity. Liberals could not have enacted the New Deal without the Great Depression. Communist revolutions have generally come about in the wake of wars. The liberal economist Victor R. Fuchs once wrote that “national health insurance will probably come to the United States in the wake of a major change in the political climate, the kind of change that often accompanies a war, a depression, or large-scale civil unrest.”

Fuchs did not mean that the public would never accept universal health insurance unless they had been brutalized into doing so. Nor was his observation evidence that he longed for disaster to befall the United States. Most American liberals today would admit that the sorry state of the American economy, foreign policy, and political life has created a golden opportunity for progressive reform. There is nothing odious about this. Yet Klein takes analogous observations from conservatives as proof that the right “prays for crisis the way drought-stricken farmers pray for rain.”

#### Predictions and scenario building are valuable for decision-making, even if they’re not perfect

**Garrett 12**

Banning, In Search of Sand Piles and Butterflies, director of the Asia Program and Strategic Foresight Initiative at the Atlantic Council.

http://www.acus.org/disruptive\_change/search-sand-piles-and-butterflies

“Disruptive change” that produces “strategic shocks” has become an increasing concern for policymakers, shaken by momentous events of the last couple of decades that were not on their radar screens – from the fall of the Berlin Wall and the 9/11 terrorist attacks to the 2008 financial crisis and the “Arab Spring.” These were all shocks to the international system, predictable perhaps in retrospect but predicted by very few experts or officials on the eve of their occurrence. This “failure” to predict specific strategic shocks does not mean we should abandon efforts to foresee disruptive change or look at all possible shocks as equally plausible. Most strategic shocks do not “come out of the blue.” We can understand and project long-term global trends and foresee at least some of their potential effects, including potential shocks and disruptive change. We can construct alternative futures scenarios to envision potential change, including strategic shocks. Based on trends and scenarios, we can take actions to avert possible undesirable outcomes or limit the damage should they occur. We can also identify potential opportunities or at least more desirable futures that we seek to seize through policy course corrections. We should distinguish “strategic shocks” that are developments that could happen at any time and yet may never occur. This would include such plausible possibilities as use of a nuclear device by terrorists or the emergence of an airborne human-to-human virus that could kill millions. Such possible but not inevitable developments would not necessarily be the result of worsening long-term trends. Like possible terrorist attacks, governments need to try to prepare for such possible catastrophes though they may never happen. But there are other potential disruptive changes, including those that create strategic shocks to the international system, that can result from identifiable trends that make them more likely in the future—for example, growing demand for food, water, energy and other resources with supplies failing to keep pace. We need to look for the “sand piles” that the trends are building and are subject to collapse at some point with an additional but indeterminable additional “grain of sand” and identify the potential for the sudden appearance of “butterflies” that might flap their wings and set off hurricanes. Mohamed Bouazizi, who immolated himself December 17, 2010 in Sidi Bouzid, Tunisia, was the butterfly who flapped his wings and (with the “force multiplier” of social media) set off a hurricane that is still blowing throughout the Middle East. Perhaps the metaphors are mixed, but the butterfly’s delicate flapping destabilized the sand piles (of rising food prices, unemployed students, corrupt government, etc.) that had been building in Tunisia, Egypt, and much of the region. The result was a sudden collapse and disruptive change that has created a strategic shock that is still producing tremors throughout the region. But the collapse was due to cumulative effects of identifiable and converging trends. When and what form change will take may be difficult if not impossible to foresee, but the likelihood of a tipping point being reached—that linear continuation of the present into the future is increasingly unlikely—can be foreseen. Foreseeing the direction of change and the likelihood of discontinuities, both sudden and protracted, is thus not beyond our capabilities. While efforts to understand and project long-term global trends cannot provide accurate predictions, for example, of the GDPs of China, India, and the United States in 2030, looking at economic and GDP growth trends, can provide insights into a wide range of possible outcomes. For example, it is a useful to assess the implications if the GDPs of these three countries each grew at currently projected average rates – even if one understands that there are many factors that can and likely will alter their trajectories. The projected growth trends of the three countries suggest that at some point in the next few decades, perhaps between 2015 and 2030, China’s GDP will surpass that of the United States. And by adding consideration of the economic impact of demographic trends (China’s aging and India’s youth bulge), there is a possibility that India will surpass both China and the US, perhaps by 2040 or 2050, to become the world’s largest economy. These potential shifts of economic power from the United States to China then to India would likely prove strategically disruptive on a global scale. Although slowly developing, such disruptive change would likely have an even greater strategic impact than the Arab Spring. The “rise” of China has already proved strategically disruptive, creating a potential China-United States regional rivalry in Asia two decades after Americans fretted about an emerging US conflict with a then-rising Japan challenging American economic supremacy. Despite uncertainty surrounding projections, foreseeing the possibility (some