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Letter from the Editor...

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Sincerely,

Christian B. Corrigan

Editor
Christian B. Corrigan

Administrative Law & Regulation

Getting More Benefits From Benefit Cost Analysis

*By J. Kennerly Davis, Jr.**

Note from the Editor:

This article discusses the use of benefit cost analysis by federal regulatory agencies. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to other perspectives on the subject, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

• Office of Information and Regulatory Affairs: http://www.whitehouse.gov/omb/oira

• Office of Management and Budget, Economic Analysis of Federal Regulations under Executive Order 12866, January 11, 1996: http://www.whitehouse.gov/omb/inforeg_riaguide

• Office of Management and Budget, Circular A-4, September 17, 2003: http://www.whitehouse.gov/omb/circulars_a004_a-4/

• Office of Information and Regulatory Affairs, Agency Checklist: Regulatory Impact Analysis: http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf

• Office of Management and Budget, Memorandum on Executive Order 13563, "Improving Regulation and Regulatory Review," February 2, 2011: http://www.whitehouse.gov/omb/memoranda_2011

I. It All Depends on Who You Ask

Last June, the Environmental Protection Agency released a draft of its proposed rule to reduce carbon dioxide emissions from existing power plants.[1] The release marked a significant milestone in the ongoing national debate about global warming, the regulatory authority of the EPA, and the appropriate role of fossil fuels in electric power generation. The release also triggered another round in the long-running debate about the validity and usefulness of the benefit cost analysis performed by the EPA and other regulatory agencies during rulemaking.

The EPA estimates that the benefits resulting from the proposed rule will far exceed the cost of its implementation. The agency projects that in fifteen years climate and health benefits together will approach $80 billion per year, while annual compliance costs will amount to only about $9 billion.[2] Supporters of the proposed rule agree with the EPA that the benefits resulting from this initiative will surpass the cost of compliance by a wide margin. Critics of the initiative, on the other hand, argue that the EPA has greatly exaggerated the benefits of the proposed rule and greatly underestimated its costs. The debate about benefits and cost, papered with dueling reports and press releases, swelled around the time of the release of the draft proposal and has continued as the CO_2 proceeding unfolds.

This sort of debate about the projected benefits and cost sof a proposed regulation is all too typical of federal agency rulemaking. The issuing agency and supporters of the new regulation claim that the benefits of the proposal will far exceed the cost of its implementation, while critics complain that the agency's analysis inflates projected benefits and downplays the cost of implementation. Each side attacks the assumptions, analysis, and conclusions of the other at length and often with ferocious intensity, but without achieving any determinative analytical resolution of their disagreement. How much a proposed rule will cost and how much it will benefit society, the answers to those questions, depend on who you ask.

This is unacceptable. The results of the benefit cost analysis performed by a federal agency during rulemaking should not depend on who you ask. It is universally recognized that a sound assessment of the benefits and costs associated with alternative courses of action is essential to good decision making and the cost effective allocation of the resources that must be committed to pursue important goals such as the protection of human health and the environment. The recurring unresolved disputes about the projected benefits and costs associated with proposed regulations clearly demonstrate that the benefit cost analysis currently performed by federal regulatory agencies suffers from serious shortcomings that undermine public confidence in the rulemaking process. These recurring unresolved disputes, and the shortcomings they reveal, prevent benefit cost analysis from making the kind of contribution to the rulemaking process that it could, and should, make. Every new regulation, by its nature, further restricts the rights of the regulated and compels the forced reallocation of private resources. The shortcomings in the process must be addressed and corrected.

II. No Lack of Federal Commitment—In Principle

According to the old adage, you can't fix what you don't understand; you cannot successfully address and correct a problem, or improve a deficient process, unless you first correctly identify the source of the problem. What then, is the source of this problem? What is the origin, the root cause, of

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the recurring unresolved disputes surrounding the benefit cost analyses performed by regulatory agencies? The source of the problem is certainly not any lack of commitment in principle to such analysis. The commitment of the executive branch of the federal government to the importance of benefit cost analysis in agency rulemaking has been clear and consistent for more than thirty years. Beginning with the Reagan administration, a series of Executive Orders have directed each cabinet department and independent agency, including the EPA, to assess the benefits and costs associated with its regulatory actions and, in the case of economically significant actions, to support its proposals with formal regulatory impact analysis that includes an estimate of the quantitative benefits and costs associated with the proposal and its alternatives. The Executive Orders direct the department or agency to select the alternative that maximizes net benefits, and to take final action only upon a reasoned determination that its analysis justifies the action to be taken. In 2011, President Obama was merely summing up and reaffirming the long-standing bipartisan executive branch commitment to the principle of benefit cost analysis when he declared, "If we don't think there are more benefits than costs to … [a rule], … we're not going to do it."[3] What then, is the problem if there is no lack of commitment to the principle?

The fundamental problem with the benefit cost analysis currently performed by federal agencies is that the process lacks at its heart anything like the clearly defined, systematic methodology that is so strongly, but incorrectly, suggested to be present by the term "benefit cost analysis." In common understanding, that term refers to a process that is defined by quantitative ratio analysis performed using a clearly defined, systematic, universally accepted methodology.

III. The Firmly Anchored Private Sector Approach

Consider, for example, a business enterprise trying to decide how best to allocate its limited resources. Typically, the management of any such enterprise will engage in "benefit cost analysis" by calculating the benefit cost ratio, commonly called the Profitability Index, of each proposed project. The Profitability Index is calculated using a clearly defined, systematic, universally accepted methodology. Following this methodology, the quantified benefits of a proposed project are captured in the numerator of the ratio, and they equal the discounted present value of the cash flows that management estimates will be generated by the proposed project. The quantified costs of the proposed project are captured in the denominator of the ratio, and they equal the total initial cash investment presently needed to implement the project. Thus, the benefit cost ratio is calculated as:

$$\text{Profitability Index} = \frac{\text{Present Value of Future Cash Flows}}{\text{Initial Investment}}$$

If the value of the benefit cost ratio, or Profitability Index, for the proposed project exceeds 1.0, i.e., if the estimated benefits of the proposed project exceed its cost, then the analysis supports a decision to invest in the project.

Whatever the results of the analysis, the clearly defined methodology, based on computational techniques that are universally understood and accepted, provides a powerful decision tool to the management of the enterprise. Of course, a decision tool is just that. It supports a disciplined decision making process; it does not necessarily dictate the outcome. With each potential investment, management will consider a host of factors in addition to the Profitability Index of the proposed project. Many of these may be non-quantitative. These additional non-quantitative factors may determine the decision in some cases. That said, quantitative benefit cost ratio analysis defines the anchoring core of the decision making process. Its results establish a clear, if rebuttable, presumption to support the proposed project or not. If management wishes to invest in a project that has a calculated Profitability Index less than 1.00, they will be obliged to make a persuasive case for their proposal that is sufficient to rebut the clear presumption established by the quantitative ratio analysis. If they proceed with their project they can be held accountable for their decision by reference to the results of the analysis they overrode.

IV. No Anchor For The Agencies

The fundamental problem with the benefit cost analysis currently practiced by federal regulatory agencies is that there is no such clearly defined, systematic, universally accepted quantitative methodology that defines the core of the process. There is no such anchoring methodology that must be adhered to as a rule and clearly confronted and persuasively rebutted by regulatory decision makers who decide to take some course of action not supported by its results. Measured against private sector benefit cost analysis, a close reading of the Executive Orders and circulars dealing with regulatory analysis leads to the regrettable conclusion that there is simply "no there there."

The Executive Orders, and the related OMB Circular A-4, are written as directives. They contain numerous provisions stating what an agency "shall" do, "should" do or "must" do. But these directives are illusory. The actions directed to be taken are themselves described using only the most general and non-specific terms, often with significant qualifications. As a result, the Executive Orders and A-4 Circular offer only very general guidance that leaves the agency free to follow almost any approach it may choose to assess, and come to conclusions about, the benefits and costs of a proposed regulation. Consider the following examples of provisions contained in the Executive Orders and OMB Circular A-4:

> 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.

> [A]gencies should assess *all* costs and benefits of available regulatory alternatives, including … both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. (emphasis added)

> The analysis of … [regulatory] … alternatives may also consider, where relevant and appropriate, values such as equity, human dignity, fairness, potential distributive impacts [across social and economic groups], privacy and personal freedom.
>
> [Agency benefit cost assessments] should include any important ancillary benefits … unrelated or secondary to the purpose of the action … [and any]… countervailing risk … not already accounted for in the direct cost of the action....
>
> [E]ach agency must … select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts [across social and economic groups]; and equity) ….
>
> Each agency shall … recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation *justify* its costs. (emphasis added)

Clearly, there is no controlling specification of either the data or the methodology the agency is to use in its assessment of benefits and costs projected to result from a proposed regulatory action. The agency is free to use whatever information it feels is the "best reasonably obtainable" relevant information. The agency is free, indeed it is directed, to aggregate apples and oranges in its assessment and to include every sort of quantitative and qualitative benefit and cost it feels is relevant, including in benefits even those that are "unrelated or secondary" to the purpose of the proposed action. Moreover, the agency is not even required to base its action on any sort of determination that the benefits of the proposed action will exceed its cost. The agency is only directed to proceed on the basis of its "reasoned determination" that the benefits of the action will "justify" its cost.

Nowhere in this indefinite agency process is there anything like the clearly defined methodology that defines the core of private sector benefit cost analysis. In stark contrast to private sector analysis, the agency process essentially amounts to a discretionary rumination on the aggregated and partially quantified pros and cons that the agency feels might be associated with the action it proposes to take.

The indefinite nature of the agency process might be acceptable if the government accurately characterized the process and effectively qualified the results of the process with appropriately modest disclaimers. But this does not happen. To the contrary, once the agency publishes its aggregate estimate of total benefits and cost, that single comparison takes on a vibrant public life of its own. It becomes a headline in the news, and a powerful talking point for the agency and its supporters in the ensuing debate. In the case of the EPA proposal to reduce carbon dioxide emissions from existing power plants, the agency estimate of $80 billion in annual benefits and $9 billion in annual costs is just such a powerful talking point. Unfortunately, the EPA estimate derives much of its power from the generous application of the term benefit cost analysis to the agency's estimation process and the understandable but unsupported implication that the numbers were arrived at using anything like the clearly defined, universally accepted methodology that should characterize benefit cost ratio analysis. In the absence of such a methodology, the proponents and critics of this and other agency actions are left to endlessly debate their differing estimates of benefits and cost based upon their respective data sets and divergent methodologies. In the absence of such a methodology, such technical debates can never be resolved. Indeed, they cannot even be framed.

This is unacceptable. The regulations promulgated by federal agencies have an enormous impact on the lives and livelihoods of Americans. The cost of compliance with federal regulations is now estimated to approach $2 trillion per year. We deserve something far better from federal rulemaking than the current indefinite process followed to estimate the benefits and costs associated with proposed regulations.

V. Reform By Analogy?

If some core methodology, analogous to the quantitative benefit cost ratio analysis performed in the private sector, could be formulated and gain acceptance for use in regulatory analysis, then the rulemaking process would be greatly improved. Of course, such a core methodology would not automatically determine the outcome of a rulemaking, any more than the calculation of the Profitability Index of a proposed project automatically determines the outcome of management deliberations in a business enterprise. Such a methodology would, however, provide a reference point and focus for the rulemaking and related policy debate that is sorely lacking today. Such a methodology could be used to capture certain benefits and costs associated with a proposal, as those are defined by the terms of the methodology, and then to calculate a ratio of those benefits and costs. This ratio, analogous to the Profitability Index calculated in the private sector, could be called the Benefits Index of the proposed regulation.

Calculation of the Benefits Index of a proposed regulation would provide a powerful decision tool for agency officials, while also improving the transparency of the rulemaking process and thus the accountability of the agency. It would support a more disciplined process of regulatory analysis, while not dictating the outcome of the rulemaking. Agency officials would continue to be free to consider, in addition to the Benefits Index, all the statutory, policy related and other factors they consider today when contemplating the pros and cons of a proposed regulation. Some of these factors may be non-quantitative. In some cases, these non-quantitative factors may determine the agency's decision about whether or not to adopt a proposed regulation. In every case, however, the calculated Benefits Index would provide a transparent anchoring core to the overall rulemaking process. The quantitative results of the Benefits Index calculation would establish a clear, if rebuttable, presumption to support the regulatory proposal, or not. If the agency wishes to adopt a regulation that has a Benefits Index less than 1.00 it will, like private sector management, be obliged to

make and defend a case for its proposal based on other grounds.

If the calculation of a Benefits Index, pursuant to a clearly defined systematic accepted methodology were part of each rulemaking, the inevitable debate about the benefits and cost, and overall merits, of the proposed regulation would be much more clearly framed than it is today and, because of that, such debate could be much more constructive than it is today. With a standardized methodology, stakeholders could replicate the agency's calculation of the Benefits Index and identify any errors in the agency's estimates of benefits and costs that need to be corrected. If the agency did calculate the Benefits Index correctly, then the debate could focus on the additional factors articulated by the agency to support its decision to adopt a regulation. These additional factors will be especially important in those cases where the agency elects to adopt a regulation with a Benefits Index less than 1.00. In those cases, the debate could and should focus on the question of whether or not the agency has successfully rebutted the presumption against the proposal established by a Benefits Index less than 1.00.

VI. A First Step

Of course, it is one thing to form the concept of a Benefits Index and quite another to actually identify terms to populate its numerator and denominator that will have sufficient credibility to be accepted for use in regulator analysis and rulemaking. That will take real work. Over the years, a great number of very capable people have devoted significant professional attention to the issues surrounding the benefit cost analysis performed by federal agencies. Over the same period of time, many others have developed considerable experience and expertise related to benefit cost analysis as it is performed in the private sector. The country could benefit greatly from a serious dialogue among the most knowledgeable of these people, and from a concerted effort by them to see if it is possible to devise a Benefits Index that could gain acceptance for use in agency rulemaking.

To maximize the productive potential of such an undertaking, it must attract the interest and efforts of those most likely to make a meaningful contribution. The undertaking should be organized and led by persons, and sponsored by organizations, already recognized for the quality and objectivity of their work on issues surrounding the benefit cost analysis currently performed by federal agencies. The dialogue needs to be well structured, with a timeline of specified duration, and exacting criteria for participation. Perhaps the organizers could call for papers, to be submitted by a deadline, in which the authors would propose and defend a specific Benefits Index. The organizers could publish the papers, adding their own commentary, and perhaps convene a conference for discussion of the papers and debate of the relative merits of the best proposals.

The details of such an undertaking can vary. The important thing is that an effort be made to provide the best market place for the best ideas on the feasibility of a Benefits Index. If, as a result of such an undertaking, there were to emerge something of a consensus about the elements of an acceptable Benefits Index, something analogous to the private sector's Profitability Index, that could represent an enormously significant contribution to the rulemaking process and related political discourse. Of course, no such consensus may emerge. The dialogue called for here may not be able to identify for rulemaking any such index analogous to the Profitability Index. But we should try. The effort is worthy. As free citizens, we all have an urgent and continuing obligation to address the shortcomings of our government and to work to improve things as best we can. Recalling Benjamin Franklin's famous remark, we have been given the priceless gift of a free republic, if we can keep it.

Endnotes

1 *See* United States Environmental Protection Agency, Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 34,830 (June 18, 2014), http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule

2 *See* United States Environmental Protection Agency, Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emissions Standards for Modified and Reconstructed Power Plants, http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule-regulatory-impact-analysis

3 Editorial, *Obama on the Farm*, Wall St. J, Aug. 18, 2011, at A12.

4 Exec. Order No. 12866, 58 Fed. Reg. 51735, 51736 (October 4, 1993), http://www.whitehouse.gov/omb/oira/eo12866_10041993.pdf.

5 *Id.* at 51735.

6 Office of Information and Regulatory Affairs, *Regulatory Impact Analysis: a Primer* at 3 (August 15, 2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

7 *Id.* at 7.

8 Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 21, 2011), http://www.whitehouse.gov/omb/oira/eo13563_01182011.pdf.

9 Exec. Order No. 12866, 58 Fed. Reg. 51735, 51736 (October 4, 1993), http://www.whitehouse.gov/omb/oira/er12866_10041993.pdf.

10 *See* Competitive Enterprise Institute, Ten Thousand Commandments 2014: An Annual Snapshot of the Federal Regulatory State (April 29, 2014),https://cei.org/publication-type/studies/ten-thousand-commandments-2014.

The Legality of Executive Action After *King v. Burwell*

*By Josh Blackman**

Note from the Editor:

This article discusses the legality of possible executive actions if the Supreme Court rules in favor of the plaintiffs in the pending *King v. Burwell* case before the U.S. Supreme Court. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to other perspectives on the subject, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Nicholas Bagley & David K. Jones, *No Good Options: Picking up the Pieces After King v. Burwell*, 125 Yale L.J. Forum 13, 19 (2015): http://www.yalelawjournal.org/forum/no-good-options-picking-up-the-pieces-after-king-v-burwell
- Nicholas Bagley, David K. Jones & Timothy Stoltzfus Jost, *Predicting the Fallout from* King v. Burwell—*Exchages and the ACA*, 372 New Engl. J. Med. 101 (2015): http://www.nejm.org/doi/full/10.1056/NEJMp1414191
- Trish Riley et al., Nat'l Acad. For State Health Pol'y, *King v. Burwell*: State Options, Mar. 17, 2015: http://www.nashp.org.php5-2.dfw1-1.websitetestlink.com/wp-content /uploads/2015/03/King_v._Burwell_Brief_FINAL.pdf
- Rachana Pradhan & Brett Norman, *No Easy Fix if Supreme Court Halts Obamacare cash*, Politico (Mar. 2, 2015): http://www.politico.com/story/2015/03/supreme-court-obamacare-white-house-115631.html

Introduction

Section 36B of the Affordable Care Act (ACA) authorizes subsidies in the form of refundable tax credits for health insurance purchased through a state-established exchange. The "credit" "shall be allowed" based on the number of months "the taxpayer . . . is covered by a qualified health plan . . . enrolled in through an Exchange established by the State under § 1311."[1] After recognizing that this statute on its face limited subsidies to exchange established by states—meaning no subsidies would be paid in states relying on the federal exchanges—the Treasury Department issued a rule, providing that subsidies would be available in *all* states "regardless of whether the Exchange is established and operated by a State . . . or by HHS."[2] The Supreme Court is currently considering the legality of this rule in the case of *King v. Burwell*. A decision is expected by the end of June.

Only sixteen states, plus the District of Columbia, elected to establish a state-based exchange. (Three of these states operate what is known as a "federally-supported exchange," which is treated as a state-based exchange). The other thirty-four states declined to establish an exchange. In response, the Department of Health & Human Services (HHS) established a "federally-facilitated exchange," allowing consumers in each of the thirty-four states to purchase health insurance. At issue in *King v. Burwell* is whether the federal government can continue to pay subsidies to consumers on the federally-facilitated exchange.

This article will assess the legality of executive actions that the Administration may take after *King v. Burwell* to continue paying subsidies in these thirty-four states. I will not discuss the merits of the case, predict how the Court should construe the statute or IRS rule, or propose congressional modifications to the ACA.[3] Rather, this analysis is premised on potential administrative fixes HHS could employ following an adverse ruling in *King v. Burwell.*

There are two possible approaches HHS could take that would continue the payment of subsidies in some or all of the thirty-four states using the federally-facilitated exchange. First, HHS could unilaterally deem several of these states as having *tacitly* established an exchange, *without* the state's subsequent cooperation. Specifically, HHS could construe the fact that fourteen states perform certain functions that overlap with the ACA—what is known as "plan management"—as evidence that they in fact intended to establish an exchange. This *post-hoc* recognition of an establishment would drastically alter the terms on which states accepted certain responsibilities. Each of the fourteen states at issue notified HHS that it was *only* performing certain limited functions, and expressly declined to establish a state-based exchange. Retroactively and unilaterally declaring that these states in fact established a state exchange would distort political accountability, and disregard the considered judgments of the sovereign states, in violation of the principles of federalism. If HHS issued this interim rule without notice and comment, litigation would likely immediately follow by the *King* plaintiffs and the states. These suits, however, would face an uphill battle to stop the unlawful payment of subsidies. The administration could also attempt to limit the judgment in *King v. Burwell* to the four named plaintiffs, but that effort to evade the Court's judgment would be met with further litigation.

Second, HHS can streamline the process to fast-track the process for states seeking to establish an exchange. The threshold inquiry is whether a state has the appropriate authority to establish an exchange. The ACA requires that before a state can elect to establish an exchange, the state shall "adopt and have in

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effect . . . a state law or regulation that the Secretary determines implements the standards within the State."[4] Eighteen of the thirty-four states enacted the "Healthcare Freedom Act," which would require an act of the legislature, or even a constitutional amendment, in order to allow the creation of an exchange. In the remaining exchanges, it is feasible that a governor's executive order would satisfy the Secretary of HHS that the state has established an exchange. Even with this speculative authority, it is unlikely that the state would be able to complete all of the necessary steps to establish an exchange in 2015. However, a state could possibly deem the federally-facilitated exchange *as* state-established. This approach would be inconsistent with the text and history of the ACA, and would likely be challenged by further litigation.

A ruling against the federal government in *King v. Burwell*, even if stayed until the end of the tax year, would leave the Administration and the states with very limited options of how to respond quickly. Resorting to dubious administrative fixes to continue the payment of subsidies would invite an immediate court challenge. The path to amend the ACA must go through Congress.

I. HHS Lacks the Authority to Deem Unwilling States as Having Established Exchanges

HHS could determine that the fourteen states that declined to establish an exchange, but continued to perform certain regulatory activities that overlap with the ACA, have in effect established an exchange. As a result, consumers in these states could continue to receive subsidies. This approach would be inconsistent with the ACA, and disregard the choices the sovereign states made not to establish an exchange. If HHS issued such regulations—likely without notice and comment—it would amount to an end-run around an adverse ruling in *King v. Burwell*, and open the door to future litigation.

A. HHS "Administrative Fix"

The statutory framework concerning the establishment of the exchange is fairly open-ended, but not devoid of any direction. The ACA grants the Secretary of HHS the authority to "issue regulations setting standards for meeting the requirements" for "the establishment and operation of Exchanges."[5] A state's "elect[ion]" to establish an exchange will occur "at such time and in such manner as the Secretary may prescribe."[6] Specifically, the Secretary determines if the state's exchange meets "Federal standards established" or if "a State law or regulation . . . implements the standards within the State."[7] At an absolute minimum, a state would have two different responsibilities: "elect" to establish an exchange, and then in fact "establish" such an exchange that meets the Secretary's standards.

In 2012, HHS released a document known as the "Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges," that offered a guide for states to "document[] how its Exchange meets, or will meet, all legal and operational requirements."[8] Under the Blueprint, the Governor of a state must submit two documents to HHS that meet the two minimum criteria: a declaration letter and exchange application.[9] The declaration letter, sent to HHS, will indicate the "type of Exchange Model [the state] intends to pursue."[10] The exchange application must "document a State's completion, or progress towards completion, of all Exchange requirements."[11]

Professors Nicholas Bagley and David K. Jones suggest in the *Yale Law Journal Forum* that "[g]iven these broad statutory delegations, HHS could revise its regulations and the Blueprint to provide that some states should be understood as having established an exchange, even if they never formally elected to do so."[12] In other words, HHS would look to past actions as tacit evidence that the state in fact established an exchange, even in states that *did not* submit the declaration and application. Bagley and Jones query whether "the regular performance of essential and substantial exchange functions, over time, [could] constitute the establishment of an exchange."[13]

Citing several dictionaries which offer definitions of "establish," the authors conclude that an "act of creation need not be intentional or formal" and "over time through a regular course of conduct, so too might states establish exchanges."[14] Based on this functionalist approach, they contend that "[s]o long as the state's ongoing activities are, by themselves, sufficient to constitute the establishment of an exchange, the federal government's heavy involvement in exchange operations should be irrelevant."[15] According to this theory, HHS could waive the "Blueprint" requirements, and deem some or all of these fourteen states to have established an exchange through past cooperation with the federal government—even if the Governor never explicitly declared an intent to establish an exchange. Call it *establishment by estoppel*.

While HHS Secretary Sylvia Burwell testified before Congress that "we don't have an administrative action that we believe can undo the damage,"[16] Bagley and Jones's proposal is worth taking seriously as a possible model for HHS's response in the event of a reversal. We must remember how *King v. Burwell* arose. Although today, the federal government has developed sophisticated and nuanced arguments about how the entire ACA, when read in context, in fact provides subsidies for federally-facilitated exchanges, and "established by the states" is a term of art, *none* of these arguments were made when the initial IRS rule was issued.[17] Rather, as documented in a House Oversight Committee Report, in justifying the IRS Rule, the Treasury Department issued a single paragraph of *ipse dixit*, simply stating that federal and state exchanges should be treated in the exact same manner.[18] All of the legal justifications came *long* after the rule was issued, during the course of litigation. The government officials who promulgated the specious reasoning behind the IRS Rule will be the same lawyers who are planning a response to an adverse ruling in *King v. Burwell*.

An "administrative fix" that treats states that perform plan management functions as having established an exchange would amount to an unlawful end-run around an adverse ruling in *King v. Burwell* for three reasons. First, HHS cannot alter the terms on which states agreed to perform plan management. The fix would amount to a bait and switch. Second, sanctioning the Secretary's aggrandizement of such wide-ranging discretion of how to recognize an established exchange would disregard Congress's intent. Third, had a state known that the continued performance of plan management would be treated as establishing an exchange, it may have chosen otherwise. Such a regula-

tion, absent subsequent actions by the state, unlawfully distorts political accountability. An effort to adopt this administration fix would be susceptible to legal challenge.

