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**Observation 1 – The Status Quo**

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

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

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

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

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

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

**Observation 2 – Federal Crowd-Out**

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

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

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

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

**Peshek & Millican ‘12**

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

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

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

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

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

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

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

Fed = duplicative, adds cost and time delays

Ceiling – disincentivizes state action

States can address problems more efficiently and quickly

Fed regs deter investment

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

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

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

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

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

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

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

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

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

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

**Observation 3 – Federalism**

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

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

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

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

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

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

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

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

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

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

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

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

**The rule finalizes:**

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

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

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

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

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

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

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

You’ll rarely find a business in America—and especially one in the fossil-fuel industry—asking for more regulation. The default mode of industry groups like U.S. Chamber of Commerce and the American Petroleum Institute (API) is that government is always the problem, and that less regulation is always the solution. That’s usually been the position of the shale gas industry in the U.S., as new hydrofracking technology has enabled companies to tap vast new natural gas deposits, transforming the energy picture in the U.S.—and eventually, around the world. Ask any natural gas executive, and they’d tell you that the only thing holding back the industry was the threat of government regulations that would raise the cost of drilling and production. Fracking, as the industry group API [says on its website](http://energytomorrow.org/energy/hydraulic-fracturing/#/type/all), is a “proven and well-regulated technology.” **Green and many locals living in shale gas territory disagree, however, giving birth to an anti-fracking movement that may have more momentum than anything else in environmentalism today. And that movement has had a serious slowing effect on shale gas**, with states like New York and Vermont restricting fracking. Overseas the public opinion of fracking is even worse, with countries like France banning the practice altogether. The International Energy Agency (IEA) has said that the world could be entering a Golden Age of Gas, so plentiful are shale deposits in countries around the world, which means the gas is there. **But environmental concerns—*if unanswered*—could end that age early**. ***That’s why good regulation—far from ~~retarding~~ the growth of the shale gas industry—might be the only thing that ensures it***. Such is the conclusion of a [new study](http://www.worldenergyoutlook.org/goldenrules/#d.en.27023) released by the IEA this week which found that “golden rules” of regulation are needed to usher in the golden age of gas. **Without it, mass opposition could limit fracking altogether.** Here’s [IEA Executive Director Marla van der Hoeven](http://www.iea.org/newsroomandevents/pressreleases/2012/may/name%2C27266%2Cen.html):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Plan**

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

**Observation 4 is Solvency**

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

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

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

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

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

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

**Willie ‘12**

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

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

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

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

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

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

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

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

**Spence ‘12**

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

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

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

***State regs are qualitatively better***

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

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

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

**Willie ‘12**

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

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

***The plan would result in superior state regulations – this card answers every disad to decentralized regulations***

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

**The imposition of federal priorities on unconsenting states can also have negative environmental results.** In many cases, the assertion of federal regulatory authority to advance environmental goals will safeguard important environmental concerns. But in other cases, **federal authority can prevent states from adopting environmentally preferable alternatives**. **Federal preemption of more protective state environmental standards can inhibit more effective environmental protection, as well as experimentation with new approaches of addressing environmental concerns.** n565 Sovereign immunity will frustrate some environmentalist suits against recalcitrant states, but it will also limit corporate efforts to preempt local decisions about land-use and community character. In Federal Maritime Commission v. South Carolina State Ports Authority, n566 for instance, a cruise ship operator sought to force South Carolina to allow the berthing of a gambling boat. Due to South Carolina's sovereign immunity, the private cruise ship operator could not force the port authority to allow its ship to berth at the port absent federal intervention. n567 Opposition to the boat may have been driven by concerns about gambling or specific parochial interests in this case, but it illustrates how limitations on federal regulatory authority can limit the federal government's ability to impose development or other potentially environmentally harmful activity on unconsenting states. Coastal communities throughout the nation, including in South Carolina, are concerned with the negative environmental impacts of congested ports, which include air and water pollution, as well as harm to sensitive coastal lands. n568 **Judicial reinvigoration of federalism limits on the spending power would have the greatest impact on the *C*lean *A*ir *A*ct** ("CAA"). **Here again, there is reason to question whether such limitations would result in net environmental harm. Under the CAA, the federal government uses the** [\*462] **threat of sanctions to impose federal air pollution control priorities on state governments.** Specifically, the threatened loss of highway funds induces states to adopt that mix of air pollution control measures preferred by federal policymakers, even when an alternative mix of pollution control measures may produce greater environmental results. **The adoption of one air pollution control measure may increase other forms of pollution or otherwise contribute to other environmental problems**. n569 **The federal gasoline oxygenate requirement is a notorious example of how environmental regulation can cause environmental harm. n570 Under the CAA, oil companies are required to use fuel additives to increase the oxygen content of fuels in certain non-attainment areas.** n571 Although ostensibly designed to reduce automotive emissions, there is substantial scientific evidence that oxygenated fuels provide little environmental benefit. n572 The addition of one oxygenate, ethanol, can reduce some emissions at the expense of increasing others. n573 Another oxygenate in wide use until recently, methyl tertiary butyl ether ("MTBE"), has been linked to widespread water pollution problems throughout the country. n574 **Several states sought relief from the various federal fuel mandates, preferring to adopt other measures to reduce auto-related air pollution, but were precluded from doing so under the CAA**. n575 **In these states, air pollution may be worse than it would otherwise be due to the assertion of federal regulatory authority. This is not the only instance in which CAA mandates may impede the achievement of optimal levels of environmental** [\*463] **protection**. Because the formation of tropospheric ozone ("smog") is in part dependent upon ratios of ozone precursors in the ambient air, measures that reduce ozone levels in some cities increase ozone levels somewhere else. n576 Earlier air pollution control provisions adopted as part of the CAA Amendments of 1977 were tailored to advantage regional coal producers at the expense of their competitors, and air quality suffered as a result. n577 **If the federal government's ability to condition the receipt of highway funds on state implementation of detailed pollution control requirements were more limited, it is likely that many states would adopt a different mix of air pollution control measures**. **While some may fear that such state flexibility could result in less protective environmental regulations,** n578 **the experience with the CAA suggests that at least some states would adopt a mix of air pollution control measures that are more appropriate to their regions' specific air pollution concerns and would be more attentive to the potential negative consequences of specific federally-preferred pollution control strategies.** Without the ability to condition highway funding on all aspects of air pollution control policy, the federal government would retain substantial ability to influence state decision-making - conditional spending could still be used in a less "coercive" manner - but it would lack the ability to force states to adopt specific measures over state opposition. **Insofar as the CAA discourages some states from adopting locally optimal air pollution control measures, this could be environmentally beneficial.** It is important to note that the claim here is not that the extension of federal power always or inexorably results in net environmental harm. The federal government has encouraged substantial environmental progress, just as it has caused, or otherwise encouraged, much environmental despoliation. The impact of federal power on environmental protection is a function of what the federal government does. **A more powerful federal government is no less prone to causing or subsidizing environmentally destructive activities than it is to effectively controlling environmental harms. An increase in federal power does not necessarily translate into increased environmental protection. By the same token, the curtailment of federal power will not necessarily lead to greater environmental harm.** [\*464] B. Non-Federal Environmental Protection **The federal government is not the only provider of environmental protection. Many of today's federal environmental programs were preceded by - if not modeled on - state efforts**. n579 States regularly adopt environmental measures that are more protective than the federal "floor," and most innovative environmental reforms have their roots in state and local efforts. **Yet existing federal programs often obstruct or discourage state reforms.** n580 **In particular, the existing regulatory system is stultified and inhibits the evolution of policy measures to account for new information and knowledge or changing circumstances.** n581 **Even so-called "cooperative" efforts, under which the federal government funds approved state environmental programs, can distort state and local priorities, redirecting resources from more to less urgent environmental matters**. Insofar as the Court's articulated federalism principles reduce the federal government's ability to dictate environmental policy from Washington, D.C., states will have greater opportunity to pick up the slack. **Decentralized approaches to environmental protection have many potential advantages over centralized regulatory regimes. Decentralization can enhance the efficiency and effectiveness of environmental controls.** n582 **No less important, decentralization can allow for experimentation with alternative approaches to environmental protection with which there is relatively little practical experience.** n583 "**By decentralizing environmental decision making, we may be able to obtain improved responsiveness to changing circumstances and new information,"** notes Professor Farber. n584 **There is no reason, a priori, to view the decentralization of environmental protection as a threat to environmental protection, as opposed to a way of making it "more effective."** n585 **The potential environmental benefits of decentralization are *not merely theoretical***. **The history and current practice of state and local environmental protection provide ample reason to question the assumption that lessening federal environmental regulatory authority necessarily results in** [\*465] **lessened environmental protection. While the federal government is the most conspicuous actor on the environmental stage, state and local governments are the avant garde, developing innovative efforts to enhance the ecological and economic performance of environmental protection**. n586 **From brownfield redevelopment plans and audit privilege rules to property-based water management and unified, multimedia permitting systems, states are trying to find ways of maximizing the return on investments in environmental policy.** n587 **The conventional wisdom holds that federal environmental regulation was necessary because states failed to adopt adequate environmental measures. This view ignores the substantial environmental progress in many areas due to state and local efforts adopted prior to the enactment of most major federal environmental laws**. n588 The EPA's first national water quality inventory, conducted just one year after adoption of the Clean Water Act ("CWA"), found that there had been substantial improvement in water quality in major waterways over the preceding decade. n589 While water quality problems persisted, the evidence suggests that states began addressing those water quality problems that were clearly identified and understood well before the federal government. **Several studies of air pollution similarly find evidence of significant environmental improvement prior to the adoption of federal environmental regulation. Historically, the first municipal smoke ordinances were adopted in the late nineteenth century, and the number of cities with effective local controls increased dramatically in the post-World War II period**. n590 **In a comprehensive study of air pollution trends, Indur Goklany documents that levels of key pollutants were in decline prior to adoption of the 1970 Clean** [\*466] **Air Act Amendments**. n591 More significantly, the rate of improvement for some pollutants was greater prior to the adoption of federal controls than after. n592 A study by Paul Portney of Resources for the Future also found that "at least some measures of air quality were improving at an impressive rate before 1970." n593 **Research by Robert Crandall of the Brookings Institution similarly concluded that pre-federal air pollution control efforts were more successful than is typically assumed: "Pollution reduction was more effective in the 1960s, before there was a serious federal policy dealing with stationary sources, than since the 1970 Clean Air Act Amendments."** n594 **These studies suggest that state and local governments had the ability and motivation to address identified environmental concerns, such as air pollution.** n595 As with water pollution, once a given air pollution problem was clearly identified and understood, state and local governments began enacting measures to address these concerns before the federal government got into the act. Indeed, in some cases the early state efforts became the model for subsequent federal measures. In others, federal regulations were adopted, with the support of industry, to preempt more stringent or less uniform state regulatory standards. n596 While it is common to suggest that federal intervention was necessary because state and local efforts "failed" to protect environmental quality, the historical record is more ambiguous. Prior to the 1970s, the federal government failed to fulfill many of its preexisting environmental obligations. Yet, as discussed above, some state and local governments were beginning to make substantial progress in addressing local environmental concerns. n597 **A common concern voiced in environmental policy debates is that lessening federal authority will lead to environmentally harmful interjurisdictional competition. Specifically, the lack of federal regulation will set off a "race to the bottom" in which state jurisdictions compete for corporate investment and economic development by reducing** [\*467] **environmental safeguards**. n598 **The theory is based upon the intuitive notion, supported by some empirical evidence**, n599 **that firms are more likely to invest in states with less costly regulatory regimes. This concern is the "central underpinning" of federal environmental regulation** n600 and has been relied upon by courts to uphold federal environmental statutes against constitutional challenges. n601 **Yet on both theoretical and empirical grounds, concerns about an environmental race to the bottom seem overstated.** Professor Revesz has demonstrated that **the framework underlying the race to the bottom theory has several analytical failings.** n602 **Firms base siting and relocation decisions on a wide range of criteria, of which environmental regulation is only one, and there is ample evidence that other factors typically play a greater role in such decisions.** n603 **Tax rates, infrastructure, availability, cost, skill of local labor, and other regulatory policies are also important considerations for businesses. If the race to the bottom operates in the environmental sphere, there is every reason to expect it to operate to the same extent in these other contexts, suggesting that federal regulation would be necessary across the board.** n604 **In this way, the race to the bottom theory - if taken seriously - proves too much. In addition, the adoption of minimum federal environmental standards to prevent a race to the bottom in environmental policy would not eliminate the competitive pressures. Rather, it would shift them to other contexts, and the hypothesized welfare** [\*468] **losses would remain**. n605 Professor Revesz also points out that the same dynamic that could theoretically produce systematic environmental underregulation could also produce overregulation. n606 If states are more aggressive at competing for industry through tax policy than through environmental policy, the likely result would be suboptimal tax rates but superoptimal levels of regulation. n607 **The theory persists, despite its flaws, because it is reasonable to assume that jurisdictions will seek to create a comparatively more attractive investment climate in order to better compete economically**. **Insofar as environmental regulations impose significant economic burdens on existing and prospective economic actors in a given area, it is also reasonable to expect jurisdictions to act so as to lessen such burdens.** n608 **Recent empirical work suggests that this is in fact the case as government officials acknowledge efforts to reduce the economic pinch of environmental regulation for economic purposes**. n609 **Yet for this to prove the race to the bottom hypothesis, it is necessary to further assume that reducing the economic cost of environmental regulation necessarily reduces the level of environmental protection.** While **such a conclusion** may be justified in certain contexts, it **cannot be assumed across the board**. As not all environmental protection measures produce equivalent levels of environmental protection at equivalent costs, it should be possible for many jurisdictions to reduce the economic cost associated with environmental measures without sacrificing environmental quality. n610 **In addition, it is important to recognize that many states compete for citizens by seeking to improve their environmental performance. Because many people may be more likely to move to a state with high levels of environmental quality, this** [\*469] **creates pressure for states to adopt more protective environmental policies.** n611 In practice, **the race to the bottom has not been observed in environmental policy**. n612 As already noted, state and local governments often regulated well before the federal government became involved. While this fact alone does not disprove the race to the bottom thesis - such state regulations could still have been suboptimal when compared to the federal alternative or some theoretical ideal - they demonstrate that competitive pressures do not preclude effective state regulation. More significantly, **where the race to the bottom thesis has been directly tested** in the context of wetlands, **the pattern of state regulation has been precisely the opposite of what the theory would predict**. **Were there a race to the bottom in the context of wetlands regulation, those states with the most wetlands should be least likely to regulate development of such areas**. As explained by Professors Houck and Rolland, "**The larger a state's wetland inventory, the more important it is to the nation**, but the less important saving it may appear to the state itself - indeed the more onerous the burden of protecting it will appear." n613 **Imposition of wetland regulations in a state in which there is a greater proportion of wetlands as a percentage of the state's total land area will impose greater costs than the imposition of similar regulations in a state in which wetlands represent a smaller proportion of its land area. Thus, one would expect such states with more wetlands to begin regulating after those states with fewer wetlands, if they were to ever regulate at all.** The pattern of state wetland regulation prior to 1975 - when the federal government was ordered by a federal court to regulate wetlands under 404 of the CWA n614 - is precisely the opposite of what the race to the bottom [\*470] theory would predict. n615 According to the National Wetland Inventory, all fifteen states in the continental United States with more than ten percent of their land area in wetlands adopted wetland protection measures prior to 1975. n616 As one review of state wetland regulations noted, "Most of the states with the largest wetland acreages have adopted wetland regulatory efforts for all or a portion of their wetlands." n617 Although the adoption of such measures can entail significant costs, the states with the most wetlands clearly determined that the value of protecting wetlands was greater than the attendant costs of regulating them - interstate competitive pressures notwithstanding. There is also no evidence that interstate competition has resulted in any erosion of state wetland protection efforts, as "no state has repealed or substantially undercut its wetland statutes once adopted." n618 To the contrary, when the Supreme Court narrowed the jurisdictional scope of CWA, including the protection of wetlands under 404, some states quickly adopted additional regulatory measures to fill the gap. n619 In fact, after the Supreme Court found that the proposed balefill site at issue in Solid Waste Agency was beyond the scope of federal jurisdiction, local government agencies that previously had supported the project quickly acted to preserve the land at issue. n620 While not every state has adopted post-Solid Waste Agency measures to address isolated wetlands, one reason for this might be the continuing uncertainty as to the precise scope of the federal government's regulatory authority post-Solid Waste Agency - and therefore continuing [\*471] uncertainty about the need for state interventions. n621 It is possible that once the precise scope of the federal government's CWA authority is clarified, more states will follow suit, much as local agencies acted to be protected from the Solid Waste Agency decision only after it was clear the federal government would not. **Limiting federal regulatory authority would certainly create room for the expansion of state and local regulatory efforts.** **At the same time, such contraction is likely to create niches filled by non-governmental efforts**. The United States has a long and proud tradition of private conservation efforts, ranging from the earliest hunting associations and conservation organizations to modern land trusts and "enviro-capitalists." To return to the wetlands context, groups ranging from Ducks Unlimited at the national level to Chesapeake Wildlife Heritage at the local level engage in substantial wetland restoration and conservation efforts, both independently and in conjunction with government agencies. n622 Other groups, such as the Peregrine Fund, National Wild Turkey Federation, and Oregon Water Trust, to name but a few, focus their efforts on particular species, habitats, or areas of environmental concern. Insofar as there is evidence that government efforts to support public goods may crowd out private investments in such goods, n623 it is possible that the curtailment of federal regulatory efforts would provide more room for private efforts. By the same token, insofar as existing federal regulations discourage private conservation efforts, as has been documented in the context of endangered species, n624 the curtailment of federal regulatory authority could remove significant barriers to greater private conservation efforts. C. A Continuing Federal Role This Article's focus on the extent to which federalism doctrines could, and perhaps should, curtail federal regulatory authority in the environmental context should not obscure the fact that federal regulatory power is likely to remain substantial for the foreseeable future. **Federalism limits the regulatory power of the federal government, but it does not eviscerate federal efforts. Where federalism's pinch is most severe, it is** [\*472] **reasonable to expect one or more justices to blink before applying the logic of existing precedents. Yet even if the Court applies the federalism principles in an unflinching manner, it will still be possible to protect environmental values. Under strict application of Lopez and Morrison, the federal government will retain the ability to regulate economic activity and truly interstate environmental problems**. n625 Industrial operations will remain within the federal government's regulatory ambit, as would activities that produce interstate spillovers. Precedents such as Hodel would not be threatened by such an approach to the Commerce Clause, nor would lower court decisions upholding federal regulatory statutes that focus on industrial enterprises and other economic activity. Adding a jurisdictional element to even the most ambitious federal environmental statutes would preserve their constitutionality, albeit at the expense of each statute's comprehensiveness. n626 A requirement that Congress include jurisdictional elements in environmental statutes that criminalize or otherwise regulate non-commercial activity would still cover the vast majority of environmentally destructive behavior. Commercial real estate developments of the sort at issue in Rancho Viejo and GDF Realty would satisfy even fairly narrow readings of such requirements, whereas non-commercial activities by individual landowners would not. n627 The greatest environmental impact on federal regulatory power would not be the result of an affirmative limitation on congressional power, but rather from the inherent inertia of the legislative process. Were the Supreme Court to find 9 of the Endangered Species Act to extend beyond the scope of Congress's enumerated powers, it could take some time before Congress amends the statute. The degree of inertia in the legislative process is substantial, and it is far easier to block legislation than to enact it. Still, there is some reason to believe that an urgent need for a new species protection statute could trigger political action. n628 Assuming widespread public support for strong federal environmental measures, such legislation would be adopted in relatively short order. The federal government lacks the power to commandeer state governments for the purposes of implementing federal programs, but state [\*473] entities are still subject to general federal environmental requirements. n629 A state-run facility is still required to meet applicable federal environmental laws. State sovereign immunity limits Congress's ability to authorize citizen suits and contribution actions against state governments, but the federal government retains several means of inducing state compliance with federal law. Sovereign immunity does not prevent the federal government from directly suing state governments, nor does it limit other avenues of relief. The extent to which the Supreme Court enforces constitutional limitations on the use of conditional spending could have the greatest impact on the federal government's ability to direct environmental policy at the state and local level. n630 Yet here too it would be easy to overestimate the likely impact of such rulings. Applying the Dole formulation to environmental statutes would curtail federal efforts to coerce state cooperation with the Clean Air Act, but it is unlikely that it would affect other environmental laws. A more stringent spending power doctrine, while unlikely, would certainly constrain federal environmental authority to a greater degree, but the federal government would retain the ability to spend federal funds for environmental purposes. To the extent this compromises environmental protection - , more precisely, to the extent it limits expenditures on environmental measures because environmental programs have difficulty competing against other priorities for a share of the public fisc - this would simply reflect political priorities.