would say high likelihood) that China and then India will replace the United States as the largest global economy has near-term policy implications for the US and Europe. The potential long-term shift in economic clout and concomitant shift in political power and strategic position away from the US and the West and toward the East has implications for near-term policy choices. Policymakers could conclude, for example, that the West should make greater efforts to bring the emerging (or re-emerging) great powers into close consultation on the “rules of the game” and global governance as the West’s influence in shaping institutions and behavior is likely to significantly diminish over the next few decades. The alternative to finding such a near-term accommodation could be increasing mutual suspicions and hostility rather than trust and growing cooperation between rising and established powers—especially between China and the United States—leading to a fragmented, zero-sum world in which major global challenges like climate change and resource scarcities are not addressed and conflict over dwindling resources and markets intensifies and even bleeds into the military realm among the major actors. Neither of these scenarios may play out, of course. Other global trends suggest that sometime in the next several decades, the world could encounter a “hard ceiling” on resources availability and that climate change could throw the global economy into a tailspin, harming China and India even more than the United States. In this case, perhaps India and China would falter economically leading to internal instability and crises of governance, significantly reducing their rates of economic growth and their ability to project power and play a significant international role than might otherwise have been expected. But this scenario has other implications for policymakers, including dangers posed to Western interests from “failure” of China and/or India, which could produce huge strategic shocks to the global system, including a prolonged economic downturn in the West as well as the East. Thus, looking at relatively slowly developing trends can provide foresight for necessary course corrections now to avert catastrophic disruptive change or prepare to be more resilient if foreseeable but unavoidable shocks occur. Policymakers and the public will press for predictions and criticize government officials and intelligence agencies when momentous events “catch us by surprise.” But unfortunately, as both Yogi Berra and Neils Bohr are credited with saying, “prediction is very hard, especially about the future.” One can predict with great accuracy many natural events such as sunrise and the boiling point of water at sea level. We can rely on the infallible predictability of the laws of physics to build airplanes and automobiles and iPhones. And we can calculate with great precision the destruction footprint of a given nuclear weapon. Yet even physical systems like the weather as they become more complex, become increasingly difficult and even inherently impossible to predict with precision. With human behavior, specific predictions are not just hard, but impossible as uncertainty is inherent in the human universe. As futurist Paul Saffo wrote in the Harvard Business Review in 2007, “prediction is possible only in a world in which events are preordained and no amount of actions in the present can influence the future outcome.” One cannot know for certain what actions he or she will take in the future much less the actions of another person, a group of people or a nation state. This obvious point is made to dismiss any idea of trying to “predict” what will occur in the future with accuracy, especially the outcomes of the interplay of many complex factors, including the interaction of human and natural systems. More broadly, the human future is not predetermined but rather depends on human choices at every turning point, cumulatively leading to different alternative outcomes. This uncertainty about the future also means the future is amenable to human choice and leadership. Trends analyses—including foreseeing trends leading to disruptive change—are thus essential to provide individuals, organizations and political leaders with the strategic foresight to take steps mitigate the dangers ahead and seize the opportunities for shaping the human destiny. Peter Schwartz nearly a decade ago characterized the convergence of trends and disruptive change as “inevitable surprises.” He wrote in Inevitable Surprises that “in the coming decades we face many more inevitable surprises: major discontinuities in the economic, political and social spheres of our world, each one changing the ‘rules of the game’ as its played today. If anything, there will be more, no fewer, surprises in the future, and they will all be interconnected. Together, they will lead us into a world, ten to fifteen years hence, that is fundamentally different from the one we know today. Understanding these inevitable surprises in our future is critical for the decisions we have to make today …. We may not be able to prevent catastrophe (although sometimes we can), but we can certainly increase our ability to respond, and our ability to see opportunities that we would otherwise miss.

#### Alt fails – risk-based policymaking inevitable

Danzig 11

Richard Danzig, Center for a New American Security Board Chairman, Secretary of the Navy under President Bill Clinton, October 2011, Driving in the Dark Ten Propositions About Prediction and National Security, http://www.cnas.org/files/documents/publications/CNAS\_Prediction\_Danzig.pdf

The Propensity to Make Predictions – and to Act on the Basis of Predictions – Is Inherently Human

“No one can predict the future” is a common saying, but people quite correctly believe and act otherwise in everyday life. In fact, daily life is built on a foundation of prediction. One expects (predicts) that housing, food and water will be safe and, over the longer term, that saved money will retain value. These predictions are typically validated by everyday experience. As a consequence, people develop expectations about prediction and a taste, even a hunger, for it. If security in everyday life derives from predictive power, it is natural to try to build national security in the same way.