B. "Administrative Fix" Would Amount to a Bait and Switch

Of the thirty-four states that did not establish a state-based exchange, fourteen perform certain "plan management" functions that overlap with the ACA. Seven of these states have a "state-partnership exchange" (AR, DE, IL, IA, MI, NH, and WV), and another seven have a "federally-facilitated exchange" that offers plan management (KS, ME, MT, NE, OH, SD, and VA).[19] Allowing HHS to alter the status of what constitutes a state-established exchange would amount to a bait and switch for the states. Professors Bagley and Jones concede that "[b]ecause the states were not on notice that operation of the exchange might be taken to count as establishment, treating that continued operation as establishment would arguably show disrespect to the states' considered choices."[20] As the Supreme Court recognized in *Pennhurst State Sch. & Hosp. v. Halderman*, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[21] A regulatory agency cannot move the goal posts on a whim—especially as a means to evade a Supreme Court decision invalidating its prior malfeasance.

1. State-Partnership Exchanges

Seven states currently operate what is known as a *State-Partnership Exchange*: Arkansas, Delaware, Illinois, Iowa, Michigan, New Hampshire, West Virginia. In these states, HHS performs *all* of the Marketplace functions, with the exception of plan management and in-person consumer assistance.[22] Plan management allows a state to "conduct all analyses and reviews necessary to support" the purchase of qualified health plans (QHP).[23] It also "include[s] recommending health plans for certification to the federally-facilitated exchange and conducting health plan oversight and monitoring."[24] These are functions long performed under state law that would overlap with HHS's duties under the ACA. In-person consumer assistance allows states to provide customer service to consumers concerning "filing an application, obtaining an eligibility determination, reporting a change in status, comparing coverage options, and selecting and enrolling in a QHP."[25] Other than these two functions, the federal government maintains *all* aspects of the exchanges. Consumers in these states will apply for and enroll in coverage on HealthCare.gov, and will likely never even realize their state has any role in the process.

It would be perverse for HHS to determine that these seven states in fact elected to establish an exchange. In late 2012 through early 2013, the Governors of each of these states sent a declaration to HHS indicating an intent to proceed *only* with a state-partnership exchange.[26] Typical of the seven declarations was Arkansas Governor Mike Beebe, who wrote that "the State of Arkansas wishes to retain as much control and autonomy as possible with regard to the operation of our health insurance exchange, rather than concede that control to Washington, D.C."[27] Arkansas sought "approval to pursue full Plan Management and Consumer Assistance functions" alone.[28] Secretary Kathleen Sebelius granted "conditional approval" on January 3, 2013 so long as Arkansas "demonstrate[s] the ability to perform all required Exchange activities" declared in the Blueprint submission, and comply with other regulations.[29]

Several of the letters stressed that the state was only electing a state-partnership exchange, and nothing else. Arkansas explained that this partnership status "will place Arkansas in a good position to make the transition to a State-Based exchange in the future *should legislative authority be obtained to do so*."[30] West Virginia Governor Earl Ray Tomblin wrote that "West Virginia retains the ability to modify the stated intent to proceed in a State Partnership Exchange until appropriate State analysis of forthcoming federal rules and guidance occurs."[31] The letter added that "West Virginia will continue to evaluate all available options concerning the Health Benefit Exchange so as to ensure that the most fiscally prudent and consumer-conscious approach is adopted in West Virginia."[32] Iowa Governor Terry E. Branstand, seeking to minimize the "Federal government's intrusion into the regulation of insurance," declared that the Hawkeye State "will continue to regulate insurance plans in Iowa."[33] (Iowa did not indicate that it would perform consumer assistance functions).

Illinois Governor Pat Quinn wrote that the state "sees this partnership as a bridge to running our own state-based Exchange," and will work with the "Illinois General Assembly to pass legislation with governance and financing language that will allow us to operate a state-based Exchange beginning in 2015."[34] (Illinois ultimately did not elect to operate its own exchange in 2015). Michigan Governor Rick Snyder noted that there was "potential for changes to Michigan's framework as more complete information is issued by the federal government."[35] New Hampshire Governor Margaret Wood Hassan explained the "New Hampshire legislature's . . . goals for the Exchange," stressing that the "partnership exchange is essential to preserving" the state's "traditional regulatory authority over insurance carriers."[36] Delaware Governor Jack A. Markell wrote that his state will "retain responsibility for both Plan Management and Consumer Assistance."[37]

Each of these seven states made clear that they were only electing for a state-partnership exchange, and nothing more. In no sense did these seven states understand that they were establishing a state-based exchange. HHS makes clear in the Blueprint that a state-based exchange is different from a state-partnership exchange.[38] Any decision by HHS to read these letters otherwise would disregard the reasoned decision-making of the sovereign states.

2. Federally-Facilitated Exchange with States Performing Plan Management

Thirty-four states (including the fourteen discussed in the previous section) expressly refused to establish an exchange or partner with HHS in any way. As a result, HHS established HealthCare.gov as a fallback federally-facilitated exchange for each state. (Subsidies being paid out on these federally-facilitated exchanges are at issue in *King v. Burwell*). On February 20, 2013, the Centers for Medicare and Medicaid Services, through an FAQ, announced that states that declined to establish an exchange, or officially partner with the federal government can still "conduct other specified plan management activities as a

part of its established regulatory role and in connection with market reform standards without submitting a Blueprint."[39] To participate, an "interested State should submit to HHS a letter as soon as possible from its Governor or Commissioner of Insurance attesting that the State will perform all the plan management activities."[40] In response, state insurance commissioners in seven of the thirty-four states notified HHS that they would continue to perform certain plan management functions, without complying with the "Blueprint" requirements: Kansas, Maine, Montana, Nebraska, Ohio, South Dakota, and Virginia. Each letter, signed by an insurance commissioner and not a Governor, made clear that the state was not electing to establish an exchange, or even partner with HHS, but simply wanted to continue its pre-existing regulatory regime for insurance plans.

South Dakota, "accept[ed]" the offer "to conduct plan management functions . . . *without* taking part in what HHS has termed the 'State Partnership Insurance Exchange Model.'"[41] Kansas's Insurance Commissioner notified HHS that though the Governor and Legislature did not "support[] the development of a state-based exchange, the Kansas Insurance Department (KID) had hoped that Kansas might be able to enter into a partnership with the federal government to perform both the plan management and consumer assistance functions required for the FFE."[42] The Commissioner wanted to "maintain [KID's] statutory and operational authority over those aspects of an exchange that are traditionally performed by state insurance regulators," which "[u]nder Kansas law KID [was] obligated" to do.[43]

Nebraska notified HHS that "while we are not entering into a formal 'partnership plan' with the federal government, we agree to perform plan management functions," which "will fall in line with our routine duties as the primary regulator of the business of insurance."[44] However, "consumer complaints about the plans or policies will remain with" HHS.[45] Montana "decided not to submit the blueprint for plan management," but asked HHS "to accept the regulatory function" to allow Montana to "conduct all plan management activities."[46] Montana did not propose to offer any consumer assistance functions. Ohio "elected not to run a state-based exchange" but "reiterated our intentions to conduct plan management activities . . . . at the state level . . . as Ohio has done for decades."[47] Maine notified HHS that the state would perform certain plan management functions.[48] Virginia Governor Robert F. McDonnell also agreed that the Commonwealth would perform plan management.[49]

The argument that these seven states elected to establish an exchange is equally, if not more strained than the seven states that opted into the state-partnership exchanges. First, state insurance commissioners (some independently elected), rather than the Governors and Legislatures made this decision. Second, almost every letter stressed that the state was *not* entering into a state-based exchange or an official partnership with the federal government. They wanted to rely on the federally-facilitated exchange. Third, and most importantly, the states were seeking to continue implementing their pre-existing regulatory regimes, which in many cases were mandated under state law. This would avoid duplication of work, and prevent HHS from intruding onto the state's traditional role in regulating insurance markets. Under this arrangement, no new responsibilities were being undertaken, and the federal government would not interfere with those efforts.

After an adverse ruling in *King v. Burwell*, HHS could argue that under an administrative fix, practically speaking, nothing changes. The states would still perform the same plan management functions, and the federal government would still perform all other tasks. In other words, all that changes is the label of the program. This argument fails because the payment of the subsidies would still trigger the individual and employer mandates, as the exchanges would now be considered "state-based," and fall within the rubric of Section 36B. In no sense can HHS deem these states to have elected to establish an exchange—that would be contrary to their clearly-expressed intents, and disregard the well-reasoned decisions of the sovereign states.

C. Administrative Fix Would Continue to Disregard Distinction Between State and Federal Exchanges

If the Supreme Court rules against the federal government in *King v. Burwell*, the Justices will recognize that through the ACA, Congress demarcated a difference between federal and state exchanges. State-established exchanges were favored, as consumers would receive subsidies. Federal exchanges were disfavored, as consumers would not receive subsidies. While Congress decided that an exchange is established "at such time and in such manner as the Secretary may prescribe,"[50] it legislated against the background principles that states would have to take certain new steps—potentially with federal funding Congress allocated—to create its own exchange. This was an important decision, and could not be brushed aside by executive fiat. Under the ACA, a state-established exchange "shall be a governmental agency or nonprofit entity that is established by a State."[51] For HHS to "deem" the "governmental agency" that specifically declined to have established an exchange, to have in fact established an exchange, would show a disregard Congress's intent, the state's intent, and principles of federalism.

Further, the ACA requires that before a state establishes an exchange, it must "adopt and have in effect . . . a State law or regulation that the Secretary determines implements the standards within the State."[52] In these fourteen states, no "law or regulation" was enacted in response to the ACA. It is true that the state had previously engaged in these functions, but the state did not opt to take these steps to comply with the law. The ACA's focus on election should not be understood to be satisfied by pre-existing state functions.

D. Post-Hoc Establishment of Exchange Distorts Political Accountability

The administrative fix would also distort political accountability. Specifically, issuing a regulation that recognizes that a state established an exchange two years after a state expressly declined to do so nullifies the tough choices politicians had to make concerning the ACA. Had a state legislator elected to participate in an exchange in 2012 or 2013, the voters of the state could have reacted accordingly. But now the elected branches of the states will have unknowingly assumed the political liability for federal policy choices. The state government will now be

perceived as responsible for the controversial law. Businesses and individuals in the state that were previously exempt from the unpopular employer and individual mandate would now be subject to expensive penalties. With the administrative fix, as the Supreme Court held in *New York v. United States*, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[53]

By blurring political accountability, the sovereignty of the states and their considered judgment are harmed. The federal government interferes with the relationship between the state and its people, and negates the ability of the electorate to hold officers accountable. This action amounts to a concrete and cognizable injury to the state's sovereignty.[54] Professors Bagley and Jones recognize that "[r]espect for federalism principles may also cut against a capacious understanding of 'establish.'"[55] Even if the meaning of "establish" is ambiguous, *Chevron* deference would not support such an expansive reading of the Secretary's discretion, as it would nullify the prerogatives of the states to decline to participate, and distort the decisions of the states to only perform plan management.[56]

E. Litigating The Administrative Fix

If HHS issues an administrative fix that retroactively deems any state that facilitates plan management as having established an exchange, litigation would almost certainly follow. Such a regulation would likely be issued before notice-and-comment rulemaking, so it can go into effect immediately and minimize any disruption in the payment of subsidies.[57] Therefore, litigation would be the only viable option to halt the change *after* it has already gone into effect.

Two parties may bring suit. First, the plaintiffs in *King v. Burwell* could allege that the "fix" amounts to an end-run around the Court's decision in their favor. Conceivably, they could even petition the Supreme Court for a rehearing if the federal government flouts an adverse ruling, so long as the petition is filed "within 25 days after entry of the judgment or decision."[58] If the judgment is issued right away, HHS could conceivably stall until after that period is over to eliminate a petition for rehearing. If the Supreme Court stays the judgment until the end of the tax year—as Justice Alito suggested during oral argument—the clock for rehearing may not start ticking until *after* the regulation is issued. If the Supreme Court does not grant rehearing, the plaintiffs would have to seek redress from the District Court for the Eastern District of Virginia.

Second, the states with federally-facilitated exchanges could also bring suit, basing standing on the penalties applied to the states as employers, as advanced in *Pruitt v. Burwell*.[59] Further, one of the fourteen states that conduct plan management could bring suit based on the "political accountability" theory of standing or based on the imminent harm of financial responsibility for a state exchange's operating expenses.[60]

In any event, litigation would be very high stakes for both the government and the challengers. For the federal government, the Supreme Court would have just held that the Treasury paid out billions of dollars of subsidies by distorting the plain meaning of a statute. The administrative fix would likely be viewed by the courts as another end-run around an uncooperative Congress. The stakes are equally high for the challengers. When *King v. Burwell* was first filed, the subsidies had not yet been paid. Today, millions of people have come to rely on these subsidies, and may be unable to afford health insurance if the subsidies are eliminated. The Supreme Court's decision would have put those subsidies on hold, but the "fix" kept the funds pouring. An injunction at this stage would halt the subsidies, restoring the status quo following a ruling in *King*, that was temporarily obviated by the administrative fix. Further, the states may not wish to litigate this issue further, as consumers in their states will lose subsidies. Indeed, many states that were involved in the constitutional challenge to the individual mandate in 2012 have not taken a position in *King v. Burwell*.[61] The political calculus makes this decision very difficult. Professors Bagley and Jones accurately state the situation: "the political conversation in the deemed states would shift: the question would be not whether to establish a state-based exchange, but whether to dismantle it."[62]

F. Limiting King v. Burwell *to Four Plaintiffs*

Another possible, even more radical option, would be for the Administration to limit the scope of *King v. Burwell* to the four named plaintiffs. University of Chicago Law Professor William Baude suggested this strategy in a controversial *New York Times* editorial.[63] "If the administration loses in King," Baude wrote, "it can announce that it is complying with the Supreme Court's judgment—but only with respect to the four plaintiffs who brought the suit." As off-the-wall as this idea sounds, the Justice Department has already suggested this ploy.

The week before oral arguments in *Halbig v. Burwell*—which raises the same issues as *King*—the Justice Department submitted a letter to the D.C. Circuit Court of Appeals, taking the position that the government was constitutionally prohibited from denying subsidies to millions of Americans.[64] In short, the government argued that people who were not parties to the suit had a due-process right to be heard before their subsidies were extinguished—as if Obamacare were some sort of constitutionally protected property interest! The challengers represented by Michael Carvin—also counsel of record in *King*—shot back, incredulous that the government had an "apparent intention to lawlessly flout this Court's binding order."[65] In August, the D.C. Circuit ruled for the plaintiffs, and sent the case back to the lower court with instructions to "vacate the IRS Rule" in its entirety—not merely with respect to the named plaintiffs.[66]

If DOJ attempted to limit the ruling in *King v. Burwell* to the named plaintiffs, the district court on remand would have to order that the Court's judgment extends beyond the named plaintiffs. While DOJ's stratagem would certainly be reversed by the courts, it would still buy time for the administrative fix to take hold.

II. HHS Has Some Authority to Streamline Establishment of State Exchanges

In order to maintain the payment of subsidies after *King v. Burwell*, states may attempt to establish exchanges before the end of 2015. Under the current regime, it is impossible for a state to establish an exchange this quickly. However, HHS may

alter the guidelines in the Blueprint to expedite the process. As a report for the National Academy of State Health Policy observed, "It is possible that HHS might revisit, allow for phased compliance, or otherwise adapt these requirements in light of *King* to allow for state exigencies."[67] Because the states are attempting to work with HHS, the federal government would have more leeway to streamline the establishment of exchanges. Though at bottom, the state still must take specific actions to *actually* establish an exchange, rather than just deeming the federal exchange as a state-based exchange.

A. State Authority to Establish Exchange

As a threshold matter, the ACA does not specifically define how a state establishes an exchange. The ACA requires that before a state can elect to establish an exchange, the state shall "adopt and have in effect . . . a state law or regulation that the Secretary determines implements the standards within the State."[68] This is easier said than done. Even assuming that state legislatures can overcome political opposition to the ACA, the majority of the thirty-four states with federally-facilitated exchanges have part-time legislatures that will be out of session by the summer of 2015.[69] Further, calling a special session is quite difficult and expensive in these states.[70]

However, Governors also have their pens and phones. In the Blueprint, HHS has deemed acceptable not only a "current law and/or regulation" but a "general authority (e.g., Executive Order) that the State has determined provides the necessary legal authority to establish an exchange."[71] In other words, even an executive order by the Governor, if he or she determines it is sufficient, will satisfy the Secretary's determination that the State has the authority to proceed. Such an executive order could allow a Governor to bypass the state legislature. At least three states—Kentucky, New York, and Rhode Island—have already established exchanges through executive order.[72] It is conceivable that Governors, in the face of opposition from their legislatures, could issue executive orders to elect to establish an exchange.

An executive order is not an option in eighteen of the thirty-four states that enacted variants of the *Healthcare Freedom Act*, which prohibits state officials from taking any actions that helps to enforce the ACA's penalties: AL, AZ, GA, ID, IN, KS, LA, MO, MT, ND, NH, OK, OH, TN, UT, VA, and WY.[73] Opting to establish an exchange would have the effect of triggering the employer and individual mandates, and would run afoul of the Healthcare Freedom Act.[74] For these states, a statutory, or even constitutional amendment, may be necessary before *any* subsidies can be paid out.

If a state is able to obtain legislation supporting the establishment of an exchange, the state would still face the formidable task of actually establishing a functional exchange. Under the Blueprint, there are fourteen distinct functions a state would need to perform before its exchange could be certified by HHS. It would be virtually impossible for a state to start building one in July 2015 with no assistance or federal funding, and expect to be ready before the end of the year.[75] Indeed, states that began the process in 2011 with significant federal funding were largely unable to meet the demand when the ACA went live in 2013—and that was with hundreds of millions of dollar in federal funding.

B. State Deeming a Federally-Facilitated Exchange is State-Based

I previously discussed the possibility that HHS may deem a federally-facilitated exchange to be stated based if the state performs certain responsibilities, such as plan management functions. The mirror-image of this proposal is that the states could recognize the federally-facilitated exchange operated by HHS to be their own state based-exchange. Once the state makes this determination, the Secretary of HHS could rubberstamp the proposal, allowing for the subsidies to continue. In other words, states with federally-facilitated exchanges would continue to rely on HealthCare.gov, but allow the Secretary to deem it a state-based exchange. With this plan, the subsidies would continue.

A report from the National Academy for State Health Policy suggests, "[t]his model offers some advantages in that it would allow for a simple, low-burden, low-cost way for the state to sustain the coverage model and subsidies now in effect under the" federally-facilitated exchange. The New Hampshire House introduced a bill that would do just this, and "establish[] the federally-facilitated health exchange as the health exchange."[76]

There are serious, but not insurmountable legal obstacles for this path. First, it would be anomalous for a state—that does absolutely *nothing* to manage an exchange—to simply deem that the federal government was in fact a state-exchange. As Professors Bagley and Jones point out, the ACA distinguishes between a state choosing to "elect[]" to create an exchange, and actually "establish[ing]" the exchange.[77] Such a reading would merge these two distinct statutory requirements, as electing to have an exchange would be no different than actually having one. There must be an actual *establishment*.

Second, this approach would (likely) conflict with the text of the statute. Section 1311(d)(1) of the ACA provides that a state exchange shall be a "governmental agency or nonprofit entity that is established by a State."[78] The most logical reading of this provision is that the phrase "established by a State" modifies both preceding clauses—"governmental agency" and "nonprofit entity." In other words, the governmental agency must be state-based. HHS is most certainly not state-based. But, as Professors Bagley and Jones observe, HHS could conclude that "established by a State" only modifies the "nonprofit entity." A court could defer to a regulatory action finding that the governmental agency—HHS—need not be state-established.[79] To reiterate a point made earlier, we must not lose sight of the fact that this entire case arose because the IRS decided to rewrite a statute that yielded results it did not like. This construction is far more linguistically plausible, and could warrant *Chevron* deference.

Third, under the ACA, all state-based exchanges are required to be "self-sustaining" by January 1, 2015.[80] As a result, states would be required to fund their operations through "user fees, state appropriations, or through redirecting existing revenue sources."[81] If HHS continued to fund the exchange in its entirety, with no state appropriations—as it must under this proposal—that would render these provisions of the ACA a nullity. States that submit blueprints that do not list all of the necessary appropriated sources of funding should be summarily denied. Finally, if a state submits a blueprint indicating that it *intends* to establish an exchange, but has not yet en-

acted the appropriate legislation, it would be inappropriate to deem that state to have established an exchange. An inchoate pledge to build an exchange—especially when not based on concrete legislation and authority—is not an establishment. Simply stated, HHS should not rubberstamp blueprints from states based on dubious legal authority, with an insufficient appropriation of funds, that is to be completed on an entirely unrealistic schedule.

C. "Supported State-Based Exchange" For States That Perform Plan Management

For the fourteen states that perform plan management functions, HHS may allow them to be certified as a "Supported State-Based Exchange." As implemented in Oregon, Nevada, and New Mexico, these states operate certain exchange functions, using the federal IT platform of HealthCare.gov. The National Academy for State Health Policy suggests that this model "is a flexible model that may be attractive to states that have the capacity to perform some functions of an SBE but where the cost and time associated with IT development is the most significant barrier to establishing a SBE." As it stands now, however, the states would have to perform far more functions than merely plan management. Nothing prevents the Secretary from modifying these regulations at her discretion, and decreasing the number of responsibilities a state must perform. However, the states will still have to perform sufficient responsibilities for it to be an actual state exchange, rather than a state shell with a federal core.

Conclusion

If the Supreme Court invalidates the IRS Rule in *King v. Burwell*, all levels of the federal and state governments will be faced with difficult decisions. However, all changes must be made in accordance with the law, and the rule of law. HHS cannot adopt an "administrative fix" to deem states that declined to establish an exchange as having established exchanges. Similarly, the Secretary does not have the authority to accept petitions to establish exchanges unless the state takes specific actions in pursuance of that objective. HHS cannot wave its wand and determine that any state performing minimal functionalities had established an exchange. This legerdemain would violate the letter, and spirit of the law. Any effort by the federal government to disregard the text and history of the ACA—which deliberately sought to put the states in control of whether to establish an exchange—will be met with future litigation.

If the ACA is to succeed, it will be based on a partnership between the states and federal governments, complying with the law Congress drafted. Executive action to bypass the separation of powers will negate the reasoned decisions of the states, and distort political accountability in violation of the principles of federalism.

Endnotes

1 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

2 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20.

3 For a discussion of the merits, *see* Brief for Cato Institute & Prof. Josh Blackman as Amici Curiae Supporting Petitioners, King v. Burwell (No. 14-114), *available at* https://www.scribd.com/doc/251279503/King-v-Burwell-Brief-for-the-Cato-Institute-and-Prof-Josh-Blackman-as-Amici-Curiae-Supporting-the-Petitioners.

4 42 U.S.C. 18041(b)(2).

5 42 U.S.C. § 18041(a)(1).

6 *Id.* at § 18041(b).

7 *Id.* § 18041(b)(1-2).

8 Ctrs. for Medicare & Medicaid Servs., Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges, (2012) [hereinafter Blueprint], https://www.cms.gov/CCIIO/Resources/Files/Downloads/hie-blueprint-11162012.pdf.

9 *Id.* at 4.

10 *Id.* at 6.

11 *Id*. at 10.

12 Nicholas Bagley & David K. Jones, *No Good Options: Picking up the Pieces After King v. Burwell*, 125 Yale L.J. Forum 13, 19 (2015).

13 Bagley, *supra* note 12, at 19.

14 Bagley, *supra* note 12, at 19.

15 Bagley, *supra* note 12, at 20.

16 Rachana Pradhan & Brett Norman, *No Easy Fix if Supreme Court Halts Obamacare cash*, Politico, Mar. 2, 2015, http://www.politico.com/story/2015/03/supreme-court-obamacare-white-house-115631.html.

17 Ilya Shapiro & Josh Blackman, *A Litmus Test for ObamaCare and the Rule of Law*, Wall St. J., Feb. 26, 2015, http://www.wsj.com/articles/ilya-shapiro-and-josh-blackman-a-litmus-test-for-obamacare-and-the-rule-of-law-1424997418.

18 Committee on Oversight and Government Reform, Committee on Ways and Means, Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies, Joint Staff Report, U.S. House of Representatives (Feb. 5, 2014), http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf.

19 The remaining states with a federally-facilitated exchange are Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

20 Bagley, *supra* note 12, at 20.

21 451 U.S. 1, 17 (1981).

22 Blueprint, *supra* note 8, at 3.

23 *Id.*

24 Sarah Dash, Christine Monahan & Kevin W. Lucia, Health Policy Brief: Health Insurance Exchanges and State Decisions, Health Aff., July 18, 2013, http://healthaffairs.org /healthpolicybriefs/brief_pdfs/healthpolicybrief_96.pdf.

25 *Id.*

26 *State Health Insurance Marketplaces*, The Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces.html.

27 Letter from Gov. Mike Beebe to Sec. Kathleen Sebelius (Dec. 12, 2013), http://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/ar-exchange-letter.pdf.

28 *Id.*

29 Letter from Sec. Kathleen Sebelius to Gov. Mike Beebe (Jan. 3, 2013), http://www.cms.gov/CCIIO/Resources/Files/Downloads/ar-blueprint-exchange-letter-01-03-2013.pdf.

30 Beebe, *supra* note 27.

31 Letter from Gov. Earl Tomblin to Sec. Kathleen Sebelius (Feb. 15, 2013), http://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/wv-marketplace-letter.pdf.

32 *Id.*

33 Letter from Gov. Terry Branstad to Sec. Kathleen Sebelius (Dec. 14, 2012). http://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/ia-exchange-letter.pdf.

34 Letter from Gov. Pat Quinn to Sec. Kathleen Sebelius (Oct. 16, 2012), http://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/il-exchange-letter.pdf.

35 Letter from Gov. Rick Snyder to Sec. Kathleen Sebelius (Jan. 22, 2013), http://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/mi-marketplace-letter.pdf.

