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Founded by Adam B. Ross & Dennis W. Donley Jr. in MCMXCVI

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The Patient Protection and Affordable Care Act continues to be a major, seemingly timeless, element of the current Administration's legacy. Timothy Sandefur expounds upon the legal implications of Obamacare in *So It's a Tax, Now What?: Some of the Problems Remaining After* NFIB v. Sebelius. Sandefur highlights some of the lesser-addressed questions remaining in the wake of the Supreme Court's ruling on the Act as conservatives and opponents of the law seek to make sense of it. He gives particular attention to the issues surrounding the individual mandate's recharacterization as a tax.

Hydraulic fracturing, or fracking, has become a pivotal and contentious part of the energy landscape. Jason Schumacher and Jennifer Morrissey give an in-depth discussion of the treatment of fracking issues on all sides of the debate in *The Legal Landscape of "Fracking": The Oil and Gas Industry's Game-Changing Technique Is Its Biggest Hurdle.* Their article describes the various fracking regulatory structures in place and currently being developed both at the federal level and by the key states. Their research will prove enlightening to both fracking experts and policy newcomers alike.

Allen Mendenhall lends a conservative perspective to an oft-misunderstood Justice—Oliver Wendell Holmes Jr. In *Justice Holmes and Conservativism,* Mendenhall argues Holmes was not so much progressive as pragmatic. He shares why conservative criticism of the Justice may be misguided, explaining that Holmes, in many ways, should be an exemplar of principle and reason that jurists of all ideological backgrounds seek to emulate.

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Evan A. Young also takes up the issue of restraint—restraint in textual interpretation. He offers up *Rules for Rulers: A Wall of Separation Between Law and Policy*, his review of Justice Antonin Scalia and Bryan A. Garner's treatise *Reading Law: The Interpretation of Legal Texts. Rules for Rulers* makes a persuasive case for utilizing the treatise, discussing how it can be used to engage in more principled argument and benefit the careers of lawyers on all career paths.

This publication and the contributions to the literature herein would not be possible without our dedicated team of editors, devoted Steering Committee and Board of Directors, and our readers and supporters. Thank you all for your investment into this small chapter of the conservative cause. It has been a great honor, and one that I will miss, to serve as Editor in Chief of the *Review.*

Timothy B. George
Editor in Chief

Austin, Texas
May 2013

SO IT'S A TAX, NOW WHAT?: SOME OF THE PROBLEMS REMAINING AFTER *NFIB V. SEBELIUS*

TIMOTHY SANDEFUR*

* Principal Attorney, Pacific Legal Foundation. J.D. 2002, Chapman University School of Law; B.A. 1998. I am grateful to the staff of the *Texas Review of Law & Politics* for inviting me to contribute this article. My colleagues Paul J. Beard II, Daniel A. Himebaugh, and Luke A. Wake and I took the lead in the Pacific Legal Foundation's challenges to the Patient Protection and Affordable Care Act (PPACA), which included not only our still-pending lawsuit, *Sissel v. U.S. Department of Health & Human Services*, No. 1:10-cv-01263-BAH (D.D.C. amended complaint filed Oct. 11, 2012), but also our extensive amicus participation in many other cases, on a wide variety of issues related to the PPACA. I thank Alan DeSerio, Ilya Shapiro, John Eastman, Anthony T. Caso, Steven J. Willis, Rob Luther, and, of course, Matt Sissel, for their assistance in those efforts. I am also grateful for the help of Randy E. Barnett, Diane Cohen, Jonathan Wood, Michael Cannon, Steven J. Willis, and my wife, Christina Sandefur, for assistance with this article. For Christina, "[T]his pure and more inbred desire of joyning to it selfe in conjugall fellowship a fit conversing ſoul (which desire is properly call'd love) is *stronger then death*."—John Milton.

> [The federal government's taxing] power, exercised without limitation, will introduce itself into every corner of the city, and country—It will wait upon the ladies at their toilett, and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly; it will go with them when they visit, and will, on all occasions, sit beside them in their carriages, nor will it desert them even at church; it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats or drinks; it will attend him to his bed-chamber, and watch him while he sleeps; it will take cognizance of the professional man in his office, or his study; it will watch the merchant in the counting-house, or in his store; it will follow the mechanic to his shop, and in his work, and will haunt him in his family, and in his bed; it will be a constant companion of the industrious farmer in all his labour, it will be with him in the house, and in the field, observe the toil of his hands, and the sweat of his brow; it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances, in which it will attend them, the language in which it will address them, will be GIVE! GIVE![1]

I. INTRODUCTION

Few predicted the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius* (*NFIB*)[2] to conclude that the "individual mandate" provision of the Patient Protection and Affordable Care Act (PPACA)[3] is not a regulation of interstate commerce, but is instead a tax on persons who do not choose to buy "minimum acceptable" health insurance.[4] This legal theory was addressed in only a few pages of the government's extensive briefing in the case and occupied practically no time during the unusual, three-day oral arguments.[5] To this day, the Obama Administration, which

1. Brutus VI, *in* 1 THE DEBATE ON THE CONSTITUTION 613, 617 (Bernard Bailyn ed., 1993).

2. 132 S. Ct. 2566 (2012).

3. Pub. L. No. 111-148, 124 Stat. 119 (2010); amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1032 (2010) (Reconciliation Act); TRICARE Affirmation Act, Pub. L. No. 111-159, 124 Stat. 1123 (2010); Clarification of Health Care Provided by the Secretary of Veterans Affairs, Pub. L. No. 111-173, 124 Stat. 1215 (2010).

4. Professor Edward Kleinbard would like me to say that he said it was a tax in his article, *Constitutional Kreplach*, 128 TAX NOTES 755 (2010).

5. *NFIB*, 132 S. Ct. at 2655 (joint dissent).

claims to have won the case, has refused to accept this "tax power" theory; in a recent interview in *Rolling Stone* magazine, President Obama registered again his view that the individual mandate is an exercise of Congress' power under the Commerce Clause and not a tax.[6] Those of us who oppose the law on legal and policy grounds must, however, live with the decision, and, what is harder, try to make sense of it. This article will address some of the questions that remain in the wake of the *NFIB* decision.[7] In Part II, I review the rationale of *NFIB*, and one especially significant problem that remains with regard to Commerce and Tax Clause jurisprudence. In Part III, I take the decision's tax power rationale at its word: How does converting the individual mandate into a tax change the effect and the constitutionality of the PPACA? In Parts IV through VI, I address three constitutional problems with this tax—the Apportionment, Uniformity, and Origination Clauses respectively. I conclude that, even if recharacterized as a tax, the requirement to buy a health insurance policy is unconstitutional.

II. HOW THE AFFORDABLE CARE ACT CHANGED ITS SPOTS

When Congress passed the PPACA, it did so with the full intention of relying exclusively on its expansive power "[t]o regulate Commerce . . . among the several States . . . ."[8] This is clear from the statute itself, which repeatedly uses the language

6. Douglas Brinkley, *Obama and the Road Ahead: The Rolling Stone Interview*, ROLLING STONE (Oct. 25, 2012), http://www.rollingstone.com/politics/news/obama-and-the-road-ahead-the-rolling-stone-interview-20121025 ("It was interesting to see [the Court] . . . take the approach that this was constitutional under the taxing power. The truth is that if you look at the precedents dating back to the 1930s, this was clearly constitutional under the Commerce Clause."). *See also* Mary Bruce, *White House Sticks to Individual Mandate as 'Penalty,' Not Tax*, ABC NEWS BLOG (June 29, 2012, 2:13PM), http://abcnews.go.com/blogs/politics/2012/06/white-house-sticks-to-individual-mandate-as-penalty-not-tax (discussing White House Press Secretary Jay Carney's assertion that it is not a tax but a penalty); Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES, July 18, 2010, at A14 ("'For us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase,' the president said last September, in a spirited exchange with George Stephanopoulos on the ABC News program 'This Week.' When Mr. Stephanopoulos said the penalty appeared to fit the dictionary definition of a tax, Mr. Obama replied, 'I absolutely reject that notion.'").

7. This article does not discuss the legal issues surrounding the establishment of "exchanges," which was recently litigated in *Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-030-RAW (E.D. Okla. amended complaint filed Sept. 19, 2012), or the Independent Payment Advisory Board, *e.g.*, *Coons v. Geithner*, No. CV-10-1714, 2012 WL 6674394 (D. Ariz. Dec. 20, 2012).

8. U.S. CONST. art. I, § 8, cl. 3.

of Commerce Clause jurisprudence to lay a constitutional foundation. For example, the PPACA asserts that the individual mandate

> is commercial and economic in nature, and substantially affects interstate commerce, as a result of the [following] effects . . . on the national economy and interstate commerce[:] . . . Private health insurance . . . pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. . . . [H]ealth insurance is sold in interstate commerce and claims payments flow through interstate commerce.[9]

It was unsurprising that the Obama Administration and its supporters addressed themselves almost wholly to questions of Congress's Commerce Clause power. Since 1937,[10] the Supreme Court has unjustifiably expanded that power to allow federal authority over matters the Constitution was not meant to permit, and what limits the Court did offer in recent years[11] appeared to have been once again demolished in the 2005 *Raich* decision.[12] The modern interpretation of this Clause has served as the primary excuse for federal expansion for a couple generations now, and the Administration's theory was that the market for health care is an enormous interstate market, so that control over that market is properly lodged with the federal government. In the eyes of the PPACA's backers, questions about the constitutionality of the individual mandate were misguided—indeed, ridiculous and legally frivolous—because such questions regarded the mandate out of context.[13] All the mandate does, the Administration claimed, is require that people pay up front for health care services that they will inevitably consume afterwards.[14] This is no different in principle from a rule obliging

9. 42 U.S.C. § 18091(1), (2) (2012).

10. NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).

11. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

12. Gonzales v. Raich, 545 U.S. 1 (2005).

13. *See, e.g.*, Ernest A. Young, Sorrell v. IMS Health *and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903, 906–07 (2012) (noting several liberal legal academics' rejection of a Commerce Clause challenge to PPACA as frivolous); Akhil Reed Amar, *Constitutional Showdown*, L.A. TIMES (Feb. 6, 2011), http://articles.latimes.com/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206 (likening a decision invalidating PPACA to the *Dred Scott* case).

14. *See, e.g.*, Brief for Petitioners (Minimum Coverage Provision) at 17–18, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 37168, at *17 ("The minimum coverage provision plays a critical role in that comprehensive regulatory scheme by regulating *how* health care consumption is financed. It creates an incentive for individuals to finance *their participation* in the health

people to pay with a credit card instead of with cash, or forcing people to pay one rate of interest instead of another.

Attractive as this argument might initially seem, it had certain obvious problems. First, the mandate was not simply a "pre-payment" requirement. It did not apply only to people who would use health care services; it also applied to people who honestly would not.[15] Furthermore, the individual mandate exempted the two classes of people most likely to obtain health care without paying for it: illegal aliens and the impoverished.[16] Nor does the PPACA require people to use the insurance that they purchase in obedience to the mandate; one may buy insurance to comply with the mandate, but then pay for health care services out of one's own pocket.[17] This looks much less like a "pre-payment" requirement than like a two-step process whereby individuals are forced to buy insurance from private companies in order to subsidize those companies which are in turn forced to insure people with pre-existing conditions (which otherwise would bankrupt the insurance industry).

This then raised the most important question in the PPACA cases: If Congress has power under the Commerce Clause to force people to buy insurance, due to the economic consequences arising therefrom, what can Congress not do? Given that Congress has only limited, enumerated powers,[18] there must be a principled answer to this question. Over two years of litigation, the Administration never managed to offer one. Instead, it took refuge in the argument that health care is simply different in some way from other kinds of goods and services.[19] In particular, everyone will need health care at some

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care market by means of insurance, the customary way of paying for health care in this country . . . .") (emphasis added).

15. *See, e.g.*, Seven-Sky v. Holder, 661 F.3d 1, 5, n.4 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012) (explaining that a plaintiff refusing medical care for religious reasons is still subject to the individual mandate).

16. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1299 (11th Cir. 2011) ("the data demonstrate that the cost-shifters are largely persons who either (1) are exempted from the mandate, (2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion."), *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566 (2012).

17. *See* Florida v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1294 n.25 (N.D. Fla. 2011), *aff'd in part, rev'd in part* 648 F.3d 1235, *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566.

18. *See* United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

19. Brief for Appellants at 37, Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067).

point, often without sufficient forewarning, so that it makes sense to force people to pay for this need ahead of time.[20] But as the Eleventh Circuit Court of Appeals observed, this is not a principled limit, just a contingent, and convenient, economic assertion, and one which could easily enable a future Congress to force people to buy cars because they will inevitably need transportation, or a cellular phone because everyone needs to communicate.[21]

This last example is particularly keen because, although this dilemma came to be known as "the "broccoli hypothetical,"[22] one of the most interesting—and little-noticed—exchanges during the oral argument centered around cellular telephones. At one point, Chief Justice Roberts asked Solicitor General Donald Verrilli if the pre-payment theory would not justify such a requirement:

> [T]he same, it seems to me, would be true, say, for the market in emergency services: police, fire, ambulance, roadside assistance, whatever. You don't know when you're going to need it; you're not sure that you will. But the same is true for health care. . . . So, can the government require you to buy a cell phone because that would facilitate responding when you need emergency services? You can just dial 911 no matter where you are?[23]

The implication was obvious—the Chief Justice was looking for some principled limit to federal power, should the Administration's argument prevail. Solicitor General Verrilli's answer was "no": "I think the fundamental difference, Mr. Chief Justice, is that that's not an issue of market regulation. This is an

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20. *Id.* at 34.

21. *See U.S. Dep't of Health & Human Servs.*, 648 F.3d at 1295–96 ("The first problem with the government's proposed limiting factors is their lack of *constitutional* relevance. These five factual criteria comprising the government's 'uniqueness' argument are not limiting principles rooted in any constitutional understanding of the commerce power. Rather, they are *ad hoc* factors that—fortuitously—happen to apply to the health insurance and health care industries. . . . We are at a loss as to how such fact-based criteria can serve as the sort of 'judicially enforceable' limitations on the commerce power that the Supreme Court has repeatedly emphasized as necessary to that *enumerated* power.").

22. *See, e.g.*, Laurence H. Tribe, *The Constitutionality of the Patient Protection and Affordable Care Act: Swimming in the Stream of Commerce*, 35 HARV. J.L. & PUB. POL'Y 873, 877 (2012).

23. Transcript of Oral Argument at 5–6, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (No. 11-398) (Mar. 27, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

issue of market regulation . . . ."[24] Verrilli was thus distinguishing the individual mandate from a cell phone mandate on the theory that the purchase of health care was only a fractional part of an economic transaction that took place over a broad expanse of time, in contrast with the purchase of a phone, which is a discrete and self-contained transaction. The regulatory power reached the former, not the latter, because the mandate was better seen as governing a moment within a market than as requiring a transaction. The problem with this answer is that it simply looks down the other end of the same telescope. An insurance policy is a commodity and no amount of legalistic redefinition could alter the fact that the mandate required people to purchase that commodity. This became obvious when, later in the argument, the telephone example resurfaced. Justice Samuel Alito asked Solicitor Verrilli[25] if the individual mandate was not better seen as an effort to force some people to subsidize the health care costs of others, to which Verrilli responded,

> [I]t would be unusual to say that it's an illegitimate exercise of the commerce power for some people to subsidize others. Telephone rates in this country for a century were set via the exercise of the commerce power in a way in which some people paid rates that were much higher than their costs in order to subsidize–[26]

Justice Antonin Scalia interrupted: "Only if you make phone calls."[27] "Well, right," answered Solicitor Verrilli. "But—but everybody—*to live in the modern world, everybody needs a telephone.*"[28]

But if everyone in the modern world needs a telephone, and it is a proper use of the commerce power to require people to purchase something they are likely to demand at some point in the future, the attempted distinction between telephones and health insurance collapses, and there again appears to be no

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24. *Id.* at 7.

25. It has become increasingly fashionable to refer to the Solicitor General by the title "General." Michael Herz, *Washington, Patton, Schwarzkopf and . . . Ashcroft?*, 19 CONST. COMMENT. 663, 664–65 (2002). Even the official transcripts of the Supreme Court now use this formulation. *See, e.g.*, Transcript of Oral Argument, *passim*, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (No. 11-398) (Mar. 27, 2012) (referring to Solicitor General Verrilli as "General Verrilli"). It is incorrect. I would suggest a return to the time-honored English practice of referring to him or her as "Mr. Solicitor so-and-so" or "Madame Solicitor so-and-so" (and for the Attorney General, "Mr. Attorney so-and-so" or "Madame Attorney so-and-so").

26. Transcript of Oral Argument, *supra* note 23, at 35–36.

27. *Id.* at 36.

28. *Id.* (emphasis added).

limit to the federal government's power to impose economic mandates on citizens.

As the decisions of Chief Justice Roberts and the four dissenting Justices made clear, the Administration's struggle to find a distinction between the individual mandate and a cell phone or broccoli mandate was ultimately unavailing.[29] If the Commerce Clause were read to allow Congress not only to require people to purchase things as a condition of engaging in certain activities, but also to require them to engage in commerce *ab initio*, there would be no clear endpoint to federal power.[30] Given the need to draw some line, the line between activity and inactivity was the clearest and most obvious one to draw. The difference between activity and inactivity, or acts and omissions, has a long and respected role in the law.[31] In tort law, one typically has no duty to act, and cannot generally be punished for nonfeasance, but has only a duty to act reasonably and to not commit misfeasance.[32] The activity/inactivity distinction is intuitively obvious and empirically verifiable with relative ease. It is also the foundation of moral philosophy relevant to debates over health care law and policy.[33] Second, while activity means engaging in a particular, definite act,

29. *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

30. *Id.* at 2587. Justice Breyer, however, made quite clear that he saw no constitutional obstacle to a cell phone mandate. Transcript of Oral Argument, *supra* note 23, at 15–17. His view was that Congress has full power to enforce any economic mandate and to "create commerce" however it sees fit. *Id.* His authority for this proposition was *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Id.* at 15. Of course, *McCulloch* says no such thing. That case upheld the constitutionality of the Second Bank of the United States—not the First—and it did so in 1819, decades after the National Bank was first created. *See id.* at 323, 331–32. By that time, it had become so much a centerpiece of a national economic system that even President Madison—a foe of big government and of the first bank—believed it now really was constitutional. Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 78 (2013). Chief Justice Marshall wrote that Congress's power to create the bank could

> scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

McCulloch, 17 U.S. (4 Wheat.) at 401. In other words, Madison, and arguably Marshall, believed the Second Bank was constitutional precisely because it was *not* unprecedented, and precisely because it was *not* creating commerce that did not previously exist.

31. *See, e.g.*, PROSSER AND KEETON ON TORTS § 56 at 373 (5th ed. 1984) ("[T]here runs through much of the law a distinction between action and inaction.").

32. *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965).

33. *See, e.g.*, Philippa Foot, *Killing and Letting Die*, *in* MORAL DILEMMAS 78–87 (2002) (distinguishing between prohibited killing and allowable withholding of care).

inactivity means not engaging in a literally infinite set of acts. At any instant, there are innumerable economic transactions in which one is not entering. To allow Congress discretionary power to impose compulsory economic mandates within this infinite set of inactions would amount to granting the federal government the very police power that the Constitution withholds.[34] Finally, Congress has power only over commercial or economic behavior.[35] But given the indefinite nature of an absence of action, the use of the adjective "economic" would dilute that term, and consequently, its modified verb. Inactivity is as much economic as it is noneconomic. If it can be regulated because of its economic consequences, then action that is not economic could just as easily be regulated because its noneconomic character could be interchangeably described as the absence of an activity that is economic.[36] The distinction between economic and noneconomic activity established in many Commerce Clause precedents would collapse, and noneconomic inactivity would just as easily be subject to federal control as inactivity that has such consequences.

As a decision that rules out federal power to "regulate" inactivity by compelling people to buy things, the *NFIB* decision does relatively little. As many have observed, the individual mandate was unprecedented; no other statute includes a provision forcing people who would choose otherwise to enter the stream of commerce.[37] But it is all too easy to imagine the consequences had the decision gone the other way. A federal power to compel people to buy products or services would have opened a pathway that the Founding Fathers specifically ruled out when they chose to create a government of limited, enumerated powers. When we reflect on the extremes to which the existing Commerce Clause precedent has already allowed Congress and its agencies to go, it is not hard to imagine that allowing Congress to force people to engage in commerce could have easily presaged an unchecked power to impose not only cell

34. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (explaining that states, not the federal government, have a general police power).

35. *Id.* at 566.

36. Consider *Lopez*, for example, where the activity was not economic in nature. One could just as easily say that this noneconomic activity was economic inactivity. Thus, a statute might prohibit a person from carrying a gun *in a noneconomic way*. This is why the regulation of inactivity is a kind of jurisdictional dividing-by-zero, and the Court was right not to go in the direction of such metaphysical conundrums.

37. *See* Transcript of Oral Argument, *supra* note 23, at 55.

phone or broccoli mandates, but also requirements to purchase whatever products and services government officials believed people should buy. By ruling out such efforts, *NFIB* hardly takes a revolutionary step toward the limited government the Framers envisioned, but it creates a meaningful endpoint for federal power that may have headed off some dire results.

But will any of this really matter? Ever since the *NFIB* decision, the legal community has been divided over whether Chief Justice Roberts's opinion with regard to the Commerce Clause is binding or just dicta. Lower courts are already split over how much of the Commerce Clause element of *NFIB* is binding,[38] and legal scholars also disagree.[39] Roberts agreed entirely with the opinion expressed in the joint dissent, that the mandate exceeded Congress's Commerce Clause power entirely—even backing up his opinion with an "accord" cite to their dissent.[40] Five Justices therefore agreed that the mandate exceeded the Commerce Clause power. Moreover, Roberts insisted that this proposition was logically necessary to his later conclusion that the mandate was an exercise of the tax power.[41] But Justice

38. *See* United States v. Henry, 688 F.3d 637, 641 n.5 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013) (noting "considerable debate about whether the statements about the Commerce Clause are dicta or binding precedent"); United States v. Spann, No. 3:12-CR-126-L, 2012 U.S. Dist. LEXIS 136282, at *9 (N.D. Tex. Sept. 24, 2012) (citing *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012)); United States v. Moore, No. CR-12-6023-RMP, 2012 U.S. Dist. LEXIS 124582, at *7 (E.D. Wash. Aug. 31, 2012) (describing Chief Justice Roberts's Commerce Clause language as a "concurring opinion"); United States v. Williams, No. 12-60116-CR-RNS, 2012 U.S. Dist. LEXIS 110371 (S.D. Fla. Aug. 7, 2012) (concluding that the Commerce Clause language in *NFIB* was a holding).

39. William A. Jacobson, *What if That Huge Conservative Doctrinal Achievement Was Mere Dicta?*, LEGAL INSURRECTION (June 29, 2012, 4:36 PM), http://legalinsurrection.com/2012/06/what-if-that-huge-conservative-doctrinal-achievement-was-mere-dicta (noting that the Commerce Clause holding was not essential to Chief Justice Roberts's opinion); David Post, *Dicta on the Commerce Clause*, VOLOKH CONSPIRACY (July 1, 2012, 6:40 PM), http://www.volokh.com/2012/07/01/dicta-on-the-commerce-clause ("I don't think Roberts' analysis of the Commerce Clause *is* binding on future courts, because it is non-binding dicta—notwithstanding Roberts' attempts to declare it otherwise."); Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess (arguing that the Commerce Clause portion of the opinion is binding and not dicta); John Elwood, *What Did the Court "Hold" About the Commerce Clause and Medicaid?*, VOLOKH CONSPIRACY, (July 2, 2012 11:28 AM), http://www.volokh.com/2012/07/02/what-did-the-court-hold-about-the-commerce-clause-and-medicaid (arguing that the Commerce Clause portion of the opinion is binding and not dicta); James Taranto, *Don't Worry, It's Binding*, WALL ST. J. (July 2, 2012, 4:12 PM), http://online.wsj.com/article/SB10001424052702304708604577502824229271852.html (arguing that the Commerce Clause portion of the opinion is binding and not dicta).

40. NFIB v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

41. *Id.* at 2600–01 ("It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question . . . . Without deciding

Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that upholding the mandate under the Taxing Clause renders Chief Justice Roberts's Commerce Clause discussion "not outcome determinative," and therefore not part of the *ratio decidendi*.[42] Roberts's mere say-so certainly cannot convert dicta into a holding. And yet, in another portion of the decision, the full Court majority appeared to sign on to Chief Justice Roberts's opinion that the exaction for not having insurance would not satisfy the Commerce Clause standards: "The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity,"[43] reads the opinion of the Court. "But from its creation, the Constitution has made no such promise with respect to taxes."[44]

This question over how much of the decision is binding may be easier to answer if we take a closer look at how the taxing power theory works in *NFIB*.

III. How the *NFIB* Tax Power Theory Works

The "saving construction" developed in *NFIB* did not uphold the entire PPACA by pointing to the tax power as a source of authority. On the contrary, the decision upheld § 5000A by relabeling the monetary exaction it imposes.[45] As originally drafted, § 5000A(a) required all applicable individuals to buy "minimum essential" health insurance, and § 5000A(b) imposed a monetary penalty for those who violated this requirement.[46] The *NFIB* "saving construction" refashions this so that § 5000A(b) imposes a generally applicable tax obligation that is triggered by a person's failure to buy "minimum essential coverage."[47] This refashioning of the statute eliminates the mandatory nature of the individual mandate, and upholds not the command itself, but only the tax triggered by a person not purchasing insurance. To emphasize: The decision does not uphold § 5000A(a) insofar as it compels purchase—five Justices

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the Commerce Clause question, I would find no basis to adopt such a saving construction.").