This taste for prediction has deep roots.16 Humans are less physically capable than other species but more adept at reasoning.17 Reasoning is adaptive; it enhances the odds of survival for the species and of survival, power, health and wealth for individuals. Reasoning depends on predictive power. If what was benign yesterday becomes unpredictably dangerous today, it is hard to develop protective strategies, just as if two plus two equals four today and five tomorrow, it is hard to do math. Rational thought depends on prediction and, at the same time, gives birth to prediction. Humans are rational beings and, therefore, make predictions.

The taste for prediction has roots, moreover, in something deeper than rationality. Emotionally, people are uncomfortable with uncertainty and pursue the illusion of control over events beyond their control. Systematic interviews of those who have colostomies, for example, show that people are less depressed if they are informed that their impaired condition will be permanent than if they are told that it is uncertain whether they will be able to return to normal functioning.19 Citing this and other work, Daniel Gilbert concludes that “[h]uman beings find uncertainty more painful than the things they’re uncertain about.”20 An “illusion of control,” to employ a term now recognized in the literature of psychology, mitigates the pain of uncertainty.21 People value random lottery tickets or poker cards distributed to themselves more than they do tickets or cards randomly assigned to others.22 A discomfort with uncertainty and desire for control contribute to an unjustifiable over-reliance on prediction.

2. Requirements for Prediction Will Consistently Exceed the Ability to Predict

The literature on predictive failure is rich and compelling.23 In the most systematic assessment, conducted over 15 years ending in 2003, Philip Tetlock asked 284 established experts24 more than 27,000 questions about future political and economic outcomes (expected electoral results, likelihoods of coups, accession to treaties, proliferation, GDP growth, etc.) and scored their results.25 Collateral exercises scored predictive achievement in the wake of the breakup of the Soviet Union, the transition to democracy in South Africa and other events. There are too many aspects of Tetlock’s richly textured discussion to permit a simple summary, but his own rendering of a central finding will suffice for this discussion: “When we pit experts against minimalist performance benchmarks – dilettantes, dart-throwing chimps, and assorted extrapolation algorithms – we find few signs that expertise translates into greater ability to make either ‘well calibrated’ or ‘discriminating’ forecasts.”26

As described below,27 there are strong reasons for a high likelihood of failure of foresight when DOD attempts to anticipate the requirements for systems over future decades. Recent experience makes this point vividly. Over the past 20 years,28 long-term predictions about the strategic environment and associated security challenges have been wrong, like most multi-year predictions on complex subjects.29 It is simple to list a halfdozen failures:30 American defense planners in 1990 did not anticipate the breakup of the Soviet Union, the rapid rise of China, Japan’s abrupt transition from decades of exceptional economic growth to decades of no growth,31 an attack like that on September 11, 2001 or the United States invasions of (and subsequent decade-long presences in) Afghanistan and Iraq.32

So, in this light, why does the defense community repeatedly over-invest in prediction?

A common conceptual error intensifies the hunger for prediction. History celebrates those who made good predictions. Because Winston Churchill’s fame rests on, among other things, his foresight about German militarism and the accuracy of his demands for preparation for World War II, it appears evident that confident prediction is the road to success. Yet it is an error to focus on numerators (instances of success) without asking about denominators (instances of failure).

33 Accordingly, there is a tendency to ignore Churchill’s failures in many other predictions (his disastrous expectations from military operations in Gallipoli, his underestimation of Gandhi, etc.). There is also a tendency to ignore the great number of other predictors who are not celebrated by history because they failed in analogous circumstances.

Moreover, prediction is subject to refinement and is often a competitive enterprise. As a result, predictive power is like wealth – gaining some of it rarely satisfies the needs of those who receive it. Predictive power intensifies the demand for more predictive power.

Tell a national security advisor that another country is likely to develop a nuclear weapon, and – after all his or her questions have been answered about the basis of the prediction – he or she will want to know when, in what numbers, with what reliability, at what cost, with what ability to deploy them, to mount them on missiles, with what intent as to their use, etc. It is no wonder that U.S. intelligence agencies are consistently regarded as failing.

Whatever their mixtures of strengths and weaknesses, they are always being pushed to go beyond the point of success.