36 Letter from Gov. Margaret Hassan to Sec. Kathleen Sebelius (Feb. 13, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/nh-marketplace-letter.pdf.

37 Letter from Gov. Jack Markell to Sec. Kathleen Sebelius (Nov. 14, 2012), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/de-exchange-letter.pdf.

38 Blueprint, *supra* note 8, at 2-3.

39 *State Evaluation of Plan Management Activities of Health Plans and Insurers,* Department of Health and Human Services (Feb. 20, 2013), https://www.cms.gov/CCIIO/Resources/Files/Downloads/plan-management-faq-2-20-2013.pdf.

40 *Id.*

41 Letter from SD Director of the Division of Insurance Merle Scheiber to Gary Cohen (March 11, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/sd-exchange-letter-03-11-2013.pdf (emphasis in original).

42 Letter from Sandy Praeger, the Kansas Commissioner of Insurance to Gary Cohen (Feb. 15, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/ks-exchange-letter-2-15-2013.pdf.

43 *Id.*

44 Letter from Nebraska Director of the Department of Insurance Bruce R. Ramge to Gary Cohen (Feb. 20, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/ne-exchange-letter-2-20-2013.pdf.

45 *Id.*

46 Letter from Commissioner of Securities & Insurance Moncia J. Lindeen to Gary Cohen (Feb. 26, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/mt-exchange-letter-2-26-2013.pdf.

47 Letter from Director of the Department of Insurance Mary Taylor to Gary Cohen (Feb. 14, 2013), http://www.healthtransformation.ohio.gov/LinkClick.aspx?fileticket=4EevXzKUgxE%3D&tabid=150.

48 Letter from Superintendent of Insurance Eric Cioppa to Gary Cohen (Mar. 18, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/me-exchange-letter-03-18-2013.pdf.

49 Letter from Gov. Robert McDonnell to Gary Cohen (Feb. 14, 2013), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/va-exchange-letter-02-14-2013.pdf.

50 42 U.S.C. § 18041(b).

51 42 U.S.C s. 18031(d)(1).

52 42 U.S.C. s. 18041(b)(2).

53 505 U.S. 144, 169 (1992).

54 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

55 Bagley, *supra* note 12, at 20.

56 Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

57 5 U.S.C. s. 533(b)(B) (noting that an agency can issue a rule without notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are . . . contrary to the public interest").

58 Supreme Court Rule 44.

59 *Oklahoma ex rel Pruitt v. Burwell*, 51 F.Supp.3d. 1080, 1084-87 (E.D. Oklahoma 2014) ("Oklahoma has not established its own Exchange, and therefore state employees would not be eligible for subsidies if not for the IRS Rule. Accordingly, the State of Oklahoma would, if not for the IRS Rule, face no risk of incurring penalties under the employer mandate.").

60 West Virginia, which is one of the 14 states that perform plan management functions, articulated this theory of standing in its challenge to the delay and modification of the individual mandate. *See* Josh Blackman, *West Virginia Files Motion for Summary Judgment in Obamacare Administrative Fix Suit*, Josh Blackman's Blog (Sep. 17, 2014), http://joshblackman.com/blog/2014/09/17/west-virginia-files-motion-for-summary-judgment-in-obamacare-administrative-fix-suit/.

61 Abby Goodnough, *Health Law Suit Hints at G.O.P. Divide,* N.Y. Times, Jan. 10, 2015. Only seven of the thirty-seven states without state-based exchanges filed a brief supporting the petitioners. Brief of the States of Oklahoma, Alabama, Georgia, South Carolina, and West Virginia, and Consumers' Research as Amici Curiae Supporting Petitioners, King v. Burwell (No. 14-114). (Among these seven, West Virginia is the only state that performs plan management activities).

62 Bagley, *supra* note 12, at 21.

63 Will Baude, *Could Obama Bypass the Supreme Court*, N.Y. Times, Mar. 17, 2015, http://www.nytimes.com/2015/03/17/opinion/could-obama-bypass-the-supreme-court.html. For a response to Baude's argument, see Josh Blackman, *The President Cannot Bypass the Courts*, National Review, Mar. 19, 2015, http://www.nationalreview.com/article/415635/president-cannot-bypass-courts-josh-blackman.

64 Halbig v. Sebelius, No. 14-5018 (D.C. Circuit), Notice of Supplemental Authority from Department of Justices (Mar. 12, 2014), http://www.cato.org/sites/cato.org/files/documents/govt_28j_on_class_actions.pdf.

65 Halbig v. Sebelius, No. 14-5018 (D.C. Circuit), Motion to Strike Notice of Supplement Authority (Mar. 14, 2014), http://www.cato.org/sites/cato.org/files/documents/halbig_motion_to_strike_filed.pdf.

66 Halbig v. Burwell, 758 F.3d 390, 412 (D.C. Cir. 2014) reh'g en banc granted, judgment vacated, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

67 Trish Riley et al., Nat'l Acad. for State Health Pol'y, *King v. Burwell*: State Options, Mar. 17, 2015, http://www.nashp.org.php5-2.dfw1-1.websitetestlink.com/wp-content /uploads/2015/03/King_v._Burwell_Brief_FINAL.pdf.

68 42 U.S.C. 18041(b)(2).

69 Nicholas Bagley, David K. Jones & Timothy Stoltzfus Jost, *Predicting the Fallout from King v. Burwell—Exchanges and the ACA*, 372 New Engl. J. Med. 101, 102 (2015).

70 *Special Sessions*, Nat'l Conf. St. Legislatures, http://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx.

71 Blueprint, *supra* note 8, at 19.

72 David K. Jones, Katharine W. V. Bradley & Jonathan Oberlander, *Pascal's Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma*, 39 J. Health Pol. Pol'y & L. 97, 98 (2014).

73 *ALEC's Health Care Freedom Initiative*, American Legislative Exchange Council, http://www.alec.org/initiatives/health-care-freedom-initiative/.

74 See Michael F. Cannon, *Goldwater Attorney: ObamaCare-Compliant Exchange Would Violate Idaho's Health Care Freedom Act*, Cato At Liberty (Jan. 30, 2013), http://www.cato.org/blog/goldwater-attorney-obamacare-compliant-exchange-would-violate-idahos-health-care-freedom-act.

75 42 U.S.C. s 18031(a)(4)(B) (no "grant [for establishing an exchange] shall be awarded under this subsection after January 1, 2015.").

76 New Hampshire House Bill 548, introduced March 11, 2015.

77 Bagley, *supra* note 12, at 27.

78 42 U.S.C. 18031(d)(1).

79 Bagley, *supra* note 12, at 27.

80 Sarah J. Dash et al., State Marketplace Approaches to Financing and Sustainability, The Commonwealth Fund Blog, (Nov. 6, 2014), http://

www.commonwealthfund.org/publications/blog/2014/nov/state-marketplace-approaches-to-financing-and-sustainability.

81 *Id.*

Criminal Law & Procedure

Paroline v. United States: The Question of Restitution

*By Dean A. Mazzone**

In *Paroline v. United States*, 134 S.Ct. 1710 (2014), the United States Supreme Court considered the perennial and vexing question of how precisely to ascertain the proper amount of restitution owed to a victim by a person convicted of possession of child pornography. Doyle Randall Paroline pleaded guilty to possessing between 150 and 300 images of child pornography; two of those images depicted the abuse of "Amy" (a pseudonym) by her uncle when she was eight or nine years old.[1] At 17, and with the prosecution of her uncle behind her, Amy learned that video images of her abuse were widely available on the internet, with unknown possessors (and viewers) numbering in the thousands.[2] The precise number can never be known.

In her victim impact statement to the Court, following Paroline's plea, and in anticipation of his sentencing, Amy said the following:

> Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle. . . . My life and my feelings are worse now because the crime has never really stopped and will never really stop. . . . It's like I am being abused over and over and over again.[3]

As noted, one of those abusers was Paroline, the admitted possessor of two of Amy's images.

Pursuant to the Mandatory Victim Restitution Act (MVRA), federal district courts must award restitution in certain cases, including cases of child sexual exploitation and child pornography.[4] Specifically, § 2259 of the statute commands that courts shall order the defendant "to pay the victim . . . the full amount of the victim's losses as determined by the court" and that "[t]he issuance of a restitution order under this section is mandatory."[5] § 2259 also references and incorporates a later section of the MVRA which directs that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."[6] This later section, however, applies generally to restitution in all types of criminal cases, and has no distinct provisions for crimes of child exploitation in cases such as Amy's.

Pursuant to § 2259, Amy sought restitution from Paroline. Amy's request: approximately $3.4 million dollars, with about $3 million of that sum attributable to lost income, and the remainder to future treatment and counseling costs.[7] All parties agreed that Amy did not know Paroline at all, except to the extent that he pleaded guilty in the federal proceeding to possessing two unlawful images of her that he accessed through the internet.[8]

After a hearing, the district court denied Amy's request for restitution from Paroline. Noting that "everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute[s] to [the victim's] ongoing harm" nonetheless, where the government must prove the amount of the victim's losses "directly produced by Paroline that would not have occurred without his possession of her images" the government simply failed to meet that burden.[9] It could not show by a preponderance of the evidence what precise losses of Amy's were caused by Paroline's specific conduct, and Amy was thus entitled to no restitution whatsoever.[10]

Amy sought review of the district court's decision, and the case wound its way eventually to the United States Court of Appeals for the Fifth Circuit. Hearing the case en banc, the Fifth Circuit held that § 2259 should be read strictly and plainly, and determined that each and every defendant who possessed the victim's images was liable for the entirety of the victim's losses, even if other possessors concededly contributed to those losses. It was a windfall for Amy. Paroline, in turn, sought review of the Fifth Circuit's judgment in the United States Supreme Court, which granted cert in short order to resolve a circuit split, and authoritatively determine the meaning, reach, and scope of § 2259, as applied to cases of child sexual exploitation. As often happens, however, perfect clarity did not necessarily result.

The majority opinion, written by Justice Kennedy, grappled with what seemed (and, after the opinion, may still seem) an impossible dilemma: in a case such as this one, how do you determine what particular portion of harm was caused by the defendant, where the total quantum of harm suffered by the victim was undoubtedly caused by a vast and effectively unknowable number of mostly anonymous persons. As the Court early in the opinion quite movingly puts it:

> The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever increasing number of wrongdoers witnessed the crimes committed against her.

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*This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

If all that is true, how should liability be apportioned where a sentencing court is faced with one defendant convicted of two counts of simple possession of child pornography, and a statute commands that he be ordered to pay "the full amount of the victim's losses"?

The Court first determined that the plain language of Section 2259 limits restitution only to those losses proximately caused by the defendant in the context of the crime with which he is charged.[11] The Court explored the history and conceptual underpinnings of the familiar legal doctrine of proximate causation. Noting both its criminal and tort law pedigree, the Court recognized that "[e]very event has many causes [] and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result."[12] Thus, proximate causation is, as some may have learned in law school, another way of saying legal causation, that is, causation sufficient to be recognized in law. The statute requires proximate causation, the Court held, and indeed the statute plainly states as much.[13]

Implicit in such a doctrine, of course, is the premise that, before a cause can be considered proximate, that is, legally sufficient, it must first be found to be a factual cause of the result, a cause in fact. As the majority observed: "a requirement of proximate cause is more restrictive than a requirement of factual cause alone."[14] The Court provided an illustrative example:

> [S]uppose the traumatized victim of a [sex] offender needed therapy and had a car accident on the way to her therapist's office. The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs.[15]

In other words, the cause, while factual, cannot be considered proximate. It would not be just to hold the defendant liable for such far-reaching results.

The *Paroline* case, troublingly, presents precisely the opposite problem. There is no doubt that Paroline increased Amy's injury by some degree. And it is plain that Paroline should be held accountable somehow for his conduct, in both the legal and the moral sense. But, as the Court noted, "a showing of but-for causation cannot be made."[16] That is, "it is not possible to prove that [Amy's] losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate."[17] Simply put, restitution, properly understood, cannot be determined in such circumstances. Standard but-for causation just cannot do the work the statute calls for. Was the district court correct, then, in declining to award Amy any restitution whatsoever?

The Court carefully considered all contrary arguments raised by the parties. For example, the Government put forward an "aggregate causation" theory, "where a wrongdoer's conduct, though alone insufficient . . . to cause the plaintiff's harm, is, when combined with conduct by other persons, more than sufficient to cause the harm."[18] The theory, imported from the law of torts, would seem a perfect fit for Paroline. But, the Court noted, "[i]f the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome."[19] Such legal fictions in fact are a poor fit for the criminal law. While such an outcome might appear just in some sense, it is, again, pure fiction, and not an accurate reflection of what actually occurred.

In addition, as the Court went on to observe, such "alternative causal standards, though salutary when applied in a judicious manner, also can be taken too far."[20] Amy's position in the case served as just such an example. Indeed, she insisted that, under the aggregate causation theory, for instance, "each possessor of her images is a part of a causal set sufficient to produce her ongoing trauma, so each possessor should be treated as a cause in fact of all the trauma and all the attendant losses incurred as a result of the entire ongoing traffic in her images."[21] Indeed, and as noted, Amy sought over three million dollars from Paroline alone, who possessed but two of those images. The majority was not exactly comfortable with such a theory, to say the least.

> The striking outcome of this reasoning—that each possessor of the victim's images would bear the consequences of the acts of the many thousands who possessed those images—illustrates why the court has been reluctant to adopt aggregate causation logic in an incautious manner, especially in interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach.[22]

The Court, simply put, could not abide such an outcome. It would not be "sensible to embrace the fiction that this victim's losses were the 'proximate result' . . . of a single possessor's offense."[23] Indeed, to do so would mean applying the statute in "a manner contrary to the bedrock principle that restitution should reflect the consequences of the defendant's own conduct . . . not the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact."[24]

At oral argument, Justice Breyer summed up the dilemma in the plainest of language:

> There's a problem in child pornography cases. Congress clearly wants restitution. Makes sense to me. But if a thousand people look at it, then each one can say: But I didn't cause more than a tiny fraction at most, and so there virtually is no restitution; right? Now, every one of the thousand says that, truthfully, and so therefore the victim gets no restitution—opposite of what Congress wanted.[25]

Or, as Chief Justice Roberts put it in his dissent (joined by Justices Scalia and Thomas), although Congress undoubtedly *wanted* to provide restitution to victims of child pornography, that is not what, in the end, they did.

> Unfortunately, the restitution statute that Congress wrote for child pornography offenses makes it impossible to award that relief to Amy in this case. Instead of tailoring the statute to the unique harms caused by child pornography, Congress borrowed a generic restitution standard that makes restitution contingent on the Government's ability to prove . . . 'the amount of the loss

> sustained by a victim as a result of the defendant's crime. . . . When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that 'amount.' And arbitrary is not good enough for the criminal law.[26]

Congress' failure, then, according to Chief Justice Roberts and the Justices who joined him, leaves Amy with no recourse, and there is nothing the judiciary can do about it. "Amy's injury is indivisible, which means that Paroline's particular share of her losses is unknowable. And yet it is proof of Paroline's particular share that the statute requires."[27] Thus, the statute, read in context and by its very own terms, suffers from an irremediable internal contradiction. "When Congress conditioned restitution on the Government's meeting that burden of proof, it effectively precluded restitution in most cases involving possession or distribution of child pornography."[28] The majority opinion, as noted, agrees completely with this diagnosis of the problem: a defendant like Paroline simply cannot appropriately be held liable for the totality of Amy's injuries, although that is just what the language of the statute appears to provide for. But the Chief Justice penned a dissent. Where Congress has set an impossible task, he says, that must be the end of the matter. The majority, however, saw things somewhat differently.

Flatly rejecting the notion that Paroline could be held responsible for all of Amy's injuries, the majority explained that such a circumstance in fact

> does not mean the broader principles underlying the aggregate causation theories the Government and the victim cite are irrelevant to determining the proper outcome in cases like this. The cause of the victim's general losses is the trade in her images. And Paroline is a part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily identifiable incremental loss he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses. Just as it undermines the purposes of tort law to turn away plaintiffs harmed by several wrongdoers, it would undermine the remedial and penological purposes of [the statute] to turn away victims in cases like this.[29]

Thus, the majority determined that a complete denial of restitution under such circumstances was unnecessary.

The majority instead concluded that the statute did not command a strict showing of but-for causation. Indeed, if that were the case, "it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach."[30] This is of course not at all consonant with the thinking of Justices Roberts, Scalia, and Thomas. Whether or not a plain reading of the text would undermine the statute's purpose is irrelevant, where the Court had

> previously refused to allow 'policy considerations'—including an 'expansive declaration of purpose,' and the need to 'compensate victims for the full losses they suffered'—to deter us from reading virtually identical statutory language [in a previous case] to require proof of the harm caused solely by the defendant's particular offense.[31]

There could be no remedy because the statute did not actually provide one, and it was not the judiciary's job to rewrite statutes. The majority refused, however, to "simply throw up its hands." It instead came up with the following formulation:

> In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses.[32]

Of course, this is easier said than done. Noting that determining restitution in cases like Paroline's "cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment,"[33] the Court set out a series of factors that it believed could be helpful, including:

> the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's causal role.[34]

Again, easier said than done. The majority foreswore any "rigid formula" and cautioned that the above factors were only "rough guideposts."[35] It expressed faith in and support for a trial court's capacity to achieve a just result under less than ideal conditions. The principal dissent nonetheless expressed dismay at the majority's resolution and guidance.[36] Chief Justice Roberts reiterated that the majority's formula was not what Congress established. The statute very simply, and very straightforwardly,

> requires restitution to be based exclusively on *the losses that resulted from the defendant's crime*—not on the defendant's relative culpability. The majority's plan to situate Paroline along a spectrum of offenders who have contributed to Amy's harm will not assist a district court in calculating the amount of Amy's losses—*the amount* of her lost wages and counseling costs—that was caused by Paroline's crime (or that of any other defendant).[37]

Moreover, and putting the plain language of the statute to one side, even the most skilled and conscientious trial judge would, in the end, have to resort to arbitrary application of the statute. The Chief Justice wrote:

> It is true that district courts exercise substantial discretion

> in awarding restitution and imposing sentences in general. But they do not do so by mere instinct. Courts are instead guided by statutory standards: in the restitution context, a fair determination of the losses caused by the individual defendant under section 3664(e); in sentencing more generally, the detailed factors in section 3553(a). A contrary approach—one that asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault—would undermine the requirement that every criminal defendant receive due process of law.[38]

The ad hoc solution proposed by the majority, in addition to being unfaithful to the law's text, will do no one any favors.

In *Paroline*'s wake, and as predicted by the principal dissent, district courts have struggled with the majority's guidance in formulating mandatory restitution orders in child pornography cases. As one district judge noted, "[t]he tools provided by *Paroline*, while seemingly useful in a theoretical sense, have proven to have very difficult, and very limited, practical application."[39] Perhaps, though, it cannot be put any better than this, in the words of another district judge:

> Though commentators may quarrel over the astuteness of the Supreme Court's professed confidence in the skill of the district courts to divine a true course through this thicket, and whatever the value of the balm its words of praise provide . . . the task seems akin to piloting a small craft to safe harbor in a Nor'easter. With the bulk of compensable loss long suffered, with potential responsible parties at varying levels of criminal culpability (from physical participant, to producer, to distributor, to consumer/voyeur), to catch as catch can prosecutions and the logical construct that the totality of restitution cannot exceed the totality of actual loss suffered by the identified victim, it is a struggle to conceive of a system that will not exceed loss and perhaps trigger creation of a judicial clearinghouse, where the courts become unseemly paymasters smoothing out restitution contributions among pornographers. The task of charting passage through these unknown waters is overwhelming.[40]

In the end, the district courts appear to have settled for now on a relatively straightforward process for determining restitution. A trial court will take the amount of general losses and divide that amount by the number of restitution orders already entered in other cases with other defendants, and the defendant before the court simply pays his evenly apportioned share. That is, a court considers:

> [T]he amount of psychological treatment/counseling costs, plus educational and/or vocational losses following the offense conduct, less those costs directly related to another defendant or litigation [that is, another unlawful possessor of the images in the "continuing traffic" of those images], plus costs arising after the offense conduct that are impossible to trace to an individual defendant alone.[41]

Of course, as the district court in *DiLeo* noted, while this formula may be simple and relatively easy to apply, "this quotient, if adopted whole hog would effectively nullify other *Paroline* factors."[42] The court was of course referring to the *Paroline* majority's suggestion that trial courts should consider "reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses [and] any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted) [.]"[43] The district court understandably characterized any such "reasonable predictions" as nothing more than "the sheerest of speculation" and "a wild guess."[44] With this de facto concession to the logic of the principal dissent in *Paroline,* and surveying the work of other trial courts, the court in *DiLeo* simply ejected any predictive considerations based on the government's (understandable) failure of proof.

The *DiLeo* court went on to find:

> In other similar ordinary cases, that is, lacking proof of most *Paroline* factors, resort was made first and foremost to some type of simple division of the known loss by the then known total number of responsible offenders. In these case, where proof of other factors was unknowable and, therefore, unavailable, those courts have provided common law precedents effectively setting a benchmark methodology for the calculation of non-token restitution awards as *Paroline* requires in child pornography cases.[45]

The resulting award of restitution, while not trivial ($2000), was surely not what the *Paroline* majority had hoped for in terms of precision. But that may have been unavoidable with such ad hoc jurisprudence and vague guidance. As always, the district courts do the best they can.

Finally, it should be noted that a federal bill introduced and passed in the United States Senate, the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015 (S. 295/H.R. 4981), deals with many of the issues discussed above, and was specifically written to address the concerns of the *Paroline* majority. For example, the bill provides that if a victim is harmed by a single defendant, that defendant must pay full restitution for all the losses. If a victim is harmed by multiple defendants, including those not yet identified, a judge may order restitution for the entire amount of the victim's losses to be paid by a single defendant, or may order certain minimum fines depending on the defendant's particular conduct, such as producing or distributing images as opposed to simple possession. Importantly, the bill also provides a mechanism for a defendant subject to an order of restitution to seek contribution from another offender and thereby spread out the cost, a remedy considered by the *Paroline* majority[46] but one ultimately rejected where there was no extant statutory basis for such a right.

In the end, Congress will have to fix the statute it wrote. Well intentioned guidance by the Supreme Court is simply no substitute for the hard work of legislating. And in the meantime, busy trial courts will work with what they have, and do their best to dispense justice under difficult circumstances, and in often heartbreaking cases. Congress, however, appears to believe that Amy deserves better.

Endnotes

1 Paroline v. United States, 134 S.Ct. 1710, 1716-1717 (2014).

2 *Id*. at 1717.

3 *Id*.

4 18 U.S.C. § 2259.

5 18 U.S.C. § 2259(b)(1); 2259(4)(A).

6 18 U.S.C. § 3664(e).

7 *Paroline*, 134 S.Ct. at 1718.

8 *Id*.

9 *Id*.

10 *Id*.

11 *Id*. at 1722.

12 *Id*. at 1719.

13 *Id*. at 1720. ("[T]he requirement of proximate cause is in the statute's text.").

14 *Id*.

15 *Id.* at 1721.

16 *Id*. at 1722.

17 *Id*. at 1723.

18 *Id*. at 1723-1724.

19 *Id*. at 1724.

20 *Id*.

21 *Id*.

22 *Id.*

23 *Id.* at 1725.

24 *Id.*

25 Transcript of Oral Argument at 9, Paroline v. United States, 134 S.Ct. 1710 (No. 12-8561).

26 *Paroline*, 134 S.Ct. at 1730 (internal citation omitted).

27 *Id.* at 1733.

28 *Id*.

29 *Id.* at 1726.

30 *Id.* at 1727.

31 *Id.* at 1734 (citing Hughey v. United States, 495 U.S. 411, 420-421 (1990).

32 *Id*. at 1727.

33 *Id*. at 1728

34 *Id*.

35 *Id*.

36 Justice Sonia Sotomayor, in a lone dissent, found fault with the majority not for its remedy, but for its determination that there was any problem with the statute in the first place. Of course a single defendant like Paroline could, and should, be liable for the entirety of the injuries suffered by a victim such as Amy. "The Court's approach . . . cannot be reconciled with the law that congress enacted. Congress mandated restitution for the full amount of the victim's losses, and did so within the framework of settled tort law principles that treat defendants like Paroline jointly and severally liable for the indivisible consequences of their intentional, concerted conduct." *Id*. at 1735. Justice Sotomayor noted that there was "every reason to think" that congress incorporated an aggregate causation theory into the statute, rather than "a but-for requirement [that] would set § 2259's 'mandatory' restitution command on a collision course with itself." *Id.* at 1737. Put colorfully, the remaining justices apparently believed they had no choice but to recognize and accept the several-car pileup that resulted. But the majority, quite unlike the principal dissent, nonetheless believed it could salvage something from the legislative wreckage.

37 *Id*. at 1733-34 (emphases in original).

38 Id., at 1734.

39 United States v. Campbell-Zorn, 2014 WL 7215214, at * 2-3(Dec. 17, 2014) (D. Mont.) (collecting cases).

40 United States v. Dileo, 2014 WL 5841083, at *5 (Nov. 4, 2014) (E.D.N.Y.).

41 Campbell-Zorn, 2014 WL 7215214, at *5 (citing United States v. Wencewicz, 2014 WL 5437057 at *3.

42 *DiLeo*, 2014 WL 5841083, at *8.

43 *Paroline*, 134 S.Ct. at 1728.

44 *DiLeo*, 2014 WL 5841083, at * 6.

45 *Id.* at *9.

46 *Paroline,* 134 S.Ct. at 1725.

Environmental Law & Property Rights

Redefining "Waters of the United States": Is EPA Undermining Cooperative Federalism?