***Commerce Clause decision would restrict federal environmental regulations – this is key to technological innovation and is net better for environmental protection***

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

V. Judicial Federalism and Environmental Protection The conventional wisdom holds that constricting federal regulatory authority necessarily sacrifices environmental protection. According to some environmental groups, the revival of federalism represents a "grave [\*453] challenge" that is "threatening the very core of environmental law." n513 Recent **Commerce Clause decisions**, for example, **could provide "the groundwork for pulling the rug out from under federal environmental protections**." n514 **This presumption is dominant both in the environmental literature and in the language of judicial opinions.** Dissenting in Solid Waste Agency, Justice Stevens suggested that the impact of the Court's opinion could well be a return to burning rivers, excessive water pollution and "the destruction of the aquatic environment." n515 Though widespread, this view overstates the environmental impact of judicially enforced limits on federal regulatory authority. **Judicial reluctance to enforce federalism limits on federal environmental regulation may well stem**, at least in part, **from concerns that such limits could hamper environmental protection**. In Gibbs v. Babbitt, for example, Judge Wilkinson suggests that to strike down the ESA take prohibition on Commerce Clause grounds would necessarily limit federal species protection efforts "to only federal lands" n516 and would "call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all America." n517 If extended to other statutes, Judge Wilkinson wrote, the holding would leave "many environmental harms to be dealt with through state tort law." n518 **Such concerns are misplaced, and their premises are largely unfounded**. The federal government's inability to prohibit the take of endangered species, at least without the inclusion of a jurisdictional requirement to ensure that the given instance was sufficiently tied to commerce, would not affect the federal government's ability to protect endangered species via the spending power through direct subsidization of conservation efforts, funding of state regulatory programs, and support for programs to increase the awareness of biodiversity concerns and their importance. n519 **Limiting the use of, or even** [\*454] **eliminating, some tools in Congress's environmental policy toolbox is hardly tantamount to proscribing all federal environmental protection.** As discussed above, n520 **the application of Commerce Clause restrictions to other environmental statutes would not result in the same curtailment of federal regulatory authority insofar as such statutes, like the Surface Mining Control and Reclamation Act** n521 or Clean Air Act, n522 target economic activity. **Yet even if the Court's federalism doctrines were to disembowel much of the existing federal regulatory structure, it is simply not true that this would leave "many environmental harms to be dealt with by state tort law."** n523 **The federal government is hardly the nation's sole environmental regulator**. **To the contrary, most environmental monitoring and enforcement occur at the state and local level**, n524 **and there is no a priori reason to assume that states would be unable or unwilling to increase their environmental efforts were federal regulation not already in place**. n525 Judge Wilkinson's concern is even more misplaced because those **environmental concerns most likely to be** [\*455**] found beyond Congress's reach are those most likely to be regulated by state and local governments**. **Indeed, most such environmental concerns are so regulated already**, albeit in cooperation with federal efforts. n526 **While limiting federal regulatory authority will necessarily affect existing federal regulatory programs, it need not result in a significant decline in environmental quality**. Indeed, **if responded to properly, limitations on federal regulatory authority could actually improve environmental performance insofar as it fosters greater reliance on more efficient and effective approaches to environmental protection**. n527 First, **just as constitutional constraints on federal authority limit federal protection, such constraints also limit the federal government's ability to impose environmental harm. Second, in many instances alternatives to federal environmental protection can** be just as, if not **more, protective of environmental values. Reducing the scope of federal environmental regulation produces greater opportunities for the adoption and implementation of such non-federal efforts.** Third, direct regulation is not the federal government's only means of advancing environmental values. Even if the Supreme Court were to impose highly restrictive federalism constraints on federal regulatory power, including the use of conditional spending under Dole, the federal government would retain substantial authority to advance environmental protection. A. **Limiting Federal Power Limits Federal Harm** Most discussions of the environmental impact of the Supreme Court's federalism jurisprudence focus on the extent to which judicially enforced constraints on federal regulatory power will limit the federal government's ability to address environmental concerns. This is a valid concern. At the same time, it must be remembered that **expansive federal authority is not inherently protective of the environment. Rather it is a double-edged sword. Just as broad federal authority can be used to protect environmental concerns, a powerful federal government has the ability to cause substantial amounts of environmental harm. The nation's history is littered with examples of environmental degradation directed, funded, or otherwise encouraged by the federal government.** Many of our country's present environmental struggles are the legacy, at least in part, of ill-conceived (albeit sometimes well-intentioned) federal programs. Environmental harm brought about by federal environmental programs span the spectrum from pollution at federal [\*456] facilities and the mismanagement of federal lands to ecologically destructive public works projects and wasteful subsidies to farmers and businesses. n528 Subsidies to farmers have encouraged the draining of wetlands and waste of water resources; n529 subsidies to ranchers have depleted populations of wild species; n530 subsidies to corporations lower the costs of polluting fuel sources; n531 and subsidies to fishermen contribute to overfishing. n532 **The federal government's environmental record on federally owned properties is** equally **poor.** The federal government chronically underfunds national park maintenance and restoration, while spending more money on land acquisition. n533 The result is substantial pollution and ecological degradation. The sewer system in Yellowstone National Park, for example, is so degraded that it pollutes local trout streams and groundwater. n534 The federal government loses money on timber sales in the national forests, and chronic mismanagement has led to ecosystem decline and a literally explosive threat of catastrophic wildfire. n535 The approximately 50,000 sites contaminated by the federal government will cost an estimated $ 235-389 [\*457] billion to clean up, according to the General Accounting Office. n536 The U.S. Department of Energy alone is responsible for environmental contamination at over 100 sites in thirty states, covering approximately two million acres. n537 Solid Waste Agency undoubtedly restricted the federal government's ability to regulate activities that harm isolated wetlands. Ironically, the federal government maintained an active policy of draining or otherwise destroying wetlands for well over a century. n538 The Swamp Land Act of 1849, for example, provided for the transfer of government-owned "swamp" into private hands on the condition that they were drained. n539 In 1900, the Supreme Court characterized wetlands as "the cause of malarial and malignant fevers" and declared that "the police power is never more legitimately exercised than in removing such nuisances." n540 At the time, the country "was draining everything in sight to make communities healthful." n541 Other government policies, ranging from subsidized irrigation projects and farm subsidies to flood control projects and subsidized disaster insurance, further contributed to wetland loss. n542 For example, it is estimated that as much as thirty percent of the forested wetland loss in the lower Mississippi Valley was due to incentives created by federal flood-control projects. n543 Flood control projects and other policies continued to encourage wetland loss well into the 1970s. n544 In addition to subsidizing the filling of wetlands and building ecologically disruptive water projects, the Army Corps of Engineers helped despoil the waters it was entrusted to protect. For instance, the Corps contributed substantially to the pollution that rendered Lake Erie a "dead" water body, regularly depositing contaminated dredge from the bottom of the Cuyahoga River into the lake. n545 This activity continued through the 1960s, even after Congress adopted legislation to force the Corps to clean up [\*458] its act. To the Corps, defiling Lake Erie in this fashion was cost-justified. n546 Today the Corps has a lead role in helping to restore the Florida Everglades, yet it was the Corps's water projects in southern Florida that helped disrupt the Everglades ecosystem in the first place. n547 Given its record of environmental harm, it is ironic that the Corps of Engineers, of all federal agencies, now has such a prominent role in environmental protection. n548 Most of the environmental harm to be laid at the federal government's feet is the result of various spending programs, yet it is the federal government's regulatory authority that is most threatened by the Court's federalism jurisprudence, particularly in the Commerce Clause context. Therefore, it is possible that limits on the scope of federal authority will affect the federal government's ability to do environmental good far more than it will curtail the federal government's penchant for encouraging environmental harm. Yet **it would be a mistake to assume that federal regulations, including federal environmental regulations, are not themselves responsible for some degree of environmental harm**. **Examples of federal regulations that have the potential to cause negative environmental effects are more common than one might expect. *Technology-based emissions standards***, **such as those embodied in the CAA** and CWA, "***play a key role in discouraging innovation" that can lead to environmental improvements.*** n549 The federal Superfund program has discouraged the rapid and cost-effective cleanup of many unused or abandoned hazardous waste sites. n550 **The complexity and rigidity of federal hazardous waste regulations can discourage hazardous waste recycling, even though such recycling is officially considered environmentally preferable to the alternatives of incineration or land disposal.** n551 The claim here is not that environmental regulations necessarily do more good than harm, but that at least some environmental regulations have negative environmental [\*459] consequences and that in at least some instances environmental regulations are the source of net environmental harm. n552

# 2ac

**2ac – T Direct Restrictions**

***1) We meet – SQ is a restriction***

**Washington Times 12** 4-23, EDITORIAL: More fracking red tape <http://www.washingtontimes.com/news/2012/apr/23/more-fracking-red-tape/>, jj

The Environmental Protection Agency (**EPA**) on Wednesday **finalized** 588 pages of **new restrictions on the production of natural gas** and oil **that take** primary **aim at** hydraulic fracturing, or “**fracking**,” a drilling technique that releases trapped natural gas from underground shale. **Gas producers will be required to install equipment** on about 13,000 new natural gas wells and around 1,200 old ones **to prevent released gas from escaping into the atmosphere**, where the agency says it contributes to “greenhouse” gases. Humans and animals release the same vilified gases merely by being alive. House Republicans say **the added restrictions belie** Mr. **Obama’s** purported **all-of-the-above energy policy**. “American energy production on state and private lands remains a bright spot in our economy, but **EPA’s** layers of **red tape threaten to stifle** job creation and **industry growth**, especially for small businesses,” said Energy and Commerce Committee Chairman Fred Upton. **Fracking has led to an exponential growth in gas production**, driving prices below $2 per million British thermal units, the lowest level in 10 years. That’s good news for American consumers but bad news for Mr. Obama’s unrealistic “green” energy initiatives. Already reliant on generous federal subsidies to survive, intermittent energy sources such as windmills and solar panels have been unable to compete on an equal footing with inexpensive alternatives such as natural gas. Regulatory compliance costs will be added into gas prices - a welcome development for struggling “eco-friendly” competitors but not for consumers, who will be forced to shell out extra dollars. The president has been all-in for renewables, backing solar manufacturers such as Solyndra, which collapsed loudly last summer after burning through $535 million in taxpayer-provided subsidies. Since then, prospects for sun power have remained dim. Last week, First Solar, which pocketed a $1.46 billion loan from the Energy Department, announced it would lay off 2,000 employees. Additional regulatory burdens may further raise the pressure on natural gas costs. The EPA is investigating a charge that fracking contaminated a water well in Wyoming, prompting anti-progress activists in Pennsylvania and New York to protest the practice on the grounds that it could endanger local water tables. In Ohio, geologists claim fracking is causing small earthquakes. Each scare story becomes the basis for new rules and higher costs. The message from the marketplace is that the trendy, feel-good “green” power sources don’t sell. **The White House response is to generate restrictions ensuring natural gas** and other affordable fossil fuels don’t, either. Though Newton’s law can’t be changed, Americans fed up with Obama’s law will have a chance to repeal it in November.

***2) Regulations key to aff ground. Key to fossil fuel affs and answering the States CP***

***3) Counter-interpretation:***

***A) Restrictions are conditions on actions***

**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.**

***B) They must make the production more difficult or expensive***

**LVM** Institute **96** – Ludwig Von Mises Institute Original Book by Ludwig Von Mises, Austrian Economist in 1940. Evidence is cut from 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 [p. 744] 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**.

***C) “On” means directly targeted***

**World English Dictionary** 20**09** (http://dictionary.reference.com/browse/on?s=t)

— prep 1. **in contact** or connection **with** the surface of; at the upper surface of: an apple on the ground ; a mark on the table cloth 2. **attached** to: a puppet on a string 3. carried with: I've no money on me 4. in the immediate vicinity of; close to or along the side of: a house on the sea ; this verges on the ridiculous! 5. within the time limits of a day or date: he arrived on Thursday 6. being performed upon or relayed through the medium of: what's on the television?

***D) Production is extraction***

**GDF** SUEZ, 20**11** global gas and lng division (GDS SUEZ, Global Gas %26 LNG Division, "Exploration and production of natural gas," [http://www.gdfsuez.com/en/businesses/gas/natural-gas-prospection-production](http://www.gdfsuez.com/en/businesses/gas/natural-gas-prospection-production/-http%3A/www.gdfsuez.com/en/businesses/gas/natural-gas-prospection-production/))

**Exploration is the first stage of the gas chain**. At the core of this essential activity, GDF SUEZ **specialists** (geologists, geophysicists, engineers, etc.) **analyze the structure of the soil to detect areas liable to contain hydrocarbons**. They carry out specific tests, such as seismic analyses, to confirm their initial studies. **When there is a high probability of discovering gas (or oil), wells are drilled**. **If those wells prove successful, production (extraction and processing of the natural gas or oil) can start**. **Exploration**-production **activities also include the acquisition of licenses (the right to explore then exploit a field) from the authorities of the countries in which those fields are located.**

***4) Prefer our interpretation – We are the middle ground – you can read coal and gas affs but the restrictions have to be tied to production – solves their limits arg***

***5) Also only we define “restrictions on production” contextually – key to predictability and topic education***

**Davies 30** (Major George, “CLAUSE 1.—(Scheme regulating production, supply and sale of coal.),” February, vol 235 cc2453-558, http://hansard.millbanksystems.com/commons/1930/feb/27/clause-1-scheme-regulating-production)

Major GEORGE DAVIES The hon. Member says he has heard no reason advanced for this Amendment. I am willing to give him one, and I will tell him that the reason why the benches are not full, as they were a short time ago, is that man cannot live by bread alone and, as there is a rule against the introduction of newspapers and foodstuffs, it is necessary for some of us to refresh ourselves after a late Division. I am not going to transgress the ruling of the Chair, as we have been given very great latitude, but I want to confine myself to the point at issue, which is **the regulation** of sale. I have had experience **in** the past of efforts to regulate the sale of sugar. **Like the coal industry** to-day, **there has been** in the past an **over-production** of many of the fundamental articles of the life of a nation. I will not dwell on the case of rubber, but the sugar situation was entirely on all fours with this situation, **as it was a question of the regulation of sale**. Facing a situation very similar in kind and not dissimilar in degree to the problem now before us, those connected with that particular industry in certain countries thought it an advantage to control and regulate the sale. **As soon as you use the word "regulation" in this connection it is idle to suggest that it does not mean restriction**. Obviously, **that is the point**—**to restrict**—and, while 2541 it **is** true the word "restrict" is not in this particular Clause, and cannot be argued in connection with this Amendment, yet **behind the word "regulate" is the word "restrict**," **in other words, controlling what has been uncontrolled, production thrown on markets not able to receive it**.

***6) Prefer reasonability – if there is no ground loss an interpretation that expands aff ground should be preferred***

### China

#### Slow manufacturing doesn’t collapse china --- econ still up

Hornby, 1/2/13 (Lucy, Lucy Hornby is the Beijing-based correspondent for Reuters Insider, a financial news channel launched by Reuters in May 2010. She has reported for Reuters in Beijing and Shanghai since 2004, traveling from the North Korean to the Pakistan border, from Ulan Bator to 1 km below the earth in a coal mine. Her specialties are politics, trade and investment issues, as well as steel and commodity markets. She previously covered Latin America for Energy Intelligence from New York, and Asian energy investment and markets for Dow Jones from Singapore. Lucy has spent 11 years in China since she first arrived in Wuhan as an English teacher in 1995. She is in her second term as vice president of the Foreign Correspondents Club of China.Reuters: “China services growth adds to economic revival hopes,” <http://www.reuters.com/article/2013/01/03/us-china-pmi-services-official-idUSBRE90201A20130103>)

(Reuters) - Growth in China's increasingly important services sector accelerated in December at its fastest pace in four months, adding to signs of a modest year-end revival in the world's second-largest [economy](http://www.reuters.com/finance/economy?lc=int_mb_1001).

China's official purchasing managers' index (PMI) for the non-manufacturing sector rose to 56.1 in December from 55.6 in November, the National Bureau of Statistics (NBS) said on Thursday.

Two PMIs on the manufacturing sector earlier this week also suggested China's economic growth was picking up late in 2012, although signs persist it depends primarily on state-led investment.

Data so far suggests only a muted revival in economic growth, rather than a return to the double-digit pace seen in [China](http://www.reuters.com/places/china) over the past three decades, Hong Kong-based economist Dariusz Kowalczyk said.

***China models US safeguards --- ineffective Chinese regulations risk environmental accidents that collapse the environment and China economy***

**Hart and Weiss, 10/11** (Melanie, Policy Analyst on China Energy and Climate Policy Daniel J, Senior Fellow and the Director of Climate Strategy at American Progress. Center for American Progress, “Making Fracking Safe in the East and West” http://www.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/china\_fracking.pdf)

**The U.S.-China Shale Gas Resource Initiative aims to provide U.S. technical assistance** ¶ **to China across all aspects of shale gas development, including safety and environmental** ¶ **protection**. **So far, however, China’s policymakers have paid little attention to safeguards.** ¶ ***This follows the U.S. model***. Shale gas production here has far outpaced the establishment ¶ and enforcement of pollution protections. ¶ Environmental protection remains a low priority for both sides. Neither nation wants to ¶ risk the commercial potential of China’s shale gas by vigorously pursuing environmental ¶ protection there. Most of the U.S. companies involved in these bilateral exploration and ¶ development projects want to exchange assessment and extraction technology for Chinese ¶ commercial market access.3¶ **The Chinese want technology transfers from the United States** ¶ that include the more mature and advanced technologies that the United States often holds ¶ back due to intellectual property right concerns.4¶ Now that the initial exploration phase in China is complete, **the United States must help prevent the environmental consequences of Chinese shale gas production.** **If China does not follow best practices to capture greenhouse gases, it is highly likely that shale development will** ¶ **increase China’s emissions instead of decreasing them**. **And that will worsen climate change**. ¶ ***A major Chinese environmental disaster,*** such as groundwater pollution, ***could be devastating*** *¶* ***for China’s economy***. **It could also easily increase public opposition to fracking** in the United ¶ States, **just like the Fukushima nuclear meltdown in Japan increased American opposition to** ¶ **nuclear power**. **The U.S. companies involved in China’s shale industry therefore have a strong** ¶ **incentive to support bilateral environmental protection efforts.**

***No CCP collapse—the government represses instability***

**Pei 9** (Minxin, Senior Associate in the China Program at the Carnegie Endowment for International Peace, 3/12. “Will the Chinese Communist Party Survive the Crisis?” Foreign Affairs. http://www.foreignaffairs.com/articles/64862/minxin-pei/will-the-chinese-communist-party-survive-the-crisis)

It might seem reasonable to expect that challenges from the disaffected urban middle class, frustrated college graduates, and unemployed migrants will constitute the principal threat to the party's rule. If those groups were in fact to band together in a powerful coalition, then the world's longest-ruling party would indeed be in deep trouble. But that is not going to happen. Such **a revolutionary scenario overlooks two critical forces blocking political change in China** and similar authoritarian political systems: **the regime's capacity for repression and the unity among the elite**. **Economic crisis and social unrest may make it tougher for the CCP to govern, but they will not loosen the party's hold on power. A glance at countries such as Zimbabwe, North Korea, Cuba, and Burma shows that** a relatively **unified elite in control of the military and police can cling to power through brutal force, even in the face of abysmal economic failure**. Disunity within the ruling elite, on the other hand, weakens the regime's repressive capacity and usually spells the rulers' doom. **The CCP has already demonstrated its remarkable ability to contain and suppress chronic social protest and small-scale dissident movements. The regime maintains the People's Armed Police**, a well-trained and well-equipped anti-riot force of 250,000. In addition, **China's secret police are among the most capable in the world** and are augmented by a vast network of informers. And although the Internet may have made control of information more difficult, **Chinese censors** can still **react quickly and thoroughly to end the dissemination of dangerous news**. Since the Tiananmen crackdown, the Chinese government has greatly refined its repressive capabilities. **Responding to tens of thousands of riots each year has made Chinese law enforcement the most experienced in the world at crowd control and dispersion**. Chinese state security services have applied the tactic of "political decapitation" to great effect, quickly arresting protest leaders and leaving their followers disorganized, demoralized, and impotent. If worsening economic conditions lead to a potentially explosive political situation, the party will stick to these tried-and-true practices to ward off any organized movement against the regime.

### Russia

#### 1) Russian collapse inevitable now

Hulbert 12 (Matthew Hulbert - Lead Analyst at European Energy Review, government consultant, Senior Research Fellow @ Netherlands Institute for International Relations, working on energy and political risk. Senior Energy Analyst at Datamonitor for global utilities, 8/29/12, http://www.forbes.com/sites/matthewhulbert/2012/08/29/russia-shell-shocked-from-u-s-shale-over-shtokman/

It’s been coming for a long time, but Gazprom has finally canned its 3.9tcm Shtokman gas development in the Barents Sea. France’s Total and Norway’s Statoil can breathe a collective sigh of relief as Gazprom’s triumvirate partners, ducking out of an increasingly expensive $20bn Arctic development. But as far as Russian Inc. is concerned, this is a strategic shocker. Far from dictating global LNG dynamics as the ‘swing producer’, Moscow is going to be kicked from pillar to post trying to set prices in Europe, and far more importantly, in Asia. That applies not only to liquid molecules, but pipeline gas as well. The reality of this hasn’t fully dawned on President Putin yet. When it does, expect the Kremlin to go for the quickest political fix it has to hand: The 63bcm South Stream pipeline specifically designed to stitch up South East European markets as the target of choice. Pathetic politics, but a sure sign of where Russia’s limited regional ambitions now rest. In Shtokman’s defence, the numbers never added up. They looked tight before the international shale explosion and downright disastrous after – especially when you consider that North West Russian fields were designed to supply a ‘burgeoning’ U.S. LNG market in the early 2000s. Once inconclusive final investment decisions got pushed back to 30th June 2012, Statoil bit the bullet in mid-August, writing off its $336.2m investment, safe in the knowledge that it could find cheaper and easy access to international gas plays. Icy extremes vs. American pie? Statoil knows which side its bread is buttered, especially without major oil and tax breaks to improve Shtokman economics. Concessions incidentally, that Rosneft has been able to offer for Arctic oil plays as the Kremlin’s new toy of hydrocarbon choice. Any residual hopes that major international players would replace Statoil in Shtokman, were dashed when Royal Dutch Shell (with a barely concealed tongue in London’s mouth) offered to help Gazprom expand its Sakhalin II LNG ambitions. The irony of this won’t be lost on Gazprom, nor will Novatek’s coup to develop relatively quick and easy Yamal LNG projects in West Siberia. Highly attractive fiscal terms from the Kremlin have certainly helped in this effort, but Putin’s very old and very tedious game of hydrocarbon divide and rule amongst domestic players, has massively missed the strategic resonance of Shtokman for Russia. Given that everything Gazprom has done over the past decade has been ‘out of the money’ (Nordstream is barely mentioned in polite conversion in Europe these days), Shtokman is the one loss-leader that would actually have made long term sense for Russia. Not only are Shtokman reserves far larger than the entire Norwegian continental shelf, Russia has had a serious depletion problem since 2001. Its existing onshore gas production peaked at 513bcm of gas in 2011, having touched 556bcm in 2006. Like it or not; Gazprom’s 35trcm of reserves are mostly in hard to reach, and environmentally challenging locations spanning the Yamal Pensinsular, Far East, Eastern Siberia and the Arctic shelf. The days of easy gas has gone. ‘Strategic Shtokman gas’ should have been the way of the future, and especially for Russian LNG plays. To put things into context, despite sitting on over 30% of global gas supplies, Russian LNG production accounts for less than 5% of global share. Moscow is basically a fringe LNG player in a global gas world. A lamentable statement when you consider Russia is the gas equivalent of Saudi Arabia in the oil world. Had Gazprom been nearly as good at producing LNG as it has been talking about it over the past decade (I’ve had multiple tongue lashings in Europe on this subject), it would be in a far better position to dictate gas fundamentals across its key markets. Combine Shtokman and Sakhalin fields, and you get around 62 million tonnes of LNG, volumes that would go an enormous way to reinforcing Russian price preferences across the globe. But forget it. Russia is far happier sitting tight and pushing the idea that mothballing upstream investments will reduce volumes in order to put gas prices firmly back on oil indexed fundamentals. That might have some credence if it wasn’t for the fact that up to 250mt/y of LNG is expected to come on-stream from every point of the compass over the next decade. West Africa, East Africa, North America, the Middle East or Australasia, you name it. Russia will just be one of many gas producers competing for European and Asian export share. At no stage will Moscow be setting the price or volumes of global gas supplies. Anybody left paying oil indexed prices in Europe can expect to go bust (and please, please, do). Chinese players aren’t nearly so stupid. If Russia can’t dictate LNG dynamics to underpin spot prices, there is no way Beijing will sign up to 70bcm of expensive Gazprom supply contracts currently on the table. Russia’s Eastern Gas programme will fall flat on its face, not to mention Moscow’s inherent arbitrage potential by simultaneously feeding Eastern and Western markets. Market maker becomes perennial market taker. So assuming Russia is becoming another bog standard gas producer, where do they go from here? One option is to cross subsidise gas plays with highly lucrative Arctic oil concessions to enhance production. If Exxon (et al.) wants in on Russia oil, be sure to support Russian gas. It’s hard to see other IOCs taking the plunger otherwise (irrespective of the terms involved). The other, more credible option is to make domestic gas sales more attractive through price reforms. Local energy prices tend to be around a third (or less) than prevailing market rates in Russia. Putin either has to free up domestic prices to let Gazprom fulfil its broader ambitions, or follow through on serious upstream privatisation for the likes of Novatek to take on Alexi Miller’s export monopoly. Right now, he’s doing neither. If anything, the form book suggests that Putin will bottle things, and go for the easier political option of promoting European pipeline projects to monopolise local supply and rents. That’s already happened on Nord Stream feeding Western Europe markets, with the South Stream (€16bn pipeline) as the low hanging fruit to pipe 63bcm of gas to South East European markets. The fact that Russia has flopped on the global gas scene won’t matter if the ‘Muscovite street’ can see Putin strutting his stuff in adjacent SE European states. Competing European pipeline projects would be blown out of the water. It would give Russia total gas control over South East Europe, and inherent hegemony over Ukraine given that Kiev would lose its current role as a European transit state. Russia would not only hold the keys to its rediscovered ‘post-Soviet’ space, it could exert serious political presence in Turkey, and even dictate terms in the Caspian region given its limited export routes. All ‘impressive stuff’, until you realise that Russia has relegated itself to a regional gas player rather than global giant. To play the big boy role, Shtokman had to go ahead to dictate terms over new gas players in the Middle East, Australasia and Africa – not to mention setting the stage for a serious approach towards a gas cartel as the logical conclusion of independent global gas prices. Unfortunately for Russia, Mr. Putin is still on the back foot. He spends most his time moaning about European market designs and U.S. shale gas developments that have broken the Russia supply model, consistently failing to grasp that Russia has to ‘up its game’ to meet the global shale challenge. Bottom line; Shtokman gas will remain stuck under the ice long after Mr. Putin has gone (circa 2018) and beyond. A tragedy for Russia, but good news for everybody else…