Put another way, the surest prediction about a credible prediction is that it will induce a request for another prediction. This tendency is intensified when, as is commonly the case, prediction is competitive. If you can predict the price of a product but I can predict it faster or more precisely, I gain an economic advantage. If I can better predict the success of troop movements over difficult terrain, then I gain a military advantage. As a result, in competitive situations, my fears of your predictive power will drive me to demand more prediction regardless of my predictive power. Moreover, your recognition of my predictive power will lead you to take steps to impair my predictive ability.34 Carl von Clausewitz saw this very clearly: “The very nature of interaction is bound to make [warfare] unpredictable.”35

These inherent psychological and practical realities will consistently lead to over-prediction. People are doomed repeatedly to drive beyond their headlights.

#### Quality of life is skyrocketing worldwide by all measures

Ridley, visiting professor at Cold Spring Harbor Laboratory, former science editor of *The Economist*, and award-winning science writer, 2010

(Matt, *The Rational Optimist*, pg. 13-15)

If my fictional family is not to your taste, perhaps you prefer statistics. Since 1800, the population of the world has multiplied six times, yet **average life expectancy has more than doubled and real income has risen more than nine times**. Taking a shorter perspective, in 2005, compared with 1955, the average human being on Planet Earth earned nearly three times as much money (corrected for inflation), ate one-third more calories of food, buried one-third as many of her children and could expect to live one-third longer. She was less likely to die as a result of war, murder, childbirth, accidents, tornadoes, flooding, famine, whooping cough, tuberculosis, malaria, diphtheria, typhus, typhoid, measles, smallpox, scurvy or polio. She was less likely, at any given age, to get cancer, heart disease or stroke. She was more likely to be literate and to have finished school. She was more likely to own a telephone, a flush toilet, a refrigerator and a bicycle. All this during a half-century when the world population has more than doubled, so that far from being rationed by population pressure, the goods and services available to the people of the world have expanded. It is, by any standard, an astonishing human achievement. Averages conceal a lot. **But even if you break down the world into bits**, **it is hard to find any region that was worse off in 2005 than it was in 1955**. Over that half-century, real income per head ended a little lower in only six countries (Afghanistan, Haiti, Congo, Liberia, Sierra Leone and Somalia), life expectancy in three (Russia, Swaziland and Zimbabwe), and infant survival in none. In the rest they have rocketed upward. Africa’s rate of improvement has been distressingly slow and patchy compared with the rest of the world, and many southern African countries saw life expectancy plunge in the 1990s as the AIDS epidemic took hold (before recovering in recent years). There were also moments in the half-century when you could have caught countries in episodes of dreadful deterioration of living standards or life chances – China in the 1960s, Cambodia in the 1970s, Ethiopia in the 1980s, Rwanda in the 1990s, Congo in the 2000s, North Korea throughout. Argentina had a disappointingly stagnant twentieth century. But overall, after fifty years, **the outcome for the world is** remarkably, astonishingly, **dramatically positive**. The average South Korean lives twenty-six more years and earns fifteen times as much income each year as he did in 1955 (and earns fifteen times as much as his North Korean counter part). The average Mexican lives longer now than the average Briton did in 1955. The average Botswanan earns more than the average Finn did in 1955. **Infant mortality is lower today in Nepal than it was in Italy in 1951**. The proportion of Vietnamese living on less than $2 a day has dropped from 90 per cent to 30 per cent in twenty years. The rich have got richer, but the poor have done even better. **The poor in the developing world grew their consumption twice as fast as the world as a whole between 1980 and 2000**. The Chinese are ten times as rich, one-third as fecund and twenty-eight years longer-lived than they were fifty years ago. Even Nigerians are twice as rich, 25 per cent less fecund and nine years longer-lived than they were in 1955. **Despite a doubling of the world population**, even **the raw number of people living in absolute poverty** (defined as less than a 1985 dollar a day) **has fallen since the 1950s**. The percentage living in such absolute poverty has dropped by more than half – to less than 18 per cent. That number is, of course, still all too horribly high, but the trend is hardly a cause for despair: at the current rate of decline, it would hit zero around 2035 – though it probably won’t. The United Nations estimates that poverty was reduced more in the last fifty years than in the previous 500.

## 1AR

### 1ar – we meet

#### EPA agrees with us

Brownell et al 12

F. William Brownell, Henry V. Nickel, Norman W. Fichthorn, Allison D. Wood, Hunton & Williams LLP, 9/6/12, LASBRISASENERGYCENTER,LLC,etal., Petitioners, v. UNITED STATES ENVIRONMENTAL ) PROTECTION AGENCY and LISA PEREZ JACKSON, Administrator, United States Environmental Protection Agency, Respondents, insideEPA database

Specifically, the April 13 Notice explains that the proposed CO2 NSPS establishes an emission limit – 1,000 pounds of CO2 per gross output, measured in pounds per Megawatt-hour (“lb/MWh”) on a 12-operating-month annual average basis – that is based on a level of emission control achievable only by certain kinds of combustion turbines that burn natural gas, i.e., so-called natural gas combined cycle (“NGCC”)units.2 Coal-fired EGUs are subject either to(1)this1,000lb/MWh limit, which they cannot achieve using any demonstrated “system of emission reduction” that is available to such units; or (2) a 30-year-averaging compliance option for coal- fired EGUs that are “designed to allow installation and operation of a carbon capture and storage (CCS) system.” Proposed 40 C.F.R. § 60.5520(b), 77 Fed. Reg. at 22,436.