By Karen Bennett & John Henson***

Note from the Editor:

This article discusses the Environmental Protection Agency's "Waters of the United States" Rule under the Clean Water Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, in some cases, such as with this article, we will do so because of some aspect of the specific issue. In the spirit of debate, whenever we do that we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

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- U.S. Environmental Protection Agency, Clean Water Rule, Ditch the Myth: Let's Get Serious About Protecting Clean Water: http://www2.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf
- Jon Devine, Natural Resources Defense Council, *Phony Objections to Clean Water Protection Rule: Myths and Facts about Agriculture and the Proposal*, Switchboard (May 6, 2014): http://switchboard.nrdc.org/blogs/jdevine/phony_objections_to_clean_wate.html
- Jon Devine, Natural Resources Defense Council, *Everything You Wanted to Know About the EPA/Army Corps Proposed Clean Water Rules but Were Too Afraid to Ask*, Switchboard (Mar. 24, 2014): http://switchboard.nrdc.org/blogs/jdevine/everything_you_wanted_to_know.html
- Environmental Protection Agency, Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence (Jan. 2015): http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download
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On April 21, 2014, without formally consulting with the States, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed to redefine the term "waters of the United States" for all Clean Water Act (CWA) programs.[1] The proposed rule generated a purported 1,081,817 public comments.[2] The comments of governors, attorneys general, and various state agencies and departments are nestled among over 1,055,000 mass mail comments, 11,800 generally non-substantive individual comments, 4,500 anonymous comments, and comments from a broad spectrum of businesses, industries, and environmental groups. As the State of Kansas declared, the States were "relegated to the status of interested party, indistinguishable from the myriad" of other commenters.[3] EPA Administrator Gina McCarthy recently stated to Congress that "[T]here is no question, I don't think, that the docket will reflect that we have done significant outreach to the states on this. We have reached out to them through our regions, through headquarters, and we will continue that discussion."[4] Despite Administrator McCarthy's assurances, many state comments in the docket describe almost no consultation with states prior to issuing the proposed definition, a rush to finalize the proposal, misleading and confusing outreach to the states after-the-fact and, as a result, a flawed rulemaking.

I. Congress Intended a Robust Clean Water Act Role for the States

The CWA and relevant Executive Orders describe a robust system of cooperative federalism. The CWA provides that it "is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[5] The Act further provides that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[6] Executive Order 13132 reinforces the need for state consultation for rulemakings that have federalism implications.[7]

II. The Agencies Did Not Consult Prior to Proposing the Definition

Despite these requirements, consultation was "certainly lacking prior to the publication of the proposed rule."[8] The agencies did not believe that they needed to consult, certifying

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that the rule "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[9] Not surprisingly, most states do not agree with EPA.[10] Oklahoma submitted a comment, for example, stating that EPA and the Corps "downplay the rule's substantial effects on the relationship between the national government and states."[11] The Pennsylvania Department of Agriculture stated that "[e]ven a cursory analysis indicates that the revised definition will have a significant economic impact on a substantial number of small entities and on the States."[12] The New Mexico Environment Department noted that "the Agencies have failed to fully evaluate state and local level implementation" which "has direct impact on required staffing levels, legislative funding requests, and general agency planning."[13]

In other settings, EPA has offered even less convincing arguments for their failure to consult. Asked why EPA did not go to the states until after the fact, Administrator McCarthy responded that "These are issues that EPA and the States have been working on literally for decades . . ."[14] This echoes what EPA officials have stated elsewhere. The Governor of Wyoming, for example, stated that "On September 12, 2014, Administrator McCarthy hosted a meeting in Washington, D.C. During that meeting, EPA staff acknowledged that little was done to solicit input from policy makers in state government on the proposed rule. The EPA indicated it viewed public comments related to previously proposed and withdrawn guidance documents as sufficient input to move forward."[15]

III. The Lack of Consultation Demonstrated a Rush to Finalize the Rule and Disadvantaged the States

In fact, many states implied that the agencies might have been in a hurry to propose and finalize the definition—leaving the states to suffer the consequences. Oklahoma stated that "there was no reason for EPA and the Corps to avoid formal and meaningful consultation with the states over the many years that have transpired since the agencies embarked upon this process."[16] The West Virginia Department of Environmental Protection agreed stating that "[t]his is quite extraordinary, given that it is undertaking to entirely redefine the scope of a decades old enactment."[17] The lack of prior consultation resulted in insufficient time for states to "assess how the reach of proposed jurisdiction may change under state law"[18] and "an inadequate period" for states "to develop comprehensive comments."[19] In doing so, the agencies "missed an opportunity to build consensus with the primary implementing entities and prevent controversy."[20] Failing to consult, EPA created "misunderstandings regarding the intent of the proposal [that] could have been avoided."[21] Instead, the rule resulted in "mass confusion among the very State partners that have worked with [the] Agencies for decades to accomplish all the water quality gains made thus far."[22] Worse still, in their rush the agencies finalized the proposed rule before finalizing the connectivity report, allowing "no ability for the public or other stakeholders to review and comment on" any changes.[23] As a result, the state of Michigan, likely among others, suffered a "loss of confidence in the process and the legitimacy of the end result."[24]

IV. The Outreach After the Proposal was Misleading, Confusing, and Insufficient

Yet, Administrator McCarthy states that EPA has "reached out to [states] through our regions, through headquarters, and we will continue that discussion."[25] Apart from the fact that consultation described as "after the fact" [26] cannot fulfill the agencies' consultation requirement, the docket reflects a flawed outreach effort. First, "[i]ncluding the states with all other stakeholders and interested parties in the opportunity for public comment…is decidedly not the robust and meaningful[] state-federal 'consult and cooperate' partnership that Congress clearly had in mind."[27] Second, meaningful state engagement and consultation cannot be boiled down to a "series of meetings, speeches, and webinars seeking to explain the proposed rule and answer questions."[28] This is especially so given that at least some of these meetings were "not recorded, not for official comment, and only to provide information."[29] Third, meaningful state engagement and consultation cannot be met by stonewalling. Apparently, "agencies' staff frequently answer[ed] questions with 'We don't know' and 'We'll have to figure that out.'"[30] Montana repeatedly reached out to the Corps for "a representative to discuss the agency's view of any change in scope of jurisdiction under the rule" and was "met with one response, 'we cannot discuss the USACE's view of how the rule will be applied, please submit comments.'"[31] On a related note, meaningful state consultation cannot occur when the Corps is either "silent"[32] or completely absent from the rulemaking process.[33] Finally, meaningful consultation cannot occur in a context where the agencies make the kinds of contradictory and misleading statements that would lead the Governor of Wyoming to declare:

> Different messages for different audiences. It is one thing to propose a rule that is excessive, onerous, and in derogation of states; it is another entirely to assure the public that they have misunderstood the proposal and then saddle those same people with the burden of a rule the content and intent of which was misrepresented by the agencies.[34]

V. The Faulty Consultation, Among other Deficiencies, Led to Widespread State Opposition and Significant Implementation Concerns

"Unfortunately, the lack of state engagement is evident."[35] This faulty process led to a flawed proposed rule that the majority of states directly oppose. Florida's Attorney General describes the proposed definition as a "raw exercise of a general federal police power."[36] Many states documented significant "concerns related to the legal rationale for the proposal and implications of that rationale on state programs."[37] For example, the North Carolina Department of Environment and Natural Resources stated that the "rule has significant implications for federalism, affects the State's traditional authority to regulate land and water use, impacts the federal-state framework under the Act, and is unlawful under the Act and the Constitution."[38] Practically, states were concerned that the proposed definition, inter alia:

- "changes [the] balance to lessen the burden on the federal government marginally, while creating significant additional unnecessary requirements for both state agencies

and individual landowners"[39]

- creates "the potential that the states will have to classify the uses of newly jurisdictional waters for application of State water quality standards"[40]

- creates "the potential for a federal veto of State economic development projects" through federal permitting[41]

- "will undoubtedly lead to increased litigation and burdensome resource constraints on our agencies"[42]

- "potentially impacts the stability of Michigan's wetland program,"[43]

- "could significantly impact the administration of [clean water] programs,"[44]

- "increases uncertainty for many landowners, advances a severe disconnect between permitting and water conservation, and dramatically underestimates the costs"[45]

- "is counter to our statewide vision and current strategic plan of locally derived management"[46]

The West Virginia Department of Environmental Protection concluded, "As might be expected with a centrally-dictated product that previously had not seen the light of day…the proposed definition presents severe problems in implementation."[47]

VI. Conclusion

The agencies, the Office of Management and Budget (OMB), and Congress are at a crossroads. The docket clearly and forcefully describes agency actio ns that "undermined the cooperative federalism at the heart of the CWA and ignored the substantial direct effects on state governments . . ."[48] The agencies effectively "ignore[d] the role States play as co-regulators,"[49] "encroach[ed] on . . . sovereignty,"[50] and "undeniably excluded" the states' "CWA co-regulating agencies."[51] Relegating states "to the status of interested party…dilute[d] their input on the repercussions and consequences of the proposed rule."[52] The proposed definition is under review by the OMB, and the agencies have indicated that the proposed definition will be finalized.[53] Both the OMB and Congress have one last opportunity to send EPA back to the drawing board before the proposed definition is finalized. Perhaps one or the other will hear and act on the cry of states like Oklahoma that:

> [T]he States and the Agencies could have been allies in the effort to clarify WOTUS jurisdiction to the benefit of all who implement the CWA's many facets. As it stands now, we've lost faith in the process and believe that the myriad flaws and points of confusion cannot be resolved satisfactorily through a series of public comment period extensions. The kind of input that our agencies and other State co-regulators seek, not to mention deserve as a matter of mutual respect and as required by law, can only be accomplished through halting the current effort, rolling up our sleeves, and developing regulatory language through a meaningful exchange of ideas and drafts.[54]

Such an approach could "lead to a more successful outcome than the protracted litigation that would result from adoption of the current rule."[55] After consultation, "the Agencies should propose a very different rule, which respects the States' primary responsibility over the lands and waters within their borders and gives farmers, developers and homeowners clear guidance as to when the CWA's requirements apply."[56]

Endnotes

1 79 Fed. Reg. 22,188 (Apr. 21, 2014).

2 EPA-HQ-OW-2011-0880. For the sake of brevity, all references to individual comments will include only the name of the commenter and the comment specific docket ID number.

3 State of Kansas at 2, Docket ID No. 16636.

4 Testimony of Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, before the Joint Committee of Environment and Public Works and Committee on Transportation and Infrastructure (Feb. 4, 2014), Session I at 2:49, *video available at* http://transportation.house.gov/calendar/eventsingle.aspx?eventid=398554, (last visited Mar. 24, 2015).

5 33 U.S.C. § 1251(b).

6 33 U.S.C. § 1251(g).

7 *See, e.g.,* Executive Order 13132 at Sections 1(a), 2(i), 3(b), and 6.

8 Tennessee Department of Environment and Conservation; Agriculture at 2, Docket ID No. 17074.

9 79 Fed. Reg. at 22,220.

10 *See, e.g.,* Maine Department of Environmental Protection at 3, Docket ID No. 14624 ("This 3% expansion of jurisdiction encroaches upon Maine's traditional and primary authority over land and water use."); Missouri Attorney General at 2, Docket ID No. 15091 ("Congress intended to preserve the States' historical primacy over the management and regulation of intrastate water and land management. . . . The Proposed Rule is inconsistent with Congressional intent and should be revised…"); Texas Attorney General at 6, Docket ID No. 5595 (declaring that the rulemaking, if not withdrawn, "will effectively read out and subrogate any notion of federalism in the Clean Water Act.").

11 State of Oklahoma at 8,, Testimony of J.D. Strong, Docket ID No. 16560.

12 Pennsylvania Department of Agriculture at 5, Docket ID No. 14465.

13 New Mexico Environment Department at 11, Docket ID No. 16552.

14 Testimony of Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, before the Joint Committee of Environment and Public Works and Committee on Transportation and Infrastructure (Feb. 4, 2014), Session I at 2:49, *video available at* http://transportation.house.gov/calendar/eventsingle.aspx?eventid=398554, (last visited Mar. 24, 2015).

15 Governor of Wyoming at 2, Docket ID No. 14584.

16 State of Oklahoma at 8, Docket ID No. 16560.

17 West Virginia Department of Environmental Protection at 15, Docket ID No. 15415.

18 *See* Virginia DEQ, Docket ID No. 18760.

19 New Mexico Environment Department at 11, Docket ID No. 16552.

20 Idaho Governor and Attorney General at 1, Docket ID No. 9834.

21 Indiana Department of Environmental Management at 3, Docket ID No. 16440; *see also, e.g.,* Wisconsin Department of Natural Resources at 1, Docket ID No. 15141 ("[A]dequate consultation could have addressed many of the concerns of our state and its elected leaders.").

22 Oklahoma at 2, Docket ID No. 16560.

23 Michigan Attorney General at 6, Docket ID No. 16469.

24 *Id* at 6.

25 McCarthy Testimony, *supra* note 4, at 2:49.

26 Nevada Department of Conservation and Natural Resources et al. at 2,

Docket ID No. 16932.

27 State of Alaska at 9, Docket ID No. 19609.

28 Kentucky DEP at 2, Docket ID No. 16535; State of Alaska at 9, Docket ID No. 19609; State of North Dakota (Governor and departments) at 13, Docket ID No. 15365.

29 Wyoming Governor at 2, Docket ID No. 14584.

30 Indiana Department of Environmental Management at 2, Docket ID No. 16440.

31 Montana Governor at 3, Docket ID No. 16694.

32 South Dakota Governor at 3, Docket ID No. 18008.

33 Tennessee Department of Environment and Conservation; Agriculture at 1, Docket ID No. 17074; North Dakota Governor and Departments, Docket ID No. 15365.

34 Governor of Wyoming, Docket ID No. 7181.

35 New Mexico Environment Department at 11, Docket ID No. 16552.

36 Florida Attorney General at 3, Docket ID No. 15429.

37 *See, e.g.*, Alabama DEM et al. at 1, Docket ID No. 16435.

38 North Carolina Department of Environment and Natural Resources at 6, Docket ID No. 17072.

39 Kansas at 1, Docket ID No. 14794.

40 State of Alaska at 15, Docket ID No. 19609.

41 Alabama Department of Environmental Management, et al at 6, Docket ID No. 16435.

42 Oklahoma at 3, Docket ID No. 16560.

43 Michigan Attorney General at 6, Docket ID No. 5462.

44 Pennsylvania DEP at 5, Docket ID No. 14845.

45 Utah at 2, Docket ID No. 16534.

46 Nevada Conservation Commission at 2, Docket ID No. 14998.

47 West Virginia DEP at 15, Docket No. 15415.

48 Utah at 15, Docket ID No. 16534.

49 Comments of Environmental Agencies from Six States at 1, Docket ID No. 16435 (Al DEM).

50 Governor of Alabama at 1, Docket ID No. 14969.

51 Oklahoma at 8, Testimony of J.D. Strong, Docket ID No. 16560.

52 Kansas at 2, Docket ID No. 16636.

53 McCarthy Testimony, *supra* note 4, at 2:17.

54 State of Oklahoma at 2, Docket ID No. 16560.

55 Colorado Attorney General, Docket ID No. 15191.

56 Attorneys General of West Virginia, Nebraska, Oklahoma, Alaska, Arkansas, Georgia, Kansas, Louisiana, North Dakota, South Carolina, and South Dakota; Governors of Iowa, Nebraska, Kansas, North Carolina, South Carolina, and Mississippi at 12, Docket ID No. 7988.

Does EPA's Clean Power Plan Proposal Violate the States' Sovereign Rights?

*By David B. Rivkin, Jr., Andrew M. Grossman, & Mark W. DeLaquil**

Note from the Editor:

This article discusses the Environmental Protection Agency's Clean Power Plan under the Clean Air Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to other perspectives on the subject, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units*, Environmental Protection Agency: http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf
- Op-ed, Michael B. Gerrard, *The Constitutional Foundation for the Clean Power Plan*, The Hill, Mar. 19, 2015: http://thehill.com/blogs/congress-blog/energy-environment/236185-the-constitutional-foundation-for-the-clean-power-plan
- Rebecca Leber, *Sorry Rand Paul, Not Only Is the EPA Carbon Rule Legal, It's Mandated By Law*, ThinkProgress (Jun. 3, 2014): http://thinkprogress.org/climate/2014/06/03/3444598/sorry-rand-paul-epa-climate-rule/

Congress's statement of policy in the Clean Air Act that "air pollution control at its source is the primary responsibility of States and local governments" is not merely hortatory.[1] It reflects both the practical reality of and constitutional limitations on federal regulation of air quality. The practical reality is that the federal government relies on the states both for the detailed policymaking necessary to achieve national goals on a state-by-state basis and for the implementation and enforcement of pollution-control programs with respect to particular sources. But, no matter its reliance, the federal government is forbidden from commandeering the states or their officials to carry out federal law, from coercing them to do so, and from invading the states' own powers. The Clean Air Act resolves this tension through a system of "cooperative federalism" that gives states the opportunity to regulate in accordance with federal goals and provides for direct federal regulation as a backstop should they fail to do so. This accommodation allows the federal government to enlist the states' assistance in achieving federal goals without exceeding its authority under the Constitution.

The Environmental Protection Agency's "Clean Power Plan" (the "Proposed Rule") abandons that careful accommodation and, in so doing, violates the Tenth Amendment and principles of federalism. The Proposed Rule requires each state to submit a plan to cut carbon-dioxide emissions by a nationwide average of 30 percent by 2030. Although ostensibly directed at emissions from fossil-fuel-fired power plants, the Proposed Rule sets targets for individual states that incorporate "beyond-the-fenceline" cuts to be achieved by increasing reliance on natural gas generation, adopting zero-emissions generation such as wind and solar, and reducing electricity demand. The goal is to phase out coal-fired power plants, which currently account for nearly 40 percent of electricity generation.

In the service of achieving EPA's policy objectives, the Proposed Rule forces each state to overhaul its energy market. Just to keep the lights on, states will have to dramatically change their energy mix, to account for the loss of coal-fired generating capacity, and to rework their regulation of energy producers, power dispatch, and transmission. This will require changes to states' legal and regulatory structures, as well as numerous regulatory actions directed at their own citizens—energy producers and consumers alike. In order to accomplish these objectives, even a state that declines to implement the Clean Power Plan will have to employ EPA's "building blocks" to prevent the Plan from wrecking the state's energy economy. And states that refuse to accede to EPA's demand to implement this new program face the specter of financial sanctions. In short, EPA's Proposed Rule forces the states to act to carry out federal policy. It is a gun to the head of the states: "Your sovereignty or your economy" is EPA's ultimate demand.

But the federal government may not "require[] the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 926 (1997). Nor may it "command state or local officials to assist in the implementation of federal law." *Id.* at 927. Nor may it employ penalties and threats to "coerce[] a State to adopt a federal regulatory system as its own." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.).

Because it violates those cardinal rules, the Proposed Rule's directives to the states "are, in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Id.* at 2592 (quotation marks omitted). The Proposed

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Rule should be withdrawn. If the rule is finalized, and if it is held to be within EPA's statutory authority, the courts would be constrained to reject it as exceeding federal power under the Constitution.

I. Background

A. The Clean Air Act and Section 111(d)

The Clean Air Act "made the States and the Federal Government partners in the struggle against air pollution."[2] As to stationary sources of emissions, the Act contains several programs under which EPA sets standards, such as for the concentration of certain pollutants in ambient air, that are then implemented and administered by the states through State Implementation Plans ("SIPs") prepared by the states.[3] These implementation plans address, among other things, enforceable emission limitations for sources, monitoring systems, enforcement programs, adequacy of personnel and funding available to implement the plan, and consultation and participation by local political subdivisions affected by the plan.[4]

EPA, in turn, is required to approve state implementation plans that satisfy the requirements of the Act and applicable regulations, including standards set by EPA.[5] Only if a state fails to submit an implementation plan, or submits one that is deficient, may EPA directly regulate sources itself through promulgation of a Federal Implementation Plan ("FIP").

In this system, EPA is "charged by the Act with the responsibility for setting [national standards]," but "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met" and "may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards."[6]

Section 111(d) implements this cooperative approach for setting "standards of performance" for certain existing stationary sources of air pollutants.[7] It provides for EPA to direct the states to submit plans that "establish[] standards of performance for any existing source for any air pollutant" which would be subject to an EPA-prescribed standard if emitted by a new source and that "provide[] for the implementation and enforcement of such standards of performance."[8] A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA] determines has been adequately demonstrated."[9] State plans, however, may also "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."[10] Only in the event that a state "fails to submit a satisfactory plan," or fails "to enforce the provisions of such plan," may EPA step in and regulate itself by setting and enforcing standards.[11]

B. EPA's Proposed Rule

EPA's Proposed Rule relies on the agency's Section 111(d) authority to set standards for existing fossil-fuel-fired power plants.[12] It aims to reduce carbon dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels, by requiring states to overhaul their "production, distribution and use of electricity."[13] States must submit state plans to achieve "emission rate-based CO_2 goals" that EPA has specified for each state.[14] These targets are based on projected emissions reductions that EPA believes can be achieved through the combination of four "building blocks":

> 1. Reducing the carbon intensity of generation at individual affected [power plants] through heat rate improvements.
>
> 2. Reducing emissions from the most carbon-intensive affected [power plants] in the amount that results from substituting generation at those [power plants] with generation from less carbon-intensive affected [power plants]….
>
> 3. Reducing emissions from affected [power plants] in the amount that results from substituting generation at those [power plants] with expanded low- or zero-carbon generation.
>
> 4. Reducing emissions from affected [power plants] in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.[15]

In plain English, EPA's building blocks anticipate that, to meet EPA's targets, states will have to: (1) require plants to make changes to increase their efficiency in converting fuel into energy; (2) replace coal-fired generation capacity with increased use of natural gas; (3) replace fossil-fuel-fired generation capacity with nuclear and renewable sources, such as wind and solar; and (4) mandate more efficient use of energy by consumers.[16] These "building blocks," in one combination or another, are effectively the only ways that a state could reorganize its electric generating capacity to achieve the targets set by EPA.

EPA describes this as a "plant to plug" approach that comprehensively addresses all aspects of energy production and consumption based on "the interconnected nature of the power sector."[17] In this respect, unlike other emissions-control programs, EPA's Proposed Rule relies extensively on "beyond-the-fenceline" measures—that is, regulation of things other than the emissions of the sources it actually purports to regulate. This describes all but the first of EPA's building blocks.

The Proposed Rule requires states to submit implementation plans, including all necessary statutory and regulatory changes, by June 30, 2016, absent special circumstances.[18] Any state that does not submit an implementation plan consistent with the rule's requirements will be subject to a federal plan devised by EPA that regulates fossil fuel-fired power plants in the state.[19]

C. The Proposed Rule Requires States To Overhaul Their Energy Sectors

Because EPA used "the combination of all four building blocks" to set state emissions targets,[20] those targets cannot be achieved only by employing controls at the sources ostensibly subject to Section 111(d) regulation: fossil-fuel-fired power

plants.[21] Accordingly, compliance with the Proposed Rule will require states to take "beyond-the-fenceline" measures that involve fundamentally restructuring their regulation and use of electricity.[22]

First, states will have to eke out whatever efficiency gains can be accomplished in a cost-effective manner from their existing coal-fired generation fleet. While this step may be within the existing statutory authority of state environmental regulators, feasible improvements may be few and far between, due to upgrades already implemented to comply with other regulations.[23] In general, states will be able to achieve improvements of only a few percentage points in emissions reduction, at most[24]—compared to the 30 percent, on average, that is required in total. Some upgrades could potentially trigger new source review obligations, making them economically infeasible.[25]

Second, states will have to revise the statutory and regulatory systems that govern dispatch among power plants to place coal-fired plants—which typically supply baseload power—at the rear of the pack.[26] That change, in turn, will require additional state actions to ensure that customers in certain areas relying on affected plants are not left without power or forced to bear unreasonable costs.[27] It will also require substantial changes to utility regulation as systems that put cost and reliability first in making dispatch determinations are reworked to consider other factors.[28] And in states where dispatch is controlled by federally regulated multi-state regional transmission organizations, other regulatory or inter-governmental actions will be required.[29]

Third, states will have to develop or incentivize zero-emissions generation, which will require state authorizing legislation and expenditures.[30] Developing sources such as wind and solar will inevitably implicate other environmental issues, such as endangered species protection, that states must also address, at considerable burden and expense.[31] They must also address how increased renewable capacity, which may fluctuate, fits into the transmission system and dispatch, as well as how such capacity will be compensated.[32] In states where it is not feasible to add renewable capacity, or that do not receive credit for such capacity that is exported, other measures will be required. For example, West Virginia anticipates that it "would be forced to participate in some form of interstate program that would include the states in which West Virginia-produced wind energy is sold. Such a program would require new statutory authority, significant groundwork in determining which states would participate, negotiations with those states, resources to develop interstate agreements to create an entity that would administer the interstate program, and time to create parallel regulations in each state to implement a program that would allow West Virginia to receive credit for the zero carbon emissions associated with current and future wind resources."[33]

Fourth, states will have to enact programs to reduce electricity demand in an enforceable fashion, requiring legislative and regulatory action.[34] States with deregulated electricity markets will face particular challenges, because power plants may be independent of power distribution companies.[35] This may also require, in some instances, regulation of consumers of electricity, which will be a new mission for state environmental and utility regulators.[36]

Finally, to achieve EPA's targets, states will inevitably have to require the idling or retirement of some coal-fired power plants and deal with the consequences of doing so.[37] This includes maintaining electric reliability for all customers, ensuring that plant operators are appropriately compensated, and ensuring that the financial impact on electricity consumers is acceptable.[38]

In sum, the Proposed Rule, if adopted as proposed or in a substantially similar form, will require states to overhaul their regulation of electricity and public utilities and to take numerous regulatory and other actions to comply with and accommodate the Proposed Rule while maintaining electric affordability and reliability. And that will be the case regardless of whether states take direct action and adopt "state plans" or whether they decline to promulgate a state plan and become subject to a federal plan—which, even if it applied only to coal-fired plants, would presumably require their retirement—due to states' pervasive regulation of the power sector, transmission, and utilities. For no state is doing nothing an option.