42. *Id.* at 2629 n.12 (Ginsburg, J., concurring).
43. *Id.* at 2599 (Roberts, C.J.).
44. *Id.*
45. *Id.* at 2594.
46. *Id.* at 2580.
47. *Id.* at 2594.

found this to be unconstitutional.[48] Instead, the decision only affirms the monetary exaction imposed in § 5000A(b). That exaction is triggered by a person's failure to buy insurance, but this is not the same as requiring a person to buy insurance and penalizing a person for failing to do so. The PPACA, says the Court, does "not . . . order[] individuals to buy insurance, but . . . impos[es] a tax on those who do not buy that product."[49] This bifurcation of the statute, upholding the tax in § 5000A(a), but finding the "minimum essential coverage" requirement unconstitutional insofar as it compels a person to purchase something, makes sense of the majority's statement that it "holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."[50] And this bifurcation explains Chief Justice Roberts's assertion that his Commerce Clause language is not dicta: it is precisely because "[t]he Federal Government does not have the power to order people to buy health insurance"[51] that the "shall" requirement in § 5000A(a) can be read as only the trigger for § 5000A(b)'s "tax on those without health insurance."[52]

The majority then goes on to explain the differences between the Commerce Clause theory offered by the Administration and its alternative tax power theory. There are three reasons why the tax power theory is preferable, the Court explains. First, the Constitution does not bar Congress from taxing people who choose not to act, while it does bar Congress from compelling behavior under the Commerce Clause.[53] Second, Congress is not free to use taxes in a manner that will make them de facto

48. *Compare id.* at 2601 ("The Federal Government does not have the power to order people to buy health insurance"), *with id.* at 2643 (joint dissent) ("Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct.").

49. *Id.* at 2593 (Roberts, C.J.).

50. *Id.* at 2599.

51. *Id.* at 2601.

52. *Id. See also* Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1, 10 (2012) ("In the ACA, the mandate was called an 'individual responsibility *requirement*.' To 'save' the rest of Obamacare, the Chief Justice essentially deleted the 'requirement' part. So the *mandate* qua mandate is gone. What is left is a tax. It was because he did away with the individual mandate by means of a 'saving construction' that Chief Justice Roberts found the 'penalty' to be constitutional as a tax. While the individual insurance 'requirement' was unconstitutional under any power, *including the tax power*, the noncoercive penalty could be upheld standing alone. And this is one reason why Chief Justice Roberts's swing opinion about the Commerce Clause cannot be dictum.").

53. *NFIB*, 132 S. Ct. at 2599.

regulations of commerce.[54] Although there have been cases in which Congress tried this, the Court says, those efforts were ruled unconstitutional.[55] "'[T]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'"[56] The opinion promises that the Court will strike down any congressional effort to exploit the taxing power to enact what are actually mandates—to impose "exaction[s] . . . so punitive that the taxing power does not authorize [them]."[57] But because the tax in § 5000A(b) is relatively modest, the Court found it unnecessary to pursue this issue further.[58] Finally, the Court observed that the power to tax is characteristically different from the power to regulate commerce because, while the latter entitles Congress to force people to act or refrain from acting in certain ways, the power to tax only allows the government to compel the payment of money: "Imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice."[59]

Whether these distinctions will do what the Court promises—prevent Congress from imposing new economic mandates in the form of taxes[60]—is something only time can reveal. Nor is this to say that the tax power theory is persuasive; on the contrary, it seems implausible,[61] as the Court itself almost admitted.[62] In any event, it is hasty and inaccurate to describe the opinion as upholding the individual mandate as an exercise of the taxing

54. *Id.* at 2599–600.

55. *Id.* at 2599 (citing Bailey v. Drexel Furniture, 259 U.S. 20 (1922), and United States v. Butler, 297 U.S. 1 (1936)).

56. *Id.* at 2599–600 (quoting Bailey v. Drexel Furniture, 259 U.S. 20, 38 (1922)).

57. *Id.* at 2600.

58. *Id.*

59. *Id.* at 2600.

60. *Id.* at 2599 ("If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.").

61. *See* Gary Lawson & David B. Kopel, *The PPACA in Wonderland*, 38 AM. J. L. & MED. 269, 278–81 (2012) (explaining why the mandate cannot be interpreted as a tax); Ilya Shapiro, *Like Eastwood Talking To A Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1, 10–18 (2012) (listing ten reasons why the tax power theory fails); John C. Eastman, *Hidden Gems in the Historical 2011–2012 Term, and Beyond*, 7 CHARLESTON L. REV. 1, 19 (2012) ("The Chief Justice's opinion is itself uncharacteristically weak at critical points, even contrived.").

62. *NFIB*, 132 S. Ct. at 2594 ("The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one.") (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

power.[63] Although the Court upheld the constitutionality of § 5000A, it did so only by bifurcating that section, declaring that the mandatory "minimum essential coverage" is voluntary, rechristening that section's "penalty" as a "tax," and pledging to limit that tax power—in particular, by invalidating any effort to use the tax power to impose de facto mandates.[64] This, too, is hardly a clear victory for limited government, but it does promise meaningful limits on federal power.

But even if § 5000A only imposes a tax, that tax must nevertheless comply with the constitutional rules for taxes.[65] Here, the *NFIB* decision falls short. Although the *NFIB* Court declared that the tax is not an unapportioned "direct tax" forbidden by the Constitution,[66] the analysis of this question makes little logical sense. And the Court failed to address the other constitutional limits on taxation—namely, the Uniformity and Origination Clauses.[67]

IV. IF IT IS A DIRECT TAX, IT IS UNAPPORTIONED

What meager precedent exists with regard to "direct taxes" is riddled with confusion and fallacies. That situation was not improved by *NFIB*. There, the majority concludes that the tax in § 5000A is not direct because it "does not fall within any recognized category of direct tax."[68] But this does not prove that the PPACA tax is not a direct tax; it only proves what the Court

63. *But see* Mark A. Hall, *A Healthcare Case for the Ages*, 6 J. HEALTH & LIFE SCI. L. 1 (2012) ("Chief Justice Roberts upheld the individual mandate not as a regulation of commerce, but as a tax . . . ."); Jessica L. Roberts, *"Healthism": A Critique of the Antidiscrimination Approach to Health Insurance and Health-Care Reform*, 2012 U. ILL. L. REV. 1159, 1202 n.266 (2012) ("The Supreme Court upheld the individual mandate as a valid exercise of Congress's power to tax."); Bruce F. Howell & Michael A. Clark, *"If It Quacks Like A Duck . . ." An Analysis of the United States Supreme Court Decision in* National Federation of Independent Business v. Sebelius, 24 HEALTH LAW. 18, 19 n.22 (2012) ("Chief Justice Roberts upheld the individual mandate as a valid exercise of Congress' taxing power . . . .").

64. *NFIB*, 132 S. Ct. at 2594.

65. *Id.* at 2598 ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.").

66. *Id.* (citing U.S. CONST. art. I, § 9, cl. 4).

67. The *NFIB* decision considered and rejected the argument that the PPACA tax is an unapportioned direct tax. *Id.* at 2599. Whether it is a non-uniform indirect tax and whether it complies with the Origination Clause were not briefed or argued, and therefore remain open to future challenge. *See* United States v. Mitchell, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered.").

68. *NFIB*, 132 S. Ct. at 2599.

had already acknowledged, that the PPACA is unprecedented.[69]

The earliest precedent on the meaning of the term "direct tax," and one on which the *NFIB* Court relied, is *Hylton v. United States*[70]—a decision long recognized as problematic.[71] *Hylton* rejected the argument that a tax on carriages was a direct tax, and did so on the premise that only taxes reasonably susceptible to apportionment can be direct; since the tax on carriages could not have been easily apportioned, it must not have been direct.[72] As Justice James Iredell put it, "the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax . . . ."[73] But the Constitution does contemplate the possibility of unapportionable direct taxes: it prohibits them.[74] "Direct" and "apportionable" need not be synonymous. While there is considerable confusion over what apportionment requires,[75] one thing is clear: The Constitution simply cannot mean what the *Hylton* Court said it meant.[76]

The question of direct taxation was somewhat clarified in

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69. *Id.* at 2586 (noting "lack of historical precedent" for the Act); *id.* at 2625 (Ginsburg, J., concurring) (acknowledging its unprecedented nature).

70. 3 U.S. (3 Dall.) 171, 171–73 (1796).

71. *See, e.g.*, David P. Currie, *The Constitution in the Supreme Court: 1798–1801*, 48 U. CHI. L. REV. 819, 859 (1981) ("In sum, the Chase and Iredell opinions demonstrate a total unconcern for making sense of the constitutional text, a tendency to equate what is law with their own policy preferences, and an inclination to lay down flat rules that went beyond what was necessary to the decision.").

72. *Hylton*, 3 U.S. (3 Dall.) at 174–75.

73. *Id.* at 181 (opinion of Iredell, J.).

74. Put *Hylton* as a syllogism: (a) all direct taxes are obligated to be apportioned, (b) this tax cannot easily be apportioned, (c) therefore it is not a direct tax. One might just as readily argue that a statute prohibiting any person from carrying a knife more than six inches long does not prohibit a person from carrying a machete or a sword because the statute only "contemplates" knives that can be reasonably confined to six inches or less, and machetes and swords cannot be reasonably confined to less than six inches. Note also that the Constitution requires that representatives shall also be apportioned in the same manner as direct taxes. U.S. CONST. art. I, § 2, cl. 3. Nobody would suggest that this requirement only applies if the census figures make apportionment reasonably practicable.

75. *See generally* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839 (2009). Apportionment would require that the aggregate tax liability in a state be in proportion to its population. Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1067 (2001). Suffice it to say that the PPACA makes no effort at apportionment.

76. *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2357 ("*Hylton*, in short, is based on faulty reasoning—or on no reasoning at all . . . ."). *See also* Murphy v. IRS, 493 F.3d 170, 184 (D.C. Cir. 2007), *cert. denied* 553 U.S. 1004 (2008) (rejecting the proposition that direct taxes means taxes susceptible to apportionment).

Pollock v. Farmers' Loan & Trust Co., which explained that the tax in *Hylton* was actually an excise, and that the *Hylton* decision was "badly reported."[77] *Pollock* found that income taxes were direct taxes, and, therefore, must be apportioned.[78] Although the Sixteenth Amendment later removed the apportionment requirement for income taxes, it did not otherwise undo the *Pollock* decision.[79] Yet, in *NFIB*, the Court glossed over this matter in a single sentence, declaring that

> [i]n [*Pollock*], we expanded our interpretation [of 'direct tax'] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax . . . . That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.[80]

But that result was not overturned by the Amendment; the Amendment simply removed the apportionment requirement for a specific type of direct tax—the income tax. It did not redefine the term "direct tax" or otherwise overrule *Pollock*. Nevertheless, the *NFIB* Court brushed *Pollock* aside, and used *Hylton* to declare that the PPACA tax is not direct because it "is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance."[81]

Then what kind of tax is this? The Constitution contemplates only two categories of taxes: "indirect taxes," which include duties, imposts, and excises,[82] and direct taxes, which must be apportioned—except for the income tax, which, under the Sixteenth Amendment, is exempt from the apportionment requirement.[83] The Constitution permits no other kind of tax. The PPACA tax is not an income tax—notwithstanding it applies

77. 158 U.S. 601, 623–28 (1895).

78. *Id.* at 630–31.

79. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 16–20 (1916).

80. NFIB v. Sebelius, 132 S. Ct. 2566, 2598 (2012).

81. *Id.* at 2598–99. *See* Eastman, *supra* note 61, at 20 ("In a great bit of circular reasoning, [Roberts] contends that the tax is not a direct tax because it doesn't apply to everyone, as the Constitution requires. But that says nothing about whether it is a direct tax or not; it merely admits that if this is a direct tax, it is unconstitutional.").

82. Duties are taxes on the importation, exportation, or consumption of goods. Excises are inland duties. THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TAXATION: INCLUDING THE LAW OF LOCAL ASSESSMENTS, 3 (1876, reprinted 2003). Impost typically refers to indirect taxes. *Id.* In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827), Chief Justice Marshall defined them as taxes on imports "secured before the importer is allowed to exercise his rights of ownership." *Id.*

83. U.S. CONST. amend. XVI.

only to persons of a certain income—because it is not a tax on incomes, but on the condition of not having insurance. Is it then an indirect tax?

Indirect taxes are "laid upon the happening of an event, as distinguished from its tangible fruits,"[84] which obviously does not apply to a tax on a person not doing something. Professor Erik Jensen has characterized indirect taxes as those taxes, typically "levies imposed on articles of consumption," which are usually absorbed into the price of a product.[85] The Founders regarded these as less dangerous than direct taxes because they can, in a sense, be controlled by a consumer's choice not to purchase the product or service if the price gets too high.[86] But the PPACA tax is not levied on an article of consumption but on the state of having not been consumed; it is not controlled by the normal operation of supply and demand. In its (admittedly scanty) briefing on the subject in *NFIB*, the government tried to characterize the PPACA tax as an excise, relying on *Bromley v. McCaughn*,[87] to contend that the tax's "imposition is contingent upon numerous factors, including income and the way an individual finances health care—'*a particular use of property.*'"[88] But it is just as hard to characterize a person's not choosing to buy insurance as a "use" of property for tax purposes as it is to characterize not buying insurance as an economic "activity" subject to regulation under the Commerce Clause. "[A] fundamental characteristic of a typical excise tax" is that it is based on an "act by the person or entity taxed," and that a person can avoid owing it "by the simple expedient of refraining from an act that would give rise to the tax."[89] But a person cannot "refrain from the act" of inaction. Although the Court characterized the PPACA tax as being "triggered by specific circumstances,"[90] that is not the same thing as being triggered by an event; the difference between circumstances and an event is the same as the difference between inactivity and activity.

84. Tyler v. United States, 281 U.S. 497, 502 (1930).
85. Jensen, *supra* note 75, at 1075.
86. THE FEDERALIST NO. 36, at 223 (Alexander Hamilton) (Jacob Cooke ed., 1961).
87. 280 U.S. 124 (1929).
88. Reply Brief for Petitioners (Minimum Coverage Provision) at 25, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 748426 (quoting *Bromley*, 280 U.S. at 136).
89. DeRoche v. Ariz. Indus. Comm'n, 287 F.3d 751, 756 (9th Cir. 2002).
90. NFIB v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

In *Bromley* itself, the Court relied on *Pollock* to distinguish true excises from "tax[es] which fall[] upon the owner merely because he is owner, regardless of the use of disposition made of his property,"[91] which "may be taken to be direct [taxes]."[92] Of these two categories, the PPACA tax falls squarely in the latter. A person is subject to it regardless of how he uses or disposes of his property. He can satisfy the tax by paying it or buying insurance, but that is only the payment of the tax, not a use of property, which is then subject to an excise. Of the two kinds of tax described in *Bromley*, the PPACA seems much more like a direct than an indirect tax. "[E]arning a certain amount of income but not obtaining health insurance" is not a transaction or an event; it is simply another way of describing the state of owning property—and a tax on the owner simply because he is an owner is a direct tax.[93] By regarding the state of "not obtaining health insurance" as a "use" of property, this portion of the *NFIB* decision contradicts the earlier portion in which the Justices refused to regard the absence of an activity as a kind of activity: not buying insurance is not a use of property which can be taxed through an excise.[94]

In short, the PPACA either imposes a direct tax, which must be apportioned, or a tax that the Constitution does not authorize Congress to impose.[95] The Court's hasty rejection of the direct tax objection is all the more problematic given how little attention was paid to this matter in the briefing—and, of course, in the public deliberation that led up to either the adoption of the PPACA or the litigation over its constitutionality.

V. IF IT IS AN INDIRECT TAX, IT IS NOT UNIFORM

Assuming that the PPACA tax is not a direct tax, and therefore need not be apportioned, it is an indirect tax, which must be

91. *Bromley*, 280 U.S. at 137.
92. *Id.* at 136.
93. *NFIB*, 132 S. Ct. at 2599.
94. As the *NFIB* dissenters observed, "if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." *Id.* at 2648 (joint dissent). So, too, if every person is engaged in a taxable activity by the simple reason that he earns an income and fails to buy a specific product, then it would seem that all exactions or duties imposed by the government can be categorized as excises.
95. *See generally* Shapiro, *supra* note 61, at 17 ("The Constitution only allows for four kinds of taxes in addition to direct ones.").

uniform throughout the United States.[96] The PPACA tax is not uniform. Here, the constitutional objection is more complicated, especially given the sparse legal precedent on uniformity. But the PPACA tax appears to violate the Constitution's Uniformity Clause.

What Uniformity Clause precedent does exist is largely unhelpful, and the courts have never ruled a tax invalid under that clause. In *The Head Money Cases*, the Supreme Court declared that indirect taxes must "operate[] with the same force and effect in every place where the subject of [the tax] is found."[97] But that case upheld the constitutionality of a tax on persons arriving through seaports, even though it would not apply to persons coming into the country over land, and therefore operated differently depending on geographic factors.[98] The tax operated alike, the Court reasoned, in every location that had an ocean port.[99] Of course, by this reading even the most arbitrary geographical distinctions might be rendered "uniform."[100] The Court offered some clarification in *Knowlton v. Moore* when it upheld an inheritance tax that "classifie[d] the rate of tax according to the relationship or absence of the relationship of the taker to the deceased."[101] This tax did not violate the Uniformity Clause, wrote Justice Edward White, because that clause does not require "intrinsic" uniformity"—that the tax "operate[] precisely in the same manner upon all individuals."[102] Rather, it requires geographic uniformity: Congress cannot tax a subject in one place differently than it taxes the same subject in another place, because the point of the uniformity requirement was "to prevent [states from] being called upon to contribute more than was deemed their due share of the burden."[103] Although stronger, this formulation still fails to prevent Congress from choosing the subjects of taxation in such a way as to accomplish effective non-uniformity—for example, taxing a product or service that is only found in one or a few states. But *Knowlton* ruled that the

96. U.S. CONST. art. I, § 8, cl. 1.
97. 112 U.S. 580, 594 (1884).
98. *Id.* at 594–95.
99. *Id.*
100. *See* Nelson Lund, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1196–97 (1984).
101. 178 U.S. 41, 83 (1900).
102. *Id.* at 84, 88–89.
103. *Id.* at 89.

Uniformity Clause does not require "that taxes should have an equal effect in each state."[104] Finally, in *United States v. Ptasynski*, the Court upheld a facially discriminatory tax which singled out Alaskan oil for special treatment on the grounds that when Congress aims at a "geographically isolated problem," it can do so by marking out a subject of taxation in geographical terms even though this renders the tax non-uniform.[105]

The point seems to be that Congress is not required to go out of its way to ensure that the consequences of a tax are the same, so long as it employs a rule of taxation that does not incorporate geographic limitations, except that geographic limitations are acceptable if Congress is seeking to address a problem that is itself geographically isolated. By these standards, the PPACA tax is not uniform.

The first reason is that the tax imposed for not having insurance can be discharged not only by purchasing a policy or paying an amount of money,[106] but also by enrolling in Medicaid[107]—but Medicaid eligibility differs by state[108] and states are even (theoretically[109]) free to opt out of the Medicaid expansion.[110] The result, write David Rivkin and Lee Casey, is a system which "imposes a nominally uniform tax liability accompanied by the practical equivalent of a fully off-setting tax credit available only to those living in certain states."[111] This is probably not sufficient to establish a lack of uniformity under existing precedent. The Court has repeatedly declared that where the federal government imposes a tax but provides an

104. *Id.* at 104.

105. 462 U.S. 74, 84 (1983). *Ptasynski* certainly "reflects an unwarranted decision to defer to Congress's judgment in all but the most flagrant cases of abuse of the taxing power." Lund, *supra* note 100, at 1206. Still, the distinction complies with common sense in being determined by reference to the unique factors of Alaska's geography. The same fact explains *Thomson Multimedia Inc. v. United States*, which upheld differential treatment of cargo to Hawaii. 26 C.I.T. 958 (Ct. Int'l Trade 2002), *aff'd* 340 F.3d 1355 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 1040 (2004). No such factors warrant the PPACA's political/geographical rule for taxation.

106. 26 U.S.C. § 5000A(f) (2012).

107. *Id.*; NFIB v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

108. *Medicaid*, HEALTHCARE.GOV, http://www.healthcare.gov/using-insurance/low-cost-care/medicaid (last visited Apr. 17, 2013).

109. In fact, opting out of Medicaid is not a viable legal option, because to do so would require a violation of the Emergency Treatment and Labor Act. Jeffrey A. Singer, *Why Medicaid Is No Longer a Voluntary Program*, REASON.COM (Dec. 30, 2011, 3:54 p.m.), http://reason.com/archives/2011/12/30/why-medicaid-is-no-longer-a-voluntary-pr.

110. *NFIB*, 132 S. Ct. at 2606.

111. David B. Rivkin, Jr., & Lee A. Casey, *The Opening for a Fresh ObamaCare Challenge*, WALL ST. J., Dec. 6, 2012, at A17.

exemption for taxpayers residing in states that have certain laws or policies, the uniformity requirement is not violated.[112]

But the second way in which the PPACA tax lacks uniformity is more significant. That statute provides that someone who cannot afford coverage is not necessarily exempted, but may still be required to pay an amount determined by a formula that is based on "the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides."[113] Since this amount differs from state to state, low-income people with identical financial circumstances would be subject to different tax obligations based solely on the fact that they live in different states.[114] In other words, it is somewhat inaccurate to say that the PPACA taxes persons who do not buy health insurance; rather, it imposes a tax on persons who do not buy affordable insurance, where affordability is statutorily determined by reference to state boundaries.[115] Suffice it to say that the PPACA makes no effort at apportionment.

This is not a binary choice; it is not that the PPACA tax either applies or does not apply depending on state law. In *Steward Machine Co. v. Davis*,[116] the Court upheld the Social Security Act[117] against a Uniformity Clause challenge even though a

112. *See, e.g.*, Riggs v. Del Drago, 317 U.S. 95, 102 (1942); Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937); Phillips v. Comm'r, 283 U.S. 589, 602 (1931); Poe v. Seaborn, 282 U.S. 101, 117–18 (1930); Florida v. Mellon, 273 U.S. 12, 17 (1927). Laurence Claus has persuasively argued that these cases are wrong and that making a federal tax depend on state law violates the Uniformity Clause just as surely as if state residents are treated differently based on the name of the state in which they reside. Laurence Claus, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENTARY 517, 521–36 (2001).

113. 26 U.S.C. § 5000A(e)(1)(B) (2012).

114. Jonathan H. Adler, *The Uniformity Clause – Another ObamaCare Challenge?*, VOLOKH CONSPIRACY (Dec. 6, 2012, 10:40 PM), http://www.volokh.com/2012/12/06/the-uniformity-clause-another-obamacare-challenge/.

115. Memorandum from Edward C. Liu & Erika K. Lunder to Senator Bill Nelson, *Analysis of Whether Linking Tax Benefits to the Geographic Variations in the Cost of Living Violates the Uniformity Clause*, 4–5 (June 5, 2009), *available at* http://www.kstreetpolicy.com/wp-content/uploads/2009/06/crs_on_health_tax_plan_nelson.pdf ("Proposals to link the exclusion of employer-provided health insurance from a taxpayer's gross income with some measure of the cost-of-living for the region in which the taxpayer resides would appear to constitute a geographical classification. Facially, the tax would vary based on the location of the taxpayer. Whether this geographical classification would violate the Uniformity Clause presents a more difficult question. . . . [B]ecause no tax has yet been found to violate the Uniformity Clause by the Court, it may not be possible to identify a clear line demarcating the scope of constitutionally permissible geographic classifications.").

116. 301 U.S. 548, 583 (1937).

117. The Court ruled that the Social Security tax is an excise tax because it is

taxpayer would be exempt from the tax if his home state adopted a state-law unemployment compensation program and paid into that program.[118] But unlike in *Davis,* a person's liability for a tax is not based on the laws of his state of residence. Instead, the *amount* of liability differs based on his state of residence.[119] Specifically, if a person's "required contribution" is more than 8% of that person's income, he is exempt—but the "required contribution" is the amount he would have paid for a certain type of insurance if purchased "through the Exchange in the State in the rating area in which the individual resides."[120] Even within those exchanges, that amount is based on factors unique to the state: insurance companies must clear any price increase on insurance policies with the exchange—which means, with the Secretary of Health and Human Services—and approval or disapproval is determined based on costs of other plans within that exchange.[121] The PPACA's rating areas are explicitly based on state boundaries.[122] And because a person who fails to maintain coverage and who does not fall below the 8% threshold is taxed based on a national average for each month in which he failed to maintain the coverage,[123] a person's final liability can also depend on geography. Since geography factors into the cost of insurance on the exchange, which in turn is factored into the determination of whether and to what extent a person is taxed, the total amount a person must pay—rather than the person's liability or non-liability—turns on state-specific economic factors, and not on details open to his choice, or even on matters relating to state law. It is true that the Court has held that uniformity is not violated where "the ultimate incidence" of a tax "is governed by state law."[124] But here, the incidence of the tax is wholly governed by federal law—a federal law employing a labyrinthine formula that explicitly discriminates based on state of residence. This factor alone determines that two persons, *ceteris paribus,* are liable for different tax amounts.[125] Consider

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conditioned on employment. *Id.* at 580–81.

118. *Id.* at 583.

119. 26 U.S.C. § 5000A(e)(1)(A) (2012).

120. *Id.* § 5000A(e)(1)(B)(ii).

121. *Id.* § 5000A(e)(2).

122. *See also Id.* § 300gg(a)(2) (setting rates based on "rating areas" that are explicitly state-based).

123. *Id.* § 5000A(c)(1).