As to the first, EPA concedes that the 1,000 lb/MWh CO2 limit it has published cannot possibly be met by any EGUs that burn coal or other solid fossil fuels.3 As to the second, in publishing a “30-year averaging option” as a putative alternative to an unachievable standard, EPA did not even suggest that CCS is an “adequately demonstrated” control system within the meaning of 42 U.S.C. § 7411(a)(1), or that this option was adopted following evaluation of the other NSPS- standard-setting criteria that must be considered in selecting a “best” system from among “demonstrated” systems.4 Cf., e.g., Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 440-41 (D.C. Cir. 1973) (remanding EPA’s selection of lime slurry scrubbing as the “best system” of control where EPA had given insufficient consideration to the “counter productive environmental effects of the system”).

In sum, EPA in the April 13 Notice published a CO2 emission standard that applies to, but cannot be met by, any new coal-fired EGUs with any “adequately demonstrated” system of emission reduction available to such EGUs. As UARG explains in its Motion for Declaratory Relief, what EPA has published cannot be, as a matter of law, an NSPS for coal-fired EGUs, and cannot trigger a statutory obligation on EPA’s part – or provide any legal basis for EPA – to promulgate a final NSPS that would apply to CO2 emissions from coal-fired EGUs. UARG explains here why the April 13 Notice constitutes “other . . . nationally applicable . . . final action” over which this Court has subject-matter jurisdiction pursuant to 42 U.S.C. § 7607(b)(1), and why UARG’s challenge to that action is ripe for review.

#### Evaluating hypothetical possibility of compliance is unreasonable

William L. Wehrum, William L. Wehrum, Hunton & Williams LLP, 8/3/12, WHITE STALLION ENERGY CENTER, LLC, et al., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent, BRIEF OF INDUSTRY AMICI CURIAE IN SUPPORT OF PETITIONERS, http://www.nam.org/~/media/2AA72BFA88F74E1B881D5BB46465B765/White\_Stallion\_Energy\_Center\_v\_EPA\_brief\_08032012.pdf

In other words, EPA’s floor methodology is based on what it believes is hypothetically “achievable” by some non-existent source, not what has been “achieved in practice” by the best actual source. And it does so without considering the beyond-the-floor factors as required under Section 112(d)(2). As EPA has explained elsewhere, such an approach is inconsistent with Section 112’s requirements: “[w]hen determining the existing source level of control, identification of a similar emission unit does not mean that the controls will automatically be applied to the MACT emission unit. Costs, non-air quality health and environmental impacts, and energy requirements should be used to assess the technologies ability to meet MACT criteria.” EPA 112(j) Guidelines at 3-19 to 3- 20 (emphasis added); see also 70 Fed. Reg. 59,402, 59,443 (Oct. 12, 2005) (rejecting a “straight emissions methodology” as creating “arbitrary” and “impermissible” results, including “a beyond the floor standard without consideration of the beyond the floor factors”).

C. MACT standards for new sources must be “achieved in practice,” not theoretically achievable by some nonexistent source.

Even if the statute is somehow deemed ambiguous, EPA’s pollutant-by- pollutant approach to setting the floor is unreasonable. “[A]chieved in practice” means more than the theoretical possibility of compliance from an imagined source:

It is reasonable to suppose that if an emissions standard is as stringent as “the emissions control that is achieved in practice” by a particular unit, then that particular unit will not violate the standard. This only results if “achieved in practice” is interpreted to mean “achieved under the worst foreseeable circumstances.”

Sierra Club v. EPA, 167 F.3d 658, 665 (D.C. Cir. 1999) (emphasis added). Instead of identifying the “best controlled similar source,” EPA established separate floors using emissions data from different sources representing the lowest emissions test result for each source, creating a set of standards reflecting the performance of a hypothetical source rather than the actual best controlled similar source.6 Id. (noting “use of the singular in the statutory language suggests” that EPA should consider the “unit with the best observed performance”). Yet, as Petitioners have demonstrated, EPA failed to demonstrate that even the multiple best controlled similar sources that it identified in setting the Utility MACT standards “will not violate” the standards that are based on the performance of those very units.