II. The Proposed Rule Commandeers the States in Violation of the Tenth Amendment

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[39] It "states but a truism that all is retained which has not been surrendered."[40] But part of what has been retained is the states' sovereign authority.[41] Thus, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[42] Among the powers denied to the federal government is the power to "use the States as implements of regulation"—in other words, to commandeer them to carry out federal law.[43] The Proposed Rule plainly does so and is therefore *ultra vires*.

While the Commerce Clause "authorizes Congress to regulate interstate commerce directly[,] it does not authorize Congress to regulate state governments' regulation of interstate commerce."[44] Thus, in *New York v. United States*, the Supreme Court struck down a provision of the Low–Level Radioactive Waste Policy Amendments Act that required states either to legislate to provide for the disposal of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal.[45]

New York holds that such commandeering is incompatible with the clear lines of accountability embodied in the Constitution's vertical separation of powers. The federal government may, the Court explained, encourage state action by "'attach[ing] conditions on the receipt of federal funds.'"[46] And it may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation."[47] In both of these instances, the state is merely "encourage[ed]…to conform to federal policy choices," and "the residents of the State retain the ultimate decision as to whether or not the State will comply" by holding state officials accountable for making such choices.[48] But that accountability is undermined "where the Federal Government directs the States to regulate, [because] it may be state officials who will bear the brunt of public disapproval, while the federal officials who

devised the regulatory program may remain insulated from the electoral ramifications of their decision."[49] In enacting the "take title" provision, the Court concluded, "Congress has crossed the line distinguishing encouragement from coercion."[50]

It made no difference that the provision allowed "latitude" to the States in choosing how to carry out the federal directive. While a state could choose to contract with a regional disposal compact, build a disposal site itself, etc., each of these options "underscore[d] the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress."[51] Also irrelevant was the importance of the federal interest at stake, as well as the states' participation in the formulation of federal policy.[52] After all, "State governments are neither regional offices nor administrative agencies of the Federal Government," but sovereigns in their own right.[53]

Printz v. United States reaffirmed and extended these principles to the commandeering of state officials.[54] At issue was a federal statute that, although it did not command states to regulate, directed certain state law enforcement officers to conduct background checks on gun buyers and perform related tasks.[55] In other words, the statute directed state officials "to participate…in the administration of a federally enacted regulatory scheme."[56] And that was a step too far: "Preservation of the States as independent and autonomous political entities" is unacceptably "undermined…by 'reducing them to puppets of a ventriloquist Congress.'"[57] Thus, the states may not be "dragooned…into administering federal law."[58]

Yet that is precisely what the Proposed Rule would do. While the Proposed Rule ostensibly applies to the industrial category of fossil-fuel-fired plants, EPA makes no pretense that compliance can be achieved through the application of a system of emission reduction, such as pollution control technology, at those sources. Instead, EPA determined that the "best system of emission reduction" is a building-block approach that includes such beyond-the-fenceline measures as dispatch, development and integration of renewable generation capacity, and regulation of power consumers.[59] In this way, the Proposed Rule's reach extends well beyond the fenceline of those sources, to the states' regulation of their power sectors.

All of these things require EPA to enlist the states and their officers. While the agency has authority to directly regulate emissions by regulated sources in lieu of a state doing so—which regulation EPA anticipates will account for only a small fraction of total reductions[60]—the remainder of the actions required will have to be carried out by the states and their officials. Indeed, federal law expressly recognizes states' exclusive jurisdiction "over facilities used for the generation of electric energy[,] over facilities used in location distribution or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter."[61] As the Supreme Court has recognized, the "economic aspects of electrical generation"—which lie at the very heart of the Proposed Rule—"have been regulated for many years and in great detail by the states."[62] That includes states' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like."[63] And it is "state public utility commissions or similar bodies [that] are empowered to make the initial decision regarding the need for power."[64] EPA does not—and could not, under its governing statute—purport to exercise or preempt these traditional state powers.[65] Instead, it expects that the states will exercise them to carry out its ends.

The agency is remarkably candid on this point. It acknowledges that states' "utility regulatory structure" will affect precisely how each complies.[66] It anticipates that administration of its rule will "extend federal presence into areas that, to date, largely have been the exclusive preserve of the state and, in particular, state public utility commissions and the electric utility companies they regulate," but without entering those areas itself.[67] It expects that a state plan will include "public utility commission orders."[68] It even recognizes that "affected entities" will include any "entity that is regulated by the state, such as an electric distribution utility, or a private or public third-party entity."[69] Indeed, each state must "demonstrate that it has sufficient legal authority to subject such affected entities other than affected [power plants] to the federally enforceable requirements specified in its state plan."[70] All of these things reflect EPA's awareness that achieving its emissions targets will require far more than just emissions controls: compliance will require states to fundamentally revamp their regulation of their utility sectors and undertake a long series of regulatory actions, all at EPA's direction.

The states have no choice in this matter. While EPA makes much of the "State Flexibilities" on offer,[71] what states lack, as in *New York*, is the choice to "decline to administer the federal program."[72] Instead, the states are treated as "administrative agencies of the Federal Government."[73] For that reason, the Proposed Rule impinges on the states' sovereign authority and therefore, like the actions under review in *New York* and *Printz*, exceeds the federal government's power.[74]

The Proposed Rule is different in kind from the sort of actions that the Supreme Court has identified as permissible ways to encourage state action: offering states the first shot at regulation, backstopped by federal preemption, and attaching conditions to the receipt of federal funds.[75] As to the former, EPA does not have the authority to preempt states' regulation of their utility sectors and energy usage.[76] Therefore states do not have the option of leaving compliance entirely in the hands of the federal government; they must take action to carry out federal policy.[77]

As to financial inducement,[78] even states that refuse to submit implementation plans—thereby leaving the means of achieving CO_2 goals to EPA in a federal plan—will still be forced to either carry out any beyond-the-fenceline measures identified by EPA or to account for the disruption and dislocation caused by the imposition of impossible-to-achieve emissions limits on power plants. If EPA effectively mandates the retirement of coal-fired plants, state utility and electricity regulators will have to respond in the same way as if the state itself had ordered the retirements. Likewise, if EPA mandates the installation of massively expensive control technologies or requires measures that disrupt the output of coal-fired plants,

the states again will be left to pick up the regulatory slack. In other words, even if a state is willing to accept the consequences of declining to regulate it still does not remain free to decline to carry out aspects of the Proposed Rule—that is, to implement federal policy.[79] In addition, as discussed below, to the limited extent that the Proposed Rule may be regarded as imposing conditions on the receipt of federal highway funds, it is unconstitutionally coercive.

This "heads EPA wins, tails the State loses" aspect of the Proposed Rule is particularly damaging to political accountability. It will be counterintuitive, to say the least, for citizens of a state that declines to directly implement the Clean Power Plan to understand that the higher electric rates that they suffer as a result of state measures to maintain reliability are actually the consequence of EPA's actions. To the contrary, citizens are far more likely to draw the conclusion that these negative impacts are the result of the state's actions, which would get the chain of causation backwards.

Finally, the Proposed Rule is not the kind of regulation of state activities that the Supreme Court upheld in *South Carolina v. Baker*[80] and *Reno v. Condon*.[81] *Baker* upheld a federal statute that effectively required states to issue registered bonds.[82] And *Reno* upheld a federal statute restricting a state's ability to sell drivers' personal information without their consent.[83] The Court found in both cases that the laws at issue "'regulated state *activities*,' rather than 'seeking to control or influence the manner in which States regulate private parties.'"[84] By contrast, the Proposed Rule does exactly what both opinions identified as impermissible: "require the [state] to enact any laws or regulations" and "require state officials to assist in the enforcement of federal statutes regulating private individuals."[85] That means, as the Court recognized in *Reno*, that *New York* and *Printz* control.

In sum, the Proposed Rule violates the Tenth Amendment's anti-commandeering doctrine and therefore exceeds the federal government's constitutional authority.[86]

III. The Proposed Rule Unlawfully Coerces the States

Just as the federal government may not commandeer states to carry out federal policy, it also may not coerce them to the same end by denying them "a legitimate choice whether to accept the federal conditions."[87] The Proposed Rule violates this anti-coercion doctrine in two respects: first, by potentially leveraging federal highway funds to coerce states into implementing a new federal regulatory program; second, by threatening to punish the citizens of states (as well as the states themselves) that do not carry out federal policy.

A. The Spending Clause

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."[88] "Incident to this power, Congress may attach conditions on the receipt of federal funds" and thereby *encourage* states to carry out federal policy.[89] But the federal government exceeds its constitutional authority when "'the financial inducement'" is "'so coercive as to pass the point at which pressure turns into compulsion.'"[90]

Thus, in *NFIB v. Sebelius*, the Supreme Court severed a statutory provision that leveraged states' existing Medicaid funding to coerce them to implement a fundamentally new program.[91] The Chief Justice reasoned that, when new conditions imposed by Congress on funding "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[92] That pressure becomes unconstitutional compulsion when the amount of funds at stake comprises a substantial portion of existing funding and the new conditions "accomplish[] a shift in kind, not merely degree" to the existing program[93]—that is, they "'surpris[e] participating States with post-acceptance or 'retroactive' conditions.'"[94] Thus, the Medicaid expansion constituted unconstitutional coercion because it amounted to an attempt to "'conscript state agencies into the national bureaucratic army.'"[95] The remedy was to give states the option of participating in the new program, without putting at risk their existing funding.[96] The Court's reasoning has been described as establishing an "anti-leveraging principle."[97]

That principle calls into question, as a general matter, the constitutionality of the Clean Air Act's threat to withhold federal highway funding from states that fail to implement and enforce certain regulatory requirements.[98] The basic argument is straightforward: "Congress has told states that wish to continue participating in the entrenched and lucrative federal highway program that they can do so only if they *also* agree to participate in a separate and independent program for reducing air pollution."[99]

Professor Jonathan Adler of Case Western Reserve University School of Law has spelled out the argument's particulars:

> First, the Clean Air Act conditions the receipt of money for one program (highway construction) on compliance with conditions tied to a separate program (air pollution control). This may be problematic because a majority of the Court [in *NFIB*] thought Congress was trying to leverage state reliance on funding for one program (traditional Medicaid) to induce participation in another program (the Medicaid expansion). While the money at stake under the Clean Air Act is far less—most states receive substantially less in highway funds than in Medicaid funds—highway funding is less directly related to air pollution control (particularly from stationary sources) than traditional Medicaid is to the Medicaid expansion.
>
> Though highway funding is less than that for Medicaid, it still may be enough to raise constitutional concerns. Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund. For many states, federal highway funds represent the lion's share of their transportation budget. As a consequence, threatening to take highway funds may strike some courts as unduly coercive under *NFIB*….
>
> The Court in *NFIB* also stressed that conditional grants of federal funds operate much like a contract, and that the parties are limited in their ability to unilaterally revise the terms. This could expose another vulnerability in the

> Clean Air Act because while the statutory requirements don't regularly change, what states must actually do to comply with the Clean Air Act's terms do. The requirements for state pollution control plans are constantly changing, as the EPA tightens or otherwise revises federal air quality standards and additional pollutants become subject to Clean Air Act regulation. Were this not enough, the recent inclusion of greenhouse gases as pollutants subject to regulation under the Act has radically altered states' obligations, such that states will now have to do many things they could not have anticipated when the Clean Air Act was last revised in 1990.[100]

The Proposed Rule is particularly vulnerable under this analysis, for three reasons. First, the regulation of emissions by stationary sources—unlike, arguably, emissions by mobile sources—has absolutely nothing to do with the purposes of the highway funds program.[101] Regulation of dispatch, development and integration of zero-emissions generation capacity, and demand-side energy efficiency regulation are even further removed. Second, the Proposed Rule surprises states with new conditions that they never could have imagined when they chose to accept highway funds or to regulate under the Clean Air Act. Whereas prior conditions concerned the control of emissions, the Proposed Rule requires states, for the first time ever, to exercise their previously independent regulatory authority over energy resources and utilities to carry out federal policy. Third, in addition to the substantial amount of money at stake,[102] the Proposed Rule conditions states' continued electric reliability on states' regulatory actions to mitigate the impact of the steps necessary to achieve the rule's targets. States, of course, depend on electric reliability to carry out their core police powers, such as public safety and the basic operation of government. EPA's inducement is therefore "much more than relatively mild encouragement—it is a gun to the head."[103]

NFIB suggests that the appropriate remedy would be to sever the penalty. While the federal government may offer conditional grants to encourage states to act, what it "is not free to do is to penalize States that choose not to participate in that new program by taking away their existing [programmatic] funding."[104] Like the statute at issue in *NFIB*, the Clean Air Act contains a severability clause.[105]

Alternatively, the preamble of the Proposed Rule states EPA's view that its individual "building blocks" are severable, "such that in the event a court were to invalidate our finding with respect to any particular building block, we would find that the [standard of performance] consists of the remaining building blocks."[106] "Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision."[107] Because the courts examine these two factors independently, an agency's preference with respect to severability is not dispositive of the question.[108] The D.C. Circuit has declined, over an agency's entreaties, to sever a portion of a regulation where so doing would cause "loss of flexibility" (a key concern of the regulation) among regulated parties.[109] Elsewhere in the Proposed Rule, EPA recognizes that "state flexibilities"—its way of referring to things other than source-level emissions controls—are essential to achieving the rule's interim and final targets.[110] As a result, despite EPA's stated preference to the contrary, the individual building blocks are not severable in light of the Proposed Rule's structure and requirements.[111] Accordingly, the Act's severability clause should govern with respect to any penalties.

Published reports of recent public remarks by the EPA Administrator suggest that EPA's current position is that it lacks authority to withhold highway funds from states that do not submit Clean Power Plan SIPs or from states whose SIPs EPA disapproves, on the basis that the Act's highway-funds penalty applies only to SIPs under the national ambient air quality standards program.[112] While this position is the best reading of the Clean Air Act, and may well be the only permissible reading, EPA does not appear to have made any legally binding statements that this is how it interprets the Act. And if EPA were to do so, the Agency likely would be due deference on such jurisdictional determinations,[113] raising the specter that not addressing the coercive aspects of the Clean Power Plan would simply do nothing more than delay the problem until the Plan is sufficiently entrenched throughout the country that the practical effects of its coercive regime would be impossible to reverse.

In sum, the Proposed Rule cannot be regarded as a proper exercise of the federal government's Spending Clause power to encourage the states to act. It is, instead, an improper attempt to leverage the states' receipt of highway funds to implement a new and surprising set of conditions and, therefore, violates the anti-coercion principle.

B. The Commerce Clause

The anti-coercion rationale of *NFIB* applies equally to attempts to employ the Commerce Clause power as a "'weapon of coercion, destroying or impairing the autonomy of the states.'"[114] Whether Congress is threatening to abuse its Spending Clause authority by curtailing existing funding to force states to implement a new and fundamentally different program, or threatening to impair states' sovereign prerogatives and injure their citizens if they choose not to "opt in" to a cooperative federalism program promulgated under the auspices of the Commerce Clause, the Tenth Amendment operates to prevent the federal government from acting to "'conscript state [agencies] into the national bureaucratic army.'"[115]

Applying the same factors as under the Spending Clause, a Commerce Clause regulation "has crossed the line distinguishing encouragement from coercion" when it leverages an existing and substantial entitlement of the citizens of a state or the state itself on a conditional basis in order to induce the state to implement federal policy.[116] When, "'not merely in theory but in fact,'" such threats amount to "economic dragooning that leaves the States with no real option but to acquiesce" to federal demands, they impermissibly "undermine the status of the States as independent sovereigns in our federal system."[117]

That describes the Proposed Rule. EPA has stated that, if the states decline to implement its terms, the agency will impose a federal plan that does so.[118] But the agency lacks authority to

carry out the actions described in its second, third, and fourth building blocks.[119] Thus, a federal plan would have to focus on heat-rate improvements at coal-fired facilities, and—to achieve anywhere near the 30 percent average reduction in CO_2 emissions targeted by EPA—would have to impose controls so burdensome that they would force plant retirements and cripple the states' electric power systems.[120] The point, of course, would be to force states to pick up the slack necessary to maintain affordable and reliable electric service through "beyond-the-fenceline" measures that are beyond EPA's authority, regardless of whether a state chooses to fix the problems that EPA has created through a state implementation plan or through other "voluntary" measures. In neither instance could it be said that the decision to adopt or reject EPA's preferred policies "'remained the prerogative of the States.'"[121] Instead, EPA's "inducement" "is a gun to the head," in light of the disruption and dislocation to citizens and the state itself if EPA were to carry out its threat.[122]

In sum, while EPA has the authority pursuant to the Commerce Clause to directly regulate certain emissions by stationary sources, a federal plan to implement the Proposed Rule would be inevitably and inherently coercive to the states.[123]

IV. Constitutional Avoidance

A court reviewing final action that is materially similar to EPA's Proposed Rule could apply the doctrine of constitutional avoidance to preclude EPA from interpreting Section 111 in a way that exceeds the limits of federal power. The statutory language is not only readily amenable to such an interpretation, but is best read that way.

Out of respect for Congress, which is also bound by and swears an oath to uphold the Constitution, federal courts must construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[124] Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[125]

Such an acceptable construction is available here. The key statutory term underlying EPA's constitutionally suspect "building block" approach is "best system of emission reduction," which the agency defines to include any possible "measures… to improve emission rates and to reduce or limit…emissions."[126] In effect, the agency views anything relating to a source—no matter how tenuously related or far removed—as fair game for regulations that nominally apply to the source alone. Among the problems with this approach is that it brooks no limiting principle; EPA claims authority to force states to regulate anything connected to the electric system and anyone using electricity, in any way that might reduce electricity consumption. As shown above, the Proposed Rule's constitutional infirmities are the result of its attempted centralization of the energy economy through measures that occur beyond the fenceline, in addition to more typical source-level requirements.

But EPA's unbounded definition of "best system of emission reduction" is not the only or the best reading of the term. The Supreme Court, viewing this language, easily recognized that it refers to "technologically feasible emission controls"—that is, emission-reduction technologies implemented at the source.[127] Indeed, EPA has reached the same conclusion in the context of Section 111(b) standards, which rely on the same term, explaining that that provision "assur[es] cost-effective controls are installed on new, reconstructed, or modified sources."[128] This reading, limited to source-level measures, also avoids constitutional doubt, because it concerns only sources of emissions themselves, which Congress unquestionably has the authority to regulate.

Accordingly, to avoid the constitutional problems identified in this analysis, a federal court would be required to read the statutory term "best system of emission reduction" to encompass only source-level measures and would, on that basis, have to vacate EPA's action as contrary to law.

V. Conclusion

What's past is prologue, and this is not the first time that EPA has been oblivious to the constitutional limits on its authority to force the states to administer its own programs. In the mid-1970s, as the agency was still working out the terms of its relationship with the states under the Clean Air Act Amendments of 1970, it "order[ed] the states to enact statutes and to establish and administer programs to force their citizens to comply with [its] federal directive[s]."[129] That effort was stopped in its tracks by three decisions, in quick succession, of the courts of appeals, astonished that a federal agency would attempt to arrogate such authority to itself.[130] By the time the Supreme Court agreed to review the regulations, "the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained."[131]

Since that time, the Supreme Court has been particularly attentive to overreaching by the federal government in its relationship with the states. Decisions like *New York*, *Printz*, and *NFIB* have recognized clear prohibitions on federal attempts to commandeer the states, to commandeer their officials, and to coerce them into action. The only constant in this changing field is that EPA has ignored these constitutional imperatives in its zeal to regulate. The best that can be said of the agency's proposed Clean Power Plan is that, if finalized in anything like its current form, it will provide another valuable opportunity for the courts to advance the cause of federalism when they strike it down.

Endnotes

1 42 U.S.C. § 7401(a)(3).

2 Gen. Motors Corp. v. United States, 496 U.S. 530, 532 (1990).

3 *See generally* 42 U.S.C. § 7410.

4 *See* 42 U.S.C. § 7410(a)(2)(A)–(M).

5 Train v. NRDC, 421 U.S. 60, 71 n.11 (1975).

6 *Id.* at 79.

7 42 U.S.C. § 7411(d)(1).

8 *Id.*

9 42 U.S.C. § 7411(a)(1).

10 42 U.S.C. § 7411(d)(1)(B).

11 42 U.S.C. § 7411(d)(2).

12 79 Fed. Reg. 34,830, 34,832/2 (June 18, 2014).

13 *Id*. at 34,832/3.

14 *Id*. at 34,833/1.

15 *Id*. at 34,836/1.

16 *Id*. at 34,836, 34,859, 34,862–63, 34,866–68, 34,871.

17 EPA, Fact Sheet: Clean Power Plan Flexibility: Flexible Approach to Cutting Carbon Pollution, June 2, 2014, http://www2.epa.gov/carbon-pollution-standards/fact-sheet-clean-power-plan-flexibility.

18 79 Fed. Reg. at 34,954/1.

19 *Id*.

20 *Id*. at 34,836/2.

21 *Id*. at 34,926/2 (reciting EPA's assumption that efficiency gains will reduce emissions by 6 percent, on average).

22 *See, e.g.*, Decl. of Scott Deloney, Indiana Department of Environmental Management, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶¶ 4, 7, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶¶ 6, 8, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶¶ 5–6, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

23 *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

24 79 Fed. Reg. at 34,926/2 (6 percent, on average, per EPA). And even that may not be achievable in many states. *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

25 *See, e.g.*, Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 4, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

26 *See* Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶ 9, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

27 *Id*.

28 *See, e.g.*, Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.B, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014) (current law and practices "require[] that the plants are dispatched in an economic manner with the most economic being used first").

29 Decl. of Scott Deloney, Indiana Department of Environmental Management, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014); Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.B, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

30 Decl. of Brian Gustafson, South Dakota Department of Environment and Natural Resources, at ¶ 10, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

31 Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶ 6, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

32 Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

33 Decl. of Laura Crowder, West Virginia Department of Environmental Protection, at ¶ 5, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014);

34 Decl. of Thomas Gross, Kansas Department of Health and Environment, at ¶ 3, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

35 Decl. of Robert Hodanbosi, Ohio Environmental Protection Agency, at ¶ 5.D, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

36 *Id*.

37 79 Fed. Reg. at 34,899/3, 34,901/3, 34,907/1, 34,933/1, 34,935/1 (acknowledging that the Proposed Rule will require retirements).

38 Decl. of Todd Parfitt, Wyoming Department of Environmental Quality, at ¶ 6, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Nov. 26, 2014).

39 U.S. Const. amend. X.

40 United States v. Darby, 312 U.S. 100, 124 (1941).

41 New York v. United States, 505 U.S. 144, 156 (1992).

42 *Id*.

43 *Id*. at 161.

44 *Id*. at 166.

45 *Id*. at 153–54. If the state did not take possession of the waste, it would nonetheless be "liable for all damages directly or indirectly incurred" as a result of its failure to do so. *Id*.

46 *Id*. at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)). Which is not to suggest that the Proposed Rule is a proper exercise of that power. *See infra* § III.A.

47 *Id*.

48 *Id*. at 168.

49 *Id*. at 169.

50 *Id*. at 175.

51 *Id*. at 176–77.

52 *Id*. at 178, 181.

53 *Id*. at 188.

54 521 U.S. 898 (1997).

55 *Id*. at 903–04.

56 *Id*. at 904.

57 *Id*. at 928 (alterations omitted) (quoting Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975), *vacated on other grounds*, 431 U.S. 99 (1977)).

58 *Id*. (quotation marks omitted).

59 79 Fed. Reg. at 34,836/1.

60 *Id*. at 34,859/3 ("EPA believes that implementation of all identified best practices and equipment upgrades at a facility could provide total heat rate improvements in a range of approximately 4 to 12 percent.").

61 16 U.S.C. § 824(b)(1). *See also* 42 U.S.C. § 2021(k) (recognizing presumptive role of states in power regulation).

62 Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

63 *Id*. at 212.

64 *Id*. (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 550 (1977)).

65 Crucially, the statute says absolutely nothing about preempting states' traditional regulation of utilities and generation. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); United States v. Bass, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."); Bond v. United States, 134 S. Ct. 2077, 2088–90 (2014). Moreover, the Proposed Rule and its preamble do not discuss or even mention preemption. *Cf.* Wyeth v. Levine, 555 U.S. 555, 576–77 (2009) (suggesting that an agency's

assertion of preemption may be a necessary, but not sufficient, condition for an ambiguous federal statute to preempt state law).

66 79 Fed. Reg. at 34,833/2, 34,900/3.

67 *Id*. at 34,902/1.

68 *Id*. at 34,914/3.

69 *Id*. at 34,917/3.

70 *Id*.

71 *Id*. at 34,897/1–98/1.

72 505 U.S. at 177. Although EPA may impose, administer, and enforce a federal plan that addresses the kind of efficiency improvements implicated by its first building block, 42 U.S.C. § 7411(d)(2), as described below, implementation of the other building blocks will require state action, which EPA does not claim the authority to preempt.

73 505 U.S. at 188.

74 FERC v. Mississippi, 456 U.S. 742 (1982), does not alter this conclusion, for two reasons. First, *FERC* upheld "only the 'command' that state agencies 'consider' federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field." *Printz*, 521 U.S. at 926. The Proposed Rule, by contrast, requires states to carry out federal policy and does not offer to relieve states of the burden of so doing. Second, to the extent that *FERC* could be read to approve an broader conception of permissible commandeering, that holding has been narrowed (if not entirely overruled) by *New York*, 505 U.S. at 161–62 (*FERC* "upheld the statute at issue because it did not view the statute as such a command"), and *Printz*, 521 U.S. at 926. *See also New York*, 505 U.S. at 204–05 (White, J., concurring in part and dissenting in part) (accusing the majority of overriding *FERC*).