124. Riggs v. Del Drago, 317 U.S. 95, 102 (1942).

125. Erik Jensen, *The Individual Mandate and the Taxing Power,* 134 TAX NOTES 97, 110

two people, John, who lives in California, and Richard, who lives in Maine. They have identical incomes and expenditures, are both married, and have the same number of dependents of the same ages. Their incomes do not fall below the minimum-filing threshold, they do not have a "hardship" as defined by the Secretary of Health and Human Services,[126] and they are not subject to a religious or other exemption.[127] To determine whether they are "individuals who can't afford coverage,"[128] therefore, the authorities must determine the costs of a type of low-cost insurance plan (called a "bronze" plan) available through the exchange in California and in Maine.[129] This amount, after some adjustment,[130] is the "required contribution."[131] If the amount exceeds 8% of the person's household income for the taxable year, the person is not required to maintain minimum essential coverage.[132] However, since the low-cost insurance plan costs, say, twice as much in California as in Maine, John is exempt while Richard is not. Now, imagine that the price of insurance on the exchange in Maine was originally equal to the price in California, but falls halfway through the year, so that it no longer exceeds 8% of Richard's income. When it comes time to pay his taxes, John will be exempted, but Richard will be required to pay a dollar amount based on the six months during which coverage became affordable in his state. John's and Richard's total tax liabilities, therefore, will turn wholly on their different states of residence.

Thus, the subject of the tax—not purchasing an affordable

(2012). Jensen expresses with some hesitation the view that "the cap on the penalty will take care of the uniformity problem: The cost of insurance might vary across the nation, but the cap will be determined using a *national* average." *Id.* The "cap" he refers to is in § 5000A(c)(1)(B), which provides that an individual's PPACA tax liability shall not exceed "the national average premium for qualified health plans ... offered through Exchanges." But this does not apply to the *exemption for low-income persons.* § 5000A(e)(1)(B)(ii).

126. Susan Dentzer, *What is the Individual Mandate and What if It's Declared Unconstitutional?*, PBS NEWSHOUR, The Rundown, Mar. 27, 2012, http://www.pbs.org/newshour/rundown/2012/03/what-is-the-individual-mandate-and-what-if-it-is-declared-unconstitutional.html.

127. *Id.*

128. *Id.*

129. U.S. DEP'T OF HEALTH & HUMAN SERVS., *Essential Health Benefits, Actuarial Value, and Accreditation Standards: Ensuring Meaningful, Affordable Coverage* (Nov. 20, 2012), http://www.healthcare.gov/news/factsheets/2012/11/ehb11202012a.html.

130. Specifically, after reduction by the amount of a credit provided by 26 U.S.C. § 36B.

131. 26 U.S.C. § 5000A (e)(3)(1)(B)(ii) (2012).

132. *Id.* § 5000A (e)(1)(A).

health insurance policy—is not uniform, but is defined by reference to geography. The "rule of liability" is not "alike in all parts of the United States,"[133] and the PPACA tax does not operate "with the same force and effect in every place where the subject of [the tax] is found."[134] This was not true of the tax at issue in *Steward Machine*, or with the taxes at issue in *Knowlton* or *The Head Money Cases*.[135] The case this resembles most is *Ptasynski*—except that here, Congress was not addressing a geographically specific problem.[136]

The second difference with the Social Security Act is that the PPACA, unlike the Social Security Act,[137] does not combine federal taxing and spending into a single, unitary program.[138] The Social Security Act offered states a choice—if they established their own programs, the federal tax could be mostly bypassed,[139] but if not, the federal government would tax citizens and employers directly and provide services directly to them with the taxed funds.[140] But under the PPACA, the federal government does not provide services to those who pay the tax, either by purchasing insurance or paying the IRS.[141] Instead, their money either goes to a private insurance company or into the general federal treasury, which can do what it likes with the money.[142] State boundaries are therefore an intrinsic part of the formula of taxation without any offsetting expenditure by the federal government that might average out the ultimate outlay of assets and liabilities. If, as Professor Laurence Claus argues, the Social Security Act was uniform, notwithstanding the exemption for residents of states having their own analogous system, because those residents "benefited from higher, offsetting

133. Florida v. Mellon, 273 U.S. 12, 17 (1927).

134. The Head Money Cases, 112 U.S 580, 594 (1884).

135. *See generally* Steward Mach. Co. v. Davis, 301 U.S. 548, 583 (1937); Knowlton v. Moore, 178 U.S. 41 (1900); Edye v. Robertson, 112 U.S. 580 (1884).

136. United States v. Ptasynski, 462 U.S. 74 (1983). Obviously, the Congress was at pains to emphasize the *national* scope of the health insurance issue it was addressing, since it was concentrating on the Commerce Clause when it passed the statute.

137. *See* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 301–1397 (2012)). ("Federal Old-Age Benefits" and "Taxes With Respect to Employers" are included in the same act).

138. *See generally* Patient Protection and Affordable Care Act, 124 Stat. §§ 119–1025 (2010).

139. *Davis*, 301 U.S. at 583. *See also* Social Security Act of 1935, §§ 901–910.

140. *See generally* Social Security Act of 1935.

141. *See generally* 124 Stat. §§ 119–1025 (2010).

142. 26 U.S.C. § 5000A (2012) (Mandate does not specify where the penalty funds are placed.).

federal spending,"[143] the PPACA still fails the test. It does not offer state taxpayers an either-or choice of liability or no liability based on state cooperation—rather, it determines the amount of tax liability based on a federal-law formula that depends on the cost of insurance policies in the state of residence, which, in turn, is based on the decisions of regulators on a government-operated exchange.[144] This is far from the uniformity contemplated in any previous case.

Of course, as with so much in the realm of the PPACA, there are no applicable precedents—we are dealing with yet another "unprecedented" element of this phantasmagorical law.[145] In the first *Pollock* opinion, Chief Justice Melville Fuller observed that "there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words 'duties, imposts, and excises,'" but that "such a tax, for more than 100 years of national existence, has as yet remained undiscovered."[146] Could the PPACA tax be this long-sought-after "unicorn tax"?[147] It seems more reasonable to conclude that a tax on "earning a certain amount of income but not obtaining health insurance,"[148] which varies based on state boundaries, is either an unapportioned direct tax or a non-uniform excise.[149]

VI. THE TAX DID NOT ORIGINATE IN THE HOUSE OF REPRESENTATIVES

Even aside from the questions of whether the PPACA tax is classified as direct or indirect, there is still another constitutional hurdle that the Act fails to leap. The Constitution requires that

143. Claus, *supra* note 112, at 530.

144. 26 U.S.C. § 5000A(c) (2012).

145. *See* Maximilian Held, *Go Forth and Sin [Tax] No More: Important Tax Provisions, and Their Hazards, in the Patient Protection and Affordable Care Act*, 46 GONZ. L. REV. 717, 731–32 (2011) (attempting to catalogue the PPACA tax and concluding that "such an anomalous example of taxation cannot be found in any Supreme Court decision.").

146. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 557 (1895).

147. Shapiro, *supra* note 61, at 17. In *Brushaber*, the Supreme Court concluded that the Sixteenth Amendment foreclosed the possibility that there could be a kind of indirect tax which is not a duty, impost, or excise, and which therefore need not be uniform. 240 U.S. 1, at 18–19; *see also* Jensen, *supra* note 76, at 2341–42 ("The idea that some levies might fall outside the scope of both rules—a possibility that was once taken seriously—has fallen by the wayside.").

148. NFIB v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

149. Questions also remain whether the "employer mandate," 26 U.S.C. § 4980H (2012), violates the Uniformity Clause for the same reasons.

all "Bills for raising Revenue" must originate in the House of Representatives.[150] But the PPACA did not originate in the House; it originated in the Senate.

The Founding Fathers viewed the Origination Clause as a critical protection against government abuses.[151] The power to tax is, of course, the most fundamental operation of sovereignty and the most dangerous.[152] Mindful of the abuses of the taxing power under the Stuart monarchy, the Constitution's authors chose to keep it as close to the voters as possible—with the House of Representatives, which is elected every two years directly by people in local districts, instead of the Senate, members of which serve alternating six-year terms and were not initially chosen by voters at all, but by state legislatures.[153] When the Anti-Federalist "Brutus" warned that the taxing power, "exercised without limitation," will "introduce itself into every corner of the city, and country" and "light upon the head of every person in the United States" crying "GIVE! GIVE!,"[154] the Constitution's supporters answered that this risk was minimized by the political checks over the taxing power.[155] "The exclusive privilege of originating money bills [belongs] to the House of Representatives," wrote Alexander Hamilton.[156] This would ensure that the power to tax belonged to "the most POPULAR branch" of the government, "the favorite of the people."[157] James Madison reiterated this point: The "principal reason" why the House was given the power "of originating money bills" was that the Representatives "were chosen by the people, and supposed to be the best acquainted with their interest and ability."[158] Perhaps

150. U.S. CONST. art. I, § 7, cl. 1.

151. *See generally* JAMES V. SATURNO, CONG. RESEARCH SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT (2011).

152. Brown v. Maryland, 25 U.S. 419, 458 (1827).

153. *See* Ronald J. Krotoszinski, Jr., *Reconsidering the Non-delegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239 (2005).

154. Brutus VI, *supra* note 1. The writings of Anti-Federalists like Brutus are critical, since under the principle of *contra proferentum* we ought to interpret the Constitution in a way that allays their fears as much as possible. *Cf.* Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) ("When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.").

155. THE FEDERALIST NO. 32, at 35 (Alexander Hamilton) (J. Cooke ed., 1961).

156. *Id.* NO. 66, at 448 (Alexander Hamilton).

157. *Id.*

158. 1 ANNALS OF CONG. 65 (1789).

the point was put best by George Mason, who considered the Senate "[a]n aristocratic body" which "should ever be suspected of an encroaching tendency," and believed that "[t]he purse strings should never be put into its hands."[159]

The PPACA originated in the Senate. On November 19, 2009, Senator Harry Reid submitted an "amendment"[160] to a bill that the House had passed the previous month, H.B. 3590. That bill, the "Service Members Home Ownership Act of 2009,"[161] provided incentives for veterans to buy houses. Reid's amendment struck out the entire text of H.B. 3590, and replaced it with what became the PPACA, including the individual mandate and seventeen other separate revenue-raising provisions,[162] estimated to increase federal revenue by $486 billion by 2019.[163] Although this "strike and replace" procedure—sometimes called "gut and amend"—is not uncommon,[164] the Court has never determined whether Congress can use this trick to get around the Origination Clause's mandate.[165]

A bill originates in the House when it is initiated there—when its substance is submitted for deliberation and enactment in the House in the first instance.[166] In *United States v. Munoz-Flores*,[167] the Ninth Circuit Court of Appeals determined that an

159. 2 RECORDS OF THE FEDERAL CONVENTION 224 (Max Farrand, ed., 1911). For more on the history of the Origination Clause, *see, e.g.*, Saturno, *supra* note 151; John L. Hoffer, *The Origination Clause and Tax Legislation*, 2 B.U. J. TAX L. 1, 2–11 (1984); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 648–68 (1986); Ronald J. Krotosynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 250–60 (2005).

160. S. Amend. 2786 to H.R. 3590, 111th Cong. (2009), 155 CONG. REC. S11,607-03 (daily ed. Nov. 19, 2009).

161. The original text of H.B. 3590 is available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590ih/pdf/BILLS-111hr3590ih.pdf.

162. S. Amend. 3276 to H.R. 3590, 111th Cong. (2009), 155 CONG. REC. S13,490-02 (daily ed. Dec. 19, 2009).

163. Letter from Cong. Budget Office to Senator Harry Reid (Nov. 18, 2009), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf.

164. *See* Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 279 (2004) ("[T]hrough a process called 'gut and amend' . . . a bill that had gone through all the constitutionally mandated procedures was used as a shell with its language replaced by an entirely new and unrelated proposal . . . .").

165. Daniel A. Himebaugh & Timothy Sandefur, *Litigation Backgrounder: The Federal Government Cannot Force Individuals to Buy Health Insurance*, PACIFIC LEGAL FOUNDATION (Sept. 2012), http://www.pacificlegal.org/document.doc?id=689.

166. *See* Hubbard v. Lowe, 226 F. 135, 137–38 (S.D.N.Y. 1915).

167. 863 F.2d 654, 661 (9th Cir. 1988), *rev'd on other grounds*, 495 U.S. 385 (1990).

appropriation bill with a legislative history similar to the PPACA's originated in the Senate because the Senate "clearly initiated" that bill. It had been "introduced in the Senate Judiciary Committee" and "was first passed by the Senate and was only adopted by the House . . . later."[168] That bill was finally attached by the Senate as an amendment to a bill that had already passed the House,[169] but the Court of Appeals nevertheless concluded that the bill "originated in the Senate."[170] The PPACA too was introduced first in the Senate in the form of a gut-and-amend substitute for a House bill that was not a bill for raising revenue, and was then passed first by the Senate and afterwards by the House.

Of course, the Constitution does allow the Senate to "propose or concur with amendments" on House-initiated revenue bills, "as on other Bills."[171] Most previous Origination Clause cases have involved taxes that were generated in the Senate as amendments to House-initiated bills for raising revenue.[172] In *Flint v. Stone Tracy Co.*, the Supreme Court upheld a tax that the Senate had added as an amendment to a House bill that had originally eliminated an inheritance tax.[173] And in *Rainey v. United States*, the Court allowed the Senate to add a tax to a tariff bill that had originated in the House.[174] But these cases did not give the Senate carte blanche to rewrite House-passed bills to make them into revenue-raising bills. Instead, the Court held that Senate amendments must be "germane" to the subject of the original House bill, which must in the first instance be a bill for raising revenue, before the Senate amendment can qualify as a constitutionally authorized amendment.[175] This germaneness

168. *Id.*

169. *See id.* at 660–61.

170. *Id.* at 661.

171. U.S. CONST. art. I, § 7, cl. 1.

172. *See, e.g.*, Boday v. United States, 759 F.2d 1472, 1476 (9th Cir. 1985); Frent v. United States, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984).

173. 220 U.S. 107, 143 (1911).

174. 232 U.S. 310, 317 (1914).

175. *See Flint*, 220 U.S. at 143. *See also* United States v. Munoz-Flores, 863 F.2d 654, 661 (9th Cir. 1988) ("[T]he power of the Senate to amend a bill originating in the House is not unlimited. The Senate's amendment must be germane to the subject matter of the House bill."), *rev'd on other grounds*, 495 U.S. 385 (1990); Armstrong v. United States, 759 F.2d 1378, 1381–82 (9th Cir. 1985) ("[*A*]*ll* legislation relating to taxes . . . must be initiated in the House," (emphasis in original) although "once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform *a proposal lowering taxes* into one raising taxes." *Id.* at 1382

requirement ensures that the Senate does not try to use its power to amend as a means of evading the Origination Clause.[176] No court has ever held that the Senate can use the gut-and-amend procedure to create from scratch a bill for raising revenue from scratch.[177] On the contrary, courts have consistently held that the Senate must respect the Origination Clause: that "*all* legislation relating to taxes (and not just bills *raising taxes*) must be initiated in the House," although "once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes into measures raising taxes,"[178] and that "courts will strike down a law when Congress has passed it in violation of such a command."[179] H.R. 3590, however, was not originally a bill for raising revenue.[180] That bill was utterly unrelated to health insurance, mandates, or tax impositions. Unlike in the prior cases, the Senate's gut-and-amend procedure is what first made H.R. 3590 into a bill for raising revenue.[181]

In *Munoz-Flores*, the Supreme Court ruled that the Origination Clause is judicially enforceable and rejected the argument that courts should defer to Congress under either the political question doctrine or the "enrolled bill" rule."[182] Whether a bill is passed in accordance with constitutional requirements is not a

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(emphasis added).

176. *See* Sperry Corp. v. United States, 12 Cl. Ct. 736, 742 (1987), *rev'd on other grounds*, 853 F.2d 904 (Fed. Cir. 1988) ("[T]he Senate . . . may not attach a revenue raising bill to a non-revenue raising House bill.").

177. *See* Jipping, *supra* note 159, at 688 ("Whatever the Senate's power to amend may be, it may not do so at all if its amendment turns a bill for some purpose other than raising revenue into a bill that raises revenue.").

178. *Armstrong*, 759 F.2d at 1381–82.

179. Rainey v. United States, 232 U.S. 310, 317 (upholding the tax because it "was proposed by the Senate as an amendment to *a bill for raising revenue* which originated in the House." (emphasis added)); *Munoz-Flores*, 495 U.S. at 386. *See also Flint*, 220 U.S. at 143 (upholding the Senate amendment because the revenue bill "originated in the House of Representatives and *was there a general bill for the collection of revenue.*" (emphasis added)).

180. *See generally* H.R. 3590, 111th Cong. (2009).

181. Notably, the Senate's own rules deem a gut-and-amend substitute to be a new bill, and treat it as though it were a Senate-initiated bill. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICE 90 (Alan S. Frumin ed., 2nd ed. 1992) ("In the case of a complete substitute for a bill . . . the text proposed to be inserted . . . [is] regarded for the purpose of amendment as a question, or as original text, and not as an amendment in the first degree."). *See also* Hoffer, *supra* note 159, at 13 (explaining that "[t]he Senate's treatment of its amendment authority is critical" to determining whether an amendment is actually an amendment or instead the initiation of a Senate-originated bill.).

182. *Munoz-Flores*, 495 U.S. at 389–97.

political question because it is susceptible of resolution by judicially manageable standards and it is not constitutionally conferred to Congress's exclusive power of enforcement.[183] And the enrolled bill rule, which requires deference to a legislature's conclusion that a bill has been passed in accordance with applicable parliamentary rules, is not a conclusive legal presumption, but an evidentiary presumption that can be overcome by sufficient showing.[184] A bill for raising revenue that originates in the Senate is therefore unconstitutional, and courts have an obligation to rule accordingly.

In response to these arguments, the Government has argued that while the PPACA is a tax, it is not a "Bill[] for raising Revenue" subject to the Origination Clause.[185] *Munoz-Flores* and other cases have indeed distinguished between those assessments that are "Bills for raising Revenue" subject to the Origination Clause and those that are "bills for other purposes which may incidentally create revenue."[186] In the latter class of cases, Congress imposes an exaction not to raise revenue, but to enforce a statute passed under the Commerce Clause or other enumerated power.[187] These impositions are not properly referred to as "taxes" at all—the courts have called them "monetary 'special assessment[s],'"[188] "sanctions,"[189] or "penalty assessments,"[190] which "are analogous to fines" and therefore "not taxes."[191] In *South Carolina ex rel. Tindal v. Block*,[192] the court found that the challenged tax was designed to enforce a regulation of interstate commerce—"to reduce overproduction of milk and shift some of the financial burden of the price support program . . . . Accordingly, the dairy amendment bears

183. *Id.* at 395–96.

184. Justice Scalia would have relied upon the enrolled bill rule to bar judicial inquiry into whether a bill satisfied the Origination Clause. *Id.* at 408–10 (Scalia, J., concurring in the judgment). But the majority rejected this argument. *Id.* at 391 (majority opinion) ("[C]ongressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments.").

185. Motion to Dismiss, Sissel v. U.S. Dep't of Health & Human Servs., No. 1:10-cv-01263 (D.D.C. filed Oct. 25, 2012).

186. Twin City Nat'l Bank v. Nebeker, 167 U.S. 196, 202 (1897). *See also Munoz-Flores*, 495 U.S. at 399–400; Millard v. Roberts, 202 U.S. 429, 436 (1906).

187. *See* Rodgers v. United States, 138 F.2d 992, 994–95 (6th Cir. 1943).

188. *Munoz-Flores*, 495 U.S. at 387.

189. *Rodgers*, 138 F.2d at 995.

190. U.S. v. Newman, 889 F.2d 88, 97 (6th Cir. 1989).

191. United States v. Ashburn, 884 F.2d 901, 904 (6th Cir. 1989).

192. 717 F.2d 874, 887 (4th Cir. 1983).

the indelible imprimatur of the Commerce Power and is not an unconstitutional exercise of the taxing power."[193] Likewise, in *Mulroy v. Block*, the tax was used as a "means of regulating commerce," and was therefore not a bill for raising revenue.[194] In *Twin City Bank v. Nebeker*[195] and *United States v. Norton*,[196] the exactions were imposed in order to enforce compliance with regulations of interstate commerce—statutes creating a national currency and a postal money order system—and in *Millard v. Roberts*, the exaction was designed to enforce compliance with a law regulating railroads in the District of Columbia pursuant to Congress's constitutional power over the District.[197] In *Munoz-Flores*, the Supreme Court ruled that the assessment was not a bill for raising revenue because it was an adjunct of a program established under Congress's law enforcement powers.[198]

The distinction was most explicitly described in the Sixth Circuit's opinion *Rodgers v. United States*, in which the plaintiff challenged a fee on the growing of wheat on the ground that it was a direct tax.[199] The court found that the fee was not a tax, but an adjunct to a statute imposed under a different enumerated power: "There is a marked distinction between taxation for revenue . . . and the imposition of sanctions by the Congress under the commerce clause."[200] While Congress's power to regulate commerce "is the power to prescribe the rules by which commerce is to be governed and the Congress is at liberty to adopt any method which it deems effective to accomplish the permitted end,"[201] including financial enforcement penalties, the separate power to tax "is a congressional power specifically mentioned and described in the Constitution, but always in connection with the subject of the revenue for the support of the government generally."[202] The Constitution's limits on the taxing power—including the prohibition on direct taxes, and, one would add, the Origination Clause[203]—"relate[] solely to

193. *Id.*
194. 569 F. Supp. 256, 262 (N.D. N.Y. 1983), *aff'd* 736 F.2d 56 (2d Cir. 1984).
195. 167 U.S. 196 (1897).
196. 91 U.S. 566 (1875).
197. *See id.* at 434 n.1; U.S. CONST. art. I, § 8, cl. 12.
198. United States v. Munoz-Flores, 495 U.S. 385, 398 (1990).
199. Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943).
200. *Id.*
201. *Id.*
202. *Id.* at 994–95.
203. *Rodgers* did not involve an Origination Clause challenge, but employed the same

taxation generally for the purpose of revenue only, and not impositions made incidentally under the commerce clause."[204] The tax at issue in *Rodgers* "ha[d] for its object the fostering, protecting and conserving of interstate commerce . . . . Revenue may incidentally arise therefrom, but that fact [did] not divest the regulation of its commerce character and render it an exercise of the taxing power."[205] For that reason, the constitutional limits on the taxing power did not apply.[206]

Is the PPACA tax a penalty or assessment exempt from the Origination Clause, or is it a bill for raising revenue which must comply with the Origination Clause? According to the *NFIB* Court's "saving construction," it must be the latter.[207] According to that decision, the PPACA was not enacted pursuant to the Commerce or Necessary and Proper Clauses, but rests solely on Congress's power to lay and collect taxes.[208] And the Court explicitly rejects the proposition that the assessment is a penalty: "[T]he shared responsibility payment may for constitutional purposes be considered a tax, not a penalty."[209] The Court emphatically rested its decision on the conclusion that the exaction at issue rests solely upon the taxing power, and the Justices reinforced their refusal to regard the PPACA tax as an enforcement penalty by contrasting it with the penalty invalidated in *Bailey v. Drexel Furniture.*[210] There, Congress used its taxing power as a pretext for regulating commerce that was beyond its reach; the tax in that case was really a "penalty . . . with the characteristics of regulation and punishment."[211] The *NFIB* Court concluded that the PPACA was the reverse of the *Drexel Furniture* scenario: § 5000A(b) was a tax and not a penalty for regulatory noncompliance.[212] In *Drexel Furniture,* the Court found that Congress had passed a law "in the name of a tax which on the face of the act is a penalty,"[213] but in *NFIB,* the

distinction the Origination Clause cases have employed.

204. *Id.* at 995.

205. *Id.* (citing Edye v. Robertson, 112 U.S. 580 (1884)).

206. *Id.*

207. *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

208. *See, e.g., id.* at 2598 ("Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it.").

209. *Id.* at 2595.

210. *Id.* at 2594–96 (citing Bailey v. Drexel Furniture, 259 U.S. 20 (1922)).

211. Bailey v. Drexel Furniture, 259 U.S. 20, 38 (1922).

212. *NFIB,* 132 S. Ct. at 2595, 2599–2600, 2662.

213. 259 U.S. at 39.

Court found the reverse: that "what is called a 'penalty' here may be viewed as a tax."[214]

One might contend that the PPACA tax is still not a bill for raising revenue because its primary intent is really to pressure people to buy insurance. But the Court acknowledged that the tax "seeks to shape decisions about whether to buy health insurance," and found that this "does not mean that it cannot be a valid exercise of the taxing power."[215] And it noted that the tax "will raise considerable revenue"[216] for the government, given that "it is estimated that four million people each year will choose to pay the IRS rather than buy insurance."[217] This conclusion is buttressed by the fact that the statute does not specify a particular use for the revenue generated by that tax.[218] In *U.S. ex rel. Michels v. James*, the court explained that bills that "impose taxes upon the people . . . for the use of the government, and give to the persons for whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government," were "unmistakably bills for raising revenue."[219] By contrast, in *Munoz-Flores*, the Supreme Court concluded that the assessment was not a tax because it was a component of a discrete program, enacted pursuant to Congress's enumerated powers, which specified precisely how the revenues collected would be disbursed.[220] But under the PPACA, moneys collected from those who do not buy insurance go into the general treasury for Congress to spend as it sees fit (as with any other tax).[221] The PPACA, as interpreted by *NFIB*, makes the exaction for not having insurance into a law "made for the direct and avowed purpose of creating revenue or public funds for the service of the government" instead of a punishment or penalty.[222]

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214. 132 S. Ct. at 2596.
215. *Id.*
216. *Id.*
217. *Id.* at 2597.
218. 26 U.S.C. § 5000A (2012).
219. 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15, 464).
220. United States v. Munoz-Flores, 495 U.S. 385, 398–99 (1990).
221. *Cf.* New Jersey v. Anderson, 203 U.S. 483, 492 (1906) ("Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. . . . The form of procedure cannot change their character." (quoting Meriwether v. Garrett, 102 U.S. 472, 513–14 (1880) (Field, J., concurring)).
222. United States v. Norton, 91 U.S. 566, 569 (1875) (defining revenue laws) (quoting United States v. Mayo, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755)).