The need to identify a single source that has achieved the best control “in practice” is particularly important with respect to ensuring that the best controlled similar source “will not violate the standard” because controls installed to reduce one HAP may have antagonistic effects on other HAPs. EPA recognized this fact but ignored it in adopting its pollutant-by-pollutant approach to establishing MACT floors:

The EPA notes ... that if optimized performance for different HAP is not technologically possible due to mutually inconsistent control technologies (for example, if metals performance decreased if organics reduction is optimized), then this would have to be taken into account by the EPA in establishing a floor (or floors). The Senate Report indicates that if certain types of otherwise needed controls are mutually exclusive, the EPA is to optimize the part of the standard providing the most environmental protection. S. Rep. No. 228, 101st Cong. 1st sess. 168 (although, as noted, the bill accompanying this Report contained no floor provisions).

EPA-HQ-OAR-2009-0234-20126 at 433 (emphases added) (Ex. 6); see also id. at 447 (“The EPA is aware that the performance of one control technology can affect the performance of other in-stream control technologies.”).

It is unreasonable to interpret the CAA to allow for standards that purport to have been “achieved in practice,” but that will not be “achievable” by actual affected sources, much less the “best controlled similar source” used to set the standard. MACT floors are based on what has been “achieved in practice,” and “beyond-the-floor” standards are based on what is “achievable” considering cost and other factors. Compare 42 U.S.C. §7412(d)(2) and §7412(d)(3). The logic of the MACT floor is self-evident. The statute reasonably presumes new sources can replicate any emission level that has already been achieved by an existing source. Section 112 “thus embodies an assumption that standards based on achievability will be more stringent than ones based merely on past achievement.” Sierra Club v. EPA, 479 F.3d 875, 884 (D.C. Cir. 2007) (emphasis added) (Williams, J., concurring).

EPA’s current pollutant-by-pollutant methodology for establishing MACT floors for new sources results in floors that themselves are not achievable (i.e., the MACT floors are more stringent than “beyond-the-floor” standards could be). Hence, EPA has adopted an interpretation that is “demonstrably at odds with the intentions of its drafters.” Id. at 885. Judge Williams recognized that EPA must avoid such a result and “keep[] the relation between ‘achieved’ and ‘achievable’ in accord with common sense and the reasonable meaning of the statute.” Id. In adopting its current pollutant-by-pollutant approach to setting floors, EPA failed to adhere to this directive.

### 1ar – counter-interp

#### Feasibility determines energy production, so barriers are restrictions

Phil et al 12

Erik Phil and Filip Johnsson, Division of Energy Technology, Chalmers University of Technolog, and Duncan Kushnir and Bjorn Sanden, Division of Environmental Systems Analysis, Chalmers University of Technology, August 2012,Material constraints for concentrating solar thermal powerEnergy Volume 44, Issue 1, August 2012, Pages 944–954

The available solar flux on land is several thousand times higher than today's anthropogenic primary energy conversion and is thereby the dominant potential source for renewable energy. The global solar market has been rapidly growing for the past decade, but is still dwarfed when compared to conventional fossil fuel power. So far, the main barrier to large-scale deployment of solar power has been higher costs of electricity, because of relatively small volumes and less historical investments in technology development than presently dominant power generation technologies. Through development and continued strong growth, as solar technologies progress down the learning-curve, the cost per kWh of solar electricity is projected to reach parity with peaking power in main markets by about 2020–2030 [1], [2], [3] and [4].

So far, photovoltaic (PV) technologies have the largest share of the solar power market, but there is at present a relatively steady share of concentrating solar thermal power (CSP, also sometimes referred to as Solar Thermal Power, STP). CSP has undergone expansion from about 400 MW installed capacity in the early 2000s, to about 1.3 GW in 2011, with another 2.3 GW under construction and 32 GW in planning. The technology is today in commercial scale deployment in Spain, USA, Australia, Egypt and India [5], [6] and [7].

CSP plants use reflective surfaces to concentrate sunlight, providing heat for a thermodynamic cycle, such as a steam turbine. The physical principle is thus very different from photovoltaic panels, which use the photons in sunlight to excite electrons and create currents in solid state matter. These differences mean that CSP will differ significantly from PV regarding properties such as environmental impact and material constraints.

With projected strong growth in view, it is of interest to identify and quantify barriers to large-scale solar power deployment, other than cost as mentioned above. One such barrier is restrictions in either the reserves (extractable resources at a given cost) or annual supply of materials needed for solar power conversion devices. Such restrictions can imply increased raw material costs as the technologies grow, or even set absolute limits to how much that can be built. The recent study on CSP by the EASAC [2] has pinpointed a need to investigate the limits and potential bottlenecks and manufacturing constraints for CSP production.