75 *Id*. at 167.

76 In at least one instance, EPA has approved a SIP revision limiting utilization of a facility, which would be among the measures required to carry out the Proposed Rule's second building block. Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Regional Haze and Interstate Transport Affecting Visibility; State Implementation Plan Revisions; Revised BART Determination for American Electric Power/Public Service Company of Oklahoma Northeastern Power Station Units 3 and 4, 79 Fed. Reg. 12,944, 12,945/1 (Mar. 7, 2014). EPA, however, never claimed authority to carry out such measures itself through a federal plan. *See id*. at 12,951/2 (noting that the preexisting FIP "does not restrict capacity utilization"). Such reductions would also have to be accompanied by other state regulatory action that is not within EPA's purview, such as changes to dispatch and utility regulation.

77 *Contrast with* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981), which concluded that the Surface Mining Control and Reclamation Act of 1977 did not present a commandeering problem because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field. *See also Printz*, 521 U.S. at 926.

78 The Clean Air Act provides EPA authority to withhold federal highway funding from states that fail to make certain approvable SIP submissions or fail to enforce their SIPs. 42 U.S.C. § 7509. This penalty is discussed further below.

79 *Compare to New York*, 505 U.S. at 176 ("Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'") (quoting *Hodel*, 452 U.S. at 288).

80 485 U.S. 505 (1988)

81 528 U.S. 141 (2000)

82 485 U.S. at 514–15.

83 528 U.S. at 143–44, 151.

84 *Id*. at 150 (alterations omitted) (emphasis added) (quoting *Baker*, 485 U.S. at 514–15).

85 *Id*. at 151. *See also Baker*, 485 U.S. at 514 (explaining that statute "does not…seek to control or influence the manner in which States regulate private parties").

86 The Proposed Rule asserts that each of its four building blocks is severable. 79 Fed. Reg. at 34,892/2. This claim is discussed and rejected in § III.A.

87 NFIB v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.). Chief Justice Roberts's opinion, being the "position taken by those Members who concurred in the judgments on the narrowest grounds," is controlling. Marks v. United States, 430 U.S. 188, 193–94 (1977) (quotation marks omitted). Subsequent citations to *NFIB* refer to the Chief Justice's controlling opinion, unless otherwise noted.

88 U.S. Const. art. I, § 8, cl. 1.

89 *Dole*, 483 U.S. at 206.

90 *NFIB*, 132 S. Ct. at 2604 (quotation marks omitted) (quoting *Dole*, 483 U.S. at 211).

91 *Id*. at 2606–07.

92 *Id*. at 2604.

93 *Id*. at 2605.

94 *Id*. at 2606 (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)).

95 *Id*. at 2607 (alteration omitted) (quoting *FERC*, 456 U.S. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part)). The joint *NFIB* dissent of Justices Scalia, Kennedy, Thomas, and Alito reaches the same conclusion based on arguably broader reasoning. *See id*. at 2661, 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

96 *Id*. at 2607.

97 Samuel Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 Geo. L.J. 861, 871 (2013) [hereinafter Bagenstos].

98 42 U.S.C. § 7509.

99 Bagenstos, *supra* note 97, at 917.

100 Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, July 23, 2012, http://perc.org/blog/could-health-care-decision-hobble-clean-air-act. *See also* Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 449–52 (2005) (pre-*NFIB* analysis finding that "[i]t is not clear that threatening federal highway moneys falls squarely within *Dole*'s holding").

101 Bagenstos, *supra* note 97, at 918–19 ("Insofar as they address stationary sources of pollution, the CAA's requirements would appear, on the same analysis, to be separate and independent from the highway-grant program. Those requirements do not govern how states should construct and maintain highways. Nor do they govern the processes by which states should choose *which* highways to construct and maintain. And they do not even govern the *use* of the highways constructed or maintained with federal funds.") (footnotes omitted).

102 *See id.* at 919 ("The average state receives more than three-quarters of a billion dollars a year in federal transportation funds," accounting for nearly 8 percent of its budget.).

103 *NFIB*, 132 S. Ct. at 2604 (quotation marks omitted).

104 *Id*. at 2607.

105 42 U.S.C. § 7615.

106 79 Fed. Reg. at 34,892/2.

107 MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988)).

108 *Id*.

109 *Id*.

110 *E.g.*, 79 Fed. Reg. at 34,837/2 (explaining that interim goals depend on such flexibilities); *id*. at 34,864/2 (accomplishing "necessary" infrastructure improvements depends on "state flexibilities"); *id*. at 34,898/1 (flexibilities "ensure that states will be able to achieve their final CO_2 emission performance goals").

111 In addition, it is not apparent that the Proposed Rule's "building blocks" are the appropriate subjects of severability analysis, given that EPA uses them to calculate overall emissions reductions and purports not to mandate that states achieve specific emissions reductions with respect to each building block. *See id*. at 34,837. In other words, the building blocks themselves are not requirements, but inputs to EPA's state-specific target calculations, and it is the requirement to achieve the targets that causes the rule to be unconstitutional.

112 *See* Jean Chemnick, *Agency won't withhold highway funds for Clean Power*

Plan—McCarthy, E&E News PM, Mar. 30, 2015.

113 *See* City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

114 *NFIB*, 132 S. Ct. at 2603 (alteration omitted) (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937)).

115 *Id*. at 2606–07 (quoting *FERC*, 456 U.S. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part)).

116 *Id*. at 2603 (quotation marks omitted).

117 *Id*. at 2602, 2604–05 (quoting *Dole*, 483 U.S. at 211–12).

118 79 Fed. Reg. at 34,951/2. *See also* Timothy Cama, *EPA delays landmark climate rule*, The Hill, Jan. 7, 2015, http://thehill.com/policy/energy-environment/228783-epa-delays-climate-rule (quoting EPA official's statement that the agency intends "to have a federal plan available, should there be states that don't submit plans").

119 *See supra* § II; William Yeatman, *What Would a Clean Power Plan FIP Look Like?*, Jan. 14, 2015, http://www.globalwarming.org/2015/01/14/what-would-a-clean-power-plan-fip-look-like/; Comments of Hon. Charles W. Pickering, Sr. & Hon. Thomas Scott, EPA-HQ-OAR-2013-0602-33150, Dec. 1, 2014 ("Pickering & Scott Comments").

120 Pickering & Scott Comments at 43–44.

121 *NFIB*, 132 S. Ct. at 2604 (alteration omitted) (quoting *Dole*, 483 U.S. at 211).

122 *Id*.

123 The holding of *New York v. United States*, 505 U.S. 144, 173–74 (1992), regarding the "access incentive" of the Low–Level Radioactive Waste Policy Amendments Act of 1985, is not to the contrary. That provision provided that "[s]tates may either regulate the disposal of radioactive waste according to federal standards..., or their residents who produce radioactive waste will be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites." *Id*. at 174. The Court held that this was a permissible "conditional exercise of Congress' commerce power" that "does not intrude on the sovereignty reserved to the States by the Tenth Amendment." *Id*. First, by contrast, a federal plan implementing the Proposed Rule would invade state sovereignty by inhibiting states' exercise of their traditional police powers, which depend on a reliable electric system. Second, the state would not have the "the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation," *id*. at 173–74, in light of EPA's inability to directly impose most of the regulatory activities targeted by the Proposed Rule. And third, it follows that a state would not be free to "continue to regulate…in any manner its citizens see fit," *id*. at 174, given the necessity of state action to mitigate the impact of federal action in the absence of complete preemption. In this respect, the Proposed Rule is much more like the "take title" provision that the Court rejected. As it explained, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id*. at 176. Nevada v. Skinner, 884 F.2d 445, 453 (9th Cir. 1989), is inapt for the same reasons, fails to anticipate the anti-commandeering and anti-coercion doctrines of *New York* and *NFIB*, and has been (at least in part) abrogated by *New York*.

124 United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

125 DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

126 79 Fed. Reg. at 34,836/1. *See also id*. at 34,888/3–89/1 (discussing objections to this definition).

127 Hancock v. Train, 426 U.S. 167, 193 (1976). *See also* PPG Indus., Inc. v. Harrison, 660 F.2d 628, 636 (5th Cir. 1981) ("Setting standards which in effect require a use of a certain type of fuel, without regard to other types of emission control, appears to be a work practice or operation standard beyond the statutory authority of the EPA."); Bethlehem Steel Corp. v. EPA, 651 F.2d 861, 869 (3d Cir. 1981) ("system" is something that a source can "install").

128 73 Fed. Reg. 34,072, 34,073/2 (June 16, 2008).

129 District of Columbia v. Train, 521 F.2d 971, 990 (1975), *vacated on other grounds by* EPA v. Brown, 431 U.S. 99 (1977).

130 *Id*. at 994; Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975); *B*rown v. EPA, 521 F.2d 827, 838–42 (9th Cir. 1975).

131 *Printz*, 521 U.S. at 925.

Financial Services & E-Commerce

Fannie and Freddie We're Stuck With: But Can We Get Rid of GSEs?

By Alex. J. Pollock

The model of Fannie Mae and Freddie Mac as "GSEs" (government-sponsored enterprises) was a profound mistake. Virtually everybody agrees with that. In retrospect, it was also an *obvious* mistake. Just imagine anybody wanting to hyper-leverage half the mortgage market on the taxpayers' credit card, so the profits were private and the losses public, create an enormous credit risk concentration in Washington DC, and inevitably curry political favor by increasing risk.

It is already six years ago that Fannie and Freddie collapsed and went from being "the envy of the world," according to their own PR and their Congressional backers, to being utterly humiliated and made into the wards of the state they still are. But during those six years the political chance to close them down has come and gone. The stars looked aligned, but as it turned out weren't, and we are still stuck with Fannie and Freddie like a $5 trillion tar baby.

Fannie and Freddie have recovered financially through lavish subsidies and regulatory advantages given by the government, including support of their mortgage-backed securities by unprecedented Federal Reserve buying; this ups their profits and market share and gives their political clients hope. Too bad, but there it is.

What can we do to avoid a threatened restoration of the GSE ancient regime? Can Fannie and Freddie be addressed before they arise from their near-death as dominating and pernicious as before?

Yes, they can be. The imperative is to eliminate to the maximum extent the special legal and regulatory favors for Fannie and Freddie, so that even though they are still operating, they would cease to function *as GSEs*.

The governing principle of how to do this is simple and straightforward: it is to *treat Fannie and Freddie exactly like every other big bank.* This will put them with no special advantages into competition with at least the seven or eight biggest banks, which is plenty for robust competition. (Some maintain that big banks are a kind of GSE--assuming that for the sake of argument, Fannie and Freddie would not be any more a GSE than every other big bank is.)

What does treating Fannie and Freddie exactly like every other big bank specifically mean? At least six steps:

• *First*: No more hyper-leverage, no more capital requirement lower than anybody else's, no more capital arbitrage using Fannie and Freddie to make the whole financial sector riskier. Fannie and Freddie must have exactly the same leverage capital minimum requirement as every other big bank: equity of at least 5% of total assets. Since at the moment they have zero equity, they have a long way to go.

• *Second*: Fannie and Freddie must be formally designated as Systemically Important Financial Institutions (SIFIs), as they quite obviously are, by the Financial Stability Oversight Council (FSOC), just like every big bank. Fannie has assets of over $3 trillion, bigger than JPMorgan and Bank of America. Freddie has assets of over $1.9 trillion, bigger than Citigroup and Well Fargo. Fannie and Freddie are undeniably major generators of systemic risk and need to be treated as such.

• *Third*: Fannie and Freddie must explicitly pay for the indubitable guaranty they enjoy from the government, just like banks have to. Fannie and Freddie should pay the government an "offset fee" assessed on their total liabilities, exactly as banks have to pay the government a "deposit insurance premium" assessed on their total liabilities. I propose a reasonable rate for this offset fee would be 0.17% per year.

• *Fourth*: All consumer protection rules must be applied in full force to loans sold to Fannie and Freddie, instead of giving them exemptions.

• *Fifth*: Every banking regulation which grants special favors to Fannie and Freddie must be eliminated. Congress should instruct the banking regulators to do this, if the regulators don't do it on their own. Banking regulations must treat Fannie and Freddie exactly as they do any other bank.

• *Sixth*: Fannie and Freddie must be subject to state and local income taxes, just like every other bank, instead of being exempt.

I do not claim these changes would create the ideal housing finance sector, but they are the best combination of correct concepts and political possibility now available.

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Litigation

A Jurisprudential Divide in *U.S. v. Wong* & *U.S. v. June*

*By Richard J. Peltz-Steele**

On April 22, the Supreme Court decided two consolidated cases construing the Federal Tort Claims Act, *U.S. v Kwai Fun Wong* and *U.S. v June, Conservator*.[1] The Court majority, 5-4, per Justice Kagan, ruled in favor of the claimants and against the Government in both cases.

On the face of the majority opinion, *Wong* and *June* come off as straightforward matters of statutory construction. But there's more going on under the surface. The cases gave the Court a chance to wrestle with fundamental questions of statutory interpretation. And the 5-4 split reflected a familiar but always intriguing jurisprudential divide.

Let's start with some basics. Like any government, including the monarchy before the Revolution, the United States enjoys sovereign immunity. It can be sued only when it says it can, which it does by statute. Early in our history, claims went to Congress directly. In 1855, Congress created the U.S. Claims Court. The 1887 Tucker Act, named for Virginian legislator John Randolph Tucker, sent contract claims to that court. Slightly expanded, the Tucker Act is still around today.

It wasn't until the Federal Tort Claims Act of 1946 (FTCA) that Congress waived federal sovereign immunity for *tort* claims. FTCA *bills* had been around for years, but it was after a B-25 bomber in heavy fog crashed into the Empire State Building that Congress was motivated to grant tort relief to victims.

Fast forward a half century to the facts of our consolidated cases. In 1999, Kwai Fun Wong was detained by the Immigration and Naturalization Service in Oregon on suspicion of illegal entry into the country. Wong is a Hong Kong native and British citizen, and a minister of an East Asian universalist faith. She alleged in a lawsuit that INS officials violated her rights by strip searching her and denying her vegetarian meals before she was deported. About the same time she filed her lawsuit, in May of 2001, she filed an FTCA negligence claim with the INS.

Under the FTCA, a person has two years in which to file a claim for relief and has to file first with the allegedly offending administrative agency. Wong did that.

A claimant then has six months from the agency's denial or failure to act to file a claim in federal district court. There things became knotty. The INS denied her claim in December of 2001. She already had a civil rights case going in court. So four months after the denial, she asked the federal district court for leave to amend her complaint, to add the FTCA claim. The district court granted leave, but by then, six months had come and gone. Wong filed, but the Government later asserted the essence of its position in these cases: *that the limitations periods of the FTCA are jurisdictional and are not subject to equitable tolling.* Nevertheless, the district court sided with Wong.

Wong's companion case, *June*, dealt with the initial two-year limitations period of the FTCA. In 2005, Andrew Booth was killed in a fatal car crash in Arizona. June was conservator for Booth's minor son in a wrongful death action against the state and its contractor, alleging negligent installation of highway barriers. According to June, it was four years after the accident, in the course of litigating the state lawsuit, that she discovered the Federal Highway Administration (FHWA) had concealed its negligence in approving the barriers without proper crash-testing. So June filed her claim with the FHWA in 2010, by then five years after the accident. In June's case, the district court agreed with the Government that the FTCA period had run.

The Ninth Circuit *en banc* held that the FTCA limitations are not jurisdictional, and are subject to equitable tolling, affirming *Wong*, reversing *June*, and giving both claimants the green light. So the Government went to the Supreme Court. Solicitors argued that Congress intended the FTCA limitations to be jurisdictional and not subject to equitable tolling. After all, the Government reasoned, the FTCA is a waiver of sovereign immunity. It's strictly construed to minimize Government exposure, so any ambiguity should be resolved in the Government's favor. Moreover, the 1946 statute copied the earlier Tucker Act, declaring claims after limitations to be "forever barred."

But throwing a wrench into the Government's argument was a 1990 case called *Irwin v. Department of Veterans Affairs*[2] under the 1964 Civil Rights Act. The *Irwin* Court opined that law-by-law adjudication of the congressional intent behind limitations was generating inconsistency and uncertainty. Instead, the Court would have a new rule, a rebuttable presumption: limitations periods in federal law are not jurisdictional—so can be tolled—unless Congress makes a clear statement to the contrary. Accordingly, Wong's and June's lawyers argued that there is no clear statement in the FTCA, so its limitations are subject to tolling.

Kagan led the majority, joined by Kennedy, Ginsburg, Breyer, and Sotomayor. The Court, 5-4, affirmed the Ninth Circuit, siding with Wong and June. *Irwin* controlled. FTCA limitations are non-jurisdictional for want of a clear statement, so claimants are entitled to equitable tolling.

The *Irwin* rule of rebuttable presumption is a "realistic assessment of legislative intent," Kagan wrote, better than the old rule of *ad hoc* fidelity to Congress. Usually a limitations period is just a claims processing rule, so Congress has to "do something special . . . to tag a statute of limitations as jurisdictional." The FTCA uses "ordinary, run-of-the-mill" language, so doesn't do anything special. There is no clear statement in legislative history, and Congress never added a clear statement by amendment.

Kagan explained as mere "legal rhetoric" the coincidence

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of language in the Tucker Act and the FTCA. And anyway, she wrote, when the Court reaffirmed Tucker limitations as jurisdictional, it did so because of *stare decisis*, not because of the *Irwin* rule. Quoting Justice Brandeis: "[I]t [wa]s more important that the rule 'be settled than that it be settled right.'"[3]

Kagan also rejected the Government's argument of strict construction of sovereign immunity waiver. That the FTCA was enacted in a different era, when Congress might have had different expectations, is still not a clear statement. The FTCA's own history and language can be read to support equitable tolling. Limitations and jurisdiction are in different sections. The also FTCA expressly likens the United States to "a private person" for purpose of tort liability. Kagan wrote, "[T]he FTCA treats the United States more like a commoner than like the Crown."

Justice Alito dissented, joined by Roberts, Scalia, and Thomas. According to Alito, the text of the statute, its history, and more than a century of precedent all pointed in the opposite direction.

On the text of the statute, Congress plainly intended a strictly limited waiver of immunity, fearful of open-ended tort liability. Causes such as defamation, and remedies such as punitive damages, are disallowed. Nine of thirty-one FTCA bills in Congress expressly authorized equitable tolling, and Congress passed a bill that did not. The FTCA used Tucker language, which has been construed invariably as jurisdictional. And lower courts caught on to the likeness, construing the FTCA likewise. *Irwin* doesn't even come into play, Alito reasoned, when the court lacks jurisdiction to begin with.

Alternatively, Alito argued, Congress still intended no equitable tolling. That's clear in the "forever barred" commandment. What Kagan found "run-of-the-mill," Alito found "no weak kneed command." Pointing to grammar, Alito opined that limitations usually direct themselves to claimants, such as "A person shall [or may] file." "Forever barred" is a passive structure, focusing on the defendant Government.

The conventional takeaway from *Wong* and *June* is that it's now easier to sue the Government. If you have a case that's late under the two-year or six-month limitations, and you would be entitled to equitable tolling in a private civil action, you can now get equitable tolling against the Government. Congress can always change that rule if it wants to.

But under the surface of *Wong* and *June*, there's more going on. The oral argument in the case sometimes delved into a surreal level of abstraction, revealing powerful currents in jurisprudence.

The deeper question surfaced in Justice Kagan's point about fidelity to Congress. Both sides on the Court agree in principle that legislative intent controls. But the Court created a problem for itself in *Irwin* when it changed the rule to a convenient facsimile of intent. The majority does not reject the argument that Congress legislated in 1946 against a backdrop of strict construction and jurisdictional limitations. But the Court decided that in the absence of a clear line of precedent, *Irwin* controls regardless of whether the statute in question came before or after *Irwin* in 1990.

The Court's position runs headlong into a declaration by Justice Alito: that the "meaning [of the FTCA], of course, cannot change over time."

It's worth noting that the Court's opinion in *Irwin* was authored by Chief Justice Rehnquist and joined by both Kennedy and Scalia. But Scalia here sides with Alito. Scalia quipped in oral argument that the claimants seemed to want "a living [FTCA]."

So this case about statutory interpretation reverberates with broader ideas about the role of the courts. *Wong* and *June* ask, what happens when the Court changes the rules of the interpretive game? Can a legal context *later in time* be dropped in behind an *earlier* Congress, even when everyone knows that's a fiction?

Scalia bought into rebuttable presumption twenty-five years ago in *Irwin*. But he refused to apply *Irwin* when it seemed to defy legislative intent.

So on the surface, *Wong* and *June* are straightforward, applying the *Irwin* rule to construe FTCA limitations in favor of claimants. But at a deeper level, the divide in *Wong* and *June* concerns the role of the courts vis-à-vis Congress—one side on the Court more willing to wield judicial prerogative and challenge Congress to keep pace; the other side on the Court more determined to cast itself as mere umpire, calling balls and strikes.

Endnotes

1 United States v. Kwai Fun Wong, No. 13-1074, slip op. (Apr. 22, 2015), available at http://www.supremecourt.gov/opinions/14pdf/13-1074_09m1.pdf.

2 498 U.S. 89 (1990).

3 Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting).

Telecommunications & Electronic Media

FCC Preemption of State Restrictions on Government-owned Broadband Networks: An Affront to Federalism

By Randolph J. May & Seth L. Cooper***

Note from the Editor:

This article is about the Federal Communications Commission's Order preempting state restrictions on government-owned broadband networks. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, in some cases, such as with this article, we will do so because of some aspect of the specific issue. In the spirit of debate, whenever we do that we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

• *Memorandum Order and Opinion*, In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.; The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of Tennessee Code Annotated Sections 7-52-601, WC Docket Nos. 14-115, 14-116 (adopted Feb. 26, 2015; released Mar. 12, 2015): http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf

• Comments of the National League of Cities et al, Federal Communications Commission, Docket Nos. 14-115 & 14-116, Aug. 28, 2014: http://apps.fcc.gov/ecfs/comment/view?id=6018325527

Introduction

The Federal Communications Commission's February 2015 Order preempting state law restrictions on local government ownership of broadband networks constitutes one of the most significant overreaches in the agency's history—a history which already includes plenty of overreaches. From the standpoint of constitutional federalism, the action is one of the most problematic ever taken by the Commission.

The FCC's claims of preemptive authority to interfere with the exercise of states' discretion over their political subdivisions clash with fundamental principles of constitutional federalism. The Supreme Court's jurisprudence has long recognized that states have broad discretion to delineate the powers local governments may exercise. Because Congress nowhere expressly has granted the FCC such preemptive authority over local government broadband networks, canons of statutory interpretation informed by constitutional principles mean that the FCC's action likely will be struck down in court.

I. Background

Over the last dozen years, a number of local governments have entered into the broadband Internet service business. Typically, local governments eager to construct and operate broadband networks offer rosy scenarios predicting high-quality services and low prices. Government-owned broadband networks usually receive start-up funding from municipal bond issues. In some instances, they receive funding directly from local taxes or fees.

Despite optimistic sales pitches by local politicians, a number of high-profile government-owned broadband networks have ended in financial failure. In such instances, significant debts from unsuccessful government-owned broadband projects have put strains on local government budgetary resources. For example, Burlington Telecom (BT) in Vermont failed to meet its service goals and borrowed $17 million from the city cash pool without permission from city officials or taxpayers. This prompted the city's mayor to settle with Citibank in 2013 for $10.5 million over additional debts.[1] Even after spending $40 million, iProvo, the broadband network started by Provo, Utah, was so financially troubled it was sold to Google for $1, requiring taxpayers to pay off its enormous start-up costs in the years ahead.[2] Lafayette Utilities Service's LUS Fiber network began operations in Lafayette, Louisiana in 2009. It has failed to produce its promised profitability, and Lafayette utilities customers faced the prospect of repaying debts of over $150 million.[3]

Government-owned broadband networks present additional concerns. A threshold issue is the problematic nature of government assuming the dual role of both enforcer of public law and competitor to private sector providers. This duality poses inherent conflicts-of-interest. For example, local governments may excuse their own networks from running the bureaucratic permitting and licensing gauntlet through which private providers must pass. Fear of disfavored treatment deters private market investment in broadband infrastructure. In addition, questions concerning the institutional incentives and

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competency of local governments operating capital-intensive advanced communications networks in rapidly innovating markets heighten the concerns of local taxpayers. And speech restrictions that are common in the terms of services of government-owned networks raise significant First Amendment issues.[4]

Whatever upsides government networks promise, the potential downsides have prompted approximately twenty states to restrict, in one way or another, local government entry into the broadband business. Several states outright prohibit government-owned broadband networks.[5] Short of an outright ban, other states impose procedural safeguards or conditions, such as public hearing requirements, preparation of business plans subject to public disclosure, and local voter approval.[6]

On July 24, 2014, local government-owned broadband projects in North Carolina and Tennessee petitioned the FCC to preempt aspects of their own states' legal restrictions.[7] The Electric Power Board of Chattanooga, Tennessee and the City of Wilson, North Carolina requested that the FCC preempt certain state law restrictions on municipal broadband networks pursuant to Section 706 of the Communications Act.[8]

In the months prior to the filing of the petitions, FCC Chairman Tom Wheeler publicly had stated his support for preemption.[9] On July 28, 2014, the FCC solicited public comments on the petitions.[10] That the FCC would consider preemption was widely expected following President Obama's January 13, 2015 speech explicitly touting government-owned networks.[11]

II. Analysis

A. The FCC's Preemption Order

On February 26, 2015, the FCC voted 3-2 to approve an order preempting certain provisions of Tennessee and North Carolina laws restricting government-owned networks.[12] The FCC "conclude[d] that the Tennessee and North Carolina laws are barriers to broadband infrastructure investment and that preemption will promote competition in the telecommunications market by removing statutory barriers to such competition."[13]

In support of its action, the FCC pointed to five sources of authority: (1) "Article I, section 8 of the Constitution gives Congress the power to regulate interstate commerce"; (2) "Internet access unquestionably involves interstate communications, and thus interstate commerce"; (3) "Congress has given the Federal Communications Commission the authority to regulate interstate communications"; (4) "The Commission has previously exercised its authority to preempt state laws that conflict with federal regulation of interstate commerce"; and (5) "section 706 of the 1996 Act directs the Commission to take action to remove barriers to broadband investment, deployment and competition."[14] In particular, the FCC asserted that "[S]ection 706 authorizes the Commission to preempt state laws that specifically regulate the provision of broadband by the state's political subdivision, where those laws stand as barriers to broadband investment and competition."[15]

The FCC maintained that it has authority to preempt "where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives."[16] The Order characterized the Tennessee and North Carolina statutory provisions as merely "state-law communications policy regulations, as opposed to a state core function in controlling political subdivisions."[17] As indicated, two FCC Commissioners dissented from the Order.[18] Neither addressed the policy merits or demerits of government-owned networks. Rather, both dissenters insisted the FCC lacks the legal authority to preempt the state restrictions.