More importantly, all previous cases in which the Court has ruled the Origination Clause inapplicable to "penalty assessments"[223] have involved assessments that are meant to enforce compliance with a statute that rests on some constitutional authority other than the Article I, Section One power to "lay and collect taxes."[224] While Congress can employ the taxing power, too, for the purposes of altering behavior, the Court has never expanded the Origination Clause exemption to cover such a statute.[225] And doing so would be troublesome, given the *NFIB* Court's pledge not to allow Congress to exploit that power to impose economic mandates at will.[226] The Origination Clause provides an important democratic check against Congress's abuse of that power—a check that is all the more important if the Court will not "protect the people from the consequences of their political choices."[227]

It follows, therefore, that the exception to the Origination Clause for taxes that are "fines" or "penalties" for enforcing regulations of commerce should not apply. If, as *NFIB* held, § 5000A is not an accessory to a regulation of commerce and rests solely on Congress's tax power,[228] then it is not exempt from the Origination Clause; accordingly, the Court should refuse to expand the existing exception to apply to the PPACA.

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223. United States v. Ashburn, 884 F.2d 901, 904 (6th Cir. 1989).

224. U.S. CONST. art. 1, § 1.

225. James Taranto, *Too Good to Be True*, THE WALL ST. J., Dec. 4, 2012, http://online.wsj.com/article/SB10001424127887323901604578159431428593260.html.

226. NFIB v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

227. *Id.* at 2579. A word is in order on this point. It most certainly *is* the job of the courts to protect people from the consequences of political choices when those choices violate the Constitution. Judges have a "duty" to serve as "faithful guardians of the constitution, where legislative invasions of it ha[ve] been instigated by the major voice of the community." FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob Cooke ed., 1961). The Framers designed the courts to serve as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *Id.* at 525. Thus when there are "irreconcilable variance[s]" between a statute and the Constitution, courts ought to prefer the Constitution to the statute, "the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *Id.* The purpose of the Constitution is manifestly to protect the people from politics, and the courts play an indispensable role in policing that boundary. *See* Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's* The Myth of Judicial Activism, 23 J.L. & POL. 1 (2007). The refusal to play that role is precisely the sort of "abdication" that Chief Justice Roberts rejected elsewhere. *NFIB*, 132 S. Ct. at 2579.

228. *NFIB*, 132 S. Ct. at 2600–01.

VII. CONCLUSION

The *NFIB* decision satisfied practically nobody.[229] If, as some have suggested,[230] Chief Justice Roberts was emulating John Marshall's *Marbury v. Madison*[231] decision, that effort failed because it resulted in an unworkable refashioning of the statute, one for which neither side contended and which neither side now fully accepts. In fact, *NFIB* may be the anti-*Marbury*. Chief Justice Marshall's opinion is a masterpiece because it asserted the Court's rightful constitutional power while tactfully withdrawing from a political dispute in which the judges were ill-suited to defend themselves.[232] He accomplished this with a masterfully logical unanimous opinion. *NFIB*, by contrast, resulted in an illogical opinion that withdraws the Court from its proper constitutional role, and does so solely as a function of political considerations. It also resulted in multiple, overlapping opinions, such that it is unclear now what parts of the opinion are even binding precedent.[233] It imposed an implausible reading on the statute, which raises more constitutional problems than it resolves. Whether the Court can clean up the mess it has created can only be determined by future litigation.

229. *See, e.g.*, Adam Liptale, *Supreme Court Upholds Health Care Law, 5–4, in Victory for Obama*, NEW YORK TIMES, June 28, 2012, http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html; Amanda Terkel, *Obama Campaign Disagrees with Supreme Court's Health Care Ruling*, HUFFINGTON POST (July 5, 2012, 1:01 PM), http://www.huffingtonpost.com/2012/07/05/obama-supreme-court-health-care-tax-penalty_n_1650953.html.

230. *See, e.g.*, Charles Krauthammer, *Why Roberts Did It*, WASH. POST, June 29, 2012, at A19; J. Gordon Hylton, *John Roberts: The New John Marshall?* MARQUETTE U. LAW SCH. FAC. BLOG (July 19, 2012),

231. 5 U.S. (1 Cranch) 137 (1803).

232. The best account of this aspect of the case is GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 433–68 (2009). It is important to emphasize—as too many commentators have not—that *Marbury* was not just a political move, but was also a correct reading of the Constitution.

233. *See, e.g.*, United States v. Henry, 688 F.3d 637 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013); Scott Lincicome, *The Obamacare Ruling: Good for Billable Hours, Bad for the Rule of Law*, SCOTT LINCICOME [BLOG] (July 1, 2012, 4:35 PM), http://lincicome.blogspot.com/2012/07/obamacare-ruling-good-for-billable.html; David Post, *Commerce Clause "Holding v. Dictum Mess" Not So Simple*, VOLOKH CONSPIRACY (July 3, 2012, 8:17 AM), http://www.volokh.com/2012/07/03/commerce-clause-holding-v-dictum-mess-not-so-simple.

THE LEGAL LANDSCAPE OF "FRACKING": THE OIL AND GAS INDUSTRY'S GAME-CHANGING TECHNIQUE IS ITS BIGGEST HURDLE

JASON SCHUMACHER & JENNIFER MORRISSEY*

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* Jason Schumacher is a partner in the Oil and Gas practice of Dentons US LLP's Dallas office. Jennifer Morrissey is a Senior Managing Associate in the firm's Energy and Natural Resources group in the Washington, DC office, where she divides her time between regulatory and appellate work. The authors wish to extend their thanks to their colleague Jim Rubin of Dentons US LLP in Washington, D.C. for his assistance in researching this article.

I. INTRODUCTION

By the end of this decade, the United States will surpass Saudi Arabia as the world's largest oil producer, and will be nearly energy independent by 2035. This was the astonishing prediction made by the International Energy Agency in its latest World Energy Outlook report.[1] The forecast is all the more surprising when one recalls that just a decade ago, the U.S. was thought to be running out of domestic natural gas and oil and was looking at becoming a long-term net importer.[2] What a difference a decade makes!

The technology primarily responsible for launching the U.S. into the number one spot—a place it has not occupied, at least with respect to oil, since the 1970s—is a combination of horizontal drilling and hydraulic fracturing.[3] Neither technique is new. The first horizontal well was drilled in the 1920s,[4] and hydraulic fracturing has been in regular use since the 1940s.[5] However, only recently has the combination of these techniques, along with other advances, developed to an extent that it is now economically viable to unlock gas and oil resources from the vast shale lying under large regions of the country—leading to one of the greatest energy booms this country has experienced.[6]

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1. *See* INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2012: EXECUTIVE SUMMARY 1–3 (2012), *available at* http://www.iea.org/publications/freepublications/publication/English.pdf; *see also North America Leads Shift in Global Energy Balance, IEA Says in Latest World Energy Outlook*, INT'L ENERGY AGENCY (Nov. 12, 2012), http://www.iea.org/newsroomandevents/pressreleases/2012/november/name,33015,en.html.

2. *See, e.g.*, ENERGY INFO. ADMIN., DOE/EIA-0383(2003), ANNUAL ENERGY OUTLOOK 2003, 2 (Jan. 2003), *available at* http://www.eia.gov/forecasts/archive/aeo03/pdf/0383(2003).pdf; *see also* ENERGY INFO. ADMIN., DOE/EIA-0484(2004), INTERNATIONAL ENERGY OUTLOOK: 2004, 51 (Apr. 2004), *available at* http://www.hsdl.org/?view&did=15903.

3. WORLD ENERGY OUTLOOK 2012, *supra* note 1, at 1 ("The recent rebound in US oil and gas production, driven by upstream technologies that are unlocking light tight oil and shale gas resources, is spurring economic activity . . . .").

4. Horizontal drain holes came into use in the 1920s, and the first recorded horizontal oil well was completed in Texas in 1929. However, as one researcher explains, "[t]he concept of non-straight line, relatively short-radius drilling, dates back at least to September 8, 1891, when the first U.S. patent for the use of flexible shafts to rotate drilling bits was issued." Lynn Helms, *Horizontal Drilling*, 35 DEPARTMENT OF MIN. RESOURCES NEWSL. 1, 2 (2008), *available at* https://www.dmr.nd.gov/ndgs/newsletter/NL0308/pdfs/Horizontal.pdf (noting that the application of the technology patented in 1891 was primarily for dental procedures, however the patent also covered uses on a much larger, industrial scale).

5. *See, e.g.*, *Hydraulic Fracturing*, ENERGY TOMORROW, http://energytomorrow.org/energy/hydraulic-fracturing/#/type/all (last visited May 4, 2013).

6. JACQUELYN PLESS, NAT'L CONFERENCE OF STATE LEGISLATURES, NATURAL GAS

Although generally hailed as positive news in terms of overall domestic energy security, lower energy costs, job creation, regional and national economic development, and so forth, the rapid rise of the drilling industry has also raised significant environmental, health, and safety concerns. Hydraulic fracturing may be the key to long-term, lower-carbon energy sustainability, but it is also an extractive industry heavily dependent on water and associated with spills, chemical constituents, air emissions, and potentially toxic wastes.[7]

Until recently, regulation of drilling activity, including hydraulic fracturing, has been nearly exclusively a state matter, and even now, states are continuing to adopt stronger, more comprehensive regulatory programs to address the issues raised by the growth in drilling.[8] The federal scheme, by contrast, has been slower to develop and generally has not targeted hydraulic fracturing specifically, although recently there has been some movement to change this as well.[9]

As these developments have evolved, the term "fracking"[10] has become one of common usage across the country, although the precise meaning will vary according to the context and from one speaker to another.[11] To date, the public conversation about shale gas has not been led by either the natural gas industry or by science. Industry for the most part has been confined to a defensive role while the dialogue has largely been shaped by popular media and politics.[12] This intense spotlight on the industry has drawn attention to the need for more transparency

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DEVELOPMENT AND HYDRAULIC FRACTURING: A POLICYMAKER'S GUIDE 1 (2012), *available at* http://www.ncsl.org/documents/energy/frackingguide_060512.pdf.

7. *Id.* at 3.

8. *Id.* at 4.

9. *See* DAVID SPENCE, FRACKING REGULATIONS: IS FEDERAL HYDRAULIC FRACTURING REGULATION AROUND THE CORNER? 3 (2010), *available at* http://www.mccombs.utexas.edu/~/media/Files/MSB/Centers/EMIC/EMIC%20Misc/Fracking-Regulations-Is-Federal-Hydraulic-Fracturing-Regulation-Around-Corner.ashx.

10. The authors recognize that the oil and gas industry often spell this word "fracing." In our research, academia, media, and social media spell usually this word "fracking."

11. Mike Soraghan, *Baffled About Fracking? You're Not Alone*, N.Y. TIMES (May 13, 2011), http://www.nytimes.com/gwire/2011/05/13/13greenwire-baffled-about-fracking-youre-not-alone-44383.html?pagewanted=all.

12. Steve Hargreaves, *The Fracking Public Relations Mess*, CNN MONEY (June 21, 2011, 11:16 AM), http://money.cnn.com/2011/06/21/news/economy/fracking_public_relations/index.htm.

among industry participants and regulators,[13] but it also has resulted in widespread dissemination of significant misinformation about industry practices, risks, and regulation.[14]

This article briefly describes the types of regulatory structures being developed for hydraulic fracturing at the state and federal level in the United States to protect public health, safety, and the environment. It also describes the current public dialogue that is driving many of the changes being proposed or made. Finally, we suggest what may lay ahead for the industry in the future.

Before delving into the national regulatory scheme, it is helpful to understand both the issues and the players who are driving the national conversation about shale gas development.

II. OVERVIEW OF THE FRACKING ISSUES

The primary and highest-profile fracking issue is water pollution.[15] Potential contamination of underground drinking water sources and rivers by chemicals used in the hydraulic fracturing process—by spills of produced water or by methane migration through fractured rock into water sources[16]—are the main worries of fracking opponents including environmental groups that are focused on natural gas drilling.[17] Another growing concern is emissions from drilling equipment or from gas leaking from wells.[18] Additionally, there are issues stemming from balancing state economic development with NIMBY ("not in my back yard") opposition to that development. The water

13. *Id.*

14. Marin Katusa, *Don't Frack Me Up: Correcting Misinformation on Hydraulic Fracturing*, FORBES (Jan. 24, 2012, 3:09 PM), http://www.forbes.com/sites/energysource/2012/01/24/dont-frack-me-up-correcting-misinformation-on-hydraulic-fracturing/.

15. Duncan Clark, *Q&A: Shale Gas and Fracking*, THE GUARDIAN (Apr. 17, 2012, 6:00 AM), http://www.guardian.co.uk/environment/2012/apr/17/shale-gas-fracking-uk.

16. Stephen G. Osborn et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 108 PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. 20, 1 (2011), *available at* http://www.nicholas.duke.edu/cgc/pnas2011.pdf.

17. *See, e.g.*, *id.*; *see also* Associated Press, *Fracking May Be Causing Groundwater Pollution, Says EPA Report*, THE GUARDIAN (Dec. 9, 2011, 8:58 AM), http://www.guardian.co.uk/world/2011/dec/09/epa-reports-fracking-groundwater-pollution.

18. *See, e.g.*, Robert W. Howarth et al., *Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations*, CLIMATIC CHANGE LETTERS (2011), *available at* http://www.sustainablefuture.cornell.edu/news/attachments/Howarth-EtAl-2011.pdf. Known alternatively as the "Cornell study" or the "Howarth study," this highly controversial report concluded that shale gas has a carbon footprint approximately 20% greater than coal, if the full lifecycle of gas production were considered.

and emissions issues are frequently the subjects of national attention, while the economic development dialogue occurs primarily at a local level.[19]

A. *Water Quality and Quantity*

Water is an essential tool in the production of natural gas.[20] In addition to water used in the drilling process to construct the well, hydraulic fracturing techniques used to stimulate the well require the use of up to six million gallons of water for each well drilled in shale formations.[21] The flowback (fluids recovered from the well including brine) requires proper treatment and disposal.[22] And the drilling process itself involves boring a hole through water tables to reach the shale plays thousands of feet below where the gas is trapped.[23]

1. Water Quality Issues

Fueled largely by news and social media, there is widespread concern about the integrity of wellbores, the possibility of leaks through faulty cement casings as the well passes through the water table, and the possibility of migration of gas or contaminants from the fractured well through layers of rock into the drinking water supply.[24] As a practical matter, there is greater risk of contamination of surface and groundwater resources from runoff and erosion accelerated by drilling-related activity, and from issues stemming from treatment and disposal methods of drilling wastewater.[25]

Wellbore integrity is generally handled as a matter of state

19. *See e.g.*, Joseph De Avila, *'Fracking' Goes Local*, WALL ST. J., Aug. 29, 2012, at A17, *available at* http://online.wsj.com/article/SB10000872396390444327204577617793552508470.html.

20. *How it Works: Water for Natural Gas*, UNION OF CONCERNED SCIENTISTS (last visited May 4, 2013), http://www.ucsusa.org/clean_energy/our-energy-choices/energy-and-water-use/water-energy-electricity-natural-gas.html.

21. *See Hydraulic Fracturing Water Usage*, FRACFOCUS, http://fracfocus.org/water-protection/hydraulic-fracturing-usage (last visited May 4, 2013).

22. *See Fracturing Fluid Management*, FRACFOCUS, http://fracfocus.org/hydraulic-fracturing-how-it-works/drilling-risks-safeguards (last visited May 4, 2013).

23. *See Hydraulic Fracturing: The Process*, FRACFOCUS, http://fracfocus.org/hydraulic-fracturing-how-it-works/hydraulic-fracturing-process (last visited May 4, 2013).

24. *See* MARY TIEMANN & ADAM VANN, CONG. RESEARCH SERV., R41760, HYDRAULIC FRACTURING AND SAFE DRINKING WATER ACT ISSUES 4 (2013), *available at* http://www.nationalaglawcenter.org/assets/crs/R41760.pdf.

25. *See id.* at 5.

regulation and is increasingly the subject of self-policing, as many industry players work to come up with a series of "best practices."[26] This issue gained significant media attention in connection with (1) well water contamination in Dimock, Pennsylvania that was blamed, in part, on faulty well casings[27] (although the source of contamination was never conclusively identified),[28] and (2) a controversial report issued by a regional office of the U.S. Environmental Protection Agency (EPA) purportedly linking water contamination with gas drilling in Pavillion, Wyoming.[29]

The migration of methane or contaminants from fracturing fluids into water sources has also been the subject of much recent study.[30] Studies so far tend to indicate that migration of

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26. *See, e.g.*, AM. PETROLEUM INST., HYDRAULIC FRACTURING OPERATIONS—WELL CONSTRUCTION AND INTEGRITY GUIDELINES (2009), *available at* http://www.shalegas.energy.gov/resources/HF1.pdf; AM. PETROLEUM INST., WATER MANAGEMENT ASSOCIATED WITH HYDRAULIC FRACTURING (2010), *available at* http://www.shalegas.energy.gov/resources/HF2_e1.pdf; AM. PETROLEUM INST., PRACTICES FOR MITIGATING SURFACE IMPACTS ASSOCIATED WITH HYDRAULIC FRACTURING (2011), *available at* http://www.shalegas.energy.gov/resources/HF3_e7.pdf; *see also* AM. PETROLEUM INST., OVERVIEW OF INDUSTRY GUIDANCE/BEST PRACTICES ON HYDRAULIC FRACTURING, (2011), *available at* http://www.api.org/policy/exploration/hydraulic fracturing/upload/hydraulic_fracturing_infosheet.pdf.

27. GOVERNOR'S MARCELLUS SHALE ADVISORY COMM'N, FINAL REPORT 75 (2011), *available at* http://www.portal.state.pa.us/portal/server.pt/document/1093774/msac_final_report_pdf.

28. *See EPA Completes Drinking Water Sampling in Dimock, Pa.*, ENVTL. PROT. AGENCY (July 25, 2012), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/1a6e49d193e1007585257a46005b61ad!opendocument (stating that contamination was not high enough for additional actions and that the "found hazardous substances" were "also naturally occurring substances.").

29. *See* DOMINIC C. DIGIULIO ET AL., ENVTL. PROT. AGENCY, INVESTIGATION OF GROUND WATER CONTAMINATION NEAR PAVILLION, WYOMING (2011), *available at* http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf.

30. *See generally* CHARLES G. GROAT & THOMAS W. GRIMSHAW, THE ENERGY INST., FACT-BASED REGULATION FOR ENVIRONMENTAL PROTECTION IN SHALE GAS DEVELOPMENT 28 (2012), *available at* http://energy.utexas.edu/images/ei_shale_gas_reg_summary1202.pdf [hereinafter UT PAPER]. The UT Paper was withdrawn by the University of Texas when it was revealed that one of the paper's authors had close financial and professional ties to a natural-gas exploration and production company and that the purported scientific basis for the paper was flawed. *See University of Texas Accepts Findings on Shale Gas Development Report*, THE U. OF TEXAS SYS. (Dec. 6, 2012), http://www.utexas.edu/news/2012/12/06/university-accepts-shale-gas-development-report/. Numerous other competing studies have surfaced in recent years, sponsored by a variety of industry stakeholders. For a concise summary of some of the more well-known of these studies and some of the questions raised about them, *see* Brian Montopoli, *A Poisoned Well? Fracking Studies Stir Doubts*, CBS NEWS (Feb 5, 2013), http://www.cbsnews.com/8301-201_162-57567508/a-poisoned-well-fracking-studies-stir-doubts/?pageNum=2.

contaminants through up to a mile of rock into the water table is unlikely, though theoretically possible where a confluence of geologic conditions occur simultaneously.[31]

Both the concerns about wellbore integrity and the possibility of contaminant migration are driving the push to require more disclosure by the gas industry of the contents of the fluids pumped down into a well to fracture the shale and release the gas trapped within the formations.[32] Fracturing fluids used in high-volume hydraulic fracturing are composed of approximately 99.5% water with the remaining .5% a mixture of sand and chemicals that serve as proppants, friction reducers, and corrosion preventers.[33] This .5% mixture, together with the produced brines, is viewed by many as a significant enough quantity to merit concern.[34] As a result, management and disposal of drilling wastewater are being closely scrutinized by both regulators and the public.[35] Although the recycling of fracturing wastewater is becoming an industry standard, the various methods of treatment and disposal currently available all have downsides.

Storing flowback in containment pits poses risks of leakage or spills, particularly in northeastern states where frequent inclement weather may affect the integrity of pits.[36] That is less of an issue in the drier western states, but even so, the land application is not always an option when large volumes of wastewater are at issue. Even when land application is possible, it must be done with great care, as a test project in West Virginia recently demonstrated the harmful impacts of overloading an area with wastewater.[37]

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31. *See* UT PAPER, *supra* note 30.

32. *See, e.g., Shale Shock: Hydraulic Fracturing*, NATURALGAS.ORG, http://www.naturalgas.org/shale/shaleshock.asp (last visited May 4, 2013).

33. *See* GROUND WATER PROT. COUNCIL & ALL CONSULTING, U.S. DEP'T OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 61–62 (2009), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf; *see also What Chemicals Are Used*, FRACFOCUS, http://fracfocus.org/chemical-use/what-chemicals-are-used (last visited May 4, 2013).

34. *See, e.g., Shale Shock*, *supra* note 32.

35. *See* David Kramer, *Shale-Gas Extraction Faces Growing Public and Regulatory Challenges*, 64 PHYSICS TODAY 23 (2011), *available at* http://www.physicstoday.org/resource/1/phtoad/v64/i7/p23_s1.

36. *See* Katusa, *supra* note 14.

37. Mary Beth Adams, *Land Application of Hydrofracturing Fluids Damages a Deciduous Forest Stand in West Virginia*, 40 J. OF ENVTL. QUALITY 1340, 1340–44 (2011); *see also* Vicki Smith, *W.Va. Study Raises Questions About Fracking Fluid*, BLOOMBERG BUSINESSWEEK (July

Wastewater treatment facilities are not always equipped to handle drilling waste, leading to fear that inadequately treated wastewater is being released into streams. New Jersey, which does not have an active natural gas drilling industry, has recently taken steps to ban the processing of any hydraulic fracturing waste out of fear that its waste treatment facilities may become an attractive disposal alternative for companies in Pennsylvania and New York (once the state-imposed moratorium on high-volume hydraulic fracturing is lifted).[38]

Some companies are experimenting with the use of harmless ingredients in their fracturing fluids in place of the more commonly used chemicals, including everyday food additives.[39] However, that is a long way from becoming industry standard. Even if the chemicals used in the fracturing fluids were not an issue, the levels of total dissolved solids (TDS)[40] in produced wastewater from hydraulic fracturing activity may still be of concern.[41] TDS levels contribute to the health of a stream.[42]

11, 2011), http://www.businessweek.com/ap/financialnews/D9ODLO7O0.htm. The U.S. Forest Service, in order to assess the potential environmental impact of drilling wastewater, poured 75,000 gallons of fracking wastewater over a quarter acre of forestland over a two-day period. *Id.* The results were predictably dire, however, the value of the experiment is limited, as even a spill at a drilling site is unlikely to involve the quantity of waste that was involved in the test.

38. *See* Assemb. B. 575 & S.B. 253, 215th Leg., 2012 Sess. (N.J. 2012). The bill passed the Assembly and Senate in June of 2012, however the governor vetoed it and instead imposed a one-year moratorium on hydraulic fracturing pending issuance of New York's Department of Environmental Quality Supplemental Environmental Impact Study. The New Jersey legislature is now also considering a permanent ban on hydraulic fracturing activities, although the move is largely symbolic since, with the exception of a small portion of the northwesternmost corner, the state does not overlie significant shale gas reserves. *See id.*

39. *See, e.g.*, Catherine Tsai, *Halliburton Executive Drinks Fracking Fluid At Conference*, HUFFINGTON POST (Aug. 22, 2011), http://www.huffingtonpost.com/2011/08/22/halliburton-executive-drinks-fracking-fluid_n_933621.html. Some companies are also working to develop technologies that will dramatically reduce, or even eliminate, the use of water to fracture a well. One company, for example, has reportedly developed a system that used liquid petroleum gas in a completely closed system, so that there is no risk associated with the hauling or disposing of used fracking water. *See, e.g., Waterless Fracking: Gas Drilling Game-Changer?*, INSIDE CLIMATE NEWS, http://insideclimatenews.org/podcast/waterless-fracking-gas-drilling-game-changer (last visited May 4, 2012).

40. TDS is the total of all organic and inorganic substances in a dissolved state in water, consisting mostly of inorganic salts. *See Total Dissolved Solids*, SW. ENVTL. HEALTH SCI. CTR., http://coep.pharmacy.arizona.edu/water/tds/ (last visited May 4, 2013).

41. *See* Joaquin Sapien, ProPublica, *With Natural Gas Drilling Boom, Pennsylvania Faces Flood of Wastewater*, SCI. AM. (Oct. 5, 2009), http://www.scientificamerican.com/article.cfm?id=wastewater-sediment-natural-gas-mckeesport-sewage&page=5.

42. *See* CHRISTINE MUTH ET AL., LEARN NC, INQUIRY-BASED EXPLORATION OF HUMAN IMPACTS ON STREAM ECOSYSTEMS: THE MUD CREEK CASE STUDY (2010), *available at* http://www.learnnc.org/lp/editions/mudcreek/6589.