#### Context is key

Haneman 59 J.A.D. is a justice of the Superior Court of New Jersey, Appellate Division. “Russell S. Bertrand et al. v. Donald T. Jones et al.,” 58 NJ Super. 273; 156 A.2d 161; 1959 N.J. Super, Lexis

HN4 In ascertaining the meaning of the word "restrictions" as here employed, it must be considered in context with the entire clause in which it appears. It is to be noted that the exception concerns restrictions "which have been complied with." Plainly, this connotes a representation of compliance by the vendor with any restrictions upon the permitted uses of the subject property. The conclusion that "restrictions" refer solely to a limitation of the manner in which the vendor may [\*\*\*14] use his own lands is strengthened by the further provision found in said clause that the conveyance is "subject to the effect, [\*\*167] if any, of municipal zoning laws." Municipal zoning laws affect the use of property.¶ HN5 A familiar maxim to aid in the construction of contracts is noscitur a sociis. Simply stated, this means that a word is known from its associates. Words of general and specific import take color from each other when associated together, and thus the word of general significance is modified by its associates of restricted sense. 3 Corbin on Contracts, § 552, p. 110; cf. Ford Motor Co. v. New Jersey Department of Labor and Industry, 5 N.J. 494 (1950). The [\*284] word "restrictions," therefore, should be construed as being used in the same limited fashion as "zoning."

#### Only contextual definition

Paul Crampton, Partner at Osler, Hoskin & Harcourt LLP, J.D., June 2009, MAJOR CHANGES TO THE COMPETITION ACT (CANADA) AND THE COMPETITION BUREAU'S ENFORCEMENT POLICIES, 8-5 Antitrust Src. 5

OUTPUT RESTRICTIONS. Paragraph 45(1)(c) applies to all agreements "to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product." In the Bureau's view, in addition to garden-variety output agreements, this language captures agreements that reduce the quantity of products supplied to specific customers or groups of customers as well as agreements to permanently or temporarily close manufacturing facilities. n31

The Draft CC Guidelines are not particularly helpful regarding agreements that typically would not be considered to constitute hard-core cartel conduct but which could raise issues under this provision, such as standard-setting agreements and JV agreements that place restrictions on the production or supply of products to be produced by the JV.

#### Does not require wholesale prohibition—limiting production is a restriction

Texas Supreme Court 10,

CAUSE NO. 08-01-18,007-CV-A, Final Judgment, http://www.supreme.courts.state.tx.us/ebriefs/12/12046401.pdf

"Restriction" is defined and commonly used to mean "[a] limitation (esp. in a deed) placed on the use or enjoyment of property." BLACK'S LAW DICTIONARY 1054 (7th ed. 2000).

### coal k

#### Cheap electricity is key to electrification – solves their impact

Dr. Frank Clemente, Professor Emeritus at Penn State University where he specializes in research on the socioeconomic aspects of energy policy, 9/28/12, Coal as the foundation of social development, http://energy-facts.org/LinkClick.aspx?fileticket=p0nwnMFNCkI%3d&tabid=100

Coal as the foundation of social development

Electricity ushered in a transformation of American society throughout the last century. Suddenly, the backbreaking work that consumed dawn to dusk for most Americans was alleviated by electric motors, dynamos and generators. Electric household appliances made it possible to heat homes, cook food, store perishable items and wash clothes without the drudgery and fear of disease that had haunted previous generations.\* This rise in the quality of life in the U.S. over the past century has been the envy of the world. Society after society seeks to emulate the progress the U.S. has made in health, education, productivity, environmental improvement, science and technology. The catalyst of this leap forward has been ever increasing access to reliable and affordable electricity. The rapid expansion of the population was closely paralleled by the production of electricity the average person could afford to buy. In 1920 electricity consumption per capita was less than 400 kWh. In 2010, consumption exceeded 13,500 kWh per person --and there were 200 million more people.

Through decade after decade, electric power in the United States has had one major common denominator -- coal. Coal has been the continuing cornerstone of our electric power supply. The first central power plant – built in 1892 by Thomas Edison on Pearl Street in Manhattan—was fueled by coal. Since that point, coal’s steady contributions have made the U.S. power system one of the most affordable and reliable in the world. Further, clean coal technology works: regulated emissions from coal have declined 70% since 1970. And the sheer scale of coal's contribution to our electric grid is a staggering confirmation of its foundational role.

Growing access to electricity means more food, cleaner water, new medicines, safer work settings and increased control of the environment through heating and eventually air conditioning—all hallmarks of industrialization and modernization made possible by electric power--over half of which came from coal.