On March 20, 2015, the State of Tennessee filed a lawsuit in the Sixth Circuit challenging the FCC's decision.[19] Tennessee's petition argues the Order is contrary to the Constitution, exceeds the FCC's authority, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act, and is otherwise contrary to law.

B. Section 706 Does Not Confer Preemptive Power on the FCC

The most obvious difficulty with basing preemptive authority on Section 706 is that the statute's language nowhere authorizes it. Section 706(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, 'in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[20]

Preemption is *not* one of the enumerated measures or methods. Inferring preemption from Section 706(a) is also difficult because of its poor fit with the statutory structure. Section 706(a) recognizes a role both for "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services." Federal preemption of state laws imposing geographic or other forms of restrictions or safeguards on government ownership of broadband networks disregards the role of state officials that the statute explicitly acknowledges.

Under Section 706(b), if the Commission concludes that advanced telecommunications services are not being deployed to all Americans on a reasonable and timely basis, then both "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" shall "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[21] Controversially, the FCC has made negative findings under Section 706(b) in recent years.[22] But Section 706(b) similarly contemplates a role for state policymakers that would be rendered null by federal preemption. Further, as Commissioner Ajit Pai pointed out in dissent, even under the majority's analysis, federal preemptive power under Section 706(b) would appear to exist only so long as negative findings persisted.[23] Preemptive power would vanish should the FCC make a subsequent finding that broadband is being deployed to all Americans on a reasonable and timely basis. That odd result suggests preemption should not be read

into Section 706(b).

Section 601(c)(1) of the Telecommunications Act of 1996 also renders implausible the Order's interpretation of Section 706. It reads: "NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[24] Curiously, although the Order concedes that "[b]y its terms, section 601(c) prevents 'implied' preemption," it interprets the provision to implicitly give such preemptive powers to the FCC.[25] Such a reading is decidedly counter-intuitive. As Commissioner Pai wrote: "It is difficult to believe that Congress would have been concerned about implicitly superseding state law in the text of the Act yet would implicitly give the Commission the authority to do the exact same thing."[26]

Section 706 is best understood as a statement of Congressional policy to guide the FCC in carrying out its other statutory responsibilities. From Congress's highly consequential and unique grant of general regulatory forbearance authority in Section 10 of the Telecommunications Act of 1996,[27] it follows that Congress's express reference in Section 706 to the use of regulatory forbearance is also consequential, signaling the deregulatory thrust of the Commission's obligation to encourage broadband deployment on a reasonable and timely basis. Prior FCC precedents had determined that Section 706 is *not* an independent grant of agency authority but rather a deregulatory policy statement to guide agency action. In particular, the Commission's *Advanced Services Order* (1998) concluded: "[T]he most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[28]

In an effort to bolster its claims of authority to regulate broadband Internet services, the FCC's present majority, over dissent, now interprets Section 706 to be a source of regulatory power.[29] In *Verizon v. FCC* (2014), the D.C. Circuit deferred to the FCC's reinterpretation.[30] However, *Verizon v. FCC* did not decisively define the boundaries of the FCC's Section 706 authority or adjudicate any particular exercises of such authority. The D.C. Circuit's decision should not be regarded as the last word on the meaning of Section 706. The Sixth Circuit remains free to reach a different conclusion regarding Section 706's meaning. As indicated, even if Section 706 is regarded as a source of regulatory power rather than as a guide to policy implementation there is ample reason for concluding the Commission lacks authority for its preemption Order. But a deregulatory interpretation that rejects Section 706 as a source of regulatory power would be fatal to claims of authority on which the FCC's Order depends.

C. The FCC's Order Is Contrary to Agency Precedent Rejecting Preemption of Restrictions on Government-Owned Networks

In a 1997 Order, the FCC rejected a petition requesting it to preempt state law restrictions on municipal telecommunications networks based on Section 253(a) of the Communications Act.[31] This provision states: "No State or local statute or regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service."[32]

As the FCC's 1997 Order declared: "[S]tates maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities."[33] It also observed that preemption "effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects."[34]

This agency precedent cannot be avoided simply because Section 706 is now invoked as opposed to Section 253. The states' authority to decide "whether or to what extent their political subdivisions may engage in proprietary activities" is not altered just because a particular FCC majority wants local governments to offer broadband services. Federalism principles previously recognized by the FCC, grounded in the Constitution, do not lend themselves to dismissals based on "reasonable explanations" about current Commission policy objectives. For that matter, the 1997 Order recommended states consider restrictions on government-owned networks rather than total bans.[35] The FCC's present about-face regarding such restrictions hardly seems reasonable. Indeed, it seems arbitrary and capricious.

D. No Clear Statement of Congressional Intent to Preempt State Control Over Local Governments Exists

The clear statement doctrine requires that Congress speak with unmistakable clarity before federal preemption of "a decision of the most fundamental sort for a sovereign entity" will be considered.[36] The rule is in "acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." In *Gregory v. Ashcroft* (1991), the Court reiterated its longstanding jurisprudential requirement that "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute,'" and that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[37]

Perhaps the most glaring analytical problem with the FCC's Order is its rejection of the clear statement doctrine's applicability. By employing hair-splitting arguments regarding state law restrictions on government-owned networks as well as core state sovereign powers, the FCC declined to analyze its Section 706-based preemptive action in light of the doctrine.

No fair reading of Section 706 can find any clear statement of congressional intent that the FCC can interpose itself between states and their political subdivisions. And Section 706 cannot be read to clearly state that Congress intended to preempt state authority over decisions about whether and to what extent to allow its political subdivisions to offer proprietary services.

The FCC attempts to dodge the clear statement doctrine by claiming "the issue before us concerns federal oversight of interstate commerce—'an area where there has been a history of significant federal presence'—not the inherent structure of state government itself."[38] According to the FCC, core state sovereignty concerns about control over political subdivisions cease once such an outright ban on government networks is removed: "Because we read section 706 to give preemptive

authority for state laws that target the regulation of broadband once a state has permitted cities to provide service, as opposed to laws that go to the 'historic police powers of the States,' the *Gregory* clear statement rule does not apply in this context."[39]

But, as explained below, the Order's overly narrow conception of state sovereignty concerns cannot be squared with the extremely broad concept of states' control over their political subdivisions, long recognized in Supreme Court decisions. Nor does the Order's rejection of the clear statement rule square with the Supreme Court precedent that is most on point.

E. The FCC Order Is Contrary to U.S. Supreme Court Precedent

The conclusion that Section 706 lacks a clear statement, and the FCC's corresponding lack of preemptive authority, is bolstered by *Nixon v. Missouri Municipal League* (2004).[40] In *Nixon*, the Supreme Court rejected federal preemption of Missouri's statute prohibiting its local governments from offering telecommunications services. More particularly, the Court expressly rejected claims that a clear statement of Congressional intent to delegate preemptive authority to the FCC was contained in Section 253(a)'s provision that "No State or local statute or regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." Unlike Section 706(a), Section 253(a) contains language prohibiting certain kinds of state or local laws or regulations. The Court nonetheless determined that application of the clear statement doctrine was required in light of the traditional state power that would be implicated by preemption, namely states' control over their own political subdivisions.

Relying on a long string of decisions, *Nixon* squarely recognized the problem that "preemption would come only by imposing interposing federal authority between a State and its municipal subdivisions, which our precedents teach 'are created as convenient agencies for exercising such of the government powers of the states as may be entrusted to them in its absolute discretion.'"[41] According to the Court, "[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not."[42]

In *Nixon*, the Supreme Court also expressed concern over the federal "one-way ratchet" resulting from local governments being able to provide services without accountability to state legislative control.[43] Suppose a local government failed to operate its broadband networks in a financially responsible manner or abused its powers to give its network an unfair competitive advantage. If preempted, a state would be forbidden from changing policy by withdrawing its local governments from the broadband business.

By declining to preempt state laws that ban outright government networks, the FCC suggested the "one-way ratchet" concern was avoided. This hinges on the Order's supposed distinction between outright bans on the one hand and various types of restrictions short of an outright ban on the other. But as Commissioner Pai wrote, the distinction is "artificial and thus untenable" because "all conditions on the provision of services are effectively prohibitions when those specified conditions are not satisfied."[44] Certainly, the one-way ratchet is not avoided to the extent states seeking to withdraw their local governments from the broadband business find it prudent to grandfather existing networks while winding down or prohibiting others.

F. Constitutional Federalism Principles Prohibit FCC Preemption of State Law Restrictions on Government Broadband Networks

Finally, and most importantly, the FCC's preemption of state restrictions on government-owned broadband networks violates constitutional federalism principles. The Supreme Court has stressed that: "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[45] The Constitution established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[46] Indeed, "[t]he Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[47]

Local governments are created by state constitutions through state legislation. They are accountable to the citizens of the respective states in which they exist. Thus, the Supreme Court has long recognized that "[s]tate political subdivisions are 'merely ... department[s] of the State, and the State may withhold, grant, or withdraw powers and privileges as it sees fit.'"[48] Our constitutional regime does not recognize, as a matter of legal status, "citizens" of Chattanooga or Wilson. It does recognize citizens of Tennessee and North Carolina. And the Constitution confers upon these citizens of states the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities. In essence, this is what the Supreme Court reaffirmed in *Nixon,* declaring that "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"[49] Preempting states' decision-making about whether or to what extent to grant powers to local governments is impermissible. A federal agency cannot turn local governments into separatist enclaves by granting them powers that their respective states never delegated in the first place.

Related to the clear statement doctrine is the canon of constitutional avoidance which demands a "clear indication" by Congress "where an administrative interpretation of a statute invokes the outer limits of Congress' power."[50] Indeed, "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[51] Under the constitutional avoidance doctrine, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[52] Rather than conclusively settle the constitutional issues, a reviewing court need only recognize the serious constitutional issues presented in order to adopt a narrower reading of Section 706 that precludes the FCC's

preemption claim.

III. Conclusion

The FCC's Order preempting state law restrictions on local government ownership of broadband networks is under review by the Sixth Circuit. The Order likely exceeds the agency's statutory authority and violates principles of constitutional federalism. The FCC's asserted authority to interfere with states' autonomy and discretion over the powers of their subdivisions is rather remarkable. A judicial ruling in the Commission's favor would constitute a severe shake-up to the structures of the Constitution's federalist system.

Endnotes

1 *See* Christopher Mitchell, *Learning from Burlington Telecom: Some Lessons For Community Networks*, Institute for Local Self-Reliance (August 2011), available at: http://www.muninetworks.org/reports/learning-burlington-telecom-some-lessons-community-networks; Mike Dooghue, *Citibank, Burlington reach settlement in $33M lawsuit*, Burlington Free Press (February 3, 2014), *available at* http://www.burlingtonfreepress.com/story/news/2014/02/03/mayor-to-announce-burlington-telecom-update/5182741/.

2 *See* Randolph J. May, *Google Goes to a Dollar Store*, FSF Blog (April 22, 2013), *available at* http://freestatefoundation.blogspot.com/2013/04/google-goes-to-dollar-store.html.

3 *See* Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers: Lafayette Case Study*, Advanced Communications Law & Policy Institute at New York Law School (June 2014), *available at* http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP---Lafayette-Case-Study---June-2014.pdf; Steve Titch, Lessons in Municipal Broadband From Lafayette, Louisiana, Policy Study 424, Reason Foundation (November 2013), *available at* http://reason.org/files/municipal_broadband_lafayette.pdf.

4 *See* Enrique Armijo, *Municipal Broadband Networks Present Serious First Amendment Problems, Perspectives from FSF Scholars*, Vol. 10, No. 11 (February 23, 2015), available at: http://freestatefoundation.org/images/Municipal_Broadband_Networks_Present_Serious_First_Amendment_Problems_022015.pdf.

5 *See, e.g.*, Mo. Rev. Stat. § 392.410(7); Nev. Rev. Stat. § 268.086, § 710.147; Tx. Util. Code Ann. § 54.201 et seq.

6 *See, e.g.* Colo. Rev. Stat. Ann. § 29-27-201 et seq; Minn. Stat. Ann. § 237.19; N.C. Gen. Stat. §160A, article 16A.

7 Petition of the Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-116 (filed July 24, 2014); Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-115 (filed July 24, 2014).

8 The Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified at 47 U.S.C. §§ 1302, 1303 ("Section 706").

9 *See, e.g.*, Tom Wheeler, *Remarks of Tom Wheeler, Chairman, Federal Communications Commission*, National Cable & Telecommunications Association (April 30, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf.

10 Public Notice: Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WC Docket Nos. 14-115 and 14-116 (released July 28, 2014).

11 Barack Obama, Remarks by the President on Promoting Community Broadband, The White House, Office of the Press Secretary (January 15, 2015), available at: https://www.whitehouse.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband.

12 *Memorandum Order and Opinion*, In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.; The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of Tennessee Code Annotated Sections 7-52-601, WC Docket Nos. 14-115, 14-116 (adopted Feb. 26, 2015; released Mar. 12, 2015) ("Order").

13 *Id.* §5.

14 *Id.* §6.

15 *Id.* §11.

16 *Id.* §11.

17 *Id.* §13.

18 *See id.* at 100-113 (Dissenting Statement of Commissioner Ajit Pai); *id.* at 114-116 (Dissenting Statement of Commissioner Michael O'Rielly).

19 *See* Tennessee v. FCC, Case No. 15-3291 (6th Cir.) (petition for review filed March 20, 2015).

20 Section 706(a).

21 Section 706(b).

22 *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126 (adopted January 29, 2015; released February 4, 2015), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf.

23 Order at 107 (Pai dissent).

24 Codified at 47 U.S.C. § 152.

25 Order at § 153.

26 *Id.* at 106 (Pai dissent).

27 Codified at 47 U.S.C. §160(a).

28 *Opinion and Order and Notice of Proposed Rulemaking*, Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., ("Advanced Services Order"), 13 FCC Rcd 2401 (1998), § 77.

29 *See, e.g.*, Order at 108-112 (Pai dissent); Randolph J. May and Michael O'Rielly, Conversation with Commission Michael O'Rielly, Free State Foundation's Sixth Annual Telecom Policy Conference, (March 18, 2018), available at http://www.freestatefoundation.org/images/March_18_2014_Agenda_030514.pdf; http://www.c- span.org/video/?318351-4/interview-michael-orielly.

30 740 F.3d 623, 639-40 (D.C. Cir. 2014).

31 *See Memorandum Opinion and Order* ("1997 Order"), In re Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3360, 3467 § 16, 3543-3548 §§ 179-188 (2007).

32 Codified at 47 U.S.C. § 253(a).

33 1997 Order, 13 FCC Rcd at 3548 § 186.

34 *Id.* at 3548 § 186.

35 *Id.* at 3549, § 190 (quoted in Order at 105 n.35 (Pai dissent)).

36 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

37 *Id.* at 461 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

38 Order at § 12.

39 *Id.* at § 155.

40 541 U.S. 124.

41 *Id.* at 140 (quoting Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-608 (1991) and citing Columbus v. Ours Garage & Wrecker Service, *Inc.*,

536 U.S. 424, 433 (2002)).

42 541 U.S. at 135.

43 *See* 541 U.S. at 135-137.

44 Order at § 105 (Pai dissent).

45 Printz v. U.S., 521 U.S. 898, 920 (1997) (quoting New York v. U.S., 505 U.S. 144, 166 (1992)).

46 *Id*. at 920 (quoting U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

47 *Id*. at 920 (citing *New York*, 505 U.S. at 168-169) (additional cites omitted).

48 Ysursa v. Pocatello Education Association, 555 U.S. 353, 362 (2009) (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923). *See also* Louisiana ex rel. Folsom v. Mayor and Administrators of New Orleans, 109 U.S. 285, 287, (1883) ("Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits") (quoted in *Ysursa*, 555 U.S. at 362).

49 541 U.S. at 140 (quoting *Mortier*, 501 U.S. at 607-608).

50 Solid Waste Agency of Northern Cook Cty v. Army Corps. of Engineers, 531 U.S. 159, 172 (2001) (internal cites omitted).

51 *Id*. at 572.

52 DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).

Book Review

The Constitution: An Introduction

By Michael Stokes Paulsen & Luke Paulsen

*Reviewed by Justice Samuel A. Alito, Jr.**

The Constitution belongs to the American people. It is based on the proposition that all legitimate political power comes from "We the People," and two centuries after its adoption, it is respected and cherished by ordinary Americans. When controversies arise about the exercise of power by the Congress, the President, or the courts, citizens turn to the Constitution for guidance.

Many Americans interested in understanding the Constitution naturally—and quite correctly—look first to the document itself, which is relatively brief and still quite readable. But where should interested citizens look if they want to know more?

A new book by Michael Stokes Paulsen, a distinguished constitutional scholar, and his son, Luke, a recent college graduate, fits the bill. It provides a solid, intelligent, reliable, and interesting look at the origins of the Constitution, its basic structure, and its interpretation over the course of our country's history.

Professor Paulsen and his son began this collaboration when Luke was in high school and continued throughout his college years at Princeton. It is easy to imagine this process as a conversation between a father, who has been immersed in the study of the Constitution for his entire adult life, and a bright son, who brings a new perspective and challenges the father to explain and defend.

The book begins by retelling the extraordinary events that led to the drafting and ratification of the Constitution and the quick addition of the Bill of Rights. Then, in well under 100 pages, it elucidates the constitutional structure that the Constitution creates. The authors evidence a great respect for the work of the Founders, and they have harsh words for those who treat the Constitution like a Rohrshach blot. But they are also painfully honest about the flaws in the original design—and in particular, the Founders' accommodation of slavery. The chapter devoted to this subject is one of the most interesting and will be instructive even for those who know a fair amount about the Constitution. (For example, how many lawyers know that, were it not for the infamous three-fifths provision, which counted a slave as three-fifths of a person for purposes of congressional apportionment, John Adams, not Thomas Jefferson, would have won the pivotal presidential election of 1800?)

After analyzing the constitutional text, the Paulsens provide a lively tour through 200 plus years of constitutional controversy and litigation. Famous and less well-known cases are recounted in accessible terms. Understanding some of the most important cases in our country's history, including *Marbury v. Madison* and the *Dred Scott* case, requires at least some comprehension of what most non-lawyers are likely to regard as arcane and boring procedural questions. But the Paulsens explain these preliminary matters without seeming to break a sweat. The Paulsens also enliven the story of our country's constitutional experience by providing brief biographies of individuals who made that history.

The Paulsens' book fairly presents both sides on major interpretive issues, but they do not hide their own point of view. They favor a form of originalism and judicial restraint. They are decidedly Hamiltonian in their view of national and presidential power, but at the same time they support a robust conception of the individual rights set out in the Bill of Rights and post-Civil War Amendments. Substantive due process, which they trace back to *Dred Scott*, however, is another matter.

An appreciable percentage of those who read this impressive book are likely to disagree with the authors on at least some major points, and that is one of the book's virtues. It invites readers to become personally engaged in the discussion of the Constitution that began in the fall of 1787 when the citizens of the states debated ratification, and this process continues today. The Paulsens' book does not tell Americans what to think, but it provides invaluable help as they think for themselves.

**Associate Justice, United States Supreme Court*

The Constitution: An Introduction *is available for order on Amazon.com: http://www.amazon.com/Constitution-Introduction-Michael-Stokes-Paulsen/dp/0465053726/ref=asap_bc?ie=UTF8*

Lee Kuan Yew: The Grand Master's Insights on China, the United States, and the World, Interviews and Selections

By Graham Allison & Robert D. Blackwill, with Ali Wyne

*Reviewed by Adam R. Pearlman**

"The present world is as full of promise as of perils."
-Lee Kuan Yew

Unique it is for the leader of a small, resource-poor city to merit such worldwide admiration (while engendering no small amount of controversy) as Lee Kuan Yew. When Lee passed away in March of this year at the age of 91, President Obama called him "[a] visionary who led his country from Singapore's independence in 1965 to build one of the most prosperous countries in the world today," adding that "he was a devoted public servant and a remarkable leader." Indeed, when one thinks of a head of government of a developing country whose rule lasts for thirty years, the first image to come to mind is generally not that of a contemplative, introspective, measured individual who believes wholeheartedly in capitalism, as much as a controlling autocrat bolstered by a cult of personality and environment of fear. Lee was not immune to the latter accusations, but he also certainly enjoyed and brought to bear (to the ultimate benefit of Singapore's transformation) the former set of qualities, as highlighted in this – one of the last books to be published about him during his lifetime. This text, compiled by Harvard professor Graham Allison, former Ambassador to India Robert Blackwill, and current RAND staffer Ali Wyne, presents a compilation of passages written and stated by Lee, the former long-time Prime Minister of Singapore whose leadership transformed the smallest country in Southeast Asia into what Henry Kissinger calls "the intellectual and technical center in the Asia-Pacific."

Formatted as if it were an interview with Lee, the work draws from over sixty years of Lee's speeches and writings in a way that attempts to answer some complicated questions the United States is likely to face for the remainder of this century. It poses hypothetical questions about the future of geopolitics and foreign relations, and presents germane (though spliced-together) insights from Lee's many speeches, writings, and interviews in an attempt to answer them. The topics covered range from the respective futures of China and the U.S., as well as the relations between those nations. India, Islamic extremism, economic growth—both domestic and as a function of globalization, and the future of democracy itself are also discussed at-length. As the editors explain, the purpose of the book is not biographical, nor is it a vehicle to look back on the last fifty years, nor Lee's role during them. "Rather, our focus is the future and the specific challenges the United States will face during the next quarter century." The work's intended readership includes high-level policymakers, and can almost serve as a ready-reference for Lee quotes or sound-bites on the several topics it covers. An *Art of War*-style manual for geopolitics it is not, but it nevertheless can serve as an introductory guide to Lee's worldly and learned vantage point of the complexities of the challenges faced by governments and societies today.

As prevailing themes throughout the text, Lee's pragmatism and affinity for Darwinist theories are both very clear. "The acid test" of success, he says, "is in performance, not promises." At the macro level, "It is only when people are encouraged to give their best that society progresses," but individuals themselves also "must have a desire to improve," not merely to gain, as "welfare and subsidies destroy the motivation to perform and succeed." He cautions against "the unwisdom of powerful intellects," who try to theorize their way to better systems of social justice than what economic evolution has wrought. And he argues that different cultures need to take different paths to democracy and the free market, all at once admiring America for being a nation of "high ideals" while criticizing the United States for trying to impose human rights on countries with cultures or climates he thinks are rightly incompatible with tenets of that doctrine, including China. His own Singapore, he says, is "in no position to be fussy about high-minded principles."

I. China and the United States: Competition and Co-existence

As portrayed in this book, Lee's assessment of the future of China focuses heavily on economic factors—projection of (at least conventional) military force is deemphasized relative to the "peaceful rise" strategy (which Lee calls a contradiction in terms); social-cultural evolution is barely touched upon, but for China's "reawakened sense of destiny" and desire to regain its former imperial status.[1] China's leaders, Lee observes, "operate on the basis of consensus and have a long view,"[2] and the peaceful rise will require up to fifty years of China focusing on educating its next generations in science and technology, economics, business, and the English language (*not* liberal arts, he specifies) so it can catch up with the rest of the world and convert to a market-based system. Even though the envisioned changes will make China's current system of governing obsolete, it will never be a western-style democracy exercising the concept of one person, one vote in a multiparty system, which he calls a "never-ending process of auctions" that accrues debts to be paid for by future generations. "A government which is open to the vagaries of the ballot box," Lee cautioned, "is a government which is already weakened before it starts to govern."

According to Lee, the peaceful rise strategy requires both internal stability and external peace, which results in China

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being more concerned with diplomacy than force. He sees the danger of a military conflict as low, but appears to favor continued U.S. military presence in the Pacific as a stabilizing force, observing, "A military presence does not need to be used to be useful." Chinese technology does not allow China to confront the United States militarily, Lee says. Rather, China's greatest advantage is economic influence in terms of overall GDP (now the world's largest economy in terms of purchasing price parity), if not in per-capita measures—they have the manpower to do things cheaply, and the country presents an incredibly large market for imports. With respect to the latter, China recognizes its position as a de-facto monopsony—the buying power of its 1.3 billion-strong population will be a driver of global markets, Lee believed, and China can flex its muscles and impose sanctions simply by denying others access.