High levels of dissolved chlorides and salts can disrupt stream system balance, which, while generally not a threat to human or aquatic health, does impact the odor and taste of water, which can lead to complaints of contamination.[43] Among common sources of TDS are mining water discharges and urban stormwater runoff, but elevated levels of TDS in streams are increasingly being linked to natural gas drilling.

Even recycling cannot continue indefinitely.[44] Eventually, produced waste must be treated and disposed of, but after multiple uses the concentrated brine has extremely high salt levels, which complicates disposal.[45] Efforts are underway to find uses for the brines. For example, some states are using it for street de-icing in the winter.[46]

Added to the above are specific challenges posed by variations in geology across the country. The image of a man living in a town with active gas drilling that caused his drinking water to light on fire created a sensation across the Internet a few years ago.[47] The implication was that the drilling activity contaminated his well water. However, in many regions of the country, shallow methane underground causes significant levels of methane concentrations to collect in wells, irrespective of the proximity of drilling.[48] When this is combined with lax state permitting requirements for drinking water well construction, as is the case in some states, the result is flammable water.[49] And in most of

43. Jennifer Hayes, Note, *Protecting Pennsylvania's Three Rivers' Water Resources from Shale Gas Development Impacts*, 22 DUKE ENVTL. L. & POL'Y F. 385, 390 (2012) (citing Sapien, *supra* note 41).

44. Kristen Allen, Comment, *The Big Fracking Deal: Marcellus Shale—Pennsylvania's Untapped Re$ource*, 23 VILL. ENVTL. L.J. 51, 63 (2012).

45. Timothy Puko, *Pennsylvania Fracking Water Being Disposed in Ohio*, TRIBLIVE (July 5, 2011), http://triblive.com/x/pittsburghtrib/s_745228.html#axzz2QNRZDErt; *see also* Sapien, *supra* note 41.

46. REBECCA HAMMER & JEANNE VANBRIESEN, NAT'L RES. DEF. COUNCIL, IN FRACKING'S WAKE: NEW RULES ARE NEEDED TO PROTECT OUR HEALTH AND ENVIRONMENT FROM CONTAMINATED WASTEWATER 34 (2012), *available at* www.nrdc.org/energy/files/Fracking-Wastewater-FullReport.pdf.

47. Footage of this phenomenon was used by director Josh Fox in 2010 in his popular anti-fracking film *Gasland*. GASLAND (New Video Group 2010), *available at* http://www.gaslandthemovie.com/. The natural gas industry produced a rebuttal film in 2012, entitled *Truthland*. TRUTHLAND (Energy in Depth 2012), *available at* http://www.truthlandmovie.com/.

48. *See, e.g.*, Michael Economides, *Slurring Natural Gas With Flaming Faucets and Other Propaganda*, FORBES, (Apr. 22, 2010), http://www.forbes.com/sites/greatspeculations/2010/04/22/slurring-natural-gas-with-flaming-faucets-and-other-propaganda/.

49. ROBERT B. JACKSON ET AL., CTR. ON GLOBAL CHANGE ET AL., RESEARCH AND

these regions, there is a lack of baseline data for drinking water quality, so it is difficult to assess the connection, if any, between gas production and high methane levels, or levels of other contaminants, in drinking water supplies.[50]

Even where there are disclosure requirements, there are other issues ranging from perceived loopholes in existing regulatory schemes to the ability of state environmental regulators in gas-boom regions to adequately handle the ever-increasing number of permit requests.[51]

2. Water Use Issues

A typical hydraulic fracturing job uses 2.5 to 6 million gallons of water depending on the particular formation where the well is being fracked.[52] While that may seem like a very large quantity, it represents just a fraction of municipal and industrial water uses, and shale gas is one of the least water-intensive energy sources.[53] To put it in context, approximately 4 million gallons of water are consumed in New York City approximately every six minutes, and it takes up to 4 million gallons to water the average golf course every three weeks.[54] Electric power generation, agricultural and industrial users, and municipalities are by far the largest water consumers.[55] According to the U.S. Geological Survey, nationwide, approximately 201,000 million gallons per

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POLICY RECOMMENDATIONS FOR HYDRAULIC FRACTURING AND SHALE-GAS EXTRACTION (2011), *available at* nicholasinstitute.duke.edu/sites/default/files/publications/researchandpolicyrecommendationsforhydraulic-fracturingandshale2010gasextraction-paper.pdf.

50. *See* Robert B. Jackson et al., *Responses to Frequently Asked Questions and Comments About the Shale-Gas Paper by Osborn et al.*. DUKE UNIV.: NICHOLAS SCH. OF THE ENV'T (June 13, 2011), http://www.nicholas.duke.edu/hydrofracking/responses-about-gas-shale; Mark Schrope, *Fracking Outpaces Science on Its Impact*, ENV'T YALE, http://environment.yale.edu/envy/stories/fracking-outpaces-science-on-its-impact (last visited May 4, 2013).

51. MATTHEW MCFEELEY, NAT'L RES. DEF. COUNCIL, STATE HYDRAULIC FRACTURING DISCLOSURE RULES AND ENFORCEMENT: A COMPARISON 6 (2012), *available at* http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf.

52. HEATHER COOLEY & KRISTINA DONNELLY, PAC. INST., HYDRAULIC FRACTURING AND WATER RESOURCES: SEPARATING THE FRACK FROM THE FICTION 15–16 (2012), *available at* http://www.pacinst.org/reports/fracking/full_report.pdf.

53. *Hydraulic Fracturing Water Usage*, FRACFOCUS, http://fracfocus.org/water-protection/hydraulic-fracturing-usage (last visited May 4, 2013).

54. Dana Bohan, *Hydraulic Fracturing and Water Use: Get the Facts*, ENERGY IN DEPTH (Oct. 8, 2012), http://www.energyindepth.org/tag/water-source/.

55. *Hydraulic Fracturing Facts*, CHESAPEAKE ENERGY, www.hydraulicfracturing.com/Water-Usage/Pages/Information.aspx (last visited Apr. 13, 2013).

day (mgd) of water are used in thermoelectric power generation (scrubbers on a single coal-fired plant may use up to 5 mgd); 130,000 mgd are used for agricultural uses (irrigation and livestock); 44,000 mgd are used for public water supply; 18,000 mgd are used for industrial uses; and about 4,000 mgd are used for mining activities, including oil and gas extraction.[56] All "mining" activity nationwide—mineral, oil and gas extraction—accounts for approximately 1% of total water withdrawals from surface and groundwater sources,[57] and although specific regional percentages will vary, it is consistently a very small percentage of total uses. And in terms of water use per unit of energy produced, shale gas is very low on the scale, using far less at one to three gallons per MMBtu (million British thermal units) than coal (up to thirty-two gals/MMBtu), nuclear (eight to fourteen gals/MMBtu), oil (eight to twenty gals/MMBtu), or agricultural biofuels such as corn ethanol or soy biodiesel (more than 2,500 gals/MMBtu).[58]

The water used in hydraulic fracturing comes from a number of sources. The majority is purchased from municipal water suppliers, although some is withdrawn from surface waters. Very little comes from groundwater sources.[59] Some companies obtain treated wastewater from municipal and industrial treatment facilities, power plant cooling water, and, increasingly, recycled produced water and flowback water is used.[60] A few companies are also working to develop methods to locate and use sour water aquifers.[61]

For the most part, water use in connection with hydraulic

56. *Water Use in the United States, 2005*, U.S. GEOLOGICAL SURVEY, http://ga.water.usgs.gov/edu/wateruse.html (Mar. 6, 2013) (providing statistics for 2005, the last year in which this data was collected).

57. *Id.*

58. *Water Use, Natural Gas Production and the Best Choice for Energy*, BARNETT SHALE ENERGY EDUC. COUNCIL (Sept. 14, 2011), http://www.bseec.org/content/water-use-natural-gas-production-and-best-choice-energy. According to this source, shale gas is 1.0-3.0 gals/MMBtu, not 0.5-3.0 gals/MMBtu.

59. *See Hydraulic Fracturing Water Usage*, FRACFOCUS, http://fracfocus.org/water-protection/hydraulic-fracturing-usage (last visited May 4, 2013) ("Most water used in hydraulic fracturing comes from surface water sources such as lakes, rivers and municipal supplies.").

60. *How Much Water is Used in a Typical Hydraulic Fracturing Operation?*, ENERGYANSWERED, http://www.energyanswered.org/questions/how-much-water-is-used-in-a-typical-hydraulic-fracturing-operation (last visited May 4, 2013).

61. Katusa, *supra* note 14.

fracturing is considered "consumptive."[62] Although some of the flowback can be treated and released back into water sources, it rarely will return to the basin of origin.[63] Further, a good quantity will not return to the water cycle, but will remain in the ground, either in the gas well or injected into disposal wells.[64]

The extent to which water use is a significant issue will depend in part on the region of the country in which the drilling takes place and on the competing uses for the water in that region. In areas where water is scarce, withdrawals from local sources may be viewed as significant.

B. *Emissions Issues*

Air emissions from hydraulic fracturing stem from methane leaks originating from wells, and emissions from the diesel or natural gas-powered equipment such as compressors, drilling rigs, pumps, and so forth that are used in the process of constructing the well and extracting the gas.[65] In addition, truck transportation of water used in the hydraulic fracturing process, both to the well site and away from the well to treatment facilities, can result in emissions of particulate matter and other pollutants into the air.

C. *Land Use Issues*

Drilling for natural gas, particularly in the Marcellus Shale

62. *See, e.g.*, COOLEY & DONNELLY, *supra* note 52 ("Additionally, much of the water injected underground is either not recovered or is unfit for further use once it is returned to the surface, usually requiring disposal in an underground injection well. This water use represents a 'consumptive' use if it is not available for subsequent use within the basin from which it was extracted."); Amy Hardberger, *Drilling Down Deep on Fracing Water Consumption*, ENVTL. DEF. FUND. (July 6, 2011), blogs.edf.org/texaswatersolutions/2011/07/06/drilling-down-deep-on-fracing-water-consumption ("Water usage for drilling is consumptive."); Mark Davis & James Wilkins, *A Defining Resource: Louisiana's Place in the Emerging Water Economy*, 57 LOY. L. REV. 273, 296 (2011) ("In the specific case of surface waters, the present and growing interest in using those waters for consumptive industrial purposes (such as fracking) or for export to increasingly dry states such as Texas will soon test both the bounds of Louisiana law and the will and wisdom of all branches of state government.").

63. COOLEY & DONNELLY, *supra* note 52, at 16.

64. *Id.* at 24 ("Flowback and produced water have been treated at a municipal wastewater treatment plant (GWPC and ALL Consulting 2009), although this practice is both uncommon and controversial.").

65. *See, e.g.*, GROUND WATER PROT. COUNCIL, *supra* note 33, at 72–75; *see also* Francis O'Sullivan & Sergey Paltsev, *Shale Gas Production: Potential Versus Actual Greenhouse Gas Emissions*, 7 ENVTL. RES. LETTERS no. 4, 2012, http://iopscience.iop.org/1748-9326/7/4/044030/pdf/1748-9326_7_4_044030.pdf.

region in the northeast, is increasingly taking place in population centers.[66] In addition to the "NIMBY" issues that typically arise when heavy industry abuts residential areas, some cities, counties, and municipalities have begun to enact bans on hydraulic fracturing, although the authority to do so is presently being tested in state courts.[67]

Environmentalists are concerned with clearance of forest or farmland to construct the drilling sites.[68] Even though the horizontal drilling technique allows multiple wells to be drilled from a single site, the sheer number of permits that have been issued in some regions has given rise to concern.[69]

D. *Induced Seismic Activity*

Induced seismic activity (earthquakes) from oil and gas drilling is a phenomenon that is increasingly gaining attention in the media. Although frequently characterized as "caused" by hydraulic fracturing, earthquakes—at least those that can be felt on the surface—appear to be more closely related to the use of underground injection wells for disposal of drilling waste, primarily brines.[70] The amount of water involved in hydrofracking is not enough to induce significant tremors, but the injection of quantities of liquid waste creates sustained pressure deep underground that may cause existing faults to "slip" in response to changes in pressure, particularly as higher pressures are required over time to inject the waste as the

66. *See, e.g.*, J. DANIEL ARTHUR ET AL., ALL CONSULTING, WATER RESOURCES AND USE FOR HYDRAULIC FRACTURING IN THE MARCELLUS SHALE REGION 4 (2010), *available at* http://fracfocus.org/sites/default/files/publications/water_resources_and_use_for_hydraulic_fracturing_in_the_marcellus_shale_region.pdf.

67. *See, e.g.*, Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. 2012); Cooperstown Holstein Corp. v. Town of Middlefield, 943 N.Y.S.2d 722 (N.Y. Sup. Ct. 2012); Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, L.L.C., No. 2011-0113 (Harrison Cnty., Ohio Ct. C.P. 2012).

68. *See, e.g.*, *Hydraulic Fracturing or "Fracking,"* NAT'L WILDLIFE FED'N, http://www.nwf.org/What-We-Do/Energy-and-Climate/Drilling-and-Mining/Natural-Gas-Fracking.aspx (last visited May 4, 2013).

69. *See, e.g.*, Kate Galbraith, *In Texas, Water Use for Fracking Stirs Concerns*, TEX. TRIBUNE (Mar. 8, 2013), www.texastribune.org/2013/03/08/texas-water-use-fracking-stirs-concerns/.

70. Terrence Henry, *How Fracking Disposal Wells Are Causing Earthquakes in Dallas-Fort Worth*, STATEIMPACT (Aug. 6, 2012, 2:52 PM), http://stateimpact.npr.org/texas/2012/08/06/how-fracking-disposal-wells-are-causing-earthquakes-in-dallas-fort-worth/; *Wastewater Injection Spurred Biggest Earthquake Yet, Says Study*, THE EARTH INST., COLUMBIA UNIV. (Mar. 26, 2013), http://www.earth.columbia.edu/articles/view/3072.

underground reservoir fills up.[71] Typically, any seismic activity at the depth of the injection well will be relatively small and will be unnoticed on the surface; however, a series of recent, small earthquakes in areas where earthquakes are relatively rare (for example, Oklahoma and Arkansas) is suspected to be linked to injection of drilling waste into underground disposal wells.[72] Presently, there is a lack of consensus on the interaction between underground formations, faults, and injected liquids, leading the researchers to call for further study.[73] And while a definitive link has not yet been confirmed, there is mounting evidence of increased, and possibly induced, seismic events in areas where natural gas production has increased and where companies are engaging in carbon capture and storage, which also involves the injection of large volumes of fluids into the ground.[74]

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71. *See* sources cited *supra* note 70.

72. *See* sources cited *supra* note 70. *See also* W.L. ELLSWORTH ET AL., U.S. GEOLOGICAL SURVEY, ARE SEISMICITY RATE CHANGES IN THE MIDCONTINENT NATURAL OR MANMADE? (2012), *available at* http://www.fossil.energy.gov/programs/gasregulation/authorizations/2012_applications/sierra_exhibits_12_100_LNG/Ex._73_-_Ellsworth_Abstract.pdf (abstract). Scientists at the U.S. Geological Survey (USGS) have released a study finding a significant increase in earthquake activity in certain parts of the U.S. where there is increased oil and gas activity. After studying the modest increase in earthquakes of a magnitude 3 or greater in a coalbed methane field near the Colorado-New Mexico border, and recent seismic activity in Arkansas and Oklahoma, the scientists determined them to be "almost certainly man-made." In a paper delivered at the annual meeting of the Seismological Society of America, the USGS scientists note that "[a] naturally-occurring rate change of this magnitude is unprecedented outside volcanic settings or in the absence of a main shock." However, the paper states that how the earthquakes are "related to changes in extraction methodologies or the rate of oil and gas production" "remains to be determined." Geologists in Colorado and Oklahoma expressed some chagrin at the report, noting that while it appears there may be a link between oil and gas production and a rise in the number and intensity of earthquakes in some regions, there is not yet enough data to reach any definitive conclusions. And while the USGS report says nothing about hydraulic fracturing, both the media and environmental community have been quick to assert that hydraulic fracturing and disposal of drilling waste has conclusively been shown to cause earthquakes. *See also* AUSTIN HOLLAND, OKLA. GEOLOGICAL SURVEY, EXAMINATION OF POSSIBLY INDUCED SEISMICITY FROM HYDRAULIC FRACTURING IN THE EOLA FIELD, GARVIN COUNTY, OKLAHOMA (2011), *available at* http://www.ogs.ou.edu/pubsscanned/openfile/OF1_2011.pdf; MARK E. MEREMONTE ET AL., U.S. GEOLOGICAL SURVEY, INVESTIGATION OF AN EARTHQUAKE SWARM NEAR TRINIDAD, COLORADO, AUGUST TO OCTOBER 2001 (2002), *available at* http://pubs.usgs.gov/of/2002/ofr-02-0073/ofr-02-0073.html.

73. Henry, *supra* note 70.

74. The National Research Council has published the results of a two-year study that suggests both the oil and gas industry and regulators could be doing more to address the risk that drilling and related activity may trigger earthquakes. COMM. ON INDUCED SEISMICITY POTENTIAL IN ENERGY TECH. ET AL., NAT'L RESEARCH COUNCIL, INDUCED SEISMICITY POTENTIAL IN ENERGY TECHNOLOGIES (2012), *available at* http://www.nap.edu/openbook.php?record_id=13355&page=R1. Led by a professor from the Colorado School of Mines, the research team concludes that underground

III. THE NATIONAL "FRACKING" DIALOGUE

The national discussion about hydraulic fracturing in the United States has been shaped by a broad and widely varied group of stakeholders, including industry, landowners, regulators, the local and national environmental community, and the news and popular media. For most people involved in the fracking conversation in the U.S., the discussion is not a simple pro-or-con issue. While those involved can generally agree on what the issues are, there has been a tremendous disconnect in the stream of information flowing between and among the stakeholders.[75] This of course creates opportunities for exploitation by some in furtherance of individual agendas, a situation that is aggravated by the fact that among both informed opponents and individuals with little knowledge of natural gas production, "fracking" has become a synonym for any oil and gas development activity.[76] This problem of basic vocabulary makes it difficult for the groups to have a coherent conversation.[77]

Events such as the well water contamination in Dimock, Pennsylvania, the Deepwater Horizon incident, the Yellowstone and Kalamazoo River pipeline spills, and the pipeline explosion in San Bruno, California, have all fueled public suspicion of the oil and gas industry. Meanwhile, the industry's general response to public fears has been to downplay these incidents as highly unusual. Individual companies typically perceive themselves as having good track records and complying with applicable laws and requirements. The public, however, perceives industry as secretive, resistant to reasonable safeguards and oversight, and

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waste disposal poses the highest threat of man-made earthquakes, and although regulations enforcing the Underground Injection Control sections of the Safe Drinking Water Act do require testing of some proposed sites, this is not mandated for all wells. As one precaution, the report urges that energy companies or regulators test for nearby fault lines before injecting drilling waste deep underground. The report does not state that a federal regulatory scheme is necessary, but coordination and regulatory and safety gap-filling, including with industry "best practices," are recommended. The report also supports the "traffic light" approach that has been adopted in the United Kingdom following seismic events there that have been linked to drilling.

75. Tim Lucas, *In the Midst of a Fracking Firestorm*, DUKENVIRONMENT MAGAZINE, Fall 2011, at 4, *available at* http://www.nicholas.duke.edu/dukenvironment/f11/fall.2011.pdf.

76. Mike Soraghan, *Baffled About Fracking? You're Not Alone*, N.Y. TIMES, May 13, 2011, http://www.nytimes.com/gwire/2011/05/13/13greenwire-baffled-about-fracking-youre-not-alone-44383.html?pagewanted=all.

77. *Id.*

callous toward local populations. Deserved or not, the high media visibility of the events listed above has made them the "poster children" for the oil and gas industry.

A further complicating factor is that, to date, the conversation about shale gas development has not been led by either the industry or science. Industry for the most part has been confined to a defensive role. The most significant studies on the effects of hydraulic fracturing are still underway and are not expected to be released for at least another year. Further, those scientific studies that have been concluded are viewed with some skepticism because of the funding behind the research.[78] Thus, the scientific community has yet to weigh in. Nor have regulators, with a few exceptions, affirmatively stepped in to shape the conversation. Instead, the dialogue is playing out primarily in the media spotlight, but it is difficult to assess whether, when, and to what extent fracking opponents (including NGOs) or the news media (including investigative journalists) are leading the dialogue.

The situation is also highly fluid. There have been some initial signs that industry and environmental leaders may not be as far apart as they thought.[79] The industry is beginning to show signs of willingness to step up and take opponents' concerns seriously; at the same time, leaders of some of the significant environmental organizations watching the issue have begun to signal that a truce may be possible.[80]

A. *Voices in the Fracking Conversation*

Overall, the national "conversation" about hydraulic fracturing in the United States has been disjointed, involving many groups with varying interests, and carried out in a tone that

78. *See, e.g.*, Howarth, *supra* note 18; *Hydraulic Fracturing*, *supra* note 5.

79. *See* Peter Lehner, *Ensuring Responsible Practices Begins with Oil and Gas Industry*, CONGRESS BLOG (Jan. 20, 2012, 11:51 AM), http://thehill.com/blogs/congress-blog/energy-a-environment/207353-peter-lehner-executive-director-natural-resources-defense-council#ixzz2MtWEIqkv. For example, over the past year, the executive director of the Natural Resources Defense Council signaled possible support for the natural gas industry, stating that the industry presently has a unique opportunity "to take the lead in getting it right for the next generation of domestic energy production," but needs to take public concerns, whether based in fact or in perception, seriously.

80. *Companies, Environmentalists Agree on New Fracking Rules*, USA TODAY (Mar. 20, 2013, 4:40 PM), http://www.usatoday.com/story/money/business/2013/03/20/fracking-standards-drilling-expansion/2003861/.

has been rather shrill. Significantly, not all groups are unified within themselves.[81] For example, the populations in the towns and regions where drilling takes place are at times sharply divided, and the national environmental groups seen as leading the anti-fracking charge typically receive some of their funding from contributions by natural gas companies, creating what may be perceived as a conflict of interest.[82]

The following is a description of some of the key stakeholders in the national hydraulic fracturing discussion.

1. The Natural Gas Industry

In addition to the natural gas companies, large and small, who are engaged in drilling, the industry view is also represented by pipeline companies; shippers and industry associations, such as the American Petroleum Institute; the Marcellus Shale Coalition; FracFocus.org; independent oil and gas associations; and numerous other organizations across the country.

As noted above, the gas industry generally has not been in front of the issues, but instead has frequently had to play a defensive role.[83]

2. The Environmental Community

While there are numerous environmental organizations active on fracking issues, among the most visible are the Natural Resources Defense Council, the Sierra Club in affected states, and various river conservation advocates and watchgroups including Riverkeepers, Delaware Riverkeepers, Lower Susquehanna Riverkeepers, American Rivers, and other groups particularly concerned with the impact of drilling on rivers and watersheds that serve as drinking water resources for regional population centers.

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81. *See, e.g.*, Bryan Walsh, *Exclusive: How the Sierra Club Took Millions from the Natural Gas Industry—and Why They Stopped*, TIME MAGAZINE (Feb. 2, 2012), *available at* http://science.time.com/2012/02/02/exclusive-how-the-sierra-club-took-millions-from-the-natural-gas-industry-and-why-they-stopped/#ixzz2Pi8p07gk.

82. *Id.*

83. Steve Hargreaves, *The Fracking Public Relations Mess*, CNN MONEY (June 21, 2011, 11:16 AM), http://money.cnn.com/2011/06/21/news/economy/fracking_public_relations/index.htm.

3. Local Groups in Affected Communities

Interest groups in affected communities tend to be loosely organized. Many are small neighborhood organizations, although there are also larger, more organized groups. Initially, the local community groups were comprised primarily of fracking opponents. The northeastern U.S. has seen more of these groups than other regions of the country,[84] one reason being that despite the long history of mining in the region, residents are unused to extraction activity on the scale that is occurring now. Many liken it to a gold rush, with a stampede of western gas companies heading east to profit from the boom. These companies are frequently viewed by local residents with deep suspicion. However, recently an increasing number of local pro-gas groups are emerging, particularly among landowners in the Marcellus region who are interested in leasing their mineral rights but are unable to do so because of fracking bans.[85]

4. State and Federal Regulators, Lawmakers, and Politicians

The key player in the federal arena is the EPA, which has been something of a wild card in the fracking dialogue, as the regional offices and the national office are not always on the same page in terms of either message or objectives.[86] The Department of the Interior's Bureau of Land Management (BLM) has also become an active participant in the recent regulatory scramble with respect to activities on federal lands.[87]

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84. KEVIN MOONEY, CAPITAL RESEARCH CTR., THE ENVIRONMENTAL MOVEMENT VS. THE MARCELLUS SHALE 3 (2012), *available at* https://capitalresearch-zippykid.netdna-ssl.com/wp-content/uploads/2012/12/GW1212-really-final-121127b.pdf.

85. *See* Associated Press, *New Coalition in New York State Says Hydrofracking Can Be Safe*, SYRACUSE.COM (Nov. 10, 2011, 8:44 PM), http://www.syracuse.com/news/index.ssf/2011/11/new_group_in_new_york_state_sa.html.

86. *Compare Pavillion Groundwater Investigation*, Envtl. Prot. Agency (Feb. 1, 2013), http://www.epa.gov/region8/superfund/wy/pavillion/ (Suggesting that fracking caused groundwater contamination in Pavillion, Wyoming), *with EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources*, Envtl. Prot. Agency (Apr. 8, 2013), http://www.epa.gov/hfstudy/ (Still studying the effects of fracking on groundwater).