What America Looked Like Before Electricity

Expanded availability of electricity led to a disproportionate increase in productivity and economic growth. New products and novel ways of creating those products drove this growth. As the century unfolded, the widening use of electricity via the moving assembly line combined to yield a continuing rise in the productivity of labor and capital. This general process continues today as electricity, much of it produced by coal, powers computerized technology in virtually every dimension of life.

Another continuing source of socioeconomic progress arises from the expanded use of commercial energy by households. Consider the shift from kerosene to electric lighting as an example. As the price of light declines, more illumination services are consumed, which leads to a direct increase in economic welfare. Further, with inexpensive illumination family members can devote time at night to improving literacy and education capacity. Households can divert hours once spent gathering firewood to improving their role in the market economy, which generates income for the family and labor services for society, thereby enhancing economic productivity such as GDP. Once again, this process continues today as electricity powers everything from the “Cloud” to personal computers.

Beneficial electrification has a dramatic impact on survival itself. Brenner’s work in the Journal of Epidemiology (2005) demonstrated the link between low energy costs, economic growth and declining mortality. In the U.S. life expectancy saw a significant surge as electricity, predominately powered by coal, steadily reached the population.

Better sanitation through electricity had a markedly positive impact on waterborne diseases. As Cutler and Miller (2005) noted in Demography, cleaner water was responsible for dramatic declines in infant mortality in the United States in the first 40 years of the twentieth century. In fact, at least 20% of the increase in life expectancy derives from reductions in infant mortality.

Affordable electricity through coal

The U.S. has benefited greatly from adequate power at a reasonable cost. U.S. manufacturers have been more internationally competitive. Electricity enhances productivity and product quality in all manufacturing processes—steelmaking, aluminum, machining. The price of electricity is critical because higher prices discourage usage. In this context, the stability of coal prices versus the volatility of natural gas prices over the past decade has buffered tens of millions of consumers from even higher electric rates. In future years, the price stability of coal will be even more important. Gas prices are linked to oil prices over time and virtually all forecasts see staggering global demand pulling oil prices higher as world oil production strains to keep up. Indeed, the EIA projects crude oil prices will be $230 per barrel by 2035. In the new peak oil world, gas prices will be a fast follower.

### 1ar – no scale up

#### May be true FOR PEOPLE – but empirical studies prove you can’t scale it up to explain IR or revolutionary politics

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(Charlotte, “Who speaks? Discourse, the subject and the study of identity in international politics,” European Journal of International Relations XX(X) 1–24)

To be clear, this move is not intended to deny the intimate links between discourse and subjectivity. The earlier foray into Lacanian thought served precisely to underline the centrality of discourse to both the making and subsequent analysis of the subject. But by the same token it also drew out what is required to wield the discourse approach effec­tively in IR. Indeed Lacan’s analysis emphasizes the sheer complexity of the dynamics of a highly individual phenomenon (identity), and consequently the difficulties in taking this level as the starting point for analysing all other levels at which identity is politically at play.13 As the discipline that positions itself at the highest level of analysis (the supra­national), IR cannot maintain its focus at the level where some of the finer debates around subjectivity take place (see for example, Butler, 1997). The issue here is one of discipli­nary specificity, or, in other words, equipping IR for what it wants to do; and the solu­tion proposed is one of suspension or bracketing.

To restate this important point differently, at the individual level, subjectivities and subject-positions remain coextensive. The distinction between subject-positions and subjectivities becomes operative once the analysis shifts beyond the individual level. This distinction thus offers a theoretically cogent way of studying identity while bracket­ing some of its more unwieldy dimensions that may, moreover, not be pertinent at the levels at which IR casts its focus. It renders the discourse approach operative for IR, because it makes it possible to study *state* identities, without having to presume that states have feelings, or indeed enter into questions of how much exactly are they like people, or what kind of selves do they possess.

What the discourse approach analyses, then, is the ways in which actors — crucially, whether individuals or states — define themselves by stepping into a particular subject-position carved out by a discourse. In taking on the ‘I/we’ of that discourse, actors’ identities are produced in a very specific way. In doing so, they are establishing them­selves as the subjects of particular discourses, such as the anti-whaling discourse, and thereby marking themselves as ‘anti-whalers’. How, then, do discursive subject-positions differ from Wendt’s (1999: 227–229) role identities, where the actor is similarly seen as stepping into institutionalized roles (such as professor and student)? The crucial differ­ence is that the concept of subject-position does not harbour any assumption about any primordial self supporting these roles. Importantly, this is not to say that the self does not exist — that the professor or student have no selves — but simply that the concept is not relevant to the analysis of the discursive construction of identity, especially when taken to the interstate level.