Although this assessment of China's economic-centered ambitions has been widely shared,[3] it bears noting that the Chinese People's Liberation Army is also currently undergoing a Goldwater-Nichols-scale reformation to allow for broader projections of force. Ensuring its military development is also noticed, China has recently engaged in several tests of its neighbors' and the United States' willingness to counter its military posturing, such as blocking Philippine exports in 2012, declaring an "Air Defense Identification Zone" in 2013, and testing its newest stealth jet during President Obama's visit in 2014, all of which emphasize its continued development of military capabilities. From China's historical vantage point, explains Robert Kaplan in his recent book, *Asia's Cauldron: The South China Sea and the End of a Stable Pacific*, "Beijing's dominance of [its local geography] is altogether natural." Thus it is perhaps for both economic and physical security reasons that Lee says China's neighbors "want the U.S. to stay engaged in the Asia-Pacific so that they are not hostages to China." Kaplan notes a Vietnamese saying that a distant water cannot put out a nearby fire. Likewise, former Assistant Secretary of State for East Asian and Pacific Affairs Kurt Campbell has characterized the desires of China's neighbors to have good relationships with both China and the United States as "not as much geostrategy as simply geography."

Toward that end, Lee says the U.S. should have established a free-trade area in Asia thirty years ago. Without a free trade agreement, Lee said, "Korea, Japan, Taiwan, and the ASEAN[4] countries will be integrated into China's economy—an outcome to be avoided." Lee went so far as to say that, if the United States were to "give up" its position as the superior power in the Pacific, that "would diminish America's role throughout the world." Although Lee thought the United States cannot stop China's rise, and eventually will have to share its preeminent position with the Chinese, he saw as a "fundamental choice" that the U.S. would either have to engage and integrate, or isolate China. He apparently advised the former course, opining that greater investment would promote liberalization in China, and observed that previous threats to its 'most favored nation' trade status were counterproductive. He foresaw a relationship that is both cooperative and competitive, noting that contest need not lead to conflict. According to Assistant Secretary Campbell, the Chinese themselves "recognize that [the U.S.] want[s] to have the best possible relationship," even if, "this is going to be among the most complex relationships the United States will ever have." As part of his long view, Lee advised that, while making China's economic system compatible with the rest of the world, "Make sure that the mindset of the younger generation is not one of hostility . . . Make them feel that they are stakeholders . . . . They have to be imbued with the right values and attitudes to meet the future with humility and responsibility," even though doing so will not make China democratic.

Lee believed that the most significant twenty-first century growth would occur in the Pacific, and President Obama credits Lee with being instrumental in his "pivot to Asia" strategy, since rebranded a "rebalance." And Lee cautioned that U.S. presence must be permanent: "If the United States wants to substantially affect the strategic evolution of Asia, it cannot come and go." The most vivid result of this thinking is the much debated (but, as of this writing, still secret) twelve-nation Trans-Pacific Partnership (TPP), which does not include China. Although the TPP would be the largest trade deal in a generation, the total population of the twelve included countries amounts to less than 60% of that of China alone. China's economy is also 60% of the combined size of the twelve included countries.

Its need to engage China and the rest of Asia in particular ways notwithstanding, Lee unambiguously recognized the U.S. as the world's only superpower, a fact he attributes to "its advances in science and technology and their contribution to its economic and military might." Foreshadowing the point central to Brookings Senior Fellow Robert Kagan's 2014 essay *Superpowers Don't Get to Retire*, Lee believed that "no major issue concerning international peace and stability can be resolved without U.S. leadership." "The world has developed because of the stability America established," Lee said. Nevertheless, "There are no historical precedents on how to maintain peace and stability and to ensure cooperation in a world of 160 nation-states," and America's debt compromises its global leadership, and risks its ability to deploy if and when necessary. The last economic crisis, which caused China to be slower in opening its capital markets, also put the U.S. in a "bumpy patch," but Lee saw the main strengths of American culture as creativity, resilience, and innovative spirit. Lee revered the value of what traditionally has been called the "Protestant work ethic" as an essential "national ethos" that is a driving force of economic competitiveness.[5]

Just as individuals' innovation and initiative are central to Lee's vision of socioeconomic success, allowing a society to realize its potential in that regard is the proper role of the government. "A clean, efficient, rational, and predictable government is a competitive advantage," Lee would say, and adhering to the rule of law ensures stability and predictability. "The business of a government," Lee said, is to "make firm decisions so that there can be certainty and stability in the affairs of the people. The art of government is utilizing to the maximum the limited resources at the country's disposal." Ultimately, however, "The government can create a setting in which people can live happily and succeed and express themselves, but finally it is what people do with their lives that determines economic success or failure." Harnessing economic growth potential, Lee believed, requires cultivating talent and creativity, rule of law, infrastructure, investment credibility, and knowledge of the English language

as "the language of business, science, diplomacy, and academia."

He worried about a "breakdown of civil society" in American culture, however. "It has a lot to do with the erosion of the moral underpinnings of a society and the diminution of personal responsibility." Lee believed western sociologists have created a culture of entitlement by attributing "hardship and failure" to "flaws in the economic system" rather than "the individual person's character,"[6] and that populism-driven politics both allows special interests to thrive and defeats self-reliance. "Liberals actively encourage people to demand entitlements with no sense of shame." Instead, creativity, innovation, and a willingness to take risks and embrace new, diverse ideas are critical to developing and maintaining strength in a globalized world of decentralized economic power. Lee observed that the Internet makes competition for goods and services truly global—there is no more local competition when everybody can compete with anyone around the world, and space and time are no longer relevant to the flow of information and ideas. Lee thought that even "regionalism" is merely disguised protectionism in today's globalized world. "There is no viable alternative to global integration," Lee said.

But as important as technology is, there is a growing need to "attract[] talent" to keep a leading technological edge. "Human talent is at present the most scarce and valuable resource for creating wealth in the knowledge economy." "The economy," Lee reminds, "is driven by new knowledge, new discoveries in science and technology . . . [S]o while the scholar is still the greatest factor in economic progress, he will be so only if he uses his brains—not in studying the great books, classical texts, and poetry, but in capturing and discovering new knowledge." In a poignant TEDx talk, world champion magician Jason Latimer frames this dilemma in a slightly different way—because the Internet only spits out the knowledge we've put into it, if today's students and researchers take for granted that the extent of our knowledge is available online, curiosity will be cabined by what is already known (or, worse, what is *believed*), discovery will cease, and the repackaging of old knowledge will be confused with new thinking.[7]

Lee offered a way to counter such dangerous stagnation of learning and creativity: "We must develop and nurture our talent so that innovation and creativity will be integral to education and training."[8] He also saw it important to be an "all-embracive society," which he said the United States is, and China is not. This includes welcoming immigrants who bring talents from abroad, as well as ideas from cultures not one's own: "Those whose cultures help them to absorb and embrace talented people of different cultures to be part of the new corporate culture will have an advantage."[9] Even so, integration and assimilation on a social level are of paramount importance. As noted above, Lee believed wholeheartedly in the English language as being a unifying force in international discourse, and therefore critical to Singapore's success. And in 1997, Lee said that "the fact that the American state [historically] insisted on an adequate command of the American version of English before accepting the immigrants as citizens of the state ensure that unifying force of one common language in the people." But contemporary political correctness has led us away from that and, in Lee's view, "Multiculturalism will destroy America."

II. On India

After several chapters dealing largely with China and U.S.-China relations, the book shifts to one chapter on India, the moral of which takes a cue from the classical liberal thinking of J.S. Mill—if the nation's culture continues systemically to depress and marginalize significant portions of its population (in this case, via the caste system), it can never hope to fulfill its full economic potential. India, Lee says, has "no sense of nurturing its best to rise to the top." It has blurred the distinction between welfare and populism, its bureaucrats are regulators rather than facilitators, its institutions are imbued with corruption, and its decentralized system of government effectively turns the country into thirty-two separate nations and fails to meet the demands of a country in need of significant reforms. Despite its instability and corruption, Lee assessed that "India's system of democracy and rule of law gives it a long-term advantage over China, although in the early phases, China has the advantage of faster implementation of its reforms." Indeed, the relationship between the world's two most populous countries is complex. Lee says India's not wanting to compete with China led to its previously rejecting offers of free trade agreements, while at the same time negotiating with other neighbors. Lee noted the balance of U.S. relations with India also prompted China to position naval forces in the Indian Ocean to protect its supplies of oil from the Middle East and commodities from Africa. Lee also viewed China's development of ports in Myanmar and Pakistan as a counter to American influence in the region. Indeed, China's recent commitment to invest $46 billion in energy and infrastructure projects in Pakistan would seem to represent its doubling-down in this regard, as the negotiating parties of the TPP continue without them.

III. Islamic Extremism and Global Security

But, for all the importance of U.S. relations to countries like China and India to the global economy and geostrategy, Lee observes in a chapter on Islamic extremism that "[t]he big divide is no longer between communist and democratic countries, or between West and East. Now it is between Muslim terrorists and the U.S., Israel, and their supporters. A secondary battle is between militant Islam and non-militant modernist Islam." He says, "The war against terrorism will be long and arduous." Force must be used to combat Islamic terrorists, but it is critical to recognize that the use of force only addresses the tip of the problem—Lee says it's the preachers who have to be persuaded. Thus, his thesis on this haunting generational problem—only moderate Muslims can defeat Muslim extremists.

"A worldwide coalition is necessary to fight the fires of hatred . . . When moderate Muslim governments . . . feel comfortable associating themselves openly with a multilateral coalition against Islamist terrorism, the tide of battle will turn against the extremists." This has happened somewhat in the case of the terrorist group currently calling itself the "Islamic State," a/k/a ISIS/ISIL/IS, where the United States is part of a nominally sixty-nation coalition, plus the European Union and, perhaps most importantly, the Arab League. And pervasive anti-American sentiment has reportedly ebbed in Pakistan

recently, due largely to a moderate middle-class's growing realization that the growth of ISIS and continued Taliban attacks targeting civilians constitute larger threats than drone strikes meant to eliminate those threats. But this is not to say "the tide" Lee spoke of has turned. Most Arab Spring countries have seen spikes in extremism, and U.S. withdrawals from Iraq and Afghanistan have left voids in counterinsurgency and force protection capabilities that have been exploited by domestic and foreign fighters, alike.

It is without a hint of irony about the Islamic world having once profited greatly from globalization that Lee notes, "militant Islam feeds off the insecurities and alienation that globalization generates among the less successful." Notwithstanding some Japanese tactics in World War II and those of Vietnamese Communists during the Vietnam War, Lee says Islamic extremists are unique in the history of civilization as a "group of people willing to destroy themselves to inflict damage on others." Further, the sheer scale makes the threat unlike any other: "Al Qaeda-style terrorism is new and unique because it is global." Lee hints at the sense of borderless brotherhood among those with "shared fanatical zealousness"—those who perceive divine inspiration from like-minded and supposedly similarly-situated derelicts anywhere in the world. The globalized world allows for sympathizers to admire the violence from afar—voyeurs, world-wide looky-lous, and sadistic narcissists combine for global terrorist theater. In that vein, Lee says that "unless militant groups in the Arab countries and Islamic theocracies are seen to fail . . . militant groups in the non-Arab Muslim world will continue to recruit extremists. . . . [T]he U.S. and its Western allies must ensure that Islamic militancy is defeated by economic, military, and other means to clearly demonstrate to non-Arab Muslims that fanaticism and militancy have no future." "Successive failures in the Muslim world will show that the theocratic state, like the communist state, is a mirage."

But the corollary to that notion is what happens if the terrorists are perceived to succeed. For example, like many others, Lee predicted that:

> The costs of leaving Iraq unstable would be high. Jihadists everywhere would be emboldened . . . . and a Taliban victory in Afghanistan or Pakistan would reverberate throughout the Muslim world. It would influence the grand debate among Muslims on the future of Islam. A severely retrograde form of Islam would be seen to have defeated modernity twice: first the Soviet Union, then the United States. There would be profound consequences, especially in the campaign against terrorism.

Lee observed, "Where the Vietnamese were content to see the Americans leave . . . Islamic militants will pursue departing Americans to all corners of the globe." In fact, in 2007, Lee stated, "If the United States leaves Iraq prematurely, jihadists everywhere will be emboldened to take the battle to Washington . . . Even worse, if civil war breaks out in Iraq, the conflict will destabilize the whole Middle East, as it will draw in Egypt, Iran, Jordan, Lebanon, Saudi Arabia, Syria, and Turkey." The United States proceeded to withdraw combat troops from Baghdad in June 2009. The Arab Spring then began in December 2010; the fighting that grew into the still-ongoing civil war in Syria began in 2011; and ISIS grew from what President Obama alluded to as al-Qaeda's "JV team" into a force warranting the above-mentioned sixty-nation coalition to combat it, while inspiring increasing numbers of loyalists within the United States.

Lee did not envision the Islamic extremists "winning," by which he meant "able to impose their extremist system." But he recognized their ability to induce fear and insecurity. Escalating concern about homegrown terrorists not only seems warranted under these circumstances, but appears to be bearing itself out in increasingly frequent examples. A recent Heritage Foundation report found that 53 of the 64 terrorist plots against the U.S. homeland that it counted between September 11, 2001 and March 2015 "were plotted or perpetrated by homegrown extremists."

And amidst all the gravity of the worldwide extremist and terrorist concerns originating from the Middle East, Lee nevertheless believed that it is Iran's nuclear program that is "the challenge that the world is most likely to bungle." It is hard to guess exactly what Lee would have thought of the framework agreed upon in April, and whether he'd see pushing back the self-imposed deadlines on the multinational negotiations as reflecting genuine resolve to come to a workable agreement (assuming any agreement allowing for a nuclear Iran could be workable), or merely as a stalling tactic.

IV. The Importance of Leadership

Leadership was a significant topic for Lee—both with respect to individuals trying to lead their citizens (or fiduciaries) to greater prosperity, and global leadership by nations, particularly that of the United States:

> America is a great nation not just because of its power and wealth, but mainly because it is a nation moved by high ideals. Only the elevating power of her idealism can explain the benign manner in which America has exercised its enormous power since the end of World War II and the magnanimity and generosity with which it has shared its wealth to rebuild a more prosperous world.

But Lee also saw limits to the applicability of those same ideas in other settings. "Americans believe their ideas are universal—the supremacy of the individual and free, unfettered expression. But they are not—never were." As noted earlier, he especially cautioned against an over-emphasis on human rights, advising that Americans should be "more understanding of the cultural realities of China."

Perhaps this explains what the *Washington Post* once described as the Obama Administration's "timid approach to confronting human rights abuses." Despite voicing concerns about China's human right record and occasionally throwing provocative jabs like taking steps to rename the street in front of the Chinese embassy after jailed dissident and Nobel winner Liu Xiaobo, the reality is that the United States appears to accept China's refusal to reform and institute human rights protections. Likewise, although the recent effort to normalize relations with Cuba included requirements that Havana release several political prisoners, the names of those persons were kept private, and independent groups therefore could not determine whether the Cubans were actually releasing individuals widely

believed to be held solely for political purposes. And as the anniversary of Boko Haram's kidnapping of the 276 "Chibok girls" in Nigeria passed with only a Twitter hashtag to show for the effort to recover them, many have found cause to question the current state of American leadership in the world.

After the kidnapping, Peggy Noonan was one of many who wrote that the United States should have taken military action to rescue the girls. She reasoned that the operation would have only had to be of limited scope and short duration, not merely for rhetorical purposes to quell the resulting diplomatic hullabaloo, but because the goal was predetermined and straightforward. But most of all, she opined, the action should have occurred quickly, quietly, and without boasting about it. The most effective way to project American power, she said, is to act decisively in defense of high principles, and then withdraw again once we have righted the wrong we sought to correct. Certain tenets of international law aside, Noonan argued that all civilized people would have been able to agree that we did right, and for the right reasons.[10]

Edward Luce in the *Financial Times* goes so far as to write that the Chinese see Obama as a weak leader and expect "empty gestures" from him, such as last year's espionage indictments against five Chinese nationals. The *Washington Post*'s editorial board disagreed, saying the Administration "should be commended" for that action. On the issue of the 2014 agreement to reduce greenhouse gas emissions, *The Economist* wrote that the U.S. sacrificed far more than China did; others opined that was to be expected given the two countries' respective states of development, and that the negotiations nevertheless represented progress on global environmental issues. These differing assessments about the current Administration's leadership, or lack thereof, begs a question for Lee not addressed in this book: to what extent current American foreign policy truly reflects, or ought to reflect high principle, rather than base pragmatism? Perhaps another loaded follow-on was also warranted: as to either our foreign or domestic policies, has the United States measured up to Lee's previously mentioned charge of "the business of" government? Our endlessly complex tax code, ever-growing library of regulations, budget sequestration, a recent history of politics trumping policymaking to the point of perceived zero-sum gains among partisan actors, all should give us pause.

V. Conclusion

Although the book as a whole conveys some sense of Lee's complex views on the interrelationships between order, stability, rule of law, economic growth, and the social-political underpinnings of each, it often does not delve into the implications or nuances of Lee's observations. For example, Lee presents a somewhat uncomfortable, if pragmatic hypothesis that without order as a precondition, it is impossible for a nation to realize high-minded ideals. A reader might agree with that proposition as a singular statement, but also understand that the rule of law in such an order-driven system is wholly dependent on the good will of he who maintains the order, and his bureaucratic acumen in the peaceful transfer of power. Otherwise, order is merely an end in its own or, worse, a means of perpetuating the wealth and power of he who maintains it, which returns a society to a quasi-Hobbesian state of nature in which the strong exploit the weak for perpetuity. Perhaps recognizing that, Lee counsels the wise and judicious use of the government's tremendous powers to promote some level of fairness reflecting a "golden mean" between competition and cooperation within a society, which would vary with time and moral values. But the book does not draw an obvious link between these two concepts that helps the reader understand how Lee's thoughts about discrete issues coagulate into the nuanced philosophy that led to his rise to be among the most consulted of the world's leaders.

As such, the biggest shortcoming of the book is the lack of context conveyed in the quoted snippets, which leads to continuity gaps and inconsistencies that a reader cannot determine whether they result from instances where Lee contradicted himself, or merely reflect an evolution of his thinking during the sixty-one years the editors pull from for this compilation. At one point, Lee calls himself a liberal; elsewhere he says he's conservative. On one page he is quoted as saying, "It is the duty of leaders to instill confidence in the people so that they will stand up to be counted;" on another, he says "Machievelli was right" (presumably about it better for a leader to be feared than loved). In some passages he shows great reverence for the United States, but he also opines "I do not believe the American system is either desirable or affordable" —the editors do not make clear whether he is speaking of our system of markets, welfare, democracy, or another subject touched upon elsewhere. He promotes wide exchanges of ideas and finding inspiration beyond one's borders, but decries multiculturalism. He expresses concern about income disparity, while observing that "equality of incomes gives no incentive to the resourceful and the industrious to outperform and be competitive." And one comment made with respect to immigration policy and attracting migrants to gain an economic advantage, that "more active government involvement in encouraging or discouraging procreation may be necessary," is left completely without context, explanation, or follow-up.

There are also several passages that quote Lee projecting political or economic developments on time horizons that had lapsed before the book was published. For example, Lee is quoted as saying in 2007 that, "India probably has three to five years to fix its infrastructure;" the book includes no indication about whether Lee believed it was on-track to doing so at the time of his last interview cited, in December 2011.

To be sure, this book will arm policymakers with plenty of Lee's quotes, but out of context it is doubtful the volume will be able to prove to be much guidance in the actual art of policymaking. And because it is somewhat a book of quotations, readers are bound to different interpretations about what Lee meant or would have thought about various developments. For readers predisposed to thinking that President Obama is a good leader and Obamacare was a great effort despite public opposition, they can quote Lee as saying that a leader "must paint his vision of their future to his people, then translate that vision into policies which he must convince the people are worth supporting, and finally galvanize them to help him in their implementation." For those who think the President lacked a coherent vision from the get-go, they can point to Lee's observation that, "One person, one vote is the most dif-

ficult form of government. From time to time, the results can be erratic. People are sometimes fickle. They get bored with stable, steady improvements in life, and in a reckless moment, they vote for a change for change's sake."

There is at least one area where the book is unambiguous, however: it does not have a happy ending for those who champion the broadest sense of American exceptionalism, in that Lee envisioned the United States as having to share its preeminent global status with China, and is somewhat unsatisfying in its lack of concrete answers to the series of vexing questions it poses. But perhaps that should be expected - a foreign leader who rose to prominence in another sphere of influence who proved tremendously effective at drawing from the strengths of the diverse cultures that comprise his polyglot constituency, is bound to candid acknowledgement of others' shortcomings and recognize the need to adapt broad principles to specific circumstances. In Singapore, Lee rooted out the corruption that is endemic to much of the rest of Asia, and was able to quell generations-long rivalries bet Singapore's three chief ethnic groups—Chinese, Malays, and Indians. He made that country, in one observer's words, "efficient beyond words," and molded a citizenry that takes great pride in their government and aspires to government service, rather than merely coveting the authority to exercise government power. This contrasts with a modern American system burdened by regulations, and hampered by a preoccupation with racial differences and political correctness that overshadows what should be common goals for a prosperous and harmonious future. Regardless of whether one agrees with Lee on any particular point, the remarkable impact of Lee's vision and leadership clearly has proven to be more significant than others' hope and change.

Endnotes

1 "Where are the protesters of Tiananmen now?" he asks rhetorically. "They are irrelevant." Although Lee may have been challenged on this point at the height of the Hong Kong protests last year, one might expect that he would have looked at those protesters' failure to affect material change as reinforcing it. Indeed, in a 1994 interview with Fareed Zakaria that appeared in *Foreign Affiars*, Lee went so far as to argue that success of the Tiananmen protesters would have effectively ruined China. "Let us assume that the students had carried the day at Tiananmen and they had formed a government. The same students who were at Tiananmen went to France and America. They've been quarreling with each other ever since. What kind of China would they have today? Something worse than the Soviet Union."

2 Lee is quoted as being "impressed by" China's current leader, Xi Jinping, who, Lee says, has had a hard life. *Forbes* listed Xi as #3 on its list of the world's most powerful people in both 2013 and 2014, behind Vladimir Putin (#1) and Barack Obama (#2). Forbes notes Xi may be "the most powerful Chinese ruler since Mao Zedong." http://www.forbes.com/profile/xi-jinping/?list=powerful-people

3 For example, Senator John McCain made statements to that effect at the Foreign Policy Initiative's 2011 conference.

4 Association of Southeast Asian Nations, whose membership consists of Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.

5 *See also* Niall Ferguson, Civilization: The West and the Rest (Penguin Books, 2012); Blaine Harden, Escape from Camp 14 (observing that "South Korea's obsession with achievement has paid astonishing dividends. . . ." South Korea's Protestants make up 24% of that country's population.).

6 Lee's point on economic entitlement arguably extends into other areas of evolving norms. The book quotes Lee as saying, in 1984, that, "Because American officials release secrets, that is supposed to be the 'in' thing. It shows that yours is a free society where if any ministers or courts suppress the truth you feel it is your duty to leak it to the opposition. That is something new, and it is not proven. So when you tamper around with the fundamentals of society . . . the effects are in the next, and often after the next, generation." One might ask if Lee, in effect, predicted the rise of leaks based on the narcissistic self-righteous indignation of low-level functionaries like Bradley Manning and Edward Snowden, a phenomenon perhaps best explained by the development of a political-legal culture more permissive of leaks, combined with an explosion of technology proliferating information more widely than ever, and a generation partial to work-life balance over honorable hard and purposeful work. *See also* n. 9, *infra*. For a discussion of a parallel generational shift with respect to individuals' behavior and privacy, *see* Adam R. Pearlman and Erick S. Lee, *National Security, Narcissism, Voyeurism, and Kyllo: How Intelligence Programs and Social Norms are Affecting the Fourth Amendment*, 2 Tex. A&M L. Rev. (forthcoming 2015).

7 Jason Latimer, *Seeing Beyond the Illusion of Knowledge*, TEDx Wall Street 2013, available at http://tedxtalks.ted.com/video/Seeing-Beyond-the-Illusion-of-K;search%3Atag%3A%22tedxwallstreet%22

8 Perhaps ironically, Lee observed that it is easy to get a "blank mind to take in knowledge and become trainable." "To get literate and numerate minds to be more innovative, to be more productive, is not easy. It requires a mindset change, a different set of values." As illustrated in the following two examples, this principle can work on two different levels – both with respect to general education, as one might suspect is what Lee was most directly referencing, as well as specific knowledge. As to the former, the "millennials" are the undoubtedly the most highly-educated generation ever, but they prioritize work-life balance over work ethic. To be sure, Lee also understood the value of working smarter, not necessarily harder – workers "must be enterprising and innovative, always seeking new ways of doing the job, to create the extra value, the extra edge," he said, but there can be little doubt that the highly educated millennials are likely not as "trainable" in the way Lee meant it as those who begin with potential and desire, but not preconceived notions about how the world does or should work. Nevertheless, the second example illustrates the tension inherent in the previous point - Anatoli Tarasov refused to watch videos of western hockey teams when developing the Soviet Union's indomitable hockey program. Instead, he created a style of play cabined only by rule books and his imagination, rather than being patterned off of how others played the game. This would seem to be a prime example of an otherwise educated man's discipline (even courage) not to use available resources that might prepare him for an assigned task, in a way that ultimately allows him to innovate in his field. To be sure, such a tact is not risk-free proposition. But one of the things Lee admired about the United States is our "frontier society" - an entrepreneurial culture that sees risk and failure as natural outcomes in the search for success.

9 On the business level, Lee said, "Corporations that get their ideas from only one culture will lose out in innovation." That American companies take the most (128) spots on the 2014 Fortune Global 500 list, perhaps is anecdotal support for Lee's valuation of diversity, to the extent American companies tend to put into practice Lee's "all-embracive" approach. But it's also worth noting that, as insular as Chinese society is, that country takes the #2 spot, with 95 companies.

10 Peggy Noonan, *Bring Back the Girls – Quietly: America Has Forgotten How to Exercise Power without Swagger*, Wall St. J., May 15, 2014. Noonan's conclusions echo the United Nation's determination that NATO's 1999 intervention in Kosovo was "illegal but legitimate."