87. Darren Goode, *Interior Retooling Its Fracking Rule*, POLITICO (Jan. 18, 2013, 7:22 PM), http://www.politico.com/story/2013/01/interior-retooling-its-fracking-rule-86424.html. *See also* U.S. Dep't of Energy, *Secretary Chu Tasks Environmental, Industry and State Leaders to Recommend Best Practices*, ENERGY.GOV (May 5, 2011), http://energy.gov/articles/secretary-chu-tasks-environmental-industry-and-state-leaders-recommend-best-practices-safe. An initial report was produced ninety days after the panel began its work; SEC'Y OF ENERGY ADVISORY BD. SHALE GAS PROD. SUBCOMM., NINETY-DAY

The Department of Energy has created a special panel on fracking for the purpose of assembling a list of recommendations for safety improvements for the drilling process.[88] However, the composition of this panel has been called into question by some federal lawmakers on Capitol Hill because it includes individuals with little or no background in natural gas production. At the same time, the panel has also been criticized by doctors and scientists from more than twenty universities and nonprofit research organizations who say the panel is too biased toward the oil and gas industry to make objective recommendations.[89]

In the spring of 2012, in response to industry cries of excessive and incoherent regulation of natural gas production, President Obama issued an executive order calling for the creation of the Interagency Working Group to Support Safe and Responsible Development of Unconventional Domestic Natural Gas Resources.[90] This federal working group on gas drilling is tasked with ensuring that the various federal agencies involved in regulating natural gas production are communicating and coordinating with one another in a manner that will enable development of the nation's vast natural gas resources without compromising the health and safety of both humans and the environment.[91] The group is headed by White House energy advisor Heather Zichal and includes representatives of at least thirteen Executive Branch departments and agencies including the EPA, Department of Energy, Department of the Interior, Department of Transportation, and the White House Council on Environmental Quality.[92]

State efforts vary from one state to another, as discussed in

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REPORT (2011), *available at* http://www.shalegas.energy.gov/resources/081111_90_day_report.pdf.

88. *See* U.S. Dep't of Energy, *supra* note 87; SEC'Y OF ENERGY ADVISORY BD. SHALE GAS PROD. SUBCOMM., *supra* note 87.

89. *See* Letter from Ronald Amundson et al. to Steven Chu, Secretary of Energy (Aug. 10, 2011), *available at* http://static.ewg.org/reports/2011/fracking/Scientists_CHU_Letter_SIGNED.pdf.

90. Exec. Order No. 13605, 77 Fed. Reg. 23107, 23107 (Apr. 13, 2012) (supporting safe and responsible development of unconventional domestic natural gas resources).

91. *Id.*

92. Heather Zichal, *Facilitating Safe and Responsible Expansion of Natural Gas Production*, THE WHITE HOUSE BLOG (Apr. 13 2012, 11:56 AM), http://www.whitehouse.gov/blog/2012/04/13/obama-administration-continues-expand-natural-gas-production-safely-and-responsibly.

more detail below. Most state regulators agree that comprehensive national regulation is both unlikely and unworkable.[93]

5. Academics, Research Commissions, and Think Tanks

Several universities in the northeastern region, special commissions, and think tanks have undertaken studies of issues related to hydraulic fracturing. Many of these studies have been funded by one side or the other of the fracking debate, undermining their credibility.[94]

6. Other Groups with an Interest in Fracking

A handful of physicians and Centers for Disease Control and Prevention (CDC) researchers recently joined the dialogue, urging caution on the part of regulators and calling for more public disclosure by industry participants about the chemicals they are using in the fracking process.[95] Celebrities, especially those with homes or ties to upstate New York, are active in the anti-fracking movement.[96] Various religious groups and professional activists are also involved. Some are opposed to drilling, while others are more interested in promoting a cautious approach and in encouraging corporate groups to be socially responsible.

On the investment front, proxy advisors and shareholder coalitions are beginning to ask for increased disclosure of hydraulic fracturing activities by natural gas companies.[97] The

93. *See* GROUNDWATER PROT. COUNCIL, STATE OIL AND NATURAL GAS REGULATIONS DESIGNED TO PROTECT WATER RESOURCES 36 (2009), *available at* http://www.gwpc.org/sites/default/files/state_oil_and_gas_regulations_designed_to_protect_water_resources_0.pdf ("developing functional date management tools are best solved at the state agency level because national databases cannot meet day-to-day state regulatory needs.").

94. *See, e.g.*, UT PAPER, *supra* note 30; *see also* Lawrence M. Cathles III et al., *A Commentary on "The Greenhouse-Gas Footprint of Natural Gas in Shale Formations" by R.W. Howarth, R. Santoro, and Anthony Ingraffea*, 113 CLIMATIC CHANGE 525 (2012), *available at* http://link.springer.com/article/10.1007%2Fs10584-011-0333-0; Timothy J. Considine et al., *The Economic Impact of the Pennsylvania Marcellus Shale Natural Gas Play: An Update*, (May 24, 2010), http://marcelluscoalition.org/wp-content/uploads/2010/05/PA-Marcellus-Updated-Economic-Impacts-5.24.10.3.pdf.

95. *See, e.g.*, Alex Wayne, *Health Effects of Fracking Need Study, says CDC Scientist*, BLOOMBERG BUSINESSWEEK (Jan. 10, 2012), http://www.businessweek.com/news/2012-01-10/health-effects-of-fracking-need-study-says-cdc-scientist.html.

96. *Artists*, ARTISTS AGAINST FRACKING, http://artistsagainstfracking.com/artists/ (last visited May 4, 2013).

97. *See* INSTITUTIONAL S'HOLDER SERVS., U.S. CORPORATE GOVERNANCE POLICY: 2012

Institutional Shareholder Services in December 2011 issued guidance in its *U.S. Corporate Governance Policy 2012 Updates*, recommending that investors vote for proposals requiring greater disclosure of environmental, safety, and health risks, and measures taken to mitigate those risks associated with natural gas drilling.[98] Similarly, the Investor Environmental Health Network and the Interfaith Center on Corporate Responsibility jointly issued an investor guide, *Extracting the Facts: An Investor Guide to Disclosing Risk from Hydraulic Fracturing Operations*, encouraging companies to be forthcoming in responding to concerns about hydraulic fracturing risks.[99]

IV. OVERVIEW OF THE REGULATORY LANDSCAPE IN THE FEDERAL ARENA

Perhaps the most significant public misconception about hydraulic fracturing is that it is unregulated. It is, in fact, highly regulated.[100] But there is no comprehensive regulatory scheme at the federal level, and though politicians on Capitol Hill occasionally flag hydraulic fracturing as activity in need of closer federal scrutiny,[101] there are no plans at present to develop comprehensive federal regulation of natural gas production generally or hydraulic fracturing specifically.

Because of the many variables in local geology, economics, and so forth, there is a general consensus that regulation is best left to the states, where hydraulic fracturing is already a highly regulated activity.[102] Most states regulate the critical aspects of the process: the integrity of the drilling process; the location of

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UPDATES 15 (2011), *available at* http://www.issgovernance.com/files/ISS_2012US_Updates20111117.pdf.

98. *See id.*

99. *See* INTERFAITH CTR. ON CORP. RESPONSIBILITY & INVESTOR ENVTL. HEALTH NETWORK, EXTRACTING THE FACTS: AN INVESTOR GUIDE TO DISCLOSING RISKS FROM HYDRAULIC FRACTURING OPERATIONS (2013), *available at* http://iccr.org/issues/subpages/ExtractingTheFacts121311LR.pdf.

100. *A Review of Shale Gas Regulations by State*, CTR. FOR ENERGY AND ECON. POL'Y, http://www.rff.org/centers/energy_economics_and_policy/Pages/Shale_Maps.aspx (last visited May 4, 2013).

101. Balazs Koranyi, *U.S. Needs Federal Fracking Rules: Salazar*, REUTERS (JUNE 25, 2012, 6:36 PM), http://www.reuters.com/article/2012/06/25/us-energy-salazar-idUSBRE85O19Q20120625.

102. *See, e.g.*, Sorell E. Negro, *Fracking Wars: Federal, State and Local Conflicts over the Regulation of Natural Gas Activities*, 35 ZONING & PLAN. REP. 1, 3 (2012) *available at* http://www.rc.com/documents/negro_frackingwars_2012.pdf.

wells; and, increasingly, the disclosure of fracturing chemicals.[103] States also may impose additional environmental rules, land restrictions, and other requirements and conditions. As with oil and gas drilling overall, hydraulic fracturing regulation is inherently local.

The misconception that hydraulic fracturing is unregulated stems from (1) the lack of a comprehensive scheme at the federal level for regulation of hydraulic fracturing activity and (2) hydraulic fracturing's specific exemption from the federal Safe Drinking Water Act (SDWA) except when diesel is used in the process.[104] Until this year, air emissions from oil and gas drilling also were not regulated as hazardous air pollutants under the federal Clean Air Act[105] (CAA). Nevertheless, federal law has long governed many key aspects of drilling, including:

- Surface water discharges and stormwater runoff are regulated under the Clean Water Act's[106] (CWA's) National Pollutant Discharge Elimination System (NPDES).[107] Under the CWA, flowback must be treated prior to discharge into surface water or underground injection.[108] Treatment is typically performed by wastewater treatment facilities, although there are a number of other treatment options.[109]
- The SDWA regulates the disposal of fluid waste deep underground.[110] Underground injection of flowback is regulated either by the EPA under SDWA authority, under the Underground Injection Control (UIC) program (if it contains diesel fuels), or by a state with primary UIC enforcement authority.[111] There are several categories of underground injection wells, each

103. *A Review of Shale Gas Regulations by State*, *supra* note 100.
104. 42 U.S.C. § 300f (2012).
105. *Id.* § 7401.
106. *Id.* § 1251.
107. 40 C.F.R. § 122 (2012). *See Overview*, NAT'L POLLUTANT DISCHARGE ELIMINATION SYS. (Mar. 12, 2009), http://cfpub.epa.gov/npdes/.
108. *Well Completion*, NATURAL GAS EXTRACTION PORTAL, http://envcap.org/ee/well_completion.cfm (last visited Apr. 14, 2013).
109. *Id.*
110. *Safe & Responsible Development: Hydraulic Fracturing 101*, AMERICA'S NATURAL GAS ALLIANCE, http://anga.us/issues-policy/safe-responsible-development/hydraulic-fracturing-101#.UYpAhJPjmEY (last visited May 7, 2013).
111. 42 U.S.C. §§ 300h–300h-8 (2012); 40 C.F.R. §§ 144–148 (2012).

with their own sets of rules.[112] At present, liquid waste from hydraulic fracturing is injected into "Class II" wells, which are generally reserved for nonhazardous waste.[113] Class II wells are not subject to the same rigorous testing that Class I wells (for hazardous waste) undergo.[114] For example, Class I wells are required to be tested for risks associated with seismic activity, while Class II wells are not.[115] Recent studies examining the potential connection between underground injection of waste from natural gas drilling operations and an uptick in earthquakes in regions not generally prone to seismic activity, however, have triggered discussion about either recategorizing hydraulic fracturing waste as hazardous or modifying the UIC rules to require additional testing of injection wells.[116] The latter scenario is more likely because it will be difficult in most cases to demonstrate that flowback from hydraulic fracturing is significantly distinguishable from other drilling waste that falls into Class II.[117]

- The emissions from engines, gas processing equipment, and other sources associated with drilling and production are regulated by the CAA. In August of 2012, in its first comprehensive regulation specifically targeting the hydraulic fracturing process, the EPA published regulations limiting emissions of volatile organic compounds (VOCs) and methane arising from hydraulic fracturing for gas development.[118] The EPA is

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112. *Classes of Wells*, ENVTL. PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/wells.cfm (last visited May 8, 2013).

113. *Class II Wells—Oil and Gas Related Injection Wells (Class II)*, ENVTL. PROT. AGENCY, http://water.epa.gov/type/groundwater/uic/class2/index.cfm (last visited May 8, 2013).

114. Chin-Fu Tsang et al., *Scientific Considerations Related to Regulation Development for CO2 Sequestration in Brine Formations*, 42 ENVTL. GEOLOGY 275, 277 (2003).

115. *See Requirements for All Class I Wells and Class I Hazardous Waste Wells*, ENVTL. PROT. AGENCY, http://www.epa.gov/ogwdw/uic/pdfs/page_uic-class1_summary_class1_reqs.pdf (last visited May 8, 2013); *see also Class II Wells—Oil and Gas Related Injection Wells (Class II)*, *supra* note 113.

116. *See, e.g.*, Briana Mordick, *More Earthquakes, This Time from Oil & Gas Waste Disposal*, NATURAL RES. DEF. COUNCIL: SWITCHBOARD (Jan. 3, 2012), http://switchboard.nrdc.org/blogs/bmordick/more_earthquakes_this_time_fro.html.

117. *See What is Flowback, and How Does it Differ from Produced Water?*, THE INST. FOR ENERGY & ENVTL. RESEARCH FOR NE. PA. (Mar. 24, 2011), http://energy.wilkes.edu/pages/205.asp.

118. Oil and Natural Gas Sector: New Source Performance Standards and National

currently reconsidering these rules but has not stayed their effectiveness while it does so.[119]

- The release of hazardous substances is regulated under the Comprehensive Emergency Response, Compensation and Liability Act[120] (CERCLA), and the Emergency Planning & Community Right-to-Know Act[121] requires reports of regulated chemicals held in certain quantities to local and state emergency responders.
- The National Environmental Policy Act[122] (NEPA) requires permits and environmental impact assessments to be conducted prior to drilling on federal lands.[123] The potential impact of natural gas drilling and production on water resources within the area under review could impact the conclusions drawn and restrictions or conditions imposed on the proposed drilling activity.

In addition to these laws and regulations, the EPA announced plans in November 2011 to initiate a rulemaking under the Toxic Substances Control Act[124] on disclosure of chemicals used in the drilling process.[125] The EPA is also expected to issue effluent guidelines in the near future for coalbed methane and shale gas production.

Also, the BLM has issued draft rules for hydraulic fracturing activities on public lands.[126] The proposed rule would require oil

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Emissions Standards for Hazardous Air Pollutant Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (Final Rule). These regulations do not cover unconventional oil and refinery equipment, which are covered by other rules.

119. *See* Unopposed Motion of Respondent EPA to Sever the Challenges to the NSPS and NESHAP Rules, to Hold Litigation in Abeyance, and to Govern Further Proceedings, American Petroleum Institute v. EPA, 706 F.3d 474 (D.C. Cir. 2013) (No. 12-1405).

120. 42 U.S.C. §§ 9601–9675 (2012).

121. *Id.* §§ 11001–11050.

122. *Id.* § 4321–4347.

123. COUNCIL ON ENVTL QUALITY, EXEC. OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA 4 (2007), *available at* http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf

124. 15 U.S.C. § 2601–2692.

125. Letter from the U.S. Environmental Protection Agency to Deborah Goldberg, Earthjustice (Nov. 23, 2011) (in response to TSCA Section 21 Petition Concerning Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production), *available at* http://www.epa.gov/oppt/chemtest/pubs/EPA-Letter-to-Earthjustice-on-TSCA-Petition.pdf.

126. *See* U.S. Dep't of the Interior, Bureau of Land Mgmt., Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 78 Fed. Reg.

and natural gas companies to report the chemicals used in hydraulic fracturing activities on federal lands and will also address wastewater handling and wellbore integrity, although the agency has proposed to leave a fair amount of regulation in the hands of the states to the extent that states can show their laws and regulations are at least as rigorous as applicable federal standards.[127] A final rule has not yet been issued.

There is a growing consensus in Washington that robust disclosure requirements, such as those in effect in Texas[128] and certain other states,[129] would go a long way toward allaying public fears. Beyond disclosure, however, even those on Capitol Hill who are sympathetic to the gas industry are somewhat reluctant to take action that might help the industry because this will give a platform to opponents and may lead to results that satisfy neither side. Federal lawmakers are closely watching a number of EPA initiatives that may impact the natural gas industry generally, as well as actions taken by other agencies that are defining roles for themselves in the domestic gas boom, some of which may prompt legislative responses.

A. *The Environmental Protection Agency*

The EPA is currently in the middle of a congressionally mandated comprehensive study on water quality issues related to the lifecycle of hydraulic fracturing from acquisition of the water through the mixing of chemicals and actual fracturing to the post-fracturing stage.[130] As part of its analysis, the EPA is conducting two prospective and five retrospective case studies on the impact of fracturing on drinking water.[131] Among other things, the case studies may involve field sampling, modeling,

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31635 (May 24, 2013) (to be codified at 43 C.F.R. §§ 3160.0-5, 3162.3-2, 3162.3-3).

127. *Id.*

128. Hydraulic Fracturing Chemical Disclosure Requirements, TEX. NAT. RES. CODE § 91.8541, 16 TEX. ADMIN. CODE 3.29(c)-(f).

129. *See, e.g.*, Ark. Oil & Gas Comm'n, Gen. R. and Reg. B-19(k) (Jan. 15, 2011); 2 COLO. CODE REGS. § 404-1:205A; (2011) IDAHO ADMIN. CODE r. 20.07.02.056 (2012); 312 IND. ADMIN. CODE 16-3-2 (2012); LA. ADMIN. CODE tit. 43, pt. XIX § 118 (2011); N.D. ADMIN. CODE § 43-02-03-27.1; W. VA. CODE §§ 22-6A-1 to 22-6-41 (2012); Wy. Oil & Gas Comm'n Rules and Regs., Ch. 3 § 45(d)(i)-(iii).

130. *EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources*, ENVTL. PROT. AGENCY (May 7, 2013), http://www2.epa.gov/hfstudy (last visited May 7, 2013).

131. *Key Issues to Be Investigated at Case Study Locations*, ENVTL. PROT. AGENCY (Mar. 18, 2013), http://www2.epa.gov/hfstudy/key-issues-be-investigated-case-study-locations.

and investigations to determine the potential relationship between the concerns raised and natural gas drilling and production activities.[132] A progress report that was issued at the end of 2012 was expected to contain preliminary findings; but it mainly outlined methods and assured the public that the final report, due in 2014, will be thorough.[133]

This is not the first time the EPA has analyzed the potential impacts of natural gas drilling on groundwater. The EPA undertook a similar examination of the impact of coalbed methane production on water sources in 2004, although that study was more limited in scope than the current study.[134] Also, while the current study does represent the most comprehensive approach the EPA has yet taken, it will not cover all potential risks of hydraulic fracturing, such as air quality, aquatic and terrestrial ecosystem effects, seismic risk, public safety concerns, occupational risks, and economic effects, all of which the agency has recommended be examined in the future.[135] The study is likely to lead to some regulatory response, although just what that would include cannot be predicted at this point.

The EPA is also playing a more significant regional oversight role in some states with regard to certain aspects of hydraulic fracturing, such as the handling of flowback and other drilling waste. It plans to proceed with permit application review and issuance of UIC wells for disposal of fluids associated with gas production.

As noted previously, in the spring of 2012, the EPA published regulations that limit emissions of VOCs and methane from hydraulic fracturing.[136] Those rules apply to new wells drilled

132. Mike Soraghan, *Frack Study's Safety Exaggerated, Bush EPA Official Says*, N.Y. TIMES (May 20, 2011), http://www.nytimes.com/gwire/2011/05/20/20greenwire-frack-studys-safety-findings-exaggerated-bush-65374.html.

133. ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES: PROGRESS REPORT (2012), http://www2.epa.gov/sites/production/files/documents/hf-report20121214.pdf.

134. *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs Study*, ENVTL. PROT. AGENCY (Mar. 6, 2012), http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_coalbedmethanestudy.cfm.

135. *Questions and Answers about EPA's Hydraulic Fracturing Study*, ENVTL. PROT. AGENCY (Mar. 18, 2013), http://www2.epa.gov/hfstudy/questions-and-answers-about-epas-hydraulic-fracturing-study.

136. *Oil and Natural Gas Air Pollution Standards: Regulatory Actions*, ENVTL. PROT. AGENCY (Mar. 28, 2013), http://www.epa.gov/airquality/oilandgas/actions.html.

after August 23, 2011, and refracturing of existing wells drilled before August 23, 2011.[137] New wells drilled prior to January 1, 2015, must use completion combustion devices (pit flaring) or reduced emissions completions (RECs) with a completion combustion device.[138] A REC separates gas and liquid hydrocarbons from flowback during well preparation through gas gathering lines, collected systems, sand traps, surge vessels, and separator tanks.[139] Significantly, in the final rule, the EPA did not specify the particular REC technology to be used.[140] Beginning January 1, 2015, owners and operators of new or refractured wells must capture the gas and will not be permitted to flare it, including through RECs.[141]

The rules establish certain exceptions. Combustion devices are not required if they are a safety hazard or prohibited by state law.[142] Wildcat wells or delineation wells do not need RECs but must use combustion devices.[143] Also exempt from regulation are low-pressure wells (coalbed methane).[144] The rules establish short pre-notification requirements and annual recordkeeping requirements.[145]

Industry was quite critical of the rule as first proposed.[146] The EPA did make significant changes in response to many of the concerns raised, including extending the compliance requirement to 2015, not specifying a REC technology, and not regulating past the point where gas enters the transmission pipeline.[147] But the EPA rejected an industry request to exempt

137. *Summary of Requirements for Processes and Equipment at Natural Gas Well Sites*, ENVTL. PROT. AGENCY 1–5 (Apr. 2012), http://www.epa.gov/airquality/oilandgas/pdfs/20120417summarywellsites.pdf.

138. *Information for States on Attainment Planning, Permitting and Compliance*, ENVTL. PROT. AGENCY (2012), http://www.epa.gov/airquality/oilandgas/pdfs/20120419infoStates.pdf.

139. *Reduced Emissions Completions for Hydraulically Fractured Natural Gas Wells*, ENVTL. PROT. AGENCY (2011), http://www.epa.gov/gasstar/documents/reduced_emissions_completions.pdf.

140. *See Information for States*, *supra* note 138.

141. *Id.*

142. *Summary of Requirements*, *supra* note 137, at 1.

143. *Id.* at 2.

144. *Id.*

145. EPA Standards of Performance for Crude Oil and Natural Gas, 40 C.F.R. § 60.5420 (2012).

146. *See* John M. Broder, *U.S. Caps Emissions in Drilling for Fuel*, N.Y. TIMES (Apr. 18, 2012), http://www.nytimes.com/2012/04/19/science/earth/epa-caps-emissions-at-gas-and-oil-wells.html.

147. *Summary of Requirements*, *supra* note 137, at 1–5.

wells with limited amounts of VOCs.[148] The rules are currently in effect, although they are being challenged by a number of parties.[149]

The EPA, in the spring of 2012, issued draft guidance under the SDWA for the use of diesel fuels in natural gas production.[150] In the Energy Policy Act of 2005, the so-called "Halliburton exemption" codified the longstanding practice of excluding hydraulic fracturing wastewater from the "hazardous" category, and thus the need to obtain separate permits, under the UIC rules except when diesel is included as an ingredient in the fracturing fluids that are pumped into the well.[151] Though diesel use was more widespread in the past than it is today, diesel is still used in certain situations where no good substitute is available, such as drilling that takes place in very cold climates.[152] The EPA's draft guidance relates to the definition of diesel, which has been under debate for some time.[153] Depending on the properties selected to characterize what qualifies as diesel, there is the risk that it may be so broadly defined as to bring innocuous substances, such as cooking oil, into the scope of the law.[154] The EPA has recommended using six Chemical Abstracts Service Registry Numbers to identify what substances would require the UIC permit because these substances contain the term "diesel" in their primary name and/or common synonyms under the Toxic Substances Control Act Inventory. The EPA is also considering variations in permitting requirements for the use of diesel fuels in fracking, such as duration of the UIC

148. *Id.*

149. *See* Broder, *supra* note 146.

150. Request for Comment on Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels-Draft: Underground Injection Control Program Guidance #84, 77 Fed. Reg. 27451 (May 10, 2012), *available at* https://www.federalregister.gov/articles/2012/05/10/2012-11288/permitting-guidance-for-oil-and-gas-hydraulic-fracturing-activities-using-diesel-fuels-draft.

151. 42. U.S.C. § 300(h)(d)(1)(B) (2012).

152. Lauren Donovan, *Helms Says EPA Could Halt Fracking in Oil Patch,* BISMARCK TRIB. (Nov. 27, 2011), http://bismarcktribune.com/news/state-and-regional/helms-says-epa-could-halt-fracking-in-oil-patch/article_fe9a3284-18b9-11e1-ba39-001cc4c03286.html.

153. Mike Soraghan, *Democrats Want Broad Definition of Diesel in Fracking Rules,* N.Y. TIMES, Aug. 8, 2011, http://www.nytimes.com/gwire/2011/08/08/08greenwire-democrats-want-broad-definition-of-diesel-in-f-29231.html.

154. *Diesel vs. Biodiesel vs. Vegetable Oil,* CONSUMERREPORTS.ORG, April 2009, http://www.consumerreports.org/cro/2012/05/diesel-vs-biodiesel-vs-vegetable-oil/index.htm.

requirements.[155]

The EPA has also responded to local community concerns over alleged contamination of groundwater from hydraulic fracturing. In the most significant case to date, residents in Dimock, Pennsylvania alleged that their groundwater had been contaminated by hydraulic fracturing activities in the nearby Marcellus Shale. These claims drew significant public attention. However, the EPA determined through several rounds of testing that drinking water in Dimock is safe for consumption and is not contaminated by hydraulic fracturing.[156]

Pursuant to its authority under CERCLA, the EPA initiated a groundwater investigation of the Wind River water formation near the town of Pavillion, Wyoming.[157] The Pavillion gas field overlies the Wind River Formation and consists of 169 production wells that extract gas from the lower Wind River Formation and underlying Fort Union Formation.[158] In this area, the shale plays are very shallow and well fracturing took place at depths of only 372 meters below ground surface with associated surface casing as shallow as 110 meters below ground surface.[159] The EPA collected aqueous samples from thirty-five domestic wells (including two samples from post reverse osmosis systems) in the area of investigation and from two municipal wells in the town of Pavillion.[160] Detection of elevated levels of methane and diesel range organics in deep domestic wells prompted the EPA to install two deep monitoring wells in June 2010 to differentiate potential deep (*e.g.*, gas production related) versus shallow (*e.g.*, pits) source soft groundwater contamination.[161] Monitoring wells were screened at a variety of depths. Both chemicals associated with hydraulic fracturing fluids and elevated levels of methane were found in the samples, though at different concentrations,

155. *Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels—Draft: Underground Injection Control Program Guidance #84*, ENVTL. PROT. AGENCY 6–11 (May 2012), http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hfdieselfuelsguidance508.pdf.