#### 2) Not unique and no link – US will not be a player in the export market and development of fracking technology around the world is inevitable

Frank A. Wolak is the Holbrook Working Professor of Commodity Price Studies in the Economics Department and the Director of the Program on Energy and Sustainable Development at Stanford University, Ph.D. in economics from Harvard, “Careful What You Wish For: The Shale Gas Revolution and Natural Gas Exports”, November 2012, http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/briefs/PolicyBrief11\_2012.pdf

What Is the Comparative Advantage of U.S. Firms? This is the first question any potential investor in a natural gas export facility should ask. Is a firm able to site, permit, construct, and begin operation of a natural gas export facility faster than other firms are able to explore, develop, and begin production using shale gas extraction technology in a potential export market? The time from siting to the start of operation of LNG export facilities is estimated to take at least 6 years and as long as 10 years. In contrast, the time from the start of drilling to operation of a shale gas field is typically less than four months. Taking this comparison further, a potential investor should also bear in mind that the environmental regulations governing shale gas exploration and development in many of the potential export destination countries in Figure 3 are likely to be less stringent than those in the United States. Labor and many materials costs are also likely to be lower in most of these countries. All of these factors point to cheap natural gas being available in these countries in the near future. By the end of 2012, China expects to produce a small but significant amount of shale gas. It also has set the very ambitious goal of having shale gas provide 6 percent of its total energy needs by 2020. India, the world’s other major energy consumer, has substantial shale gas reserves and ambitious shale gas development plans. This logic points to a not improbable “build it and no one comes” outcome for an investor in an LNG export facility, after spending billions of dollars and six years to complete the project. It is very likely that by the time the export facility is completed significant shale gas production activity will be taking place in many potential U.S. export markets and that prices at these locations will be below the delivered price of U.S. LNG to these locations. These locations are also likely to become potential competitors to the United States in the global LNG market. The $3/MMBTU to $4/MMBTU differential for liquefaction, transportation, and regasification implies that even if these wholesale prices at these locations are double those in the United States, LNG from the U.S. would have a difficult time competing with domestic supplies of natural gas in these countries. There is one major factor working in favor of the profitability of shale gas exports. Horizontal drilling technology and hydraulic fracturing are well-understood technologies, but how they are best applied to extract shale gas depends on the details of the local geology. During the early stages of the development of shale gas in the United States, significant trial, error, and expense went into finding the most cost-effective way to extract these resources. Consequently, a major source of uncertainty facing shale gas developers outside of the United States is how transferrable the experience in the U.S. will be to these other countries and how long it will take to find the best way to deploy the best methods for the local geology. Nevertheless, betting against the ability of U.S. firms working with local partners to address these issues seems unwise, because it is a bet against what U.S. firms excel in—developing and commercializing new technologies and products. A final argument against the rapid development of shale gas resources in other parts of the world is the potential inability of U.S. firms to gain access to these resources at commercially attractive terms. A number of factors can prevent this: 1) the unwillingness of the local governments to sign contracts with U.S. firms on desirable terms, 2) the lack of welldefined subsurface property rights to allow exploration, and 3) the lack of the necessary pipeline and other infrastructure to carry the gas to the market once it has been found. History has shown that all of these factors are genuine concerns, but given how long it takes to bring online an LNG facility in the United States and how long that facility will need to operate to recover the extremely large cost to construct it, it is hard to imagine that these challenges cannot be overcome in that time frame in a number of regions with large shale gas reserves.

#### 3) Economics takes out the link EVEN IF there is political will – producers have zero interest – any exports will be small

Edward McAllister, Reuters, December 7th 2012, http://www.reuters.com/article/2012/12/07/us-lng-idUSBRE8B60WI20121207

(Reuters) - The economic boon of opening up U.S. natural gas production for export as described in a high-profile report this week has not drastically shifted expectations about how much fuel will eventually find its way to foreign shores. With more than a dozen projects proposed to liquefy and export a bounty of cheap U.S. natural gas, industry experts say big obstacles remain to make them all economical, despite the clear message from the government-funded study: the more gas shipped overseas, the better for the domestic economy. The long-awaited report, commissioned by the Department of Energy and conducted by NERA Economic Consulting, lifted some uncertainty about the overall fiscal impact of gas exports. However, the huge cost of building intricately designed plants that cool natural gas to a liquid for shipping, the volatility of U.S. gas prices and the uncertainty about global demand remain key hurdles for potential exporters, regardless of the political landscape. "It was a positive report, but it doesn't radically change my view on exports," said Katherine Spector, head of commodities strategy at CIBC World Markets. "A lot of it will come down to economics." The debate about exporting gas abroad has raged since new drilling technologies revolutionized U.S. gas production, pitting gas producers who would capture higher prices abroad against consumers who would benefit from lower fuel costs at home. Output has risen to record highs due to the development of vast shale deposits. Prices, meanwhile, fell to 10-year lows in April. With excess gas at home, and prices far below global levels, companies are scrambling to export U.S. gas to high-paying markets in Europe and Asia. Fifteen projects are in the early stages of approval to export, according to government records. One project - Cheniere Energy's Sabine Pass plant in Louisiana - has the full regulatory go ahead and has already signed deals to supply companies in India, Great Britain and South Korea. Oil majors have followed suit, with Exxon Mobil (XOM.N) seeking export approval from its Golden Pass import terminal in Texas and Royal Dutch Shell (RDSa.L) also considering its options. But the government stalled the approval of further projects this year until it had received the report on the affect exports would have on the U.S. economy. That report on Wednesday concluded that exports would overall be beneficial, despite leaving consumers to pay more for gas at home. It got a tepid reception from U.S. manufacturers that benefit from lower cost gas and would see profits take a hit if lower domestic supplies drive up prices. Despite the report's overall positive outlook for exports, it did not change the bigger picture for U.S. exports for market experts. "The prospects for projects going ahead are less about the regulatory approval process and more about the market and the ability of global importers to absorb additional supply," said Gordon Pickering, a director with Navigant Energy. The industry has been stung by swings in the gas market in the past. A decade ago, companies were scrambling to build terminals to import natural gas into the United States as domestic production fell. Since the shale gas boom, those projects -- which cost billions of dollars -- are mostly gathering dust. PRICES, NOT POLITICS Gas exports in the form of liquefied natural gas (LNG) is reliant firstly on U.S. gas prices remaining far below global prices for some time, which lends added risk to billion-dollar LNG projects. Currently, with U.S. gas prices below $4 per million British thermal units (mmBtu) and Asian spot prices at $15, it is profitable to sell gas there, even after the cost of liquefying the gas and shipping it across the ocean. But U.S. gas prices are known for their historic volatility, keeping some Asian buyers wary. "The support for the U.S. is very conditional. People are very excited by this, but it will be interesting to see what they think if prices hit $5.50," said Nikos Tsafos, analyst at PFC Energy in Washington. PFC expects to see two or three U.S. LNG projects up and running by 2020. U.S. prices have doubled since hitting April's low around $1.90 per mmBtu. On Thursday, gas futures traded in New York settled at $3.67. Moreover, U.S. LNG producers will be fighting for a share of a competitive global LNG market dominated by a few large producers, and the appetite for new supply will influence how many U.S. projects are eventually built. "Qatar, Russia and Australia have a leadership position in those markets and are going to fight very hard to retain what they have," Navigant's Pickering said. "They are at least five years ahead of these U.S. LNG projects."

#### 4) No Link and Turn - International producers know the US exports will be limited – And this expands their market

Kevin Begos, CSM, October 1st 2012, http://www.csmonitor.com/Environment/Latest-News-Wires/2012/1001/Natural-gas-boom-in-US.-Is-Russia-the-big-loser

But one top Gazprom executive said shale gas will actually help the country in the long run. Sergei Komlev, the head of export contracts and pricing, acknowledged the recent disruptions but predicted that the U.S. fuels wouldn't make their way to Europe on any important scale. "Although we heard that the motive of these activities was to decrease dependence of certain countries on Gazprom gas, the end results of these efforts will be utterly favorable to us," Komlev wrote in an email to the AP. "The reason for remaining tranquil is that we do not expect the currently abnormally low prices in the USA to last for long." In other words, if the marketplace for natural gas expands, Russia will have even more potential customers because it has tremendous reserves. Komlev even thanked the U.S. for taking the role of "shale gas global lobbyist" and said Gazprom believes natural gas is more environmentally friendly than other fossil fuels. "Gazprom group generally views shale gas as a great gift to the industry," he wrote. When natural gas prices rise, "it will make the U.S. plans to become a major gas exporter questionable." Whether exports happen involves a dizzying mix of math, politics and marketplaces, along with the fact that U.S. natural gas companies — and their shareholders — want prices to rise, too.

#### 4) The turn is unique – Russian market is shrinking

#### 5) Spot pricing better for suppliers

Matthew Hulbert, Lead Analyst at European Energy Review, Contributor to Forbes, “Why America Can Make or Break A New Global Gas World”, 8/5/12, http://www.forbes.com/sites/matthewhulbert/2012/08/05/why-america-can-make-or-break-a-new-global-gas-world/

This historical legacy isn’t going to instantly lose contemporary resonance: hence the real question isn’t whether long-term bilateral supply contracts will be struck. They will. But what’s used as the pricing reference point within them: spot market prices based on supply-demand fundamentals should be the increasingly logical answer. The deeper gas markets get, the more credible independent benchmarks become. But that ironically raises a ‘thornier’ final question for us to ponder: Who would ultimately gain most from a globalised gas market? The obvious short to medium term answer is consumers. Gas on gas pricing should drive competition and efficiency gains, not to mention far greater energy security by fostering diversification of supplies. But as much as gas producers initially balk at the idea, an emerging single price point could give them everything they want – reduced price volatility, with far broader and more flexible markets, rather than relying on a single consumer at the end of a pipeline where the price is ‘set’ by OPEC. Take that argument to its logical conclusion, and we could even see far greater supply side collusion, both in volumes and price. A single price point = core set of single swing producers. The ‘gas cartel’ debate has been chronically overdone of late, but ignoring supply side collusion full stop could prove to be a costly mistake, just as it was to ignore the world’s largest oil producers in the 1960s. That would certainly be an explosive twist in a fascinating gas convergence tale – out of a supposed existential crisis, could come the biggest opportunity gas producers ever had.

### Court da

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

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

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

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

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

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

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

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

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

***The Court has a mountain of political capital to make conservative rulings post ACA***

Adam **Liptak**, NYT, “Supreme Court Faces Weighty Cases and a New Dynamic”, Sept 29th 20**12**, http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html?pagewanted=all&\_r=0

The term will also provide signals about the repercussions of Chief Justice John G. Roberts Jr.’s surprise decision in June to join the court’s four more liberal members and supply the decisive fifth vote in the landmark decision to uphold President Obama’s health care law. Every decision of the new term will be scrutinized for signs of whether Chief Justice Roberts, who had been a reliable member of the court’s conservative wing, has moved toward the ideological center of the court. “The salient question is: Is it a little bit, or is it a lot?” said Paul D. Clement, a lawyer for the 26 states on the losing side of the core of the health care decision. The term could clarify whether the health care ruling will come to be seen as the case that helped Chief Justice Roberts protect the authority of his court against charges of partisanship while accruing a **mountain of political capital** in the process. He and his fellow conservative justices might then **run the table** on the causes that engage him more than **the limits of federal power ever have**: cutting back on racial preferences, on campaign finance restrictions and on procedural protections for people accused of crimes.

***Oral arguments were heard in October --- no way the plan causes justices to revise decisions they’ve already made***

***Conservative ruling now***

Adam **Liptak**, NYT, “Supreme Court Faces Weighty Cases and a New Dynamic”, Sept 29th 20**12**, http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html?pagewanted=all&\_r=0

On Oct. 10, the court will hear Fisher v. University of Texas, No. 11-345, a major challenge to affirmative action in higher education. The case was brought by Abigail Fisher, a white woman who says she was denied admission to the University of Texas based on her race. The university selects part of its class by taking race into account, as one factor among many, in an effort to ensure educational diversity. Just nine years ago, the Supreme Court endorsed that approach in a 5-to-4 vote. The majority opinion in the case, Grutter v. Bollinger, was written by Justice Sandra Day O’Connor, who said she expected it to last for a quarter of a century. But Justice O’Connor retired in 2006. She was succeeded by Justice Samuel A. Alito Jr., who was appointed by Mr. Bush and who has consistently voted to limit race-conscious decision making by the government. Chief Justice Roberts, another Bush appointee, has made no secret of his distaste for what he has called “a sordid business, this divvying us up by race.” Justices Kennedy, Antonin Scalia and Clarence Thomas all dissented in the Grutter case, and **simple math** suggests that there may now be five votes to limit or overturn it..

***Plan follows precedent – That’s Adler – That provides a shield***

#### Conservative ruling doesn’t kill affirmative action

Coates ’12 – Ta-Nehisi Coates is a senior editor at The Atlantic, where he writes about culture, politics, and social issues. He is the author of the memoir The Beautiful Struggle. 10-15-12, The Atlantic, The Supreme Court Can't Kill Affirmative Action, <http://www.theatlantic.com/national/archive/2012/10/the-supreme-court-cant-kill-affirmative-action/263638/>, jj

Richard Thompson Ford notes that whatever the Supreme Court does, they can't really stop universities from using soft measurements to achieve diversity:¶ [T]he rub is that a lot of these are racially correlated, and some may be hard to disentangle from race itself. For instance, if a university considers an applicant's experience with prejudice, in the form of sex discrimination, anti-gay bias, religious bigotry and animosity based on disability, shouldn't it also consider an applicant's experience with racism? Moreover, when an admissions or hiring decision involves multiple subjective factors, its very hard to know whether not race, per se, was one of them. ¶ It's not surprising that opponents of affirmative action zero in on objective measures of qualification and merit, because without them to provide a baseline of equal treatment, it's hard to tell whether or not a decision maker has discriminated. Civil rights lawyers in employment discrimination cases do the same thing. For instance, if an employer promotes men over women with more experience, civil rights lawyers point to the superior objective qualifications of the women as gotcha evidence. But the employer can always retort that the men chosen for the promotions had better soft skills. And that claim is almost impossible to refute because the value of soft skills is a judgment call. ¶ As employers have shifted from objective qualifications to subjective soft skills, and as the courts have deferred to their judgments, it's become increasingly hard to prove employment discrimination. As a result, employment discrimination plaintiffs today lose at a higher rate than any other class of plaintiffs in federal court. Unless the court changes the rules for people who are challenging affirmative action, it will be just as hard to prove that a university considering the long list of factors like the one I laid out above factored in race in an admissions decision.¶ Adam Serwer made a similar point a few months back:¶ "They probably will make a ruling that will further limit affirmative action," says Randall Kennedy, a professor at the Harvard University School of Law and a supporter of affirmative action. "Will it kill affirmative action? No." ¶ Even if Fisher prevails, he says, affirmative action in higher education may well continue--just via methods less explicitly reliant on race. "Even right-wingers get nervous with racial homogeneity," Kennedy argues. "Why do you think they loved Herman Cain so much? If Patrick Buchanan were elected president of the United States, there would have been a person of color in the cabinet." ¶ Previous efforts to curtail what are known as "race-conscious" policies have shown that "universities don't just throw up their hands and give up on racial diversity," says Rick Kahlenberg, an education expert at the Century Foundation. "They look to race-neutral alternatives, some of which can produce substantial racial and ethnic diversity."¶ The point here is not that there will be zero damage, but that affirmative action, at this point in American history, is not so much a single policy but a broad American value. This is, again, one of the great triumphs of the black freedom struggle. From the perspective of the struggle, Hermain Cain is a problem -- but he is a decidedly better problem than the previous ones. He is also the problem we fought for, and thus evidence of progress. ¶ Affirmative action enjoys defenders in the corporate world and the military because of the relative success of the long war. The war continues, regardless of the court.

#### Diversity obv not k2 military

#### Secession is not contagious---no spillover

Saideman ‘08 (Stephen, political science at McGill University & Canada Research Chair in International Security and Ethnic Conflict, 2-20, “Kosovo comparison absurd” lexis, jj)

Second, this concern about the impact of Kosovo upon Quebec is part of a larger misconception about ethnic conflict and separatism in particular - that they are contagious. There is much concern that Kosovo's independence might set an unfortunate precedent, encouraging groups elsewhere to increase their efforts to become independent. However, individuals, groups and governments are far more motivated by the dynamics within their countries than by near or distant examples. One can learn positive or negative lessons from any event, so one takes away the lessons to learn and ignores the lessons that might be discouraging. Yes, Kosovo is independent so that might encourage separatists, but, on the other hand, the costs paid over the course of the past 20 years should discourage others.

#### No impact to secessionism.

Daniel Philpott in 1998 (Assistant Professor of Political Science at UC-Santa Barbara, “National Self-Determination and Secession,” p. 91)

Even if secessions did proliferate, though, which I do not advocate, we should be clear why it would be a problem. It is not necessarily a problem, for instance, for there to be small state. As I claimed in my original argument, there is no reason why even a city or tiny region cannot be self-determining. Andorra, Monaco, Liechtenstein, Singapore, and (up until this year) Hong Kong have all feared perfectly well as tiny sovereignties. There are some limits to how small a sovereign entity can be, but these arise from the necessity of providing certain public functions: maintaining roads and utilities, educating children, preserving minimal order, and providing basic public goods. 20 It is not necessarily a problem, either, for there to be a large number of states. International stability and peace has endured among the many and collapsed among the few. Compare Europe’s fate with 300 German states during the late seventeenth and eighteenth centuries.21

### EPA CP

#### 1 – Perm – do both

This would only solve methane adv, not going for that

NO solve federalism --- that’s better internal link to climate lead --- rebalance

#### States will always be better – 3 reasons:

#### 1 – can respond faster and more efficiently --- they can find an accident and fix it immediately

#### 2 – states are more flexible – can easily change regs to adopt new standards

#### 3 – bring more people to the table to reg --- federal gov only concerned with safety, not production

#### Plan’s key to soft power and climate leadership

**Seeking Alpha ‘09**

Seeking Alpha was named the Most Informative Website by Kiplinger's Magazine and has received Forbes' 'Best of the Web' Award.

Seeking Alpha is the premier website for actionable stock market opinion and analysis, and vibrant, intelligent finance discussion. We handpick articles from the world's top market blogs, money managers, financial experts and investment newsletters - publishing approximately 250 articles daily. Seeking Alpha gives a voice to over 5,000 contributors, providing access to the nation's most savvy and inquisitive investors. Our site is the only free, online source for over 1,500 public companies' quarterly earnings call transcripts, including the S&P 500.

3-21, A Natural Gas-Centric Revitalization Program, <http://seekingalpha.com/article/127110-a-natural-gas-centric-revitalization-program>, jj

Instead of more ridiculous financial bailouts (does anyone other than me think the Fed buying US treasuries simply incest?), **what America really needs is a reindustrialization plan based on natural gas** transportation. **If Obama** and his leadership team **would focus an energy** and industrial revitalization **program based on natural gas** transportation, **the US could once again become a *world leader* instead of a world problem.** **America’s abundant natural gas resources combined with its tremendous asset of the existing 2.2 million mile natural gas grid is our key *competitive advantage* over many other countries.** If Obama set a goal to convert half of America’s vehicle fleet to NGV’s over the next 5 years, **we could**:

Save millions of jobs in the automotive industry.

Reduce foreign oil imports by 5-6 million barrels a day (around 50% of total foreign oil imports).

Save trillions of dollars which would otherwise go to foreign oil producers.

Increase royalty payments to thousands of farmers and landowners sitting atop American natural gas.

Create thousands of jobs in the energy, infrastructure, and CNG sectors.

Reduce CO2 emissions by hundreds of millions of tons annually.

Drastically reduce particulate emissions from gasoline powered automobiles responsible for the smog in so many American cities.

**Restore American energy and climate leadership and our reputation as a wise and moral country capable of attacking its own problems instead of other countries.**

Rally the country behind a goal everyone could understand, participate in, and profit from.

**Strengthen the US dollar and balance our financial trade and budget deficits.**

Protect us from dire economic and social consequences of Peak Oil.

The costs of such a program would pay for itself very quickly by reducing the expense of foreign oil, including huge military expenditures to fund oil wars and securing foreign oil transport. Like the interstate highway system, cross country railroads and telegraph lines, the man-on-the-moon project and so many other government sponsored programs, natural gas vehicles and a natural gas refueling infrastructure would pay dividends to all Americans for decades to come. They would remove oil as a critical variable in the energy equation until clean energy capacity is online and clean vehicle technology is robust and mature enough to make the total transition to renewable fuels. Anything less than this natural gas centric policy will not keep America addicted to foreign oil. As we already know, **our 65% reliance on foreign oil will continue the economic, environmental, and national security problems which are already at crisis levels.**

***Climate leadership fails***

**Loris 7-23-2012** [Nicolas, Herbert and Joyce Morgan Fellow at the Thomas A. Roe Institute for Economic Policy Studies, The Assault on Coal and American Consumers, <http://www.heritage.org/research/reports/2012/07/the-assault-on-coal-and-american-consumers>] Awirth

The EPA has long ignored the disagreement within the scientific community on classifying carbon dioxide as a pollutant and on the magnitude of anthropogenic (manmade) global warming. Yet even setting aside the scientific dissention on these two points, the EPA regulations will not reduce carbon dioxide enough to have any meaningful effect. Attempting to reduce carbon dioxide unilaterally will significantly change overall global emissions. **China and India’s carbon dioxide emissions are rapidly increasing as their economies continue to expand, and they have no intention of slowing economic growth to curb emissions**. **Even if the EPA were to reduce U.S. carbon emissions 83 percent below 2005 levels by 2050, as mandated by cap-and-trade bills, the reduction would constitute a negligible portion of worldwide emissions and do nothing to impact global temperatures**.[30]

**2AC cour ruling**

***Doesn’t solve the aff***

***1) Spending clause key – otherwise the EPA will coerce the States into bad regulations – that’s Adler - Ensures methane leaks that cause extinction -***

***2) Doesn’t solve germaneness – spending clause allows unlimited federal coercion that decks federalism***

#### Perm – do the CP

#### PiCs bad & a voting issue--- steals aff ground and forces us to debate ourselves --- inflates small da’s and justifies perm – do the cp perm – do both

#### They’ll just make the regs a condition of receiving funds --- spending clause ruling k

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

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

By making almost all of the environmental statutes dependent on one clause, albeit a broad clause of the Constitution, Congress has placed at risk many environmental statutes.

If the Commerce Clause applies, then the Spending Clause is superfluous. If, however, the Commerce Clause does not encompass such environmentally sensitive matters as isolated wetlands or species, then Congress may still accomplish these goals by attaching conditions to federal funds. The conditions can also result in the waiver of a state's Eleventh Amendment sovereign immunity. States would need to be clearly informed of the conditions attached to the federal funds; specifically, any waivers of sovereign immunity and the conditions upon which a state may rescind its consent.

#### Spending clause kills federalism

Baker ’01 – Lynn Baker is the Thomas Watt Gregory Professor at the University of Texas School of Law. The Annals of The American Academy of Political and Social Science, March, 2001, 574 Annals 104, ARTICLE: Conditional Federal Spending and States' Rights, Lexis, jj

 [\*105] AMIDST all the attention afforded the Supreme Court's recent federalism decisions, one important fact has gone largely unnoticed: the greatest threat to state autonomy is, and has long been, Congress's spending power. No matter how narrowly the Court might read Congress's powers under the commerce clause and Section 5 of the Fourteenth Amendment, and no matter how absolute a prohibition the Court might impose on Congress's "commandeering" of state and local officials, the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate. n1¶ THE CASE LAW¶ On several occasions beginning in 1923, the Court has explicitly stated that a conditional offer of federal funds to the states is constitutionally unproblematic because it "imposes no obligation but simply extends an option which the State is free to accept or reject." n2 Because a state has "the 'simple expedient' of not yielding to what she urges is federal coercion," n3 the Court has concluded that "the powers of the State are not invaded" n4 and there is no Tenth Amendment violation.¶ In its 1987 decision in South Dakota v. Dole, the Court made clear that conditional federal spending affords Congress a seemingly easy end run around any restrictions the Constitution might be held to impose on Congress's ability to regulate the states. The Dole Court reaffirmed both that "objectives not thought to be within Article I's 'enumerated legislative fields' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds" n5 and that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants." n6 The Court cautioned that "the spending power is of course not unlimited . . . but is instead subject to several general restrictions articulated in our cases." n7 Unfortunately, none of the stated restrictions was portrayed as having much bite.¶ The most promising constraints on conditional federal spending noted by the Dole Court were a "germaneness" requirement and a "coercion" threshold. With regard to "germaneness," the Court observed that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,'" but added that this restriction was merely "suggested (without significant elaboration)" by prior cases. n8 With regard to "coercion," the Court opined that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" n9 The Court concluded that a threatened loss to states of 5 percent of their otherwise [\*106] obtainable allotment of federal highway funds, for example, did not pass this critical point, but the Court did not suggest what percentage of these (or any other) funds might. n10¶ For those who lament the fact that any constitutional limits on Congress's regulatory powers can apparently be circumvented through combined use of the taxing and spending powers, Dole leaves three important issues unresolved. First, although the Dole Court suggested that the spending clause did not authorize Congress either to coerce the states unduly n11 or to impose conditions "unrelated 'to the federal interest in particular national projects or programs,'" n12 it provided neither a workable definition of these critical "coercion" and "germaneness" standards nor any actual or hypothetical example of their violation.¶ Second, the Dole Court attempted no answer to the central normative question raised by its suggestion that there are limits on Congress's power to offer the states conditional funds: why should Congress not be able to attach any conditions it chooses to the federal funds it offers the states? As the Court itself has repeatedly observed, a state is always free to decline an offer of federal funds that it finds unattractive. n13 Why, then, is additional, judicial protection needed to ensure the states' autonomy? Third, to the extent that Dole would relegate control over conditional federal spending to the federal political process, one might question the ability of the states to protect themselves from Congress within that process.¶ TOWARD A NORMATIVE THEORY OF CONDITIONAL FEDERAL SPENDING¶ There are at least three good reasons for the Court to abandon the Dole test in favor of one that would better safeguard state autonomy by, for example, presuming invalid those offers of federal funds to the states that, if accepted, would regulate them in ways that Congress could not directly mandate. First, the federal government has a monopoly power over the various sources of state revenue, which renders any offer of federal funds to the states presumptively coercive. Second, many conditional offers of federal funds will actually pose a choice only to a small subset of states, and this minority cannot effectively protect themselves against the majority of states through the political process. Third, federal regulatory spending is especially likely to reduce aggregate social welfare by reducing the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents.

#### Federal overreach kills effective response to terrorist attack

Nivola 10 (Pietro, The American Interest, “Rebalancing American Federalism”, March/April, http://www.the-american-interest.com/article-bd.cfm?piece=787)

Thinking along those lines warrants renewed emphasis today. America’s national government has had its hands full coping with a deep and lingering economic crisis and onerous security challenges around the world. It cannot, or at any rate ought not, keep piling on top of those daunting tasks a second-tier agenda that injudiciously dabbles in too many decisions and duties best consigned to local entities. Turning every imaginable issue into a Federal case, so to speak, diverts and polarizes political leaders at the national level, and erodes recognition of local responsibilities. A kind of attention deficit disorder besets anybody who attempts to do a little of everything rather than a few important things well. Although not a root cause of catastrophes like the submersion of a historic American city by a hurricane in 2005, the terrorist attacks of September 11, 2001, the great financial bust of 2008 or the successful resurgence of the Taliban in Central Asia, an overstretched and distracted government stands less chance of mitigating such tragedies.

***Quick response it key – large casualties ensures a US response that escalates to nuclear war.***

**Conley, ’03** (Lt Col Harry W. is chief of the Systems Analysis Branch, Directorate of Requirements, Headquarters Air Combat Command (ACC), Langley AFB, Virginia. Air & Space Power Journal - Spring 2003 -- http://www.airpower.maxwell.af.mil/airchronicles/apj/apj03/spr03/conley.html)

The number of American casualties suffered due to a WMD attack may well be **the most important variable i**n determining the nature of the US reprisal. A key question here is how many Americans would have to be killed to prompt a massive response by the United States. The bombing of marines in Lebanon, the Oklahoma City bombing, and the downing of Pan Am Flight 103 each resulted in a casualty count of roughly the same magnitude (150–300 deaths). Although these events caused anger and a desire for retaliation among the American public, they prompted no serious call for massive or nuclear retaliation. The body count from a single biological attack could easily be one or two orders of magnitude higher than the casualties caused by these events. Using the rule of proportionality as a guide, one could justifiably debate whether the United States should use massive force in responding to an event that resulted in only a few thousand deaths. However, what if the casualty count was around 300,000? Such an unthinkable result from a single CBW incident is not beyond the realm of possibility: “According to the U.S. Congress Office of Technology Assessment, 100 kg of anthrax spores delivered by an efficient aerosol generator on a large urban target would be between two and six times as lethal as a one megaton thermo-nuclear bomb.”46 Would the deaths of 300,000 Americans be enough to trigger a nuclear response? In this case, proportionality does not rule out the use of nuclear weapons. Besides simply the total number of casualties, the types of casualties- predominantly military versus civilian- will also affect the nature and scope of the US reprisal action. Military combat entails known risks, and the emotions resulting from a significant number of military casualties are not likely to be as forceful as they would be if the attack were against civilians. World War II provides perhaps the best examples for the kind of event or circumstance that would have to take place to trigger a nuclear response. A CBW event that produced a shock and death toll roughly equivalent to those arising from the attack on Pearl Harbor might be sufficient to prompt a nuclear retaliation. President Harry Truman’s decision to drop atomic bombs on Hiroshima and Nagasaki- based upon a calculation that up to one million casualties might be incurred in an invasion of the Japanese homeland47- is an example of the kind of thought process that would have to occur prior to a nuclear response to a CBW event. Victor Utgoff suggests that “if nuclear retaliation is seen at the time to offer the best prospects for suppressing further CB attacks and speeding the defeat of the aggressor, and if the original attacks had caused severe damage that had outraged American or allied publics, **nuclear retaliation would be more than just a possibility, whatever promises had been made.”**

#### Condo is bad and a voting issue--- causes 2ac time and strat skew and arg irresponsibility which decimates fairness and ground --- dispo solves

#### Plan would remove the ESA – solves biodiversity and results in a superior law

Jonathan H. Adler, Associate Professor of Law and Associate Director. Center for Business Law & Regulation, Case Western Reserve University School of Law, 90 Iowa L. Rev. 377, January 2005

The Endangered Species Act ("ESA") is the federal regulatory statute most at risk under the Court's Commerce Clause jurisprudence, but it would be a mistake to assume a threat to the Endangered Species Act necessarily poses a threat to the survival of endangered species. Enacted in 1973 to save species from the brink of extinction, the ESA has hardly been a success. In over thirty years, fewer than forty of over 1,000 species have been delisted as endangered or threatened. n553 In this time more species have been delisted because they went extinct or never should have been listed as endangered in the first place than have been legitimately "recovered" due to the Act. n554

Among the various factors that contribute to the ESA's ineffectiveness as a conservation tool are the very regulatory strictures most at risk to Commerce Clause challenge. Section 9 prohibits the "take" of endangered species, including significant modification of listed species' habitat. The presence of a listed species can freeze the use of private land, barring everything from timber cutting and ditch digging to plowing a field or building a home. In Riverside County, California, the ESA even prevented private landowners from disking to clear firebreaks on their own land lest they disturb the habitat of the Stephens' kangaroo rat. n555 Consequently, private landowners are penalized for owning endangered species habitat. n556

In this fashion, the ESA creates economic incentives for private landowners to engage in the deliberate destruction of actual or potential wildlife habitat and to forego or prevent future habitat creation on privately [\*460] owned land. n557 Professors Lueck and Michael report that forest owners respond to the likelihood of ESA regulation by harvesting timber and reducing the age at which timber is harvested. n558 Such preemptive habitat destruction could well "cause a long-run reduction in the habitat and population" of endangered species. n559 In some instances, it is likely that the economic incentives created by the Act result in the net loss of species habitat. That is, in some cases the ESA may be responsible for more habitat loss than habitat protection. n560

Professors Lueck and Michael are not alone in their findings. A study in Conservation Biology further reports that just as many landowners responded to the listing of Preble's meadow jumping mouse by destroying potential habitat as undertook new conservation efforts. n561 It also found a majority of landowners would not allow biologists on their land to assess mouse populations out of fear that land-use restrictions would follow the discovery of a mouse on their land. n562 The Fish and Wildlife Service also acknowledges that its own regulations can lead to habitat loss on private land. In the Pacific northwest, land-use restrictions imposed to protect the northern spotted owl made private landowners fear the lost use of their land and that "this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is useable by owls." n563

Insofar as ESA regulation discourages private land conservation, it is undermining species conservation efforts. The majority of endangered and threatened species depend on private land for some portion of their habitat, n564 so by discouraging private land conservation, the ESA could well have a devastating impact on species conservation efforts. While there is no conclusive evidence as to the net effect of the ESA on species conservation on private land, there is more than enough evidence to challenge the prevailing [\*461] assumption that limitations on ESA regulation of private land will result in net harm to endangered species. If courts hold that the Commerce Clause limits federal regulation of private land, it may even prompt the federal government to adopt alternative approaches to species conservation that do not produce the same unintended consequences and conserve species in a more effective and equitable manner.

***Biodiversity loss causes extinction***

Young**,** PhD coastal marine ecology, 10 [Ruth, “Biodiversity: what it is and why it’s important”, February 9th, <http://www.talkingnature.com/2010/02/biodiversity/biodiversity-what-and-why/>]

Different species within ecosystems fill particular roles, they all have a function, **they all have a niche**. They interact with each other and the physical environment to provide ecosystem services that are **vital for our survival**. For example plant species convert carbon dioxide (CO2) from the atmosphere and energy from the sun into useful things such as food, medicines and timber. Pollination carried out by insects such as bees enables the [production of ⅓ of our food crops](http://www.talkingnature.com/2010/01/biodiversity/bees-pollination/). Diverse mangrove and coral reef ecosystems provide a wide variety of habitats that are essential for many fishery species. To make it simpler for economists to comprehend the magnitude of services offered by biodiversity, a team of researchers estimated their value – it amounted to $US33 trillion per year. “By protecting biodiversity we maintain ecosystem services” Certain species play a “keystone” role in maintaining ecosystem services. Similar to the removal of a keystone from an arch, the removal of these species can result in the collapse of an ecosystem and the subsequent removal of ecosystem services. The most well known example of this occurred during the 19th century when sea otters were almost hunted to extinction by fur traders along the west coast of the USA. This led to a population explosion in the sea otters’ main source of prey, sea urchins. Because the urchins graze on kelp their booming population decimated the underwater kelp forests. This loss of habitat led to declines in local fish populations. Sea otters are a keystone species once hunted for their fur (Image: Mike Baird) Eventually a treaty protecting sea otters allowed the numbers of otters to increase which inturn controlled the urchin population, leading to the recovery of the kelp forests and fish stocks. In other cases, ecosystem services are maintained by entire functional groups, such as apex predators (See [Jeremy Hance’s post at Mongabay)](http://news.mongabay.com/2010/0202-hance_toppredators.html). During the last 35 years, over fishing of large shark species along the US Atlantic coast has led to a population explosion of skates and rays. These skates and rays eat bay scallops and their out of control population has led to the closure of a century long scallop fishery. These are just two examples demonstrating how biodiversity can maintain the services that ecosystems provide for us, such as fisheries. One could argue that to maintain ecosystem services we don’t need to protect biodiversity but rather, we only need to protect the species and functional groups that fill the**keystone roles**. However, there are a couple of problems with this *idea*. First of all, for most ecosystems **we don’t know which species are the keystones!** Ecosystems are so complex that we are still discovering which species play vital roles in maintaining them. In some cases its groups of species not just one species that are vital for the ecosystem. Second, even if we did complete the enormous task of identifying and protecting all keystone species, **what back-up plan would we have** if an unforseen event (e.g. pollution or disease) led to the demise of these ‘keystone’ species? **Would there be another species to save the day** and take over this role? Classifying some species as ‘keystone’ implies that the others are not important. This may lead to the non-keystone species being considered ecologically worthless and subsequently over-exploited. Sometimes we may not even know which species are likely to fill the keystone roles. An example of this was discovered on Australia’s Great Barrier Reef. This research examined what would happen to a coral reef if it were over-fished. The “over-fishing” was simulated by fencing off coral bommies thereby excluding and removing fish from them for three years. By the end of the experiment, the reefs had changed from a coral to an algae dominated ecosystem – the coral became overgrown with algae. When the time came to remove the fences the researchers expected herbivorous species of fish like the parrot fish (Scarus spp.) to eat the algae and enable the reef to switch back to a coral dominated ecosystem. But, surprisingly, the shift back to coral was driven by a supposed ‘unimportant’ species – the bat fish (Platax pinnatus). The bat fish was previously thought to feed on invertebrates – small crabs and shrimp, but when offered a big patch of algae it turned into a hungry herbivore – a cow of the sea – grazing the algae in no time. So a fish previously thought to be ‘unimportant’ is actually a keystone species in the recovery of coral reefs overgrown by algae! Who knows how many other species are out there with unknown ecosystem roles!In some cases it’s easy to see who the keystone species are but in many ecosystems seemingly unimportant or redundant species are also capable of changing niches and maintaining ecosystems. The **more biodiverse** an ecosystem is, the more likely these species will be present and the **more resilient** an ecosystem is to future impacts. Presently we’re only scratching the surface of understanding the full importance of biodiversity and how it helps maintain ecosystem function. The scope of this task is immense. In the meantime, a wise insurance policy for maintaining ecosystem services would be to conserve biodiversity. In doing so, we increase the chance of maintaining our ecosystem services in the event of future impacts such as disease, invasive species and of course, climate change. This is the international year of biodiversity – a time to recognize that biodiversity makes **our survival on this planet** possible and that our protection of biodiversity maintains this service.

# 2ac Add ons

### 2

***Plan’s prevents EPA overstretch***

**Adler 3-16-13** – Jonathan H. Adler, Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law; Senior Fellow, Property & Environment Research Center. Case Research Paper Series in Legal Studies, Working Paper 2013-9, March 16, 2013, CONSERVATIVE PRINCIPLES FOR ENVIRONMENTAL REFORM, online, jj

Decentralize Decision-making¶ Though some environmental problems, such as climate change, are¶ truly global in scope, **most environmental problems are local or regional in**¶ **nature**. Few, if any, environmental concerns could truly be described as¶ “national,” save perhaps for the preservation of national treasures. **Yet the**¶ **lion’s share of environmental policy is directed**—albeit not implemented—¶ **in Washington, D.C.** Truly **local matters, such as the proper level of**¶ **localized air pollutants or the extent to which a given water system should**¶ **control for given contaminants in drinking water supplies are questions of**¶ **federal law**. At the same time, the federal government has largely¶ abandoned many environmental responsibilities that clearly belong on the¶ federal government’s plate.104¶ **There are many reasons environmental protection efforts would**¶ **benefit from greater decentralization**. First, as already noted, **most**¶ **environmental problems are local or regional in nature, and do not involve**¶ **the sort of interjurisdictional spillovers that would justify federal**¶ **intervention. Environmental policy questions also tend to involve difficult**¶ **trade-offs between competing economic, ethical, and aesthetic values**—¶ **values that may vary from place-to-place**. **There is no reason to expect**¶ **every corner of the country to share precisely the same environmental**¶ **priorities. At the same time, environmental conditions are incredibly**¶ **variable across the country. Even where regions suffer from the same**¶ **environmental concern, such as tropospheric ozone pollution** (aka “smog”),¶ **the particular causes and contributions will vary, necessitating variable**¶ **policy responses**. **Yet the information necessary to address such concerns**¶ **is most readily available at the local level**. ***One-size-fits-all policy***¶ ***approaches too easily become one-size-fits nobody***.105¶ **Decentralizing environmental decision-making also creates the**¶ **opportunity for greater innovation in environmental policy**. **State efforts at**¶ **environmental protection long predate federal environmental regulations**¶ **and many federal programs were spurred by or modeled after preexisting**¶ **state programs**. **The best way to address a given environmental concern**¶ **may be difficult, which is even more reason to allow different jurisdictions**¶ **to experiment with different approaches**. Such interjurisdictional¶ **competition does not produce a “race to the bottom**” or prevent states from¶ adopting environmental measures.106 To the contrary, **empirical research**¶ **has shown that states seek to address those environmental concerns**¶ **important to their citizens when they can and are quick to learn about and**¶ **replicate the successful policy experiments of their neighbors**.107¶ **Decentralizing much environmental policymaking would also have the**¶ **added benefit of making it easier for the federal government to focus its**¶ **efforts on those environmental concerns where a federal role is easiest to**¶ **justify, such as in supporting scientific research and addressing interstate**¶ **spillovers**.108 Thanks to the Supreme Court, **the EPA will have its hands**¶ **full dealing with greenhouse gas emissions** in a futile effort **to forestall** the¶ effects of **global climate change**. **Allowing state and local governments to**¶ **exercise more control over more localized concerns would make it easier**¶ **for the EPA to focus on this task**.

***EPA overstretch prevents effective nanotech regs***

George **Reynolds**, 5-27-**07**, Food Production Daily, Nanotechnology needs more regulation and funding, <http://www.foodproductiondaily.com/Packaging/Nanotechnology-needs-more-regulation-and-funding>, jj

**Regulations to oversee nanotechnology are needed** to protect human health and the environment, according to a new report.¶ The report, by the Woodrow Wilson International Center for Scholars, adds to growing public concern over the potential risks posed by nanotechnology, which could to lead to laws regulating the industry being implemented.¶ Uncertain impacts to health, the environment, and society may arise with the growth of nanotechnology, the report says.¶ **If we want to ensure that the benefits of nanotechnology far exceed any risks, we need an oversight system that assures safety** while providing transparency for both businesses and the public,” it stated.¶ Nanotechnology is the manipulation of materials at near atomic scales to create new processes, materials and devices. Food, packaging and a host of other products can benefit from the technology, which can be used to increase shelf life, strengthen products and improve nutritional content.¶ The report claims that nanotechnology could be a catalyst for changes to the Environmental Protection Agency (**EPA**), which **currently oversees the technology**.¶ **The major areas that require strengthening are science, program integration, personnel, international activities, and program evaluation,**” the report claims. “**Inadequate resources, both money and trained people, is a problem for EPA** as it is for all federal regulatory agencies.”

***Extinction***

**Treder and Phoenix 07** (Mike, consultant to the Millennium Project of the American Council for the United Nations University and to the Future Technologies Advisory Group, Chris, CRN’s directory of research,Center for Responsible Nanotechnology, Results of Our Ongoing Research, April 16, http://www.crnano.org/dangers.htm#arms)

**Nanotech weapons could be extremely powerful and could lead to a dangerously unstable arms race. Molecular manufacturing raises the possibility of horrifically effective weapons**. As an example, the smallest insect is about 200 microns; this creates a plausible size estimate for a nanotech-built antipersonnel weapon capable of seeking and injecting toxin into unprotected humans. The human lethal dose of botulism toxin is about 100 nanograms, or about 1/100 the volume of the weapon. **As many as 50 billion toxin-carrying devices – theoretically *enough to kill every human on earth* – could be packed into a suitcase**. **Guns of all sized would be far more powerful, and their bullets could be self-guided.** Aerospace hardware would be far lighter and higher performance; built with minimal or no metal, **it would be much harder to spot on radar**. **Embedded computers would allow remote activation of any weapon, and more compact power handling would allow greatly improved robotics.** These ideals barely scratch the surface of what’s possible. An important question is whether nanotech weapons would be stabilizing or destabilizing. Nuclear weapons, for example, perhaps can be credited with preventing major wars since their invention. However, nanotech weapons are not very similar to nuclear weapons. Nuclear stability stems from at least four factors. The most obvious is the massive destructiveness of all-out nuclear war. All-out nanotech war is probably equivalent in the short term, but nuclear weapons also have a high long-term cost of use (fallout, contamination) that would be much lower than nanotech weapons. Nuclear weapons cause indiscriminate destruction; nanotech weapons could be targeted. Nuclear weapons require massive research effort and industrial development, which can be tracked far more easily than nanotech weapons development; **nanotech weapons can be developed much more rapidly due to faster, cheaper prototyping.** Finally, nuclear weapons cannot easily be delivered in advance of being used; the opposite is true of nanotech. **Greater uncertainty of the capabilities of the adversary, less response time to an attack, and better targeted destruction of an enemy’s visible resources during an attack all make nanotech arms race less stable.** Also, ***unless nanotech is highly controlled***, **the number of nanotech nations in the world could be much higher than the number of nuclear nations, increasing the chance of a regional conflict blowing up.**

### 1

#### US Supreme Court decisions are modeled by Pakistan

**Khan 11** (Amjad Mahmood, Senior Litigation Associate – Latham & Watkins LLP, Postgraduate Research Fellow – Harvard Law School, JD – Harvard Law School, “Misuse and Abuse of Legal Argument by Analogy in Transjudicial Communication: the Case of Zaheeruddin v. State,” Richmond Journal of Global Law & Business, 10(4), http://muslimwriters.org/wp-content/uploads/2012/06/khan\_10-4-2.pdf)

This article explores the risks and limits of transjudicial communication. In particular, I critique the scholarly contention that transjudicial communication can be built upon commonly accepted methods of legal reasoning. I argue that transnational courts do not uniformly understand or apply commonly accepted methods of legal reasoning, especially legal argument by analogy. As a result, **transnational courts** that **utilize transjudicial communication** can and do render specious, even destructive, judicial opinions. I analyze the case of Zaheeruddin v. State—**a** controversial decision **by the Supreme Court of Pakistan** that **upheld** the constitutionality of Pakistan’s antiblasphemy **ordinances**. **The Supreme Court of Pakistan** poorly ***analogized to numerous U.S. Supreme Court authorities* to bolster and legitimize its** deeply flawed **decision**. INTRODUCTION In his 2009 majority opinion in Graham v. Florida, U.S. Supreme Court Justice Anthony Kennedy cited to foreign law as persuasive authority to hold that life-without-parole sentences for juveniles convicted of non-homicide crimes were unconstitutional. 2 In his 2003 majority opinion in Lawrence v. Texas, Justice Kennedy cited a decision by the European Court of Human Rights as persuasive authority to hold that a Texas statute criminalizing acts of sodomy was unconstitutional. 3 **The recent and rising trend of U.S. courts to rely on foreign law** for constitutional adjudication, particularly for contentious issues, **illustrates more generally the *globalization of modern constitutionalism***. Indeed, as legal problems become more common across more common law systems in the world, **courts *increasingly rely on the legal opinions of outside jurisdictions* as a powerful source of persuasive authority**. Professor Anne-Marie Slaughter describes such cross-court citation and deliberation on common legal problems as “transjudicial communication.” 4 Her typology suggests the relative merits of this communication and even describes its increasing trend as an emergence of a new and promising “global community of courts.” 5 Transjudicial communication, argues Slaughter, fosters cross-fertilization of legal ideas and becomes a “pillar of a compelling vision of global legal relations” where “national differences would be recognized, but would not obscure common legal problems nor block the adoption of foreign solutions.” 6 For Slaughter, **what helps develop this cross-fertilization of legal ideas is a common judicial identity and legal methodology**, **including** among other tools, **common methods of legal reasoning across legal systems**. 7 This article explores some of the risks and limits of transjudicial communication. I call into question Slaughter’s contention that common methods of legal reasoning necessarily advance cross-fertilization of ideas between courts of competing systems. I argue that transnational courts do not uniformly understand methods of legal reasoning. To this end, I focus my critique on one particular method of legal reasoning that Slaughter would deem to be “common” to transjudicial communication: legal argument by analogy. Proper legal argument by analogy is a less common, or a less consistently applied, judicial methodological tool to work with. To encourage transjudicial communication through legal argument by analogy is problematic not only because the mode of analogy itself is more rigorous than it appears, but also because legal argument by analogy carries special risks in the transjudicial setting. Part I details Slaughter’s typology of transjudicial communication. Part II introduces the basic principles and methodology underlying legal argument by analogy. Here, I contrast the views of two prominent scholars of jurisprudence—Professor Cass Sunstein and Professor Scott Brewer—concerning the rational force of legal argument by analogy. I also outline the basic problems associated with legal argument by analogy and highlight what Sunstein refers to as the “distinctive illogic of bad analogical reasoning.” 8 Finally, Part III illustrates the troubling consequences of poor analogical reasoning in the transjudicial context by way of an analysis of Zaheeruddin v. State 9 —**a controversial and extant** 1993 **decision by the Supreme Court of Pakistan that *relies principally on U.S. constitutional and trademark law as persuasive authority***. PART I: SLAUGHTER’S TYPOLOGY OF TRANSJUDICIAL COMMUNICATION A. Horizontal and Vertical Communications **Slaughter’s typology of transjudicial communication succinctly summarizes the characteristics and relative merits of certain courts *citing and deferring to courts outside their national jurisdiction***. She outlines two major types of transjudicial communication: horizontal and vertical. **She defines horizontal communication as communication between courts of the same authority and stature across national** and regional borders (e.g., the U.S. Supreme Court referencing decisions of the Supreme Court of Zimbabwe, or vice versa). 10 Horizontal communication consists of a court’s tacit emulation of a court of another jurisdiction by way of cross-citation of decisions. 11 Horizontal communication usually operates as a “monologue” where neither the originating nor the sharing court has any direct and formal links, nor do they directly converse with one another. 12 **The originating court is wholly unaware that its views have a foreign audience; *the listening court manufactures the foreign audience***. Slaughter defines vertical communication as communication between courts of different statures across national and regional borders (e.g., the U.S. Supreme Court referencing decisions by the Inter- American Court, or vice versa). 13 Like horizontal communication, vertical communication consists of cross-citation between courts, but usually involves more formal deference on the part of a court of narrow jurisdiction towards a court of wider jurisdiction. Vertical communication can operate as a “dialogue” where both the originating and sharing courts recognize and acknowledge each other’s cross-citations. 14

***Pakistan decentralization key to stability --- prevents terror and Indo Pak war***

**Sokolski 9** (Henry, Executive Director of the Nonproliferation Policy Education Center, “PAKISTAN’S NUCLEAR FUTURE: REINING IN THE RISK,” Strategic Studies Institute, December, http://www.strategicstudiesinstitute.army.mil/pdffiles/pub963.pdf)

With any attempt to assess security threats, there is a natural tendency to focus first on the worst. **Consider** the most recent appraisals of **Pakistan’s nuclear program**. Normally, **the risk of war between Pakistan and India and** possible **nuclear escalation** would be bad enough. Now, however, most American security experts are riveted on the frightening possibility of **Pakistani nuclear weapons capabilities falling into the hands of terrorists intent on attacking the United States**. 1 Presented with the horrific implications of such an attack, the American public and media increasingly have come to view nearly all Pakistani security issues through this lens. Public airing of these fears, in turn, appear now to be influencing terrorist operations in Pakistan. 2 Unfortunately, **a nuclear terrorist act is only one**— and hardly the most probable—**of several frightening security threats Pakistan now faces or poses**. We know that **traditional acts of terrorism and conventional military crises** in South West Asia **have nearly escalated into wars and**, more recently, ***even threatened Indian and Pakistani nuclear use***. Certainly, **the war jitters that attended the recent terrorist attacks** against Mumbai **highlighted the nexus between conventional terrorism and war**. For several weeks, the key worry in Washington was that **India and Pakistan might not be able to avoid war**. 3 Similar 2 concerns were raised during the Kargil crisis in 1999 and the Indo-Pakistani conventional military tensions that arose in 2001 and 2002—crises that most analysts (including those who contributed to this volume) believe could have escalated into nuclear conflicts. This book is meant to take as long a look at these threats as possible. Its companion volume, Worries Beyond War, published last year, focused on the challenges of Pakistani nuclear terrorism. 4 These analyses offer a window into what is possible and why Pakistani nuclear terrorism is best seen as a lesserincluded threat to war, and terrorism more generally. Could the United States do more with Pakistan to secure Pakistan’s nuclear weapons holdings against possible seizure? It is unclear. News reports indicate that the United States has already spent $100 million toward this end. What this money has bought, however, has only been intimated. We know that permissive action link (PAL) technology that could severely complicate unauthorized use of existing Pakistani weapons (and would require Pakistan to reveal critical weapons design specifics to the United States that might conceivably allow the United States to remotely “kill” Pakistani weapons) was not shared. Security surveillance cameras and related training, on the other hand, probably were. 5 Meanwhile, the Pakistani military—anxious to ward off possible preemptive attacks against its nuclear weapons assets—remains deeply suspicious of the United States or any other foreign power trying to learn more about the number, location, and physical security of Pakistan’s nuclear weapons holdings. 6 Conducting secret, bilateral workshops to discuss nuclear force vulnerabilities and how best to manage different terrorist and insider threat scenarios has 3 been proposed. It seems unlikely, however, that the Pakistanis would be willing to share much. 7 Destroying or retrieving Pakistani nuclear assets is another option that might prevent terrorists seizing them in a crisis. But the United States would have extreme difficulty succeeding at either mission even assuming the Pakistani government invited U.S. troops into their territory. 8 What else might help? If policymakers view the lack of specific intelligence on Pakistani nuclear terrorist plots against the United States as cold comfort and believe that such strikes are imminent—then, the answer is not much. 9 If, on the other hand, they believe conventional acts of terrorism and war are far more likely than acts of nuclear terrorism, then there is almost too much to do. In the later case, nuclear terrorism would not be a primary, stand alone peril, but, a lesser included threat—i.e., a danger that the Pakistani state could be expected to avert assuming it could mitigate the more probable threats of conventional terrorism and war. What sort of Pakistan would that be? A country that was significantly more prosperous, educated, and far more secure against internal political strife and from external security threats than it currently is. How might one bring about such a state? The short answer is by doing more to prevent the worst. Nuclear use may not be the likeliest bad thing that might occur in Pakistan, but it is by far the nastiest. Certainly in the near- to mid-term, it is at least as likely as any act of nuclear terrorism. More important, it is more amenable to remediation. This last point is the focus of this volume’s first two chapters. Neil Joeck, now the U.S. National Intelligence Officer for South West Asia, and Feroz 4 Hassan Khan, **Pakistan’s former director of Arms Control and Disarmament Affairs, examine just how easily conventional wars between India and Pakistan might be *ignited and go nuclear***. The first observation both analysts make is that keeping the peace between India and Pakistan is now a serious issue for U.S. security officials. With 55,000 American troops in Afghanistan, Washington can ill afford increased military tensions and nuclear rivalries between Islamabad and New Delhi that deflect or reduce Pakistan’s own anti-terror operations along Afghanistan’s southern border. More worrisome is their second shared assessment: **India and Pakistan have developed military doctrines that increase the prospects of nuclear use**. Although India has pledged not to use nuclear weapons first, it has increased its readiness to launch shallow “Cold Start” conventional military strikes against Pakistan calibrated to deter Pakistani military or terrorist incursions. Meanwhile, **Pakistani military planners insist that Pakistan will use nuclear weapons immediately if India attacks Pakistan’s nuclear forces, conventional forces, and territory**, or if it strangles Pakistan’s economy. Unfortunately, each of these countries’ plans to deter war are too prone to fail. Precisely how does India intend to attack Pakistani territory either in a shallow or temporary fashion without tripping Pakistan’s nuclear trip wires? U.S. interventions, following terrorist acts that the Indian public has accused Pakistan’s intelligence service of having backed, kept India from attacking Pakistan, but will such U.S. interventions work in the future? Indian military planners claim that they want to be able to punish Pakistan for any future perceived provocations well before any U.S. intervention has a chance to succeed. 5 Given India’s interest in escalating its schedule of conventional military retribution, will Pakistan decide to intensify its own nuclear deployment efforts to persuade New Delhi that it is serious about its nuclear first use doctrine? How can Islamabad adjust its forward deployed nuclear forces to be credibly on the ready without also increasing the odds of unauthorized use or military miscalculation? Then, there is the larger problem of nuclear rivalry. India claims the size and quality of its nuclear forces are driven by what China has; Pakistan, in turn, claims that the size and quality of its nuclear forces are driven by what India has. As one enlarges its forces, so must the other. In an attempt to disrupt an action-reaction nuclear arms race while still ambling ahead, New Delhi recently persuaded the United States and other leading nuclear supplier states to allow India to expand its civilian nuclear and space launch sectors with imported foreign technologies and nuclear fuel. India’s hope here is not to ramp up its domestic rocket and reactor production directly so much as to upgrade these programs and free up and supplement its own domestic missile technology and nuclear fuel production efforts with peaceful foreign assistance. 10 Although subtle, this approach has failed to calm tensions with Pakistan. Instead, Islamabad has used U.S. and foreign nuclear and space cooperation with India as an argument for enlarging its own nuclear arsenal. Thus, in 2007, Pakistan’s National Command Authority warned that if the U.S.-India nuclear deal altered the nuclear balance, the command would have to reevaluate Pakistan’s commitment to minimum deterrence and review its nuclear force requirements. Reports then leaked out that Islamabad had begun construction of a new plutonium production reactor 6 and a new reprocessing plant. Shortly thereafter, Pakistan announced plans to expand its own civilian nuclear power sector roughly 20-fold by the year 2030 to 8.8 gigawatts generating capacity. The idea here is to expand Pakistan’s ability to make nuclear electricity that would also afford it a larger nuclear weaponsmaking mobilization base it could use if India ramps up its own nuclear weapons-making efforts. 11 This brings us to this volume’s third chapter by Peter Tynan and John Stephenson of Dalberg Global Development Advisors. Just how economically sensible is expanding Pakistan’s civilian nuclear sector over the next 2 decades? The short answer is not very. As Tynan and Stephenson explain in their analysis, “Even under Pakistan’s most ambitious growth plans, nuclear energy will continue to contribute a marginal amount [3 to 6 percent] of electricity to meet the country’s economic goals.” 12 More important, building the number of large reactors that this level of expansion would require would be extremely difficult to achieve. Expansion of alternative energy sources, decentralized micro hydro, increased energy efficiency, coal, and natural gas, they conclude, would be far less risky. In fact, they conclude that Pakistan could save considerable money over the next 2 decades and achieve its energy goals sooner by not building more nuclear power plants. The political salience of this point is magnified when paired with earlier analyses that Tynan and Stephenson did of India’s planned nuclear power expansion. In India’s case, Dalberg’s conclusions were much the same: India could not meet its energy goals even under its most ambitious nuclear expansion plans, and there were a number of cheaper, quicker alternatives that make near- and mid-term investment in nuclear expansion a bad buy. 13 **Bottom line**: **In both the Pakistani and Indian cases**, **expanding nuclear power only makes sense if one is willing to lose money or is eager to make many more bombs**. **Judging from the state of its current finances, Pakistan can ill afford to do either**. This much is clear from the economic analyses of Shavid Javed Burki and S. Akbar Zaidi presented in Chapters Four and Five. Pakistan, Burki writes, faces a “grim economic situation”: “**There is likely to be a sharp reduction in the rate of economic growth**, **an unprecedented increase in rate of inflation, a significant increase in the incidence of poverty, a widening in the already large regional income gap, and increases to unsustainable levels of the fiscal and balance of payments gaps**.” 14 **Moving the nation away from foreign charity funding toward an economic growth agenda will not be easy**. Certainly, all unnecessary public spending, excessive military support, and consumer subsidies (e.g., for energy) must be cut. Pakistan, moreover, must assume a significant portion of the backend financing of its own planned growth. Investments in education and the agricultural sector must be increased substantially. Taxes will have to be increased without increasing the poverty rate or the already significant economic disparities between Pakistan’s key regions. **None of this can come without political pains**. **To be specific, they will require political reforms that cannot *simply be made top down* from Islamabad, but will require a decentralization of powers to the localities**. The good news is that **some of this change may be pushed by modernizing trends**, which both Burki and Zaidi note, are already under way. These include the urbanization of Pakistan, the dramatic growth in electronic communications (e.g., cell phone use has increased 10-fold to roughly 50 percent of the population in the last 5 years, the number of private TV 8 stations from one to more than 30), and the emerging domination of higher education by women (perhaps by a factor now as high as four-to-one) and their entry into Pakistan’s work force. In addition to these generally positive trends, there is increased investment in Pakistan and remittances from the oil-rich Persian Gulf, increasing trade with India (now Pakistan’s seventh largest source of imports), and the prospect of a demographic dividend, which Craig Cohen details in Chapter Six. This demographic dividend, which will afford Pakistan a large labor supply relative to its young and old, Craig predicts, will continue to grow through the year 2050. This, he argues, has the potential to power significant economic growth “because the dependency burden is low,” increasing savings and “allowing development of human capital.” 15 All of **this should help stabilize Pakistan’s economy and society**. **None of these trends**, however, **can possibly help if the government cannot reduce inflation** (pegged at 28 percent in the first quarter of 2009), educate and feed its population, power its businesses and homes, and attend to its growing (and potentially violent) adolescent population. **Achieving these objectives**, in turn, **requires political stability**, domestic security, and increased domestic and foreign trade and investment. It is unclear if this requisite stability will finally be achieved. **What is clear**, though, **is that any successful attempt will only be possible if Pakistan and its friends focus less** in the near term **on** direct forms of **democratization** **and more on ethnic reconciliation and *regional accommodation.*** Maya Chadda details how one might go about this in Chapter Seven. She makes a key recommendation that those assisting Pakistan— principally the United States—distinguish between 9 violence that is driven by ethnic differences and that which is driven by Islamist terrorist organizations. Professor Chada argues that **the United States should do more to help Pakistan** integrate its ethnic groups while letting Pakistan and its military take the lead in fighting Islamic fundamentalism. What this requires, in turn, is an understanding of the key ethnic groups—the Punjabis, Sindhis, Pashtuns, Balochis, and others—and establishing metrics for safeguarding these groups’ rights. **Reforming *Pakistan’s federal model* toward this end will not entail the promotion of direct**, liberal democracy, **but it will create the *key building blocks necessary* to create such a system**. **More important, it will give the key religious and ethnic groups the power and the interest needed to** shape Pakistan’s economic and social order ***and to keep them vested in Pakistan’s future***. What, then, should the United States do? With regard to Pakistan reformulating its federal model, the United States might help to focus and condition economic assistance and freer access to U.S. markets and encourage Islamabad to foster greater equality among Pakistan’s key regions and ethnic and religious groups. One suggestion that this book’s authors discussed was giving each of Pakistan’s provinces greater power to promote trade directly with India and focusing foreign investment to expand such commerce. **The aim here is to moderate Indian-Pakistani relations by bolstering Pakistan’s growing middle class**. Pakistan, however, must take the first steps**: If Islamabad does not want to reformulate its federal model** to accommodate its various regions and ethnic and religious groups, **Washington is in no position to help.**

### 3

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

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

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

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

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

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

#### Loss of judicial legitimacy crushes U.S. Soft power

Harold Koh, 03

Professor or Law at Yale. 10-3-03.<http://globetrotter.berkeley.edu/people3/Koh/koh-con4.html> Yes.

Yes. Again, **this is an idea of a legal exoskeleton** that is **not just a restraint**, but it's also a source of power. **If you stay within the legal exoskeleton, you're exercising legal power**; **when you step outside, you're sacrificing your legitimacy.** The big challenge of this administration: can they fight outlaws while staying within the law? T**here has been too much of a tendency to say "fight fire with fire, legal niceties don't count"; and then find that we are viewed as as big of an outlaw as some of the countries that we're criticizing.** **That weakens our cooperative power, our soft power**. Joe Nye,\* the political scientist, distinguishes America's hard power -- military and economic power -- from its soft, cooperative, persuasive power. **I see the rule of law and our reputation for promoting the rule of law, human rights, as core to our soft power**. We have been squandering that reputation and relying on our hard power. It turns out that hard power is good for defeating Iraq. It turns out it's not good for rebuilding Iraq; for that **we need soft power, and we are sacrificing that soft power. We're squandering it at a time when we need it the most.**

#### Soft power is key to survival--pandemics, economic collapse, nuclear war, and nuclear terrorism.

**Nye and Armitage, ’07** [Jospeh S. Nye, Sultan of Oman Sultan of Oman Professor of International Relations and former Dean of the Kennedy School of Government at Harvard, and Richard, deputy secretary of state from 2001 to 2005, both are co-chairs of the CSIS Commission on Smart Power, 2007, “CSIS Reports – A Smarter, More Secure America”, http://www.csis.org/component/option,com\_csis\_pubs/task,view/id,4156/type,1/, 11/6]

The information age has heightened political consciousness, but also made political groupings less cohesive. Small, adaptable, transnational networks have access to tools of destruction that are increasingly cheap, easy to conceal, and more readily available. Although the integration of the global economy has brought tremendous benefits, threats such as pandemic disease and the collapse of financial markets are more distributed and more likely to arise without warning. The threat of widespread physical harm to the planet posed by nuclear catastrophe has existed for half a century, though the realization of the threat will become more likely as the number of nuclear weapons states increases. The potential security challenges posed by climate change raise the possibility of an entirely new set of threats for the United States to consider. The next administration will need a strategy that speaks to each of these challenges. Whatever specific approach it decides to take, two principles will be certain: First, an extra dollar spent on hard power will not necessarily bring an extra dollar’s worth of security. It is difficult to know how to invest wisely when there is not a budget based on a strategy that specifies trade-offs among instruments. Moreover, hard power capabilities are a necessary but insufficient guarantee of security in today’s context. Second, success and failure will turn on the ability to win new allies and strengthen old ones both in government and civil society. The key is not how many enemies the United States kills, but how many allies it grows. States and non-state actors who improve their ability to draw in allies will gain competitive advantages in today’s environment. Those who alienate potential friends will stand at greater risk. China has invested in its soft power to ensure access to resources and to ensure against efforts to undermine its military modernization. Terrorists depend on their ability to attract support from the crowd at least as much as their ability to destroy the enemy’s will to fight.

# 1ar

### 1AR [1:00]

#### 1) We meet – the EPA rules are defined as restrictions - that’s Washington Times – It’s the only evidence contextual to the aff

#### And The Journal of Environmental Law agrees

Orford 12 – Adam D. Orford, J.D. from Columbia University School of Law, editor in chief of the Columbia Journal of Environmental Law, May 29th, 2012, "EPA To Regulate Air Emissions from Hydraulic Fracturing As Industry Comes Under Scrutiny" [www.martenlaw.com/newsletter/20120529-air-emissions-from-hydraulic-fracturing](http://www.martenlaw.com/newsletter/20120529-air-emissions-from-hydraulic-fracturing)

**EPA’s new rules** phase out 40 C.F.R Part 60, subparts KKK and LLL (dealing with equipment leaks and SO2 emissions at natural gas production facilities), incorporating and expanding on the prior restrictions in new subpart OOOO (NSPS for natural gas production, transmission, and distribution). The rules also revise 40 C.F.R. Part 63, Subparts HH and HHH (NESHAPs for natural gas production, transmission, and storage facilities). The new regulations will consume many pages of the Federal Register,[17] are highly technical, and should be consulted directly regarding specific requirements. The remainder of this article describes the new green completion rule, and summarizes the more significant new fugitive emissions controls.

#### So does The Institute for Energy Research

Murphy 11 Robert Murphy, 2-9-11, Institute for Energy Research, EPA Will Destroy Jobs, Not Create Them, <http://www.instituteforenergyresearch.org/2011/02/09/epa-will-destroy-jobs-not-create-them/>, jj

If proponents of the EPA’s new regulations want to admit that they will hurt the conventional economy, but will yield benefits in the form of reduced air pollution or global warming, then that is at least a coherent argument. To see if the plan made sense, we would then face the empirical question of seeing whether the alleged environmental benefits came at too high a cost in terms of lost jobs and lower economic output. But that’s not what the folks at PERI are claiming. Instead, they are mixing up their costs with their benefits. They are saying that it is a good thing that it will take more workers to produce electricity, and hence drive up electricity prices. In reality, the way to help the economy is to adopt policies that stimulate productive investment and job creation. A great starting point would be to lift arbitrary restrictions on domestic energy production.

#### 2) Their interpretation crushes aff ground - There are zero restriction coal affs and they overlimit natural gas and oil to leasing. Be lenient to restriction affs – they are key to beat the states CP.

#### No OCS or leasing restriction affs under their interp

Kathleen Gramp and Jeff LaFave, CBO Budget Analysis Division, August 2012, http://www.cbo.gov/sites/default/files/cbofiles/attachments/08-09-12\_Oil-and-Gas\_Leasing.pdf

Other than the temporary ban on leasing in the eastern Gulf of Mexico, there currently are no statutory restrictions on OCS leasing. Decisions about leasing are made administratively—in consultation with industry and the states—for five-year periods. Leases cannot be offered for areas that are not included in a five-year plan, but the available regions may change whenever a new plan is adopted. The next plan is expected to go into effect in August 2012 and will extend for five years unless a future Administration chooses to restart the process before that plan expires.

#### 3) And there is no ground loss - Fracking affs are inevitable – they will just be leasing based and there are no disads to leasing they can’t read against regulations. But licensing doesn’t solve our offense – Regulation affs key to coal and diversity in the oil and gas literature – plus there is still a big context disad. They still get all market based disads and there’s no impact to being slightly more precisely

Leasing only topic is worse for neg ground --- causes squirrely affs that open up one patch of land in Vermont for drilling which links to nothing

#### 4) Group the counter-interpretation - extend Plummer and LVM – Restrictions are conditions that make production more expensive or difficult – solves the intent to define - Framing issue - The regulation MUST be tied to production – solves unlimiting. Restrictions ON production check

#### Prefer our interpretation - We are the key middle ground – reasonable limit and Negs get production and pricing disads – Affs can answer States CP.

#### Vote on context – Extend Davies – Restrictions are regulations in energy debates - Context outweighs – Key to a predictable research base and topic education – turns the internal link and terminal impact to limits.

#### Regulations can be restrictions

Martin Borowski, Faculty at Birmingham Law School, Vice-President of the British Section of the International Association for Philosophy of Law and Social Philosophy, 2003 “Religious Freedom as a Fundamental Human Right, a Rawlsian Perspective” in Pluralism and Law, Conference Proceedings” p. 58

Despite the problems that arise in distinguishing restrictions and regulations, noted above, one might introduce different criteria to justify both types of diminutions. One can distinguish formal and material criteria of justification. Rawls does not mention any formal criterion. Materially, a regulation has to respect the central range of applications of a basic liberty. But this applies to restrictions, too, and cannot give rise to any difference. Every diminution of a basic right or freedom, whether or not it is based on the content or the modality of a citizen’s action, is a restriction and, as such, has to be justified. The distinction between restrictions and regulations is expendable.

#### Context is key, not formal definitions or intent to define

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."

#### 5) Our aff is reasonably topical if there is no ground loss – this solves their “arbitrary” arguments. Limits is a more arbitrary voter since they can always define the topic as minus our aff --- cx proves no ground loss. Neg has structural checks like the block and the K

## Case

### China

#### Slow manufacturing doesn’t collapse china --- econ still up

Hornby, 1/2/13 (Lucy, Lucy Hornby is the Beijing-based correspondent for Reuters Insider, a financial news channel launched by Reuters in May 2010. She has reported for Reuters in Beijing and Shanghai since 2004, traveling from the North Korean to the Pakistan border, from Ulan Bator to 1 km below the earth in a coal mine. Her specialties are politics, trade and investment issues, as well as steel and commodity markets. She previously covered Latin America for Energy Intelligence from New York, and Asian energy investment and markets for Dow Jones from Singapore. Lucy has spent 11 years in China since she first arrived in Wuhan as an English teacher in 1995. She is in her second term as vice president of the Foreign Correspondents Club of China.Reuters: “China services growth adds to economic revival hopes,” <http://www.reuters.com/article/2013/01/03/us-china-pmi-services-official-idUSBRE90201A20130103>)

(Reuters) - Growth in China's increasingly important services sector accelerated in December at its fastest pace in four months, adding to signs of a modest year-end revival in the world's second-largest [economy](http://www.reuters.com/finance/economy?lc=int_mb_1001).

China's official purchasing managers' index (PMI) for the non-manufacturing sector rose to 56.1 in December from 55.6 in November, the National Bureau of Statistics (NBS) said on Thursday.

Two PMIs on the manufacturing sector earlier this week also suggested China's economic growth was picking up late in 2012, although signs persist it depends primarily on state-led investment.

Data so far suggests only a muted revival in economic growth, rather than a return to the double-digit pace seen in [China](http://www.reuters.com/places/china) over the past three decades, Hong Kong-based economist Dariusz Kowalczyk said.

#### Rising service sector and maturing economy

Hornby, 1/2/13 (Lucy, Lucy Hornby is the Beijing-based correspondent for Reuters Insider, a financial news channel launched by Reuters in May 2010. She has reported for Reuters in Beijing and Shanghai since 2004, traveling from the North Korean to the Pakistan border, from Ulan Bator to 1 km below the earth in a coal mine. Her specialties are politics, trade and investment issues, as well as steel and commodity markets. She previously covered Latin America for Energy Intelligence from New York, and Asian energy investment and markets for Dow Jones from Singapore. Lucy has spent 11 years in China since she first arrived in Wuhan as an English teacher in 1995. She is in her second term as vice president of the Foreign Correspondents Club of China.Reuters: “China services growth adds to economic revival hopes,” <http://www.reuters.com/article/2013/01/03/us-china-pmi-services-official-idUSBRE90201A20130103>)

. China's fast-growing services industry has so far weathered the global slowdown much better than the factory sector, with the PMI consistently signaling healthy expansion and hitting a 10-month high of 58.0 in March. That's partly due to a maturing [economy](http://www.reuters.com/finance/economy?lc=int_mb_1001) as well as a historic shift in the last decade leading a majority of Chinese to live and work in cities rather than the countryside. China's services sector generated 43 percent of China's GDP in 2010 and by 2011 provided nearly 36 percent of new jobs, exceeding the agricultural sector for the first time. Beijing has acknowledged that greater consumer activity is needed to reduce the economy's reliance on the exports sector and investment-led growth. "Expanding domestic demand will be a major stimulus for China's economic growth, and the greatest potential will come from the service sector," Xia Nong, deputy director-general of the Department of Industry under the National Development and Reform Commission, said on Friday, according to the China Daily. Xia pledged to open the services sector to more foreign competition as well as encouraging Chinese service firms to go overseas. Foreign investment into the service sector of $47.57 billion in the first 11 months of 2012 surpassed that directed to the manufacturing industry, which slumped by 7.1 percent, the China Daily said over the weekend, citing Ministry of Commerce data. The growing services sector has taken up some of the slack from the property sector, which has struggled with investment and purchasing restrictions as well as a credit crunch.

***China models US safeguards --- ineffective Chinese regulations risk environmental accidents that collapse the environment and China economy***

**Hart and Weiss, 10/11** (Melanie, Policy Analyst on China Energy and Climate Policy Daniel J, Senior Fellow and the Director of Climate Strategy at American Progress. Center for American Progress, “Making Fracking Safe in the East and West” http://www.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/china\_fracking.pdf)

**The U.S.-China Shale Gas Resource Initiative aims to provide U.S. technical assistance** ¶ **to China across all aspects of shale gas development, including safety and environmental** ¶ **protection**. **So far, however, China’s policymakers have paid little attention to safeguards.** ¶ ***This follows the U.S. model***. Shale gas production here has far outpaced the establishment ¶ and enforcement of pollution protections. ¶ Environmental protection remains a low priority for both sides. Neither nation wants to ¶ risk the commercial potential of China’s shale gas by vigorously pursuing environmental ¶ protection there. Most of the U.S. companies involved in these bilateral exploration and ¶ development projects want to exchange assessment and extraction technology for Chinese ¶ commercial market access.3¶ **The Chinese want technology transfers from the United States** ¶ that include the more mature and advanced technologies that the United States often holds ¶ back due to intellectual property right concerns.4¶ Now that the initial exploration phase in China is complete, **the United States must help prevent the environmental consequences of Chinese shale gas production.** **If China does not follow best practices to capture greenhouse gases, it is highly likely that shale development will** ¶ **increase China’s emissions instead of decreasing them**. **And that will worsen climate change**. ¶ ***A major Chinese environmental disaster,*** such as groundwater pollution, ***could be devastating*** *¶* ***for China’s economy***. **It could also easily increase public opposition to fracking** in the United ¶ States, **just like the Fukushima nuclear meltdown in Japan increased American opposition to** ¶ **nuclear power**. **The U.S. companies involved in China’s shale industry therefore have a strong** ¶ **incentive to support bilateral environmental protection efforts.**

***No CCP collapse—the government represses instability***

**Pei 9** (Minxin, Senior Associate in the China Program at the Carnegie Endowment for International Peace, 3/12. “Will the Chinese Communist Party Survive the Crisis?” Foreign Affairs. http://www.foreignaffairs.com/articles/64862/minxin-pei/will-the-chinese-communist-party-survive-the-crisis)

It might seem reasonable to expect that challenges from the disaffected urban middle class, frustrated college graduates, and unemployed migrants will constitute the principal threat to the party's rule. If those groups were in fact to band together in a powerful coalition, then the world's longest-ruling party would indeed be in deep trouble. But that is not going to happen. Such **a revolutionary scenario overlooks two critical forces blocking political change in China** and similar authoritarian political systems: **the regime's capacity for repression and the unity among the elite**. **Economic crisis and social unrest may make it tougher for the CCP to govern, but they will not loosen the party's hold on power. A glance at countries such as Zimbabwe, North Korea, Cuba, and Burma shows that** a relatively **unified elite in control of the military and police can cling to power through brutal force, even in the face of abysmal economic failure**. Disunity within the ruling elite, on the other hand, weakens the regime's repressive capacity and usually spells the rulers' doom. **The CCP has already demonstrated its remarkable ability to contain and suppress chronic social protest and small-scale dissident movements. The regime maintains the People's Armed Police**, a well-trained and well-equipped anti-riot force of 250,000. In addition, **China's secret police are among the most capable in the world** and are augmented by a vast network of informers. And although the Internet may have made control of information more difficult, **Chinese censors** can still **react quickly and thoroughly to end the dissemination of dangerous news**. Since the Tiananmen crackdown, the Chinese government has greatly refined its repressive capabilities. **Responding to tens of thousands of riots each year has made Chinese law enforcement the most experienced in the world at crowd control and dispersion**. Chinese state security services have applied the tactic of "political decapitation" to great effect, quickly arresting protest leaders and leaving their followers disorganized, demoralized, and impotent. If worsening economic conditions lead to a potentially explosive political situation, the party will stick to these tried-and-true practices to ward off any organized movement against the regime.

#### 1. CCP will never collapse---the party’s power is absolute

Fukuyama 3-12-11 (Francis, Professor & SAIS Foreign Policy Institute Senior Fellow, WSJ, “Is China Next?” <http://online.wsj.com/article/SB10001424052748703560404576188981829658442.html>, jj)

According to Mr. Huntington, however, revolutions are made not by the poor but by upwardly mobile middle-class people who find their aspirations stymied, and there are lots of them in China. Depending on how you define it, China's middle class may outnumber the whole population of the United States. Like the middle-class people of Tunisia and Egypt, those in China have no opportunities for political participation. But unlike their Middle Eastern counterparts, they have benefited from a dramatically improving economy and a government that has focused like a laser beam on creating employment for exactly this group. To the extent that we can gauge Chinese public opinion through surveys like Asia Barometer, a very large majority of Chinese feel that their lives have gotten better economically in recent years. A majority of Chinese also believe that democracy is the best form of government, but in a curious twist, they think that China is already democratic and profess to be satisfied with this state of affairs. This translates into a relatively low degree of support for any short-term transition to genuine liberal democracy. Indeed, there is some reason to believe that the middle class in China may fear multiparty democracy in the short run, because it would unleash huge demands for redistribution precisely from those who have been left behind. Prosperous Chinese see the recent populist polarization of politics in Thailand as a warning of what democracy may bring. The fact is that authoritarianism in China is of a far higher quality than in the Middle East. Though not formally accountable to its people through elections, the Chinese government keeps careful track of popular discontents and often responds through appeasement rather than repression. Beijing is forthright, for example, in acknowledging the country's growing income disparities and for the past few years has sought to mitigate the problem by shifting new investments to the poor interior of the country. When flagrant cases of corruption or abuse appear, like melamine-tainted baby formula or the shoddy school construction revealed by the Sichuan earthquake, the government holds local officials brutally accountable—sometimes by executing them. Another notable feature of Chinese government is self-enforced leadership turnover. Arab leaders like Tunisia's Zine al-Abidine Ben Ali, Egypt's Mr. Mubarak and Libya's Col. Moammar Gadhafi never knew when to quit, hanging on 23, 30 and 41 years, respectively. Since Mao, the Chinese leadership has rigidly adhered to terms of about a decade. Mr. Hu, the current president, is scheduled to step down in 2012, when he is likely to be replaced by Vice President Xi Jinping. Leadership turnover means that there is more policy innovation, in sharp contrast to countries like Tunisia and Egypt, which have been stuck for decades in the rut of crony capitalism. The Chinese government is also more clever and ruthless in its approach to repression. Sensing a clear threat, the authorities never let Western social media spread in the first place. Facebook and Twitter are banned, and content on websites and on China-based social media is screened by an army of censors. It is possible, of course, for word of government misdeeds to get out in the time between its first posting by a micro-blogger and its removal by a censor, but this cat-and-mouse game makes it hard for a unified social space to emerge. A final critical way in which China's situation differs from that of the Middle East lies in the nature of its military. The fate of authoritarian regimes facing popular protests ultimately depends on the cohesiveness and loyalty of its military, police and intelligence organizations. The Tunisian army failed to back Mr. Ben Ali early on; after some waffling, the Egyptian army decided it would not fire on protesters and pushed Mr. Mubarak out of power. In China, the People's Liberation Army is a huge and increasingly autonomous organization with strong economic interests that give it a stake in the status quo. As in the Tiananmen uprising in 1989, it has plenty of loyal units around the country that it could bring into Beijing or Shanghai, and they would not hesitate to fire on demonstrators. The PLA also regards itself as the custodian of Chinese nationalism. It has developed an alternative narrative of 20th-century history that places itself at the center of events like the defeat of Japan in the Pacific war and the rise of a modern China. It is very unlikely that the PLA would switch sides and support a democratic uprising. The bottom line is that China will not catch the Middle Eastern contagion anytime soon. But it could easily face problems down the road. China has not experienced a major recession or economic setback since it set out on its course of economic reform in 1978. If the country's current property bubble bursts and tens of millions of people are thrown out of work, the government's legitimacy, which rests on its management of the economy, would be seriously undermined.

### 2AC A2: No Impact

#### Hegemony collapse causes global nuclear war --- extend Ikenberry --- without unipolarity international anarchy and arms racing ensures --- best social science proves

#### Transition fails and causes global wars

**Brzezinski ’12** (Zbigniew Brzezinski, national security advisor under U.S. President Jimmy Carter, is author of the forthcoming book Strategic Vision: America and the Crisis of Global Power, Foreign Policy, After America

<http://www.foreignpolicy.com/articles/2012/01/03/after_america?page=0,1>, jj)

For **if America falters, the world is unlikely to be dominated by a single preeminent successor** -- not even China. **International uncertainty, increased tension among global competitors, and** even **outright chaos would be far more likely outcomes**. **While a sudden, massive crisis of the American system** -- for instance, another financial crisis -- **would produce a fast-moving chain reaction leading to global political and economic disorder, a steady drift by America into increasingly pervasive decay or endlessly widening warfare with Islam would be unlikely to produce, even by 2025, an effective global successor**. **No single power will be ready by then to exercise the role that the world,** upon the fall of the Soviet Union in 1991, **expected the United States to play: the leader of a new, globally cooperative world order**. **More probable would be** a protracted phase of rather inconclusive realignments of both global and regional power, with no grand winners and many more losers, in a setting of **international uncertainty and even of potentially fatal risks to global well-being. Rather than a world where dreams of democracy flourish, a Hobbesian world of enhanced national security based on varying fusions of authoritarianism, nationalism, and religion could ensue**. The leaders of the world's second-rank powers, among them India, Japan, Russia, and some European countries, are already assessing the potential impact of U.S. decline on their respective national interests. The Japanese, fearful of an assertive China dominating the Asian mainland, may be thinking of closer links with Europe. Leaders in India and Japan may be considering closer political and even military cooperation in case America falters and China rises. **Russia**, while perhaps engaging in wishful thinking (even schadenfreude) about America's uncertain prospects, **will almost certainly have its eye on the independent states of the former Soviet Union**. Europe, not yet cohesive, would likely be pulled in several directions: Germany and Italy toward Russia because of commercial interests, France and insecure Central Europe in favor of a politically tighter European Union, and Britain toward manipulating a balance within the EU while preserving its special relationship with a declining United States. **Others may move more rapidly to carve out their own regional spheres: Turkey in the area of the old Ottoman Empire, Brazil in the Southern Hemisphere, and so forth**. **None of these countries, however, will have the requisite combination of economic, financial, technological, and military power even to consider inheriting America's leading role**. China, invariably mentioned as America's prospective successor, has an impressive imperial lineage and a strategic tradition of carefully calibrated patience, both of which have been critical to its overwhelmingly successful, several-thousand-year-long history. China thus prudently accepts the existing international system, even if it does not view the prevailing hierarchy as permanent. It recognizes that success depends not on the system's dramatic collapse but on its evolution toward a gradual redistribution of power. Moreover, the basic reality is that **China is not yet ready to assume in full America's role in the world. Beijing's leaders themselves have repeatedly emphasized that on every important measure of development, wealth, and power, China will still be a modernizing and developing state several decades from now, significantly behind not only the United States but also Europe and Japan in the major per capita indices of modernity and national power**. Accordingly, **Chinese leaders have been restrained in laying any overt claims to global leadership.** At some stage, however, **a more assertive Chinese nationalism could arise** and damage China's international interests. **A swaggering, nationalistic Beijing would unintentionally mobilize a powerful regional coalition against itself**. None of China's key neighbors -- India, Japan, and Russia -- is ready to acknowledge China's entitlement to America's place on the global totem pole. They might even seek support from a waning America to offset an overly assertive China. **The resulting regional scramble could become intense, especially given the similar nationalistic tendencies among China's neighbors**. **A phase of acute international tension in Asia could ensue**. ***Asia of the 21st century could then begin to resemble Europe of the 20th century -- violent and bloodthirsty.*** At the same time, **the security of a number of weaker states located geographically next to major regional powers also depends on the international status quo reinforced by America's global preeminence -- and would be made significantly more vulnerable in proportion to America's decline. The states in that exposed position -- including Georgia, Taiwan, South Korea, Belarus, Ukraine, Afghanistan, Pakistan, Israel, and the greater Middle East -- are today's geopolitical equivalents of nature's most endangered species**. Their fates are closely tied to the nature of the international environment left behind by a waning America, be it ordered and restrained or, much more likely, self-serving and expansionist. A faltering United States could also find its strategic partnership with Mexico in jeopardy. America's economic resilience and political stability have so far mitigated many of the challenges posed by such sensitive neighborhood issues as economic dependence, immigration, and the narcotics trade. A decline in American power, however, would likely undermine the health and good judgment of the U.S. economic and political systems. ***A waning United States would likely be more nationalistic, more defensive about its national identity, more paranoid about its homeland security, and less willing to sacrifice resources* for the sake of others' development.** The worsening of relations between a declining America and an internally troubled Mexico could even give rise to a particularly ominous phenomenon: the emergence, as a major issue in nationalistically aroused Mexican politics, of territorial claims justified by history and ignited by cross-border incidents. **Another consequence of American decline could be a corrosion of the generally cooperative management of the global commons -- shared interests such as sea lanes, space, cyberspace, and the environment, whose protection is imperative to the long-term growth of the global economy and the continuation of basic geopolitical stability**. In almost every case, **the potential absence of a constructive and influential U.S. role would fatally undermine the essential communality of the global commons because the superiority and ubiquity of American power creates order where there would normally be conflict.** None of this will necessarily come to pass. Nor is the concern that America's decline would generate global insecurity, endanger some vulnerable states, and produce a more troubled North American neighborhood an argument for U.S. global supremacy. In fact, the strategic complexities of the world in the 21st century make such supremacy unattainable. But **those dreaming today of America's collapse would** probably **come to regret it. And as the world after America would be increasingly complicated and chaotic, it is imperative that the United States pursue a new, timely strategic vision for its foreign policy -- or start bracing itself for a dangerous slide into global turmoil.**

## Courts CP

### Condo 1AR

#### Vote aff on conditionality

#### They have no offense, dispo solves

#### First --- Fairness – condo changes the course of the debate by not allowing us to put out our best answers in the 2AC and isn’t reciprocal.

#### Fairness outweighs education – debate's a game and fair competition is k2 overall participation – short-circuits educational loss

#### Second --- Education –

#### a. Not real world & Advocacy skills turns your education offense – hinders argument development encourages neg to go for least covered

#### b. In-round – kills deep education --- magnified by artificially competitive mechanism CP

#### Skew not inevitable – we can straight-turn disads and procedurals don't take long – also proves neg bias because they get a diversity of args. Unique skew --- we have to spend big chunks of the

**2AC cour ruling**

#### Federal overreach kills effective response to terrorist attack

Nivola 10 (Pietro, The American Interest, “Rebalancing American Federalism”, March/April, http://www.the-american-interest.com/article-bd.cfm?piece=787)

Thinking along those lines warrants renewed emphasis today. America’s national government has had its hands full coping with a deep and lingering economic crisis and onerous security challenges around the world. It cannot, or at any rate ought not, keep piling on top of those daunting tasks a second-tier agenda that injudiciously dabbles in too many decisions and duties best consigned to local entities. Turning every imaginable issue into a Federal case, so to speak, diverts and polarizes political leaders at the national level, and erodes recognition of local responsibilities. A kind of attention deficit disorder besets anybody who attempts to do a little of everything rather than a few important things well. Although not a root cause of catastrophes like the submersion of a historic American city by a hurricane in 2005, the terrorist attacks of September 11, 2001, the great financial bust of 2008 or the successful resurgence of the Taliban in Central Asia, an overstretched and distracted government stands less chance of mitigating such tragedies.

***Quick response it key – large casualties ensures a US response that escalates to nuclear war.***

**Conley, ’03** (Lt Col Harry W. is chief of the Systems Analysis Branch, Directorate of Requirements, Headquarters Air Combat Command (ACC), Langley AFB, Virginia. Air & Space Power Journal - Spring 2003 -- http://www.airpower.maxwell.af.mil/airchronicles/apj/apj03/spr03/conley.html)

The number of American casualties suffered due to a WMD attack may well be **the most important variable i**n determining the nature of the US reprisal. A key question here is how many Americans would have to be killed to prompt a massive response by the United States. The bombing of marines in Lebanon, the Oklahoma City bombing, and the downing of Pan Am Flight 103 each resulted in a casualty count of roughly the same magnitude (150–300 deaths). Although these events caused anger and a desire for retaliation among the American public, they prompted no serious call for massive or nuclear retaliation. The body count from a single biological attack could easily be one or two orders of magnitude higher than the casualties caused by these events. Using the rule of proportionality as a guide, one could justifiably debate whether the United States should use massive force in responding to an event that resulted in only a few thousand deaths. However, what if the casualty count was around 300,000? Such an unthinkable result from a single CBW incident is not beyond the realm of possibility: “According to the U.S. Congress Office of Technology Assessment, 100 kg of anthrax spores delivered by an efficient aerosol generator on a large urban target would be between two and six times as lethal as a one megaton thermo-nuclear bomb.”46 Would the deaths of 300,000 Americans be enough to trigger a nuclear response? In this case, proportionality does not rule out the use of nuclear weapons. Besides simply the total number of casualties, the types of casualties- predominantly military versus civilian- will also affect the nature and scope of the US reprisal action. Military combat entails known risks, and the emotions resulting from a significant number of military casualties are not likely to be as forceful as they would be if the attack were against civilians. World War II provides perhaps the best examples for the kind of event or circumstance that would have to take place to trigger a nuclear response. A CBW event that produced a shock and death toll roughly equivalent to those arising from the attack on Pearl Harbor might be sufficient to prompt a nuclear retaliation. President Harry Truman’s decision to drop atomic bombs on Hiroshima and Nagasaki- based upon a calculation that up to one million casualties might be incurred in an invasion of the Japanese homeland47- is an example of the kind of thought process that would have to occur prior to a nuclear response to a CBW event. Victor Utgoff suggests that “if nuclear retaliation is seen at the time to offer the best prospects for suppressing further CB attacks and speeding the defeat of the aggressor, and if the original attacks had caused severe damage that had outraged American or allied publics, **nuclear retaliation would be more than just a possibility, whatever promises had been made.”**

***Plan’s prevents EPA overstretch***

**Adler 3-16-13** – Jonathan H. Adler, Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law; Senior Fellow, Property & Environment Research Center. Case Research Paper Series in Legal Studies, Working Paper 2013-9, March 16, 2013, CONSERVATIVE PRINCIPLES FOR ENVIRONMENTAL REFORM, online, jj

Decentralize Decision-making¶ Though some environmental problems, such as climate change, are¶ truly global in scope, **most environmental problems are local or regional in**¶ **nature**. Few, if any, environmental concerns could truly be described as¶ “national,” save perhaps for the preservation of national treasures. **Yet the**¶ **lion’s share of environmental policy is directed**—albeit not implemented—¶ **in Washington, D.C.** Truly **local matters, such as the proper level of**¶ **localized air pollutants or the extent to which a given water system should**¶ **control for given contaminants in drinking water supplies are questions of**¶ **federal law**. At the same time, the federal government has largely¶ abandoned many environmental responsibilities that clearly belong on the¶ federal government’s plate.104¶ **There are many reasons environmental protection efforts would**¶ **benefit from greater decentralization**. First, as already noted, **most**¶ **environmental problems are local or regional in nature, and do not involve**¶ **the sort of interjurisdictional spillovers that would justify federal**¶ **intervention. Environmental policy questions also tend to involve difficult**¶ **trade-offs between competing economic, ethical, and aesthetic values**—¶ **values that may vary from place-to-place**. **There is no reason to expect**¶ **every corner of the country to share precisely the same environmental**¶ **priorities. At the same time, environmental conditions are incredibly**¶ **variable across the country. Even where regions suffer from the same**¶ **environmental concern, such as tropospheric ozone pollution** (aka “smog”),¶ **the particular causes and contributions will vary, necessitating variable**¶ **policy responses**. **Yet the information necessary to address such concerns**¶ **is most readily available at the local level**. ***One-size-fits-all policy***¶ ***approaches too easily become one-size-fits nobody***.105¶ **Decentralizing environmental decision-making also creates the**¶ **opportunity for greater innovation in environmental policy**. **State efforts at**¶ **environmental protection long predate federal environmental regulations**¶ **and many federal programs were spurred by or modeled after preexisting**¶ **state programs**. **The best way to address a given environmental concern**¶ **may be difficult, which is even more reason to allow different jurisdictions**¶ **to experiment with different approaches**. Such interjurisdictional¶ **competition does not produce a “race to the bottom**” or prevent states from¶ adopting environmental measures.106 To the contrary, **empirical research**¶ **has shown that states seek to address those environmental concerns**¶ **important to their citizens when they can and are quick to learn about and**¶ **replicate the successful policy experiments of their neighbors**.107¶ **Decentralizing much environmental policymaking would also have the**¶ **added benefit of making it easier for the federal government to focus its**¶ **efforts on those environmental concerns where a federal role is easiest to**¶ **justify, such as in supporting scientific research and addressing interstate**¶ **spillovers**.108 Thanks to the Supreme Court, **the EPA will have its hands**¶ **full dealing with greenhouse gas emissions** in a futile effort **to forestall** the¶ effects of **global climate change**. **Allowing state and local governments to**¶ **exercise more control over more localized concerns would make it easier**¶ **for the EPA to focus on this task**.

***EPA overstretch prevents effective nanotech regs***

George **Reynolds**, 5-27-**07**, Food Production Daily, Nanotechnology needs more regulation and funding, <http://www.foodproductiondaily.com/Packaging/Nanotechnology-needs-more-regulation-and-funding>, jj

**Regulations to oversee nanotechnology are needed** to protect human health and the environment, according to a new report.¶ The report, by the Woodrow Wilson International Center for Scholars, adds to growing public concern over the potential risks posed by nanotechnology, which could to lead to laws regulating the industry being implemented.¶ Uncertain impacts to health, the environment, and society may arise with the growth of nanotechnology, the report says.¶ **If we want to ensure that the benefits of nanotechnology far exceed any risks, we need an oversight system that assures safety** while providing transparency for both businesses and the public,” it stated.¶ Nanotechnology is the manipulation of materials at near atomic scales to create new processes, materials and devices. Food, packaging and a host of other products can benefit from the technology, which can be used to increase shelf life, strengthen products and improve nutritional content.¶ The report claims that nanotechnology could be a catalyst for changes to the Environmental Protection Agency (**EPA**), which **currently oversees the technology**.¶ **The major areas that require strengthening are science, program integration, personnel, international activities, and program evaluation,**” the report claims. “**Inadequate resources, both money and trained people, is a problem for EPA** as it is for all federal regulatory agencies.”

***Extinction***

**Treder and Phoenix 07** (Mike, consultant to the Millennium Project of the American Council for the United Nations University and to the Future Technologies Advisory Group, Chris, CRN’s directory of research,Center for Responsible Nanotechnology, Results of Our Ongoing Research, April 16, http://www.crnano.org/dangers.htm#arms)

**Nanotech weapons could be extremely powerful and could lead to a dangerously unstable arms race. Molecular manufacturing raises the possibility of horrifically effective weapons**. As an example, the smallest insect is about 200 microns; this creates a plausible size estimate for a nanotech-built antipersonnel weapon capable of seeking and injecting toxin into unprotected humans. The human lethal dose of botulism toxin is about 100 nanograms, or about 1/100 the volume of the weapon. **As many as 50 billion toxin-carrying devices – theoretically *enough to kill every human on earth* – could be packed into a suitcase**. **Guns of all sized would be far more powerful, and their bullets could be self-guided.** Aerospace hardware would be far lighter and higher performance; built with minimal or no metal, **it would be much harder to spot on radar**. **Embedded computers would allow remote activation of any weapon, and more compact power handling would allow greatly improved robotics.** These ideals barely scratch the surface of what’s possible. An important question is whether nanotech weapons would be stabilizing or destabilizing. Nuclear weapons, for example, perhaps can be credited with preventing major wars since their invention. However, nanotech weapons are not very similar to nuclear weapons. Nuclear stability stems from at least four factors. The most obvious is the massive destructiveness of all-out nuclear war. All-out nanotech war is probably equivalent in the short term, but nuclear weapons also have a high long-term cost of use (fallout, contamination) that would be much lower than nanotech weapons. Nuclear weapons cause indiscriminate destruction; nanotech weapons could be targeted. Nuclear weapons require massive research effort and industrial development, which can be tracked far more easily than nanotech weapons development; **nanotech weapons can be developed much more rapidly due to faster, cheaper prototyping.** Finally, nuclear weapons cannot easily be delivered in advance of being used; the opposite is true of nanotech. **Greater uncertainty of the capabilities of the adversary, less response time to an attack, and better targeted destruction of an enemy’s visible resources during an attack all make nanotech arms race less stable.** Also, ***unless nanotech is highly controlled***, **the number of nanotech nations in the world could be much higher than the number of nuclear nations, increasing the chance of a regional conflict blowing up.**

### 1AR – Terror Inev

#### Nuclear terrorism is extremely likely and is comparatively the largest threat to international stability.

Zafar Nawaz Jaspal, 2012, is Associate Professor at the Department of International Relations, Quaid-I-Azam University, Islamabad, Pakistan, is advisor on Non-Proliferation at the South Asian Strategic Stability Institute, London, Center of Excellence: Defense against Terrorism, Ankara, Turkey and Armed Forces War College, National Defense University, Islamabad, Command and Staff College Quetta, a Course Coordinator at the Foreign Services Academy, Ministry of Foreign Affairs, a Research Fellow at the Institute of Strategic Studies, Islamabad and Islamabad Policy Research Institute, Journal of Political Studies, Vol. 19 Issue 1, "Nuclear/Radiological Terrorism: Myth or Reality?,” Ebsco Host

The misperception, miscalculation and above all ignorance of the ruling elite about security puzzles are perilous for the national security of a state. Indeed, in an age of transnational terrorism and unprecedented dissemination of dual-use nuclear technology, ignoring nuclear terrorism threat is an imprudent policy choice. The incapability of terrorist organizations to engineer fissile material does not eliminate completely the possibility of nuclear terrorism. At the same time, the absence of an example or precedent of a nuclear/radiological terrorism does not qualify the assertion that the nuclear/radiological terrorism ought to be remained a myth. Farsighted rationality obligates that one should not miscalculate transnational terrorist groups — whose behavior suggests that they have a death wish — of acquiring nuclear, radiological, chemical and biological material producing capabilities. In addition, one could be sensible about the published information that huge amount of nuclear material is spread around the globe. According to estimate it is enough to build more than 120,000 Hiroshima-sized nuclear bombs (Fissile Material Working Group, 2010, April 1). The alarming fact is that a few storage sites of nuclear/radiological materials are inadequately secured and continue to be accumulated in unstable regions (Sambaiew, 2010, February). Attempts at stealing fissile material had already been discovered (Din & Zhiwei, 2003: 18).Numerous evidences confirm that terrorist groups had aspired to acquire fissile material for their terrorist acts. Late Osama bin Laden, the founder of AL Qaeda stated that acquiring nuclear weapons was a “religious duty” (Yusufzai, 1999, January 11). The IAEA also reported that “al-Qaeda was actively seeking an atomic bomb.” Jamal Ahmad al-Fadl, a dissenter of Al Qaeda, in his trial testimony had “revealed his extensive but unsuccessful efforts to acquire enriched uranium for al-Qaeda” (Allison, 2010, January: 11). On November 9, 2001, Osama bin Laden claimed that “we have chemical and nuclear weapons as a deterrent and if America used them against us we reserve the right to use them (Mir, 2001, November 10).” On May 28, 2010, Sultan Bashiruddin Mahmood, a Pakistani nuclear scientist confessed that he met Osama bin Laden. He claimed that “I met Osama bin Laden before 9/11not to give him nuclear know-how, but to seek funds for establishing a technical college in Kabul (Syed, 2010, May 29).” He was arrested in 2003 and after extensive interrogation by American and Pakistani intelligence agencies he was released (Syed, 2010, May 29). Agreed, Mr. Mahmood did not share nuclear know-how with Al Qaeda, but his meeting with Osama establishes the fact that the terrorist organization was in contact with nuclear scientists. Second, the terrorist group has sympathizers in the nuclear scientific bureaucracies. It also authenticates bin Laden’s Deputy Ayman Zawahiri’s claim which he made in December 2001: “If you have $30 million, go to the black market in the central Asia, contact any disgruntled Soviet scientist and a lot of dozens of smart briefcase bombs are available (Allison,2010, January: 2).”The covert meetings between nuclear scientists and al Qaeda members could not be interpreted as idle threats and thereby the threat of nuclear/radiological terrorism is real. The 33Defense Secretary Robert Gates admitted in 2008 that “what keeps every senior government leader awake at night is the thought of a terrorist ending up with a weapon of mass destruction, especially nuclear(Mueller, 2011, August 2).” Indeed, the nuclear deterrence strategy cannot deter the transnational terrorist syndicate from nuclear/radiological terrorist attacks. Daniel Whiteneck pointed out: “Evidence suggests, for example, that al Qaeda might not only use WMD simply to demonstrate the magnitude of its capability but that it might actually welcome the escalation of a strong U.S. response, especially if it included catalytic effects on governments and societies in the Muslim world. An adversary that prefers escalation regardless of the consequences cannot be deterred” (Whiteneck, 2005, summer: 187) since taking office, President Obama has been reiterating that “nuclear weapons represent the ‘gravest threat’ to United States and international security.” While realizing that the US could not prevent nuclear/radiological terrorist attacks singlehandedly, he launched 47an international campaign to convince the international community about the increasing threat of nuclear/radiological terrorism. He stated on April 5, 2009: “Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold (Remarks by President Barack Obama, 2009, April 5).” He added: “One terrorist with one nuclear weapon could unleash massive destruction. Al Qaeda has said it seeks a bomb and that it would have no problem with using it. And we know that there is unsecured nuclear material across the globe” (Remarks by President Barack Obama, 2009, April 5). In July 2009, at the G-8 Summit, President Obama announced the convening of a Nuclear Security Summit in 2010 to deliberate on the mechanism to “secure nuclear materials, combat nuclear smuggling, and prevent nuclear terrorism” (Luongo, 2009, November 10). President Obama’s nuclear/radiological threat perceptions were also accentuated by the United Nations Security Council (UNSC) Resolution 1887 (2009). The UNSC expressed its grave concern regarding ‘the threat of nuclear terrorism.” It also recognized the need for all States “to take effective measures to prevent nuclear material or technical assistance becoming available to terrorists.” The UNSC Resolution called “for universal adherence to the Convention on Physical Protection of Nuclear Materials and its 2005 Amendment, and the Convention for the Suppression of Acts of Nuclear Terrorism.” (UNSC Resolution, 2009)The United States Nuclear Posture Review (NPR) document revealed on April6, 2010 declared that “terrorism and proliferation are far greater threats to the United States and international stability.” (Security of Defense, 2010, April 6:i). The United States declared that it reserved the right to “hold fully accountable” any state or group “that supports or enables terrorist efforts to obtain or use weapons of mass destruction, whether by facilitating, financing, or providing expertise or safe haven for such efforts (Nuclear Posture Review Report, 2010, April: 12)”. This declaration underscores the possibility that terrorist groups could acquire fissile material from the rogue states.

## CP 2

***Climate leadership fails***

**Loris 7-23-2012** [Nicolas, Herbert and Joyce Morgan Fellow at the Thomas A. Roe Institute for Economic Policy Studies, The Assault on Coal and American Consumers, <http://www.heritage.org/research/reports/2012/07/the-assault-on-coal-and-american-consumers>] Awirth

The EPA has long ignored the disagreement within the scientific community on classifying carbon dioxide as a pollutant and on the magnitude of anthropogenic (manmade) global warming. Yet even setting aside the scientific dissention on these two points, the EPA regulations will not reduce carbon dioxide enough to have any meaningful effect. Attempting to reduce carbon dioxide unilaterally will significantly change overall global emissions. **China and India’s carbon dioxide emissions are rapidly increasing as their economies continue to expand, and they have no intention of slowing economic growth to curb emissions**. **Even if the EPA were to reduce U.S. carbon emissions 83 percent below 2005 levels by 2050, as mandated by cap-and-trade bills, the reduction would constitute a negligible portion of worldwide emissions and do nothing to impact global temperatures**.[30]

#### Warming D

#### Natural gas cements climate leadership

Casten 9 (Sean Casten, president of Recycled Energy Development, December 16, 2009, “Natural gas as a near-term CO2 mitigation strategy,” Grist, http://goo.gl/b8z08)

Discussions of CO2 reduction tend to start from a presumption of near-term economic disruption coupled to long-term investment in green technology. The presumption isn’t right. The U.S. could reduce its total CO2 footprint by 14-20 percent tomorrow with no disruption in our access to energy services, without investing in any new infrastructure. The Waxman-Markey proposal to reduce CO2 emissions by 17 percent over 10 years is constrained only by its ambition. This near-term opportunity would be realized by ramping up our nation’s generation of electricity from gas and ramping down our generation from coal, taking advantage only of existing assets. Its scale and potential for immediate impact deserves consideration; even partial action towards this goal would have dramatic political and environmental consequences, establishing U.S. leadership and credibility in global climate negotiations.

***Plan is also key to sustainable energy - Makes the transition to renewables effective***

**Frank et al ‘09**

Matthew Frank, Jenna Goodward, Sarah Ladislaw, and Kate Zyla, May 2009, CSIS, Crossing the Natural Gas Bridge, <http://csis.org/files/publication/090626_final_crossing_gas_bridge.pdf>, jj

Addressing climate change will require extensive changes in the ways that we produce, transport and use energy. **Given the scope, scale and complexity of the current energy system, the transition to a low carbon energy future will take time, significant investment and carefully crafted polices**. **During the transition, it is important for policymakers and the private sector to balance the need for aggressive action to reduce emissions with the need for reliable and affordable energy supplies**. **Natural gas can play a critical role in “building a bridge” to a secure, low-carbon energy system**. **It is the least carbon intensive fossil fuel** (burning gas emits less carbon dioxide than burning coal or oil), **and there are readily available supplies**, both within and outside of the United States. **New natural gas power generation facilities can be brought online quickly compared to other low-carbon sources such as nuclear power**. **They also enable more renewable energy by providing baseload power generation to complement the intermittent nature of renewables like wind and solar power**. There is already a great deal of existing infrastructure –from electric power plants and home furnaces to pipelines and ports – that is able to store, transport, and use natural gas.

***Bridge fuels key --- renewables can’t displace fossil fuels in the short term***

**Tour et al. ‘10**

James M. Tour, Carter Kittrell and Vicki L. Colvin are in the Department of Chemistry, Department of Mechanical Engineering and Materials Science, and the Green Carbon Center, Rice University. Nature Materials 9,871–874(2010), Green carbon as a bridge to renewable energy, <http://www.nature.com.proxy.lib.wayne.edu/nmat/journal/v9/n11/full/nmat2887.html>, jj

**A green use of carbon-based resources that minimizes the environmental impact of carbon fuels could allow a smooth transition from fossil fuels to a sustainable energy economy.** Carbon-based resources (coal, natural gas and oil) give us most of the world's energy today, but the energy economy of the future must necessarily be far more diverse. **Energy generation through solar, wind and geothermal means is developing now, but not fast enough to meet our expanding global energy needs.** **We advocate that 'green carbon'**, which enables us to use carbon-based sources with high efficiency and in an environmentally friendly manner**, will provide our society time to develop alternative energy technologies and markets without sacrificing environmental or economic quality**. Green carbon will help to reduce the loss of our precious carbon resources, which are better reserved for high-value chemicals, and it will ensure that those hydrocarbons used for fuels will minimize carbon emissions. Through intensive research and development in green carbon, our society can guarantee an energy future that uses carbon strategically, without smokestacks, greenhouse gases and extensive environmental damage. Building a solid bridge **There is a chasm between the diminutive proportions of renewable energy currently available and our overwhelming dependence on fossil fuels that currently propel society**. The energy policy review of the Obama administration makes this soberingly clear: “**The use of renewable energy today and even in the next 5 to 10 years is still extremely limited when put into the context of total world use of fossil fuels**. For example, **the world used the equivalent of 113,900 terawatts hours** [TWh] **of fossil energy to fuel** economic activity, human mobility, and global telecommunications, among other modern day **activities in 2007**. **Replacing those terawatts hours with non-fossil energy would be the equivalent of** constructing an extra 6,020 nuclear plants across the globe or 14 times the number of nuclear power plants in the world today. In renewable energy terms, it is **133 times the amount of solar, wind and geothermal energy currently in use on the planet.**”1 Barring a huge reduction in our global standard of living, **we will need to rely on carbon-based energy for some time**. Whether this will last for several decades or into the next century is unclear, but what is apparent is that renewable approaches to energy generation are increasing at an annual rate of 7.2% compared with 1.6% for non-renewable growth2, and the continued growth of renewables will demand sustained government support. **During this transition we propose a green carbon bridge that minimizes the environmental impact of carbon fuels and lowers our reliance on these resources for primary energy generation**. Ultimately, green carbon will use hydrogen from renewable sources, while at the same time producing basic chemical feedstocks.

#### **NG k2 renewables**

Bridges, 2/1/13 (Rutt, former SEG president, “The future of natural gas,” http://www.epmag.com/item/The-future-natural-gas\_112017)

Recent low gas prices have kept the more efficient gas plants running nearly flat out. Stricter pollution regulation has also benefited gas, and the increased use of gas has been a major factor in a 14% drop in US CO2 emissions since 2007. Gas has been a favorite alongside intermittent wind and solar since plants can start up and shut down in about 30 minutes and also can run at variable power levels. It is impossible to do a quick startup or shutdown of a coal or nuclear plant. Since 2001 and especially in the past year there has been a dramatic decrease in the use of coal and a dramatic increase in the use of gas. Once again, the market is a powerful force. Here is what the US electricity market looks like right now, and here is where it appears to be headed: Coal will continue to shrink due to cost and pollution issues (but export markets are strong); Gas has major market and environmental advantages and should continue to grow if we can mitigate price spikes and better address public concerns about [fracing](http://epmag.com/context/Baker_Hughes_Incorporated/201003/hydraulic_fracturing.htm?k=Fracing); Delays and cost overruns for the two new US nuclear plants will hurt prospects for growth; Hydropower lacks good sites for new dams and has little growth potential; Wind and solar are heavily dependent on unpredictable subsidies to consistently grow; and Everything else is too small to matter unless enhanced geothermal can greatly reduce costs.

## DA

### Top level

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

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

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

#### Judicial Activism high and inevitable in the Roberts Court

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, The University of Chicago, “CITIZENS UNITED AND CONSERVATIVE JUDICIAL ACTIVISM”, 3/26/2012, http://illinoislawreview.org/wp-content/ilr-content/articles/2012/2/Stone.pdf

This brings me back to Citizens United. If conservative Justices adhered to either their judicial restraint or originalist conceptions of judicial review, they would surely have upheld the law at issue in Citizens United. Certainly, under an approach embracing judicial restraint and deference to the elected branches of government, the Court would have had to uphold the challenged provisions of BCRA. Only by invoking a high degree of judicial scrutiny and aggressively second-guessing the judgments of Congress and the President could the conservative Justices justify their position in Citizens United. Similarly, any Justice attempting seriously to employ an originalist analysis in Citizens United would also have had to uphold the legislation. There is no credible reason to believe that the Framers of the First Amendment understood the Amendment as guaranteeing a right of for-profit corporations to spend unlimited amounts of money in order to shape the outcomes of the U.S. political process.78 How, then, could the five conservative Justices have invalidated the challenged law in Citizens United? The answer, of course, is simple. John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito are committed neither to judicial restraint nor to originalism. Rather, like the liberal Justices of the Warren Court, they employ a form of selective judicial activism. It seems clear, though, that these Justices would have joined few, if any, of the Warren Court decisions I listed earlier. But despite the conservative rhetoric about “strict constructionism,” “originalism,” “judicial restraint,” and “call[ing] balls and strikes,”79 the current conservative Justices are just as activist as their liberal predecessors—but in a wholly different set of cases. In a series of aggressively activist decisions, the current conservative Justices have held unconstitutional affirmative action programs,80 gun control regulations,81 limitations on the authority of corporations to spend at will in the political process,82 restrictions on commercial advertising,83 laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation,84 the environment, violence against women, age discrimination, federal legislation regulating guns,85 and policies of the state of Florida relating to the outcome of the 2000 presidential election.86 The challenge is to figure out what theory of judicial review or constitutional interpretation drives this particular form of activism. Al- though one can readily discern the specific conception of judicial review that undergirds the Warren Court’s judicial activism, which was clearly rooted in the concerns of Jefferson, Madison, and Hamilton about majoritarian dysfunction, no similar principle or constitutional methodology explains the jurisprudence of contemporary conservative judicial activists. To understand the Warren Court’s use of judicial activism, all one needs to do is to look at the results and then ask, “Why these cases and not others?” The answer, as we have seen, is quickly apparent. But if one attempts the same inquiry about the decisions of the current conservative Justices, no principled explanation emerges for their version of selective activism. Rather, to paraphrase Justice Frankfurter’s critique of an earlier generation’s judicial activism, the selective activism of the current conservative majority seems to be born out of “their prejudices and their respective pasts and self-conscious desires.”87 The point, in other words, is that judicial activism itself is neither inherently good nor inherently bad. It is a legitimate and essential method of constitutional interpretation—when used in appropriate circumstances.

#### Not unique – Citizens United

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, The University of Chicago, “CITIZENS UNITED AND CONSERVATIVE JUDICIAL ACTIVISM”, 3/26/2012, http://illinoislawreview.org/wp-content/ilr-content/articles/2012/2/Stone.pdf

Third, there is the question of judicial activism versus judicial restraint. This is, for me, the most intriguing facet of the decision in Citizens United. How should courts decide how much deference or how much scrutiny is appropriate in considering the constitutionality of government action? That is the central question of U.S. constitutional law, at least insofar as courts are concerned. In the last half-century, conservatives have derided judicial activism as illegitimate and called for a more restrained exercise of the power of judicial review. In Citizens United, however, the conservative majority embraced an aggressively activist approach, disregarding an effort by our nation’s elected officials to bring order to what they regarded as a dangerously out-of-control electoral process.30 The stakes were clearly high, and members of Congress and the President (Bush II, by the way) obviously have a high degree of expertise in such matters. Why, then, did the conservative Justices not exercise restraint and defer to the judgment of our elected leaders? This is the question to which I now turn.

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

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

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

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

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

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

### November decision

***Oral arguments were heard in October --- no way the plan causes justices to revise decisions they’ve already made***

#### Court decisions are compartmentalized

Redish 87 (Martin H., Professor of Law – Northwestern University, and Karen L. Drizin, Clerk – Illinois State Supreme Court, New York University Law Review, April, Lexis)

a. The fallacy of the concept of fungible institutional capital. The basis for Dean Choper's suggested judicial abstention on issues of federalism [143](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n143) is the desire "to ease the commendable and crucial task of judicial review in cases of individual consitutional liberties. It is in the latter that the Court's participation is both vitally required and highly provocative." [144](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n144) Judicial efforts in the federalism area, he asserts, "have expended large sums of institutional capital. This is prestige desperately needed elsewhere." [145](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n145) Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another. As one of the current authors has previously argued: It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would  [\*37]  have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts. [146](http://www.lexis.com/research/retrieve?_m=11c71424f02a19dd3fddea3d6d214ae5&docnum=9&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-zSkAb&_md5=29cb5075b93d84858cb8ef752799c5b9&focBudTerms=supreme%20court%20w/35%20political%20capital%20or%20institutional%20capital%20w/35%20strong%20or%20strength%20or%20increas%21%20or%20abundan%21&focBudSel=all#n146)

**1ar – fisher uq**

#### Conservative ruling now --- extend Liptak --- O’Connor’s gone and simple math proves

#### Most conservative court ever – no chance for affirmative action

**Jones, 3/18/13** (Nikole Hannah-Jones, joined ProPublica in late 2011. Prior to that, she covered governmental issues, the census, and race and ethnicity at The Oregonian. There she exposed significant shortcomings in the enforcement of fair housing laws in Portland, and eventually prompted officials to draft the city’s first fair housing plan. She has won the Society of Professional Journalists Pacific Northwest Excellence in Journalism Award three times.¶ ProPublica“A Colorblind Constitution: What Abigail Fisher’s Affirmative Action Case Is Really About” http://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r)

But as the Supreme Court's make-up has grown more conservative, it has taken up a steady stream of [so-called reverse discrimination cases](http://www.doi.gov/pmb/eeo/cases/reverse.cfm), in which white plaintiffs have argued that race-specific measures born of the civil rights movement discriminate against white Americans and violate the 14th Amendment.¶ Supreme Court decisions have eroded programs and laws that use race to remedy inequalities, but not eliminated them altogether. And in a 2003 opinion written by centrist Sandra Day O'Connor, the justices narrowly upheld affirmative action in college admissions when it is the only means to ensure diversity.¶ But the Court's make-up changed in what scholars consider a significant way when Samuel Alito, considered the third most conservative Supreme Court justice since 1937, replaced O'Connor in 2006. Since then, several justices have made their constitutional disdain for race-conscious programs known. In a controversial 2007 decision, Chief Justice John Roberts sent a clear message when he used the equal protection argument at play in Brown v. Board of Education to strike down voluntary desegregation plans in schools.¶ Evoking a colorblind Constitution, Roberts said, "The way to stop discriminating on the basis of race, is to stop discriminating on the basis of race."¶ And just last month during oral arguments over the constitutionality of a key aspect of the Voting Rights Act, Justice Antonin Scalia derisively called what's considered the most successful civil rights law in history [a "racial entitlement."](http://www.huffingtonpost.com/2013/02/27/voting-rights-act-supreme-court_n_2768942.html)

#### Conservative ruling

**Blum, 3/8/13** (Alexander, “[Affirmative action case unlikely to affect U.](http://www.browndailyherald.com/2013/03/08/affirmative-action-case-unlikely-to-affect-u/)” http://www.browndailyherald.com/2013/03/08/affirmative-action-case-unlikely-to-affect-u/)

“There’s a very strong expectation that the court will do away with (affirmative action),” said Michael Tesler, assistant professor of political science. “It is highly debated whether it’s necessary or not.”¶ Tesler said the court is expected to rule in favor of Fisher in part because former Justice Sandra Day O’Connor — who was involved in the 2003 Grutter v. Bollinger Supreme Court ruling that formally established diversity as a “compelling interest” for universities to achieve — is no longer on the bench.¶ Vice President and General Counsel Beverly Ledbetter said O’Connor was a “central figure” in the 2003 case, adding that O’Connor had attended some of the Fisher arguments.

#### conservative decision now

**PolicyMic, Oct 2012** (“Affirmative Action Supreme Court Case: How SCOTUS May Rule on Fisher vs University of Texas” http://www.policymic.com/articles/16129/affirmative-action-supreme-court-case-how-scotus-may-rule-on-fisher-vs-university-of-texas)

The University of Texas case will be heard by only 8 Justices in October. Justice Elena Kagan has recused herself because of her previous role solicitor general in the lower court’s case. Kagan’s vote could have proven crucial, but let’s look at where the others might fall.¶ Three justices have personal experience with affirmative action. One positive: Justice Sonya Sotomayor; and two justices negative: Justices Samuel Alito and Clarence Thomas. Thomas had to face skepticism of his intelligence after his graduation from Yale law school, as some employers thought that his degree was due to affirmative action policies rather than his own abilities. Thomas has [called](http://www.thedailybeast.com/newsweek/2008/09/26/from-clarence-thomas-to-palin.html) affirmative action a “cruel farce” and a “badge of dishonor.”¶ Thomas dissented against Grutter, which upheld affirmative action and voted in the majority forGratz, which limited affirmative action. Thomas’ view on affirmative action is that they are policies of reverse racism, and is thus staunchly opposed their existence in general.¶ **Thomas: In favor of Fisher**¶ Alito, despite coming from a working class family was involved in a group called Concerned Alumni of Princeton [that worried about the increased number of women and minorities admitted to Princeton](http://www.cnn.com/2012/03/07/opinion/navarrette-affirmative-action/index.html). This already makes a strong case where he might vote, but Alito has only been on the Court since 2006, after both Grutter and Gratz were decided so he has not been on the Court to hear a case on higher education affirmative action.¶ There is another aspect though, a [public school affirmative action case](http://oyez.org/cases/2000-2009/2006/2006_05_908): Parents Involved in Community Schools v. Seattle School District No. 1, which addressed the issue of school districts assigning children their public school in order to achieve racial integration. The Court, Alito included, decided that the state could not assign public schools for this purpose and denied it “compelling state interest.”¶ On the flip side, the case dealt with racial integration and desegregation rather than a justification for just greater diversity (the common defense in higher education affirmative cases) and Alito has not always voted against discrimination cases (see the age-discrimination case [Gomez-Perez v. Potter](http://oyez.org/cases/2000-2009/2007/2007_06_1321)**).**¶ **Alito: In favor of Fishe**r¶ Justice Sonia Sotomayor has personal experience with affirmative action. She admits that she is a “perfect affirmative action baby,” [acknowledging the disparity in her test scores](file:///C%3A%5C.%20%20http%5C%3Aarticles.cnn.com%3A2009-0) in comparison to other accepted Princeton undergraduate and Yale law students. Because Fisher could eliminate affirmative action, it is likely that Sotomayor will pull weight from her personal life in her decision and vote to give others the same gracious chance she was.¶ **Sotomayor: In favor of UT-Austin**¶ Both Justice Ruth Bader Ginsberg and Stephen Breyer were around for Grutter and Gratz. Ginsberg voted in favor of affirmative action in both cases, Breyer on the other hand voted in favor in Grutter, but not in Gratz because of the UMichigan’s point system’s similarities to the quota system overturned in Bakke. Despite this, the Grutter decision is a greater indicator because of its support for affirmative action in a general sense. It is unlikely either will vote to eliminate affirmative action policies**.**¶ **Ginsberg: In favor of UT-Austin** ¶ **Breyer: In favor of UT-Austin**¶ Kennedy has voted against every pro-affirmative action case during his tenure, but because of de facto “swing vote” position on the Court after O’Connor left, he may prove to not be so predictable. It is doubtful that he will rule against his own precedent though.¶ **Kennedy: In favor of Fisher**¶ Scalia, like Kennedy, has voted against every pro-affirmative action case, but in 2003 he confirmed his stances against affirmative action. The same year as Grutter and Gratz, the Supreme Court declined to review a Denver case about an affirmative action program to help minority-owned and female-owned construction companies. The interesting fact about this denial of review is that Scalia took the unusual step to [dissent the Court’s action](http://articles.cnn.com/2003-11-28/justice/findlaw.analysis.dorf.scalia_1_dissent-affirmative-action-denver-case?_s=PM:LAW). Scalia accused his colleges of undermine the “colorblindness” principle found in the Fourteenth Amendment’s equal protection clause. What this translates to is that affirmative action is (to Scalia) in fact reverse discrimination, giving minorities and women a leg up on average white citizens.¶ **Scalia: In favor of Fisher**¶ Chief Justice John Roberts was not around during Grutter or Gratz, but he wrote the majority decision on Parents v. Seattle so that might prove to be his positive connection with Fisher. He[noted in the decision](http://campusprogress.org/articles/admissions_experts_worried_about_implications_of_affirmative_action_ca/), that “racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” It is worth noting however, that of the “conservative wing,” Roberts has been the least vocal on affirmative action.¶ Roberts could easily decide that affirmative action is no longer needed and should not be protected by the FourteenthAmendment or that Fisher herself is responsible for not being eligible for the TTP program**.**¶ **Roberts: Leaning in favor of Fisher**¶ **So it looks like a 5-3 decision in favor of Fisher.** That might be killer to low-income college applicants across the United States. It could mean that they will not be able into college simply because of an earlier education disadvantage. It also might change diversity in college and limit the land of opportunity for minorities and [limit educational progress](http://www.dailyiowan.com/2012/10/05/Metro/30193.html); at least the top 10% to15% of colleges and universities.¶

***Conservative decision now --- Kennedy will limit Grutter***

**Liptak, 10/10/12** (Adam, Adam, the Supreme Court correspondent of The New York Times.¶ Mr. Liptak, a lawyer, joined The Times’s news staff in 2002 and began covering the Supreme Court in the fall of 2008. He has written a column, “Sidebar,” on developments in the law, since 2007.¶ Mr. Liptak’s series on ways in which the United States’s legal system differs from those of other developed nations, “American Exception,” was a finalist for the 2009 Pulitzer Prize in explanatory reporting.¶ “Justices Weigh Race as Factor at Universities,” http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html?pagewanted=1&\_r=0)

The member of the court who now probably holds the decisive vote, Justice Anthony M. **Kennedy, tipped his hand only a little, asking a few questions that indicated discomfort with at least some race-conscious admissions programs**.¶ **Those questions, along with his voting record, suggested that Justice Kennedy may be prepared to limit the Grutter decision.** He told Mr. Garre that he was uncomfortable with the university’s efforts to attract minority students from privileged backgrounds.¶ “**What you’re saying,” Justice Kennedy said, “is that what counts is race above all.**”¶ He asked a lawyer for Abigail Fisher, a white woman who was denied admission to the university and who filed the lawsuit before the justices, whether the modest racial preferences used by the university crossed a constitutional line. Then **he proposed an answer to his own question.¶ “Are you saying that you shouldn’t impose this hurt or this injury, generally, for so little benefit?”** he asked.¶ Justice Sonia **Sotomayor summarized the central question** in the case, echoing Chief Justice Roberts. **“At what point — when — do we stop deferring to the university’s judgment that race is still necessary?” she asked. “That’s the bottom line of this case**.”¶ In the [2003 decision](http://www.law.cornell.edu/supct/html/02-241.ZO.html), Justice O’Connor wrote that she expected it to stand for 25 years. “I know that time flies,” Justice Stephen G. Breyer said on Wednesday, “but I think only nine of those years have passed.”¶ **By the conclusion of the argument, it seemed tolerably clear that the four members of the court’s conservative wing were ready to act now to revise the Grutter decision.**

#### Kennedy won’t uphold affirmative action

**Bravin, 10/10/12** (Jess, Wall Street Journal, “Justices Clash on Affirmative Action,” http://online.wsj.com/article/SB10000872396390443982904578047192287305354.html)

Justice Anthony Kennedy, considered the only one of the court's five conservatives open to arguments for affirmative action, damped university administrators' hopes of retaining largely unfettered discretion over race's role in admissions. When UT's lawyer, Gregory Garre, sought to explain an admissions formula the university says is a "holistic" review of myriad individual attributes, Justice Kennedy was skeptical.¶ "So what you're saying is that what counts is race above all," he said. "You want underprivileged of a certain race and privileged of a certain race. So that's race."¶ Justice Kennedy gave no suggestion of retreating from his prior view of diversity as a compelling state interest. He has said that this, in theory, could justify some racial preferences. However, he has never voted to uphold any affirmative-action program to come before the court.¶ UT's position was problematic to the court's conservatives partly because the university has been able to maintain a diverse enrollment through a colorblind admissions formula that automatically accepts roughly the top 10% in class rank from each Texas high school. Because Texas has many schools that are nearly all black or all Hispanic, that plan has yielded roughly 5% black and 20% Hispanic undergraduate enrollment.

### 1AR – Aff Action Inev

#### Even in the worst case most maximalist decision, Aff action would survive

#### Affirmative action is inevitable --- extend Coates --- admissions offices will find other ways to let in minorities --- there’s too much momentum

Brenda Iasevoli, Oct 24 2012, The Village Voice, Goodbye, Affirmative Action?, <http://www.villagevoice.com/2012-10-24/news/goodbye-affirmative-action/>, jj

Yet schools will push for a diverse student body, even if the use of racial preferences is outlawed. Many observers predict that if race is outlawed as a factor in admissions, it will give way to a proxy: economic class.

#### No impact

Fisher ’12 – Daniel Fisher, Forbes Staff, I am a senior editor at Forbes, covering legal affairs, corporate finance, macroeconomics and the occasional sailing story. I was the Southwest Bureau manager for Forbes in Houston from 1999 to 2003, when I returned home to Connecticut for a Knight fellowship at Yale Law School. Before that I worked for Bloomberg Business News in Houston and the late, great Dallas Times Herald and Houston Post. While I am a Chartered Financial Analyst and have a year of law school under my belt, most of what I know about financial journalism, I learned in Texas. 10-9-12, Forbes, Will Fisher vs. Texas End Affirmative Action, Or Make It More Effective?, <http://www.forbes.com/sites/danielfisher/2012/10/09/will-fisher-vs-texas-end-affirmative-action-or-make-it-more-effective/>, jj

The cold, hard facts, meanwhile, show that racial discrimination isn’t the biggest problem in higher education. Poor students of whatever race stand a much lower chance of getting into selective schools, as I wrote in May. If students truly benefit from being exposed to the views and life experiences of a diverse selection of classmates, they probably aren’t getting much of that at the nation’s most elite colleges.¶ “A lot of admissions officers tend to focus on how `interesting’ a student is,” Richard Sander, a professor at the UCLA School of Law who studies racial and economic disparities in higher education, told me in May. “Being `interesting’ tends to be inversely related to being poor. Doing an internship in Indonesia is incompatible with holding a summer job.”¶ That leaves a possible good outcome for students even if the court votes to end race-based admissions with Fisher vs. University of Texas, the case being argued tomorrow. Most admissions officers are truly committed to diversity, and believe race is one critical component for achieving it. If race is taken away, that doesn’t mean they can’t still assemble a diverse class; it just means they have to be more aggressive in recruiting economically disadvantaged students.¶ Sander’s research into the files at one unnamed “very elite college” showed that in 1999, there was only a 4% chance a black student with SAT scores above 1200 but from the bottom 20% of socioeconomic status would even apply for admission. Equally qualified black students from the top quintile had a 48% chance of applying. The comparable spread for white students was 14% for the lowest quintile and 34% for the wealthiest.¶ After California voters passed a measure banning racial considerations at the University of California system, minority enrollment at the most prestigious schools fell. Berkeley and UCLA responded by investing in programs to improve public schools to try and increase the pool of qualified minority applicants.

### No Impact – Military Deference

#### No impact on the military

Carter ’03 – Phillip Carter¶ FindLaw Columnist¶ Special to CNN.com, July 15, 2003, Judicial deference to military may affect gay rights, war on terror, <http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security/>, jj

The reason for his poor chances is the longstanding tradition of judicial deference to the military. American courts nearly always defer to the judgment of the executive branch and the military where matters of national security (broadly defined) are concerned.¶ The doctrine has been questioned in a series of recent high-profile cases. Nevertheless, it still stands.¶ The constitutional roots of judicial deference on military matters¶ To understand the roots of the tradition of deference, it is necessary to refer first to constitutional text and history.¶ Article II of the Constitution gives the Executive Branch power over international policy and military affairs. Specifically, Section 2 says that "The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States." Section 2 goes on to empower the President to make treaties and carry on foreign relations.¶ As the ratification debates reveal, the Framers assigned these powers to the President because they feared that judicial or congressional interference in these areas might render the new nation weak, or incapable of rapid response to threats from abroad. The Framers also felt that because, at the time, the majority of national security knowledge and expertise lay in the Executive Branch, decision making on such issues properly belonged to that branch.¶ Accordingly, while Article II gives expansive military and foreign policy powers to the President, Article I gives Congress only limited military powers. It may "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations"; "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water"; "raise and support armies, but no appropriation of money to that use shall be for a longer term than two years"; "provide and maintain a navy"; "make rules for the government and regulation of the land and naval forces"; and provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions . . ." But that is all.¶ Finally, Article III gives the judicial branch no power at all over the military. As a result, the courts, unlike the other two branches, have no constitutional mandate to make military policy.¶ The tradition of judicial deference to the military grew out of this constitutional structure and history. As commander-in-chief, the argument goes, the President should have the utmost latitude in making decisions that affect the readiness of America's military. Similarly, Congress deserves free rein in exercising its Constitutional responsibilities to fund the military and make laws for its governance. In contrast, the courts have no such Constitutional mandate to make military policy; thus, they should yield to decisions by the President and Congress.¶ Another reason for deference: Reluctance to intervene in interbranch clashes¶ In addition, the case for deference has been strengthened by the courts' own reluctance to referee fights between the two elected branches of government. Owing their own powers to life-tenured appointment, not periodic election, Supreme Court Justices and other federal judges have been reluctant to overturn the majority will of the people, as expressed through the President and Congress.¶ Occasionally, federal judges have stepped in when the two other branches have clashed, and when the Constitutional division of labor has been unclear. For instance in Youngstown Sheet & Tube Co. v. Sawyer, also known as the "Steel Seizure Case," the Supreme Court intervened when President Harry Truman attempted to seize several steel mills in order to prevent a labor stoppage during the Korean War.¶ President Truman argued that he had the inherent power as commander-in-chief to take this action, but the court disagreed. In a sharp rebuke, the court held that Truman had neither the lawmaking authority nor executive authority to take such action -- even in wartime. In his oft-cited concurrence, Justice Robert Jackson wrote that the President's "command power is not such an absolute as might be implied from that office in a militaristic system, but is subject to limitations consistent with a constitutional Republic whose law and policymaking branch is a representative Congress."¶ In this instance the court was willing to say that Congress, not the president, possessed the relevant power. However, in military matters, the Supreme Court has typically supported -- rather than curtailing -- the exercise of presidential power.¶ To take the most notorious -- and shameful -- example, during World War II, the Supreme Court invoked the doctrine of deference to the military in Korematsu v. United States, to uphold the decision to intern 120,000 Japanese-Americans with scant regard for their constitutional rights.¶ In so doing, the court emphasized the "real military dangers" the detention was intended to address. It also stressed the fact that the decision had been made by "the properly constituted military authorities . . . because they decided that the military urgency of the situation demanded" it.¶ Plainly, the Korematsu Court -- though it purported to apply "strict scrutiny" to a policy based on national origin discrimination -- was actually deferring broadly to the judgment of military decision makers, and of President Roosevelt in particular. In addition, it did so even though the case was decided in 1944, when the war had turned in America's favor.¶ Modern-day judicial deference to the military¶ Judicial deference to the military also was exemplified by two important decisions in the 1980s, near the height of the Cold War.¶ In 1981, a group of plaintiffs argued that the draft was unconstitutional because, among other reasons, it excluded women. In Rostker v. Goldberg, the Supreme Court refused to overturn the draft policy, saying it reflected the considered judgment of the military that it needed men for combat -- and thus men for a draft.¶ The court found it "difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches."¶ The court also added it that "judicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."¶ Then, in 1986, in Goldman v. Weinberger, the Supreme Court ruled that the Air Force could restrict the religious freedom of a Jewish officer who sought to wear a yarmulke -- despite the First Amendment issues this regulation posed. Again the court made clear that, under the circumstances, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Today, Goldberg stands for the proposition that the military may burden the constitutional rights of its members with a minimum of interference from the courts.

### No Impact – Not Key to Readiness

#### No racial disparity in the military

JAMES JOYNER, MARCH 8, 2011, Outside the Beltway, Military Leadership Too White and Male?, <http://www.outsidethebeltway.com/military-leadership-too-white-and-male/>, jj

But the military doesn’t exist as a job corps; it’s there to fight our nations wars and to deter conflict by sheer readiness. Nor is the racial disparity particularly high. Indeed, the top ranks of the armed forces are much more racially and ethnically diverse than those of the Fortune 500. A college degree is an entry level requirement for commissioning (with rare exceptions) and whites are much more likely to have crossed that hurdle, for a variety of factors.

### Impact D

#### Secession is not contagious---no spillover

Saideman ‘08 (Stephen, political science at McGill University & Canada Research Chair in International Security and Ethnic Conflict, 2-20, “Kosovo comparison absurd” lexis, jj)

Second, this concern about the impact of Kosovo upon Quebec is part of a larger misconception about ethnic conflict and separatism in particular - that they are contagious. There is much concern that Kosovo's independence might set an unfortunate precedent, encouraging groups elsewhere to increase their efforts to become independent. However, individuals, groups and governments are far more motivated by the dynamics within their countries than by near or distant examples. One can learn positive or negative lessons from any event, so one takes away the lessons to learn and ignores the lessons that might be discouraging. Yes, Kosovo is independent so that might encourage separatists, but, on the other hand, the costs paid over the course of the past 20 years should discourage others.

#### No impact to secessionism.

Daniel Philpott in 1998 (Assistant Professor of Political Science at UC-Santa Barbara, “National Self-Determination and Secession,” p. 91)

Even if secessions did proliferate, though, which I do not advocate, we should be clear why it would be a problem. It is not necessarily a problem, for instance, for there to be small state. As I claimed in my original argument, there is no reason why even a city or tiny region cannot be self-determining. Andorra, Monaco, Liechtenstein, Singapore, and (up until this year) Hong Kong have all feared perfectly well as tiny sovereignties. There are some limits to how small a sovereign entity can be, but these arise from the necessity of providing certain public functions: maintaining roads and utilities, educating children, preserving minimal order, and providing basic public goods. 20 It is not necessarily a problem, either, for there to be a large number of states. International stability and peace has endured among the many and collapsed among the few. Compare Europe’s fate with 300 German states during the late seventeenth and eighteenth centuries.21