156. ENVTL. PROT. AGENCY, *supra* note 28.

157. DIGIULIO ET AL., *supra* note 29 (investigation of groundwater contamination near Pavillion, Wyoming).

158. *Id.* at xi.

159. *Id.*

160. *Id.* at 5.

161. *Id.*

depending on the depths from which the samples were taken.[162] The EPA stated that the data, taken as a whole, was consistent with a conclusion that hydraulic fracturing in the area may have been the cause, however, more studies would need to be conducted, as the EPA study did not have any data on the area prior to the drilling of the wells.[163] Further, while the report did not conclude that hydraulic fracturing contaminates water sources generally,[164] this marked the first time that the EPA linked groundwater contamination to shale gas production. The EPA cautioned that hydraulic fracturing practices vary from region to region, and that those used in Pavillion, where the shale plays are particularly shallow, are not necessarily reflective of the industry as a whole.[165] The report has been widely criticized, including by state regulators, both for its methodology and for the lack of baseline data to support the conclusions.[166]

B. *The Department of the Interior*

The Department of the Interior has unveiled a plan to automate and streamline the Bureau of Land Management's permitting process for oil and gas drilling on federal lands.[167] By implementing a new automated system designed to track permit applications through the entire review process and quickly flag missing or incomplete information, permitting time delays are expected to be greatly reduced.

The BLM has also issued proposed rules related to the protection of water quality in connection with hydraulic

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162. *Id.*

163. *Id.* at 39.

164. *See* ENVTL. PROTECTION AGENCY, *supra* note 155.

165. *See id.* at 39.

166. *See, e.g.*, Peter R. Wright et al., *Groundwater-Quality and Quality-Control Data for Two Monitoring Wells near Pavillion, Wyoming, April and May 2012*, U.S. GEOLOGICAL SURVEY (2012), http://pubs.usgs.gov/ds/718/; *see also API's Review of Recent USGS Pavillion, Wyoming Reports Show USGS Groundwater Sampling Results Differ From EPA's Results in 2011 Draft Report*, AM. PETROL. INST. 1 (Oct. 2012), http://www.api.org/~/media/Files/News/2012/12-October/Pavilion_Review_v4.pdf; Laura Zuckerman, *Conflicting Reports Fuel Fracking Debate Tied to Wyoming Town*, REUTERS (Sep 28, 2012), http://www.reuters.com/article/2012/09/29/us-usa-fracking-wyoming-idUSBRE88S00020120929.

167. Press Release, Bureau of Land Mgmt., Secretary Salazar Visits North Dakotas Oil Boom; Unveils Initiatives to Accelerate Drilling Permits and Leases on Federal Lands (Apr. 3, 2012), *available at* http://www.blm.gov/co/st/en/BLM_Information/newsroom/2012/secretary_salazar.html.

fracturing activities on federal and tribal lands.[168] These rules will impact drilling activity on public lands across the U.S., but particularly in the western part of the country, where BLM manages nearly 700 million subsurface acres of federal mineral estate and 56 million subsurface acres of Indian mineral estate. Similar to what is required by many state laws,[169] the rules include requirements for disclosure of chemical ingredients in fracturing fluids, as well as rules on wellbore integrity and wastewater management.[170] Pre-approval will have to be obtained for hydraulic fracturing (and refracturing) operations.[171] Operators will be required to submit detailed plans before stimulating wells, including keeping "cement bond" logs proving that usable water has been isolated, and then, within thirty days of completion, operators will need to provide information on how the job was actually performed.[172] Additionally, drilling companies will be asked to identify the source and location of water to be used as a base fluid and must submit well stimulation design information, methods for handling recovered fluids, results of mechanical integrity testing of well casings, and certification that treatment fluid complies with all applicable federal, state, tribal, and local requirements.[173] Following receipt of more than 170,000 comments on its proposal, the BLM revised its initial version of the draft rules, and attempted to strike a balance between commercial and environmental interests.[174] Of particular note, in recognition of the many states that have adapted effective regulations on the practice, the revised rule allows the BLM to grant a variance that would apply to all lands within boundaries of states or tribes where the Bureau determines existing state or tribal regulations would meet or exceed the effectiveness of the proposed rule.[175]

168. *See* Bureau of Land Management, *supra* note 126.
169. *See A Review of Shale Gas Regulations by State, supra* note 100.
170. *See* Bureau of Land Management, *supra* note 126.
171. *Id.* §§ 3162.3-2(a), 3162.3-3(a), (c), 3162.3-3(e).
172. *Id.* § 3162.3-3(e).
173. *Id.* § 3162.3-3(d).
174. Interior Releases Updated Draft Rule for Hydraulic Fracturing on Public and Indian Lands for Public Comment: Commonsense Measure Will Support Safe and Responsible Production of America's Domestic Energy Resources, BUREAU OF LAND MGMT. (May 16, 2013), http://www.blm.gov/wo/st/en/info/newsroom/2013/may/nr_05_16_2013.html.
175. *Id.*

C. *The Department of Energy*

One of the most significant influences that the DOE is likely to have on the industry, both in the near and long term, concerns whether or not to approve exports of natural gas. While the U.S. is blessed with abundant supplies of shale gas that currently exceed market demand, tending to support the case for exports, policymakers are concerned about the long-term effects of natural gas exports on domestic supplies and price.[176] Currently there is a backlog of export applications at the DOE while the agency sorts out the potential long-term impacts.[177]

Liquefied natural gas (LNG) exports are regulated under Section 3 of the Natural Gas Act[178] (NGA), which permits the import or export of natural gas if it is determined to be "consistent with the public interest."[179] The responsibility for exports under NGA Section 3 is divided between the DOE, which has authority over the movement of natural gas across U.S. borders, and the Federal Energy Regulatory Commission (FERC), which has authority to license the siting and construction of import and export terminals.[180] To date, the DOE has taken the position that LNG exports to countries with which the U.S. has a Free Trade Agreement (FTA) requiring national treatment in trade in natural gas are deemed "consistent with the public interest."[181] At present, the U.S. has eighteen such arrangements.[182] It is possible that the DOE may also include countries that are in the process of negotiating such an agreement with the U.S. in the FTA group, although to date, that has not been tested.[183] LNG exports to non-FTA countries

176. Brad Plumer, *Why the Fight over Natural Gas Exports Might Be Overblown*, WASH. POST (Feb. 11, 2013, 2:27 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/11/why-the-fight-over-natural-gas-exports-may-be-overblown/.

177. Ted Sickinger, *Natural Gas Exports Bring Big Benefits to Economy, but Domestic Prices Could Rise*, THE OREGONIAN (Dec. 6, 2012), http://www.oregonlive.com/business/index.ssf/2012/12/natural_gas_exports_bring_big.html.

178. 5 U.S.C. § 717b (2012).

179. *Id.* § 717b(a).

180. *Id.* § 717b(e)(1).

181. *Id.* § 717b(c).

182. *How to Obtain Authorization to Import and/or Export Natural Gas and LNG*, DEP'T OF ENERGY, http://fossil.energy.gov/programs/gasregulation/How_to_Obtain_Authorization_to_Import_an.html#Free%20Trade (last visited Apr. 13, 2013).

183. At the time this article was written, the U.S. Senate was considering proposed legislation that would permit exports of natural gas to NATO countries and other strategic allies, such as Japan, on the same basis as FTA countries. *See* Expedited LNG for American Allies Act of 2013, S. 192, 113th Cong. (2013). The bipartisan group

require a specific case-by-case determination that the export is consistent with the public interest.[184] That public-interest determination can involve a number of factors, including the short- and long-term effects on U.S. energy markets, supplies, and price.[185]

In the few authorizations granted to date,[186] the DOE conditioned its export approval on the agency's continued monitoring of domestic supply and price conditions, and reserved for itself the right to take "appropriate actions" in the future if the "cumulative impacts" of its export authorizations subsequently lead to a reduction in the supply of natural gas needed to meet essential domestic needs.[187] Although the DOE has not elaborated on precisely what "appropriate actions" it might take if domestic natural gas prices reach unacceptable levels, it has indicated that it is prepared to take any and all actions permitted by existing authority.[188] The DOE appears to favor a cautious approach that would offer investors predictability. It does not appear that the DOE plans to use its export authority as a domestic price-maintenance mechanism. Instead, it is likely to focus on security of supply in a broader sense.

In 2011, the DOE temporarily suspended processing all pending applications for export authorization on hold pending further study as to how LNG exports would affect domestic natural gas and energy prices and the economy.[189] Two studies

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sponsoring the bill represents constituents amounting to approximately 67.5% of non-federal dry gas production in the United States.

184. 15 U.S.C. § 717b(a) (2012).

185. *See, e.g.*, Steven Miles & Thomas Eastment, *US Debate on LNG Exports Centered at Energy Department*, OIL & GAS J., (April 1, 2013), http://www.ogj.com/articles/print/volume-111/issue-4/special-report-lng-update/us-debate-on-lng-exports-centered.html; Adam James, *Natural Gas Revolution and Its Implications: LNG Exports 101*, THE ENERGY COLLECTIVE (Apr. 3, 2013), http://theenergycollective.com/adamjames/204676/lng-exports-101.

186. *See, e.g.*, Order Conditionally Granting Long-Term Authorization to Export LNG from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, Order No. 2961, DOE/FE Docket No. 10-111-LNG (May 20, 2011), *available at* http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders_Issued_2011/ord2961.pdf [hereinafter Sabine Pass].

187. *Id.* at 31–33.

188. *Id.*

189. *See, e.g., The Department of Energy's Program Regulating Liquefied Natural Gas Export Applications: Hearing Before the Subcomm. on Energy Policy, Health Care, and Entitlements of the H. Comm. on Oversight and Government Reform*, 113th Cong. (2013) (statement of Christopher Smith, Assistant Secretary for Fossil Energy (Acting), U.S. Department of

were commissioned to assess the "cumulative impacts" of exporting domestic natural gas. The first of those studies was performed by the Energy Information Administration (EIA) within the DOE and released in January 2012.[190] This report concluded that under all scenarios considered, exports of LNG will lead to higher domestic natural gas prices, increased domestic production, reduced domestic natural gas consumption, and increased natural gas imports from Canada.[191] The EIA also concluded that higher natural gas prices can be expected to lead to less natural gas and more coal consumption in the power generation sector, which, when combined with the effects of liquefaction equipment, would result in an increase in carbon dioxide emissions.[192] The second study, prepared by National Economic Research Associates, Inc. (NERA), was released in December 2012, and concluded that increased LNG exports, even under "stress cases" with high gas-production costs and significant demand for U.S. LNG in global markets, will yield net economic benefits to the U.S.[193] Different from the EIA study, the NERA report examined external factors such as whether or not the quantities of exports under consideration could be sold at prices that would support the calculated (increased) domestic prices and analyzed the level of U.S. exports that global markets realistically could be expected to absorb.[194] The report found some negative competitive effects to certain manufacturing segments of the economy with energy expenditures exceeding 5% of the value of output, particularly industries that process raw natural resources into bulk commodities.[195] However, the report noted that employment in these industries is one-half of 1% of total U.S. employment and

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Energy); Sabine Pass, *supra* note 186; Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas to Non-Free Trade Agreement Nations, Order No. 3282, DOE/FE Docket No. 10-161-LNG (May 17, 2013), *available at* http://energy.gov/fe/downloads/fe-docket-no-10-161-lng [hereinafter Freeport Order].

190. *Effect of Increased Natural Gas Exports on Domestic Energy Markets*, ENERGY INFO. ADMIN. (Jan. 2012), http://www.eia.gov/analysis/requests/fe/pdf/fe_lng.pdf.

191. *Id.* at 6.

192. *Id.*

193. *Macroeconomic Impacts of LNG Exports from the United States*, NERA ECON. CONSULTING (Dec. 2012), http://www.fossil.energy.gov/programs/gasregulation/reports/nera_lng_report.pdf.

194. *Id.* at 1–2.

195. *Id.* at 2.

that value added in these industries as a percentage of shipments is half of what it is in the remainder of the manufacturing sector.[196]

D. *The Securities and Exchange Commission*

The SEC has also inserted itself into the fracking conversation, sending letters to drilling companies seeking information about chemical use, including quantification estimates, to ensure accurate public disclosure.[197] The SEC has adopted disclosure rules under the Dodd–Frank Wall Street Reform and Consumer Protection Act pertaining to "resource extraction issuers." Such issuers include companies engaged in the commercial development of oil, natural gas, or minerals who are required to file annual reports with the SEC to disclose payments made by itself or its affiliates to the U.S. or foreign governments to further the commercial development of oil, natural gas, or minerals.[198]

E. *Other Potentially Applicable Federal Rules*

1. The Occupational Safety and Health Act

The Occupational Safety and Health Act sets standards to help keep workers safe.[199] These rules include requiring companies to maintain and have readily available on site Material Safety Data Sheets (MSDSs) for any chemicals used by workers at that

196. *Id. See also Liquid Markets: Assessing the Case of U.S. Exports of Liquefied Natural Gas*, BROOKINGS INST. (May 2012), http://www.brookings.edu/~/media/Research/Files/Reports/2012/5/02%20lng%20exports%20ebinger/0502_lng_exports_ebinger.pdf. The Brookings Institution, a think tank known for its work on economic and policy matters, concluded that exports of LNG from the U.S. will have only a "modest upward impact" on domestic prices and manufacturers. *Id.* at vi. The report urges U.S. lawmakers to take a laissez-faire approach and to refrain from actively promoting or limiting LNG exports through laws or regulations: "Efforts to intervene in the market by policy makers are likely to result in subsidies to consumers at the expense of producers, and to lead to unintended consequences." *Id.* at vii. The report notes the environmental concerns related to increased domestic natural gas production, but does not address changes in overall emissions other than to state that this will depend on whether LNG replaces renewables, coal, or nuclear generation. *Id.* at 44. Further studies by other groups are expected before the DOE, which has put permitting of LNG exports on hold temporarily, completes its assessment of the impact of LNG exports on the U.S. economy.

197. *See* Deborah Solomon, *SEC Bears Down on Fracking*, WALL ST. J. (Aug. 25, 2011), http://online.wsj.com/article/SB10001424053111904009304576528484179638702.html.

198. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 70116 (Nov. 23, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-11-23/pdf/2012-28455.pdf.

199. 29 U.S.C. §§ 651–678 (2012).

location.[200] State regulators also frequently require MSDSs to be filed and available to the public in connection with the issuance of various permits.[201]

2. Emergency Planning and Community Right-to-Know Act

The Emergency Planning and Community Right-to-Know Act[202] requires storage of regulated chemicals above certain quantities to be reported annually to local and state emergency responders.[203]

V. REGIONAL AND STATE REGULATION AND TRENDS

A. *Overview of U.S. Legal and Regulatory Regimes for Water Use*

Water withdrawals are primarily a matter of state law in the U.S.[204] The federal government may become involved to the extent that water withdrawals are made from waters on federal lands or from federal multipurpose water projects, such as federally managed reservoirs, or to the extent that they affect navigable streams under federal jurisdiction.[205] The federal government may also become involved where tribal water resources are at issue, where there are interstate disputes over rights to waters flowing through streams, or where there are fish and wildlife species at risk.[206] A host of federal agencies may be involved, depending on the particular water resource. However, most regulation of water use will occur at both the state and regional level.[207]

There are three primary water use regimes in the U.S. Most

200. 29 C.F.R. § 1910.1200(g)(8) (2013).

201. *See, e.g.*, OHIO REV. CODE § 1509.10(E) (2013).

202. Emergency Planning and Community Right-to-know Act of 1986, 42 U.S.C. §§ 11001-11050 (2006). *See also Summary of the Emergency Planning & Community Right-to-Know Act*, ENVTL. PROT. AGENCY, http://www.epa.gov/lawsregs/laws/epcra.html (last visited Apr. 13, 2013).

203. 40 C.F.R. § 355 (2011).

204. *Assessing the Environmental Risks of the Water Bottling Industry's Extraction of Groundwater Before the U.S. H.R. Oversight and Gov't Reform Domestic Policy Subcomm.*, 110th Congress 2 (2007) (statement of Noah D. Hall, Assistant Professor of Law, Wayne State University Law School).

205. *Id.* at 11–14; Stephen H. Greetham, *Water and Tribal Authority: Managing Legal Uncertainties*, W. STATES LAND COMM'RS ASS'N, http://www.glo.texas.gov/wslca/pdf/presentations-2013/managing-legal-uncertainty.pdf (last visited Apr. 13, 2013).

206. Hall, *supra* note 204.

207. Hall, *supra* note 204.

states east of the Mississippi River follow a common-law riparian rights system.[208] Most western states have a prior appropriation or first-beneficial-use regime.[209] And a handful of states follow a hybrid, or "regulated riparian" system.[210]

Under riparian rights rule, a water resource is shared by riparian users, *i.e.*, all those whose property touches the water resource.[211] There is no right to a certain amount of water during a shortage or when faced with competing uses.[212] Generally, the upstream landowner has priority with respect to water in streams touching his property and may withdraw unlimited amounts of water for domestic and reasonable extraordinary use on the property.[213] As for groundwater, the landowner may withdraw water underlying his property regardless of the effect on neighboring or downstream tracts.[214] Also, under the riparian rights rule, a transfer of water resources off the property was traditionally considered unreasonable per se, but that view has recently been modified to allow for some non-riparian uses, including municipal water supply, in some regions of the country.[215]

The rule of prior appropriation is a "first in time, first in line" rule.[216] For surface waters, the original user, regardless of whether he is downstream of subsequent competing uses, may generally take as much water as needed.[217] There is no obligation to share the resource.[218] Where two users are equal in their position in line, the tie goes to the "higher" use.[219] Groundwater

208. David Feldman, *Water Supply Challenges Facing Tennessee: Case Study Analyses and the Need for Long-Term Planning*, ENERGY, ENV'T AND RES. CTR. 22 (June 2000), *available at* http://eerc.ra.utk.edu/divisions/wrrc/water_supply/Report.PDF.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 24.

213. *Id.* at 24–25.

214. *Id.* at 27.

215. *Id.* at 31.

216. Lieutenant Colonel Michael J. Cianci, Jr. et al., *The New National Defense Water Right—An Alternative to Federal Reserved Water Rights for Military Installations*, 48 A.F. L. REV. 159, 160 (2000) (citing ROBERT E. BECK, 2 WATERS AND WATER RIGHTS 83 (1991)).

217. *See id.* ("This system of water law grants priority to senior historical water users."); Feldman, *supra* note 208, at 24 ("Appropriators whose rights are senior may take their full water rights even if the result is that there is not enough water left for junior appropriators to take for their needs.").

218. *See* Feldman, *supra* note 208, at 24 (noting that even during shortages, "there is no duty to abate use so as to share").

219. *See* David M. Howitt, Comment, *Oregon Water Management: The Need to Combat*

may be treated differently from one state to another. In some states, groundwater ownership is treated as a property right similar to ownership of minerals or oil and is "owned in place." This means that the landowner has the right to capture and pump as much as may be available, regardless of the effect on neighboring landowners.[220] In most states, groundwater remains with the surface estate if mineral rights are severed.[221]

In a hybrid system—also known as a "regulated riparian" system—water rights are allocated for periods of time by means of a permit with conditions, such as minimum flow requirements, to protect downstream users.[222] While restrictions on transfers are eased under that system, a requirement to compensate the basin of origin may remain.[223] Approximately one-third of states follow a hybrid water rights regime.[224] The Mid-Atlantic region of the U.S. has, in addition to state regulation, regional regulatory bodies that oversee water

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Water Spreading and Some Proposals for the Future, 9 J. ENVTL. L. & LITIG. 249, 254 (1994) (noting that, due to an Oregon statute, the Water Resources Commission can "classify the state's water sources as to their highest and best use, which can have the effect of restricting the water's future use").

220. *See* Gerald Torres, *Liquid Assets: Groundwater in Texas*, 122 YALE L.J. ONLINE 143 (2012), http://yalelawjournal.org/the-yale-law-journal-pocket-part/property-law/liquid-assets:-groundwater-in-texas/ ("Texas is conventionally considered a 'rule of capture' state with regard to groundwater. Although sometimes referred to as an 'absolute ownership regime,' the rule of capture means that if you can reduce the groundwater to possession, it is yours. This right is not unlimited, and the water is protected from your neighbor's usurpation by a liability rule while it is in the ground. That is, your neighbor can pump water from a well on his land, and as long as he does not commit a trespass, his possession of the groundwater is protected even if he injures your capacity to use the groundwater.") (footnotes omitted).

221. *See* Taelor A. Allen, Comment, *The South Texas Drought and the Future of Groundwater Use for Hydraulic Fracturing in the Eagle Ford Shale*, 44 ST. MARY'S L.J. 487, 498 (2012) ("In the context of oil and gas exploration and the conveyance of mineral rights, it is important to note that groundwater in Texas is legally a part of the surface estate, rather than the mineral estate." (citing Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.))).

222. *See* Feldman, *supra* note 208, at 28 ("[P]ermit[s] issued under regulated Riparianism are not as secure as are those represented by the prior appropriation doctrine. They are limited in time and administrative officials retain substantial discretion to alter permittees' rights.") (footnote omitted); Christine A. Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 411 ("[R]egulated riparianism . . . . provide[s] for the protection of minimum flows . . . .") (footnotes omitted).

223. *Cf.* Klein, *supra* note 222, at 459 (discussing regulations allowing "transbasin diversions" while providing for the protection of "basin[s] of origin" and for compensation to "source watersheds").

224. ANDREW L. ZAESKE, WATER USE AND AGRICULTURE PRODUCTION: A COUNTY LEVEL ANALYSIS OF THE CONTINENTAL UNITED STATES 10 (2013), *available at* http://www4.ncsu.edu/~xzheng/zaeske-paper.pdf.

quantity (and quality) issues under a regulated riparian system.[225] The Delaware River Basin Commission (DRBC) (comprised of representatives from New Jersey, New York, Pennsylvania, and Delaware), the U.S. Army Corps of Engineers (the Corps),[226] and the Susquehanna River Basin Commission (SRBC) (including Maryland, Pennsylvania, New York, and the Corps)[227] each provide drinking water to millions of customers within their regions and are responsible for handling permit requests for water withdrawals in their respective river basins.

B. *Interstate Water Commissions in the Marcellus Region*

1. Water Use

Water allocation in the Marcellus region is slightly different in that regulation is divided depending on the water resource in question.[228] In most states, state regulatory bodies handle withdrawal permitting. But in the Delaware and Susquehanna River basins, the multistate river basin commissions noted earlier grant water allocation permits for withdrawals of surface or groundwater greater than 100,000 gallons per day.[229] In addition, the DRBC requires permits for withdrawals greater than 10,000 gallons per day in certain regions deemed to be "Groundwater Protection Areas."[230] These commissions also have the authority to require reductions in consumptive uses during droughts and can require payment of fees to provide storage in reservoirs for release during low flows.[231] Additionally, the commissions

225. *See* PENN. STATE COLL. OF AGRIC. SCIS. COOP. EXTENSION, RIVER BASIN APPROACHES TO WATER MANAGEMENT IN THE MID-ATLANTIC STATES 4 (2010), *available at* http://pubs.cas.psu.edu/FreePubs/pdfs/ua466.pdf (discussing the formation of the multistate Delaware River Basin Commission).

226. *See generally* DEL. RIVER BASIN COMM'N, http://www.state.nj.us/drbc/ (last visited May 14, 2013).

227. *See generally* SUSQUEHANNA RIVER BASIN COMM'N, http://www.srbc.net/ (last visited May 14, 2013).

228. *See Marcellus Education Fact Sheet: Water Withdrawals for Development of Marcellus Shale Gas in Pennsylvania*, PENN. STATE UNIV. COLL. OF AGRIC. SCIS. COOP. EXTENSION, 4–5 (2010), *available at* http://pubs.cas.psu.edu/freepubs/pdfs/ua460.pdf (noting the issues about which the commissions are concerned and the necessity of seeking commission approval prior to drilling).

229. ARTHUR ET AL., *supra* note 66, at 14.

230. *Id.* at 18.

231. *See* Albert R. Jarrett, *Consumptive Water Use Restrictions in the Delaware River Basin*, PENN. STATE UNIV. COLL. OF AGRIC. SCIS. COOP. EXTENSION, 1 (2013), *available at* http://pubs.cas.psu.edu/freepubs/pdfs/fl99.pdf.

monitor water quality, resolve disputes over competing uses, and issue exploration and drilling permits within their respective jurisdictions.[232]

With respect to water resources not under the jurisdiction of the DRBC or the SRBC, the states each have their own system of overseeing and permitting water withdrawals.

2. Water Quality

The DRBC was expected to vote on proposed water quality regulations that would apply to *any* natural gas exploration or production activity in the Delaware River Basin at the end of 2011.[233] For the past several years, there has been a moratorium on drilling in the Delaware River Basin pending agreement within the DRBC on regulations that would apply to natural gas development projects.[234] While no drilling for production is taking place at this time, more than 10,000 leases are held in anticipation of issuance of the regulations.[235] However, the vote was postponed after the Governor of Delaware announced he would vote against the regulations.[236] New York's Governor had indicated he would hold off support pending an environmental analysis by his state's Department of Environmental Conservation, which is expected to be completed sometime in 2012.[237] Pennsylvania and New Jersey were expected to support the proposed regulations, but how the Corps representative was planning to vote was unknown. Given the uncertainty of the

232. PENN. STATE UNIV. COLL. OF AGRIC. SCIS. COOP. EXTENSION, *supra* note 228, at 4–5 (discussing the issues about which the commissions are concerned, and noting the necessity of seeking commission approval prior to drilling).

233. *Delaware River Basin Commission: Battleground for Gas Drilling*, STATEIMPACT, http://stateimpact.npr.org/pennsylvania/tag/drbc/ (last visited Apr. 13, 2013).

234. *Id.*

235. *See* Susan Phillips, *Gas Drilling Along the Delaware River Remains Uncertain*, STATEIMPACT (Nov. 21, 2011), http://stateimpact.npr.org/pennsylvania/2011/11/21/gas-drilling-along-the-delaware-river-remains-in-limbo/ ("[A] drilling moratorium exists until the regulatory agency that oversees drilling in areas near the Delaware river implements new drilling rules."); *see also* Associated Press, *Key Delaware River Gas Drilling Vote Postponed*, WALL ST. J. (Nov. 18, 2011), http://online.wsj.com/article/APa11d7405f6524fcaba568158a09764df.html.

236. Bryan Walsh, *Political Fractures over Fracking, Science & Space*, TIME (Nov. 21, 2011), http://science.time.com/2011/11/21/political-fractures-over-fracking/.

237. DEL. RIVER BASIN COMM'N, MEETING OF DECEMBER 8, 2011 MINUTES, Series 2011 No. 6, at 5 (Dec. 8, 2011), *available at* http://www.nj.gov/drbc/library/documents/12-8-11_minutes.pdf.

outcome, the vote was postponed indefinitely.[238] A new date for the vote has not yet been determined. Some groups have suggested that the solution is for Pennsylvania to withdraw from the DRBC.[239]

C. *Key State Regulations and Trends*

1. New York

a. *Regulation of Water Use*

Until recently, outside of the interstate commissions, water withdrawals in New York were not comprehensively regulated.[240] Previously, permits were required only for public water supply withdrawals and certain other uses in some counties.[241] Today, all water withdrawal systems with a capability of withdrawing 100,000 gallons per day (gpd) or more must be permitted, and water use from those systems must be reported annually.[242] Additionally, registration is required for large volumes of withdrawals in the Great Lakes Basin for any existing agricultural withdrawals of greater than 100,000 gpd and for any major basin water diversions of greater than 1,000,000 gpd.[243] The New York State Department of Environmental Conservation oversees the permitting process.[244]

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238. *See* STATEIMPACT, *supra* note 233 (describing the cancellation of the vote and the lack of future plans to reschedule it).

239. *See, e.g.*, Greg Little, *Delaware River Basin Commission Meeting Canceled*, WAYNE INDEP. (Nov. 18, 2011), http://www.wayneindependent.com/article/20111118/NEWS/311189998.

240. *See Water Withdrawal Permits*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/86935.html (last visited May 14, 2013) (comparing the old and the new regulatory schemes).

241. *Id.*

242. *Id.*; N.Y. ENVTL. CONSERVATION § 15-3301 (McKinney 2013). *See generally Water Withdrawals for Non-Agricultural Facilities*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/55509.html (last May 14, 2013) (regarding withdrawals generally).

243. *See Great Lakes Water Withdrawal & Registration*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/25581.html (last visited May 14, 2013) (regarding withdrawals from the Great Lakes); *Water Withdrawals for Agricultural Facilities*, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/86747.html (last visited May 14, 2013) (regarding agricultural withdrawals).

244. *Water Withdrawal, Conservation & Drought*, N.Y. DEP'T OF ENVTL. CONSERVATION (2013), http://www.dec.ny.gov/lands/313.html (last visited May 14, 2013).

b. *Protection of Water Quality*

Due to concerns over potential groundwater contamination, particularly in the New York City watershed, New York has taken a very cautious regulatory approach to natural gas drilling.[245] By preventing the issuance of new permits for high-volume hydraulic fracturing in the state pending the outcome of a study by the state Department of Environmental Conservation (NYDEC) (the Supplemental Generic Environmental Impact Statement or SGEIS),[246] New York has created a de facto moratorium on the process.[247] In 1992, the NYDEC concluded that drilling activity would not likely have significant environmental impact provided certain conditions were met.[248] But like the 2004 EPA study, that study did not specifically examine horizontal drilling and high-volume hydraulic fracturing techniques.[249] The SGEIS updated the earlier report on the impacts of natural gas development, with greater attention paid to new technologies and to derivative issues, such as solid and liquid waste disposal, potential for gas migration resulting from hydraulic fracturing, and noise and air pollution risks.[250]

The draft report, released in 2011, included the following recommendations[251]:

245. *See* Steve Hargreaves, *New York Set to Lift Fracking Ban*, CNN MONEY (July 1, 2001, 2:33 PM), http://money.cnn.com/2011/07/01/news/economy/fracking_new_york/index.htm.

246. *Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs* (Revised Draft), N.Y. STATE DEP'T OF ENVTL. CONSERVATION (Sept. 7, 2011), http://www.dec.ny.gov/energy/75370.html.

247. *See NY Assembly Votes to Extend Fracking Moratorium Until 2015*, AOL ENERGY (April 6, 2013), http://energy.aol.com/2013/03/14/ny-assembly-extends-fracking-moratorium-until-2015/.

248. *See 1992 Findings Statement for Oil and Gas GEIS*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/25581.html (last visited Apr. 14, 2013) (noting that the GEIS recommended changes to the regulatory structure based on environmental concerns).

249. *See Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (GEIS)*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/45912.html (last visited May 14, 2013) (noting that hydraulic fracturing and horizontal drilling necessitated a new environmental study).

250. *SGEIS on the Oil, Gas and Solution Mining Regulatory Program: Well Permit Issuance for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/47554.html (last visited May 14, 2013).

251. A final report was expected at the end of 2012. However, in December 2012, following receipt of more than 60,000 comments, the NYDEC released a revised draft

- The imposition of a permanent ban on drilling in the New York City and Syracuse watersheds, as well as within the vicinity of any primary aquifer or public water supply well or reservoir, or near the private water well of a domestic use spring;
- A ban on surface drilling on state-owned land, including parks and wildlife management areas; and
- Strict controls on high volume fracturing on private lands.

Among other recommendations, the draft SGEIS indicated that the current statewide moratorium on high-volume hydraulic fracturing may become permanent in the New York City and Syracuse watersheds, on primary aquifers, on certain state lands, and in floodplains.[252] Drilling or fracking within 2,000 feet of public drinking water supplies and within 500 feet of private water wells would also be prohibited unless the landowner provides a waiver.[253] Drilling permit holders would be required to draft stormwater pollution prevention plans and to implement control measures to minimize discharge of pollutants.[254] Minimum requirements related to construction and maintenance of the wells—most of which reflect current industry standards—would also be imposed on operators.[255] The draft SGEIS would also direct companies to file detailed transportation plans and report on the condition of the roads that they want to use to explore and develop natural gas resources in the state, and would impose limits on where companies can place wells or well pads. With respect to groundwater contamination from fluids escaping from the wellbore or the potential migration of natural gas to a water well, the report concluded that the risk was minimal as long as the well is properly constructed.

On May 15, 2012, a new study was released by the Shale

SGEIS and a Notice of Continuation for the related rulemaking proceeding. N.Y. DEP'T OF ENVTL. CONSERVATION, *supra* note 249; *High Volume Hydraulic Fracturing Proposed Regulations*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/regulations/77353.html (last visited May 14, 2013).

252. N.Y. DEP'T OF ENVTL. CONSERVATION, *supra* note 249, at Executive Summary 20–27.

253. *Id.* at 21–22.

254. *Id.* at ch. 1, 11, ch. 7, 26–29.

255. *Id.* at ch. 7, 49–55.

Resources and Society Institute at the University of Buffalo.[256] That study found that increased state oversight combined with improved industry practices and technological advances resulted in safer natural gas drilling and production in Pennsylvania, New York's neighbor situated at the heart of the Marcellus Shale boom.[257] The study also concluded that the regulations proposed by the NYDEC are likely sufficient to mitigate the risk of most of the kinds of problems that Pennsylvania has seen as its industry has grown.[258] Opponents of drilling in New York have taken little comfort in the report, which they have asserted was too narrow in scope.[259] However, the report represented the first time that the environmental risks of hydraulic fracturing in that region had been analyzed based on actual data rather than anecdotal evidence.[260]

The New York State Assembly has also taken steps to expand the study of possible impacts of fracking.[261] In 2012, they included a fracking health study in a state budget proposal,[262] and also passed a bill requiring the study of the public health effects associated with high-volume hydraulic fracturing, including the impact on air quality and water contamination, with particular emphasis on the effects on childhood development.[263] That study was intended to complement the SGEIS, and in March 2013 the state assembly voted to extend the fracking moratorium until May 2015 to allow for an even more extensive assessment of the health impacts of drilling,[264]

256. Cory Nealon, *UB's Shale Resources and Society Institute Examines Violations in Developing Natural Gas in Pennsylvania's Marcellus Shale*, UNIV. OF BUFFALO NEWS CTR. (May 15, 2012), http://www.buffalo.edu/news/releases/2012/05/13434.html.

257. *Id.*

258. *Id.*

259. *See The UB Shale Play: Distorting the Facts about Fracking: A Review of the University at Buffalo Shale Resources and Society Institute's Report on "Environmental Impacts During Marcellus Shale Gas Drilling,"* PUB. ACCOUNTABILITY INITIATIVE 5 (2012), *available at* http://public-accountability.org/wp-content/uploads/UBShalePlay.pdf (implying the report may have defined what constitutes an "environmental event" too narrowly).

260. Nealon, *supra* note 256 (quoting Timothy J. Considine).

261. Mary Esch, *NY Assembly Calls for Fracking Health Impact Study*, YAHOO! FINANCE (Mar. 13, 2012), http://finance.yahoo.com/news/ny-assembly-calls-fracking-health-145806930.html.

262. *Id.*

263. *See* N.Y. STATE ASSEMB. B. NO. A10234, 2012 Leg., (N.Y. 2012), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A10234&term=2011&Summary=Y&Actions=Y&Votes=Y&Text=Y.

264. N.Y. STATE ASSEMB. B. NO. A05424A, 2013 Leg. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A05424&term=2013&Summ

although at the time of this writing the prospects that the extension will take effect are uncertain.

Meanwhile, because not all drilling activity is banned in New York under the moratorium, some companies are exploring the possibility of using liquefied petroleum gas to fracture the shale rock underlying the state.[265] Not surprisingly, this has alarmed environmental groups, particularly because this technique is not within the scope of the SGEIS.[266]

On the local level, anti-drilling landowners in upstate New York have been successful in passing drilling bans in numerous small towns.[267] However, now some pro-drilling landowner groups are beginning to join together to attempt to overturn local fracking bans.[268] The arguments they have raised range from the violation of zoning and land-use ordinances and procedures to preemption of state law in the area of mining regulation, which includes oil and gas extraction and pollution controls. More than fifty towns in the state have passed fracking bans, while dozens more have put temporary moratoriums into place, with other towns considering similar ordinances, though the state assembly's passage of a continued moratorium may preclude the need for any additional local laws.[269]

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ary=Y&Actions=Y&Votes=Y&Text=Y.

265. *See, e.g.*, *eCORP Tests New Waterless LPG Fracking Method on First Shale Well*, MARCELLUS DRILLING NEWS (Jan. 9, 2013), http://marcellusdrilling.com/2013/01/ecorp-tests-new-waterless-lpg-fracking-method-on-first-shale-well/.

266. *See, e.g.*, Letter from Walter Hang et al., Toxics Targeting, to The Honorable Andrew M. Cuomo, Governor of New York, *available at* http://www.toxicstargeting.com/MarcellusShale/documents/letters/2012/12/07/doh-review.

267. *See, e.g.*, Daniel Wiessner, *N.Y. Appeals Court Hears Arguments in Drilling Ban Cases*, THOMSON REUTERS (Mar. 31, 2013), http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/N_Y__appeals_court_hears_arguments_in_drilling_ban_cases/; *New York Town Bans Fracking Discussions*, RT (Feb. 13, 2013), http://rt.com/usa/new-fracking-board-sanford-138/.

268. *See, e.g.*, Daniel Wiessner, *New York Landowners Seek to Overturn Fracking Ban*, REUTERS (Mar. 31, 2012), http://www.reuters.com/article/2012/06/01/us-usa-fracking-ban-idUSBRE85001E20120601; *Some NY Towns Want Fracking, Association Doesn't Speak for Them*, MARCELLUS DRILLING NEWS (Feb. 18, 2013) http://marcellusdrilling.com/2013/02/some-ny-towns-want-fracking-association-doesnt-speak-for-them/.

269. *See* Chris Dolmetsch & Danielle Sanzone, *N.Y. Dairy Farm with Gas Leases Urges End to Drill Ban*, BLOOMBERG (March 21, 2013), http://www.bloomberg.com/news/2013-03-21/n-y-dairy-farm-with-gas-leases-urges-end-to-drill-ban.html ("Fracking already is banned in more than 50 New York towns, while dozens more have moratoriums in place or are considering bans, according to Karen Edelstein, a geographic information-systems consultant in Ithaca.").

2. Pennsylvania

Pennsylvania has more hydraulic fracturing operations ongoing than any of its neighboring states. Pennsylvania's vigilant Department of Environmental Protection (PaDEP) is highly responsive to public concerns and is actively involved in regulation and oversight of the numerous drilling operations taking place within the state.[270]

a. *Water Use*

Pennsylvania has no statewide comprehensive regulation of water withdrawals. As part of its permitting process for wells, Pennsylvania requires applicants to identify the water source that will be used in drilling operations, so that the possible impact on it may be studied if necessary.[271] The PaDEP grants allocation permits to public water systems that use surface water, while the state Fish and Boat Commission monitors the effects of actual and proposed withdrawals on stream flows and aquatic habitats.[272] Uses other than public uses that involve withdrawals of 10,000 or more gallons per day over any thirty-day period must be registered and reported to the PaDEP.[273]

b. *Water Quality*

In addition to administering and enforcing compliance with permitting requirements, waste controls, and extensive recordkeeping and reporting requirements, the PaDEP studies the effect of wastewater on rivers and other water sources within the state.[274] In response to regulatory gaps that have become apparent as the natural gas industry has grown, the state has

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270. *See Public Participation*, PA. DEP'T OF ENVTL. PROT., OFFICE OF EXTERNAL AFFAIRS, http://www.depweb.state.pa.us/portal/server.pt/community/public_participation/13785 (last visited May 14, 2013).

271. *Drilling for Natural Gas in the Marcellus Shale Formation Frequently Asked Questions*, PA. DEP'T OF ENVTL. PROT. 1 (Oct. 14, 2008), http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/MarcellusShale/MarcellusFAQ.pdf.

272. *Pennsylvania's Surface Water Allocation Program*, PA. DEP'T OF ENVTL. PROT. 1 (Feb. 2012), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-87495/3940-FS-DEP4107.pdf; *Environmental Services*, PA. FISH AND BOAT COMM'N, http://fishandboat.com/environ.htm (last visited May 14, 2013).

273. *See, e.g.*, 27 PA. CONS. STAT. ANN. §§ 3111–20 (West 2003); 25 PA. CODE § 110 (2008).

274. Susan Phillips, *PA DEP to Study Radiation Related to Marcellus Shale*, STATEIMPACT (Jan. 24, 2013), http://stateimpact.npr.org/pennsylvania/2013/01/24/pa-dep-to-study-radiation-related-to-marcellus-shale.

enacted new guidelines for permitting oil and gas drilling projects, including no longer expediting permitting for certain projects, especially those lying within floodplains or on contaminated lands.[275]

In early 2011, the Governor of Pennsylvania formed the Marcellus Shale Advisory Commission to study the impact of fracking and to make recommendations to legislators and regulatory authorities for future action.[276] The commission issued a report in July 2011[277] recommending, among other things:

- The imposition of a drilling impact fee to be paid by drillers to the counties in which fracking operations take place, to be used by local communities to address environmental issues that arise in connection with those operations;
- The mandatory pooling of gas reserves;
- Stiff penalties for violations of applicable regulations;
- Increased setbacks from streams, wells and public water systems;
- The establishment of best practices and enforcement mechanisms to ensure compliance;
- Greater public disclosure requirements, especially with respect to any hazardous substance content of fracking fluids and waste, as well as wastewater tracking and disposal.

Pennsylvania lawmakers implemented many of the recommendations in February 2012, with legislation imposing new safety regulations and permitting counties in Pennsylvania to collect an impact fee from drilling companies, among other things.[278] The law also aims to resolve growing concern about

275. *PADEP Accepts Public Comment on Oil and Gas Erosion Control Permit*, BRILLIANT ENVTL. SERVS., (Feb. 23, 2012), http://brilliantenvironmental.com/2012/padep-accepts-public-comment-on-oil-and-gas-erosion-control-permit.

276. Pa. Exec. Order No. 2011-01 (Mar. 8, 2011), *available at* http://www.portal.state.pa.us/portal/server.pt/community/executive_orders/708.

277. Governor's Marcellus Shale Advisory Board Report (July 22, 2011), *available at* http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC_Final_Report.pdf.

278. H.B. 1950, Act 13, Gen. Assemb., Reg. Sess. (Pa. 2012) (amending provisions of the Oil and Gas chapter of Pennsylvania's Consolidated Statutes, 58 Pa. CONS. STAT. §§2301–3504), *available at* http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0013..HTM.

piecemeal regulation resulting from local fracking bans by authorizing the attorney general to override stricter local regulations that are not aligned with state regulatory efforts and that hamper regulatory certainty and consistency.[279] The law has been challenged on the basis that it inappropriately overrides local zoning efforts by municipalities to manage drilling, and it has been criticized as not providing enough protection for drinking water sources and for not imposing a high enough impact fee to counter the perceived risks associated with drilling.[280] A sharply divided state court in the summer of 2012 ruled that parts of the law are unconstitutional because they infringe on the rights of municipalities to direct energy development within their jurisdictions.[281]

Proposals have also been floated for statewide guidelines for private well standards.[282] However, this effort has been stalled in

279. H.B. 1950, Act 13 § 3303, Gen. Assemb., Reg. Sess. (Pa. 2012) ("Notwithstanding any other law to the contrary, environmental acts are of Statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The Commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.").

280. Robinson Twp. v. Commonwealth, 52 A.3 463 (Pa. Commw. Ct. 2012) (appeal heard by Pennsylvania Supreme Court Oct. 2012); *UPDATE: Where PA Stands with Act 13*, PA CAMPAIGN FOR CLEAN WATER (Dec. 3, 2012), http://www.pacleanwatercampaign.org/gasdrilling/update-where-pa-stands-with-act-13; Timothy Puko, *Drop in Natural Gas Prices Hits State's Drilling Fee Revenue*, TRIB TOTAL MEDIA (Apr. 3, 2012), http://triblive.com/business/headlines/3770535-74/drilling-fee-state#axzz2PhyCkXKM.

281. Robinson Twp., 52 A.3 at 463. The intent of the law was to provide a predictable framework for natural gas producers, which have poured millions of dollars into the region and were faced with a jigsaw puzzle of local zoning ordinances and bans on drilling activity in some towns. However, the court found that the law created "irrational" zoning schemes that would allow drilling in residential communities or commercial districts that are not prepared to handle industrial activity: "[W]e hold that [the act] violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm," the majority said. *Id.* at 484 "If the Commonwealth-proffered reasons are sufficient, then the legislature could make similar findings requiring . . . coal strip mines, steel mills, industrial chicken farms, rendering plants and fireworks plants in residential zones." *Id.* Three of the panel, however, indicated that they would have upheld the law on the basis that it is within the state's police power, and neither "eviscerate[s] local land use planning," nor "give[s] carte blanche to the oil and gas industry to ignore local zoning ordinances." *Id.* at 495 (dissenting opinion). The minority also stated that because the Marcellus underlies a vast portion of the state, and does not fall within any one municipality, a statewide solution is appropriate. "The natural resources of this commonwealth exist where they are, without regard to any municipality's comprehensive plan." *Id.* An appeal is pending before the state supreme court.

282. Pennsylvania does not regulate private wells, but does provide guidance on construction and testing for safety. *See Private Water Wells*, PA. DEP'T OF ENVTL. PROT., http://www.portal.state.pa.us/portal/server.pt/community/private_water_wells/20690

part because a significant group of rural landowners who are not affected by hydraulic fracturing oppose the notion of the state monitoring their private wells.[283]

3. Vermont

Vermont enacted the nation's first statewide fracking ban.[284] The move, however, is largely symbolic as there are few, if any, recoverable shale deposits known to underlie the state.[285]

4. Ohio

a. *Water Use*

In Ohio, surface and groundwater withdrawals of more than two million gallons per day over a thirty-day period require a permit from the Director of the Ohio Department of Natural Resources.[286] Withdrawals of more than 100,000 gallons per day require registration.[287] Ohio is a riparian rights state and applies a "reasonable use" test to groundwater withdrawals, which involves assessment of nine factors including the purpose of the use, its impact on other users, the economic and social value of the use, and the practicality of avoiding harm by adjusting the use or method of use of the applicant or of other users.[288]

b. *Water Quality and Other Safety Regulations*

In anticipation of Utica Shale development, the state of Ohio has enacted energy legislation that establishes new safety and insurance requirements for drilling companies and tightens regulations relating to wastewater disposal, particularly the

(last visited Apr. 17, 2013).

283. *See, e.g.*, Scott Detrow, *New Bill Would Set Statewide Water Well Standards*, STATEIMPACT (Jan. 10, 2012), http://stateimpact.npr.org/pennsylvania/2012/01/10/new-bill-would-set-statewide-water-well-standards/.

284. VT. STAT. ANN. Tit. 29, § 571 (2012).

285. Jason McLure, *Vermont Poised to be First State to Outlaw Fracking*, REUTERS (May 8, 2012), http://www.reuters.com/article/2012/05/08/us-usa-fracking-vermont-idUSBRE84718720120508.

286. OHIO REV. CODE ANN. § 1501.33 (West 2012).

287. OHIO REV. CODE ANN. § 1521.16(A) (West 2012).

288. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902); Cline v. Am. Aggregates Corp., 474 N.E. 2d 324 (Ohio 1984). *See* J. Hanson et al., *Water Withdrawal Rights*, OHIO DEP'T OF NATURAL RES. (1991), http://dnr.state.oh.us/tabid/4065/default.aspx.

underground injection of liquid drilling waste.[289] The injection rules were considered necessary in response to both the concerns over potential induced seismic activity from the underground injection of drilling waste, and the increased quantities of waste being sent to Ohio from Pennsylvania and West Virginia, particularly in the face of a potential ban on treatment of drilling waste in New Jersey.[290] The legislation also requires owners of horizontal wells to obtain a minimum of $5 million in insurance coverage for injuries or property damage to neighboring landowners[291]—which may prove challenging if carriers follow the lead of one major insurance company and exclude coverage of damage attributable to hydraulic fracturing.[292] The new law also streamlines the state permitting requirements for construction and inspection of new pipelines and gas processing plants, including disclosure requirements, but it allows operators some flexibility in protecting trade secrets.[293] An increase in state severance taxes for oil and gas was considered, but left out of the legislation. However, it is expected

289. S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).

290. A bill to ban treatment of fracking waste passed both the New Jersey Senate and General Assembly (Assemb. B. 575 & S.B. 253, 215th Leg., 2012 Sess. (N.J. 2012)), *available at* http://www.njleg.state.nj.us/bills/BillView.asp. On September 24, 2012, New Jersey Governor Chris Christie issued an absolute veto of the measure. *See* Veto of Assembly Bill No. 575 by Chris Christie, Governor, N.J. (Sept. 24, 2012), *available at* http://www.njleg.state.nj.us/2012/Bills/A1000/575_V1.PDF. *See also* Mark Niquette, *Ohio Tries to Escape Fate as a Dumping Ground for Fracking Fluid*, BLOOMBERG (Jan. 31, 2012), http://www.bloomberg.com/news/2012-02-01/ohio-tries-to-escape-fate-as-a-dumping-ground-for-fracking-fluid.html (expressing concern that Ohio has become the dumping ground for contaminated brine and stating that state lawmakers are considering tightening regulations to stem out-of-state fluid shipments).

291. OHIO REV. CODE ANN. § 1509.07(A)(2) (West 2012).

292. Nationwide Mutual Insurance Company has taken the position that its personal and commercial policies "were not designed to cover" the risks related to hydraulic fracturing, including water contamination and earthquakes. Press Release, Nationwide Statement Regarding Concerns About Hydraulic Fracturing, (Jul. 13, 2012), *available at* http://www.nationwide.com/newsroom/071312-FrackingStatement.jsp. The company did not initially make a public announcement of its position, but an internal memo on underwriting guidelines was leaked and posted on numerous anti-fracking websites, after which Nationwide issued a press release confirming its position. *Id.* According to the press release, "Risks involved with hydraulic fracturing are now prohibited from general liability, commercial auto, motor truck cargo, auto physical damage and public auto coverage . . . We will not bind risks with this exposure, and any policies currently written with this coverage will be nonrenewed." *Id.*

293. SB 315: OHIO'S ENERGY POLICY, http://governor.ohio.gov/Portals/0/pdf/MBR/SB315Energy.pdf (last visited May 14, 2013) (stating that the "lengthy oil and gas operations permitting process is streamlined from a matter of months to a matter of days . . . ."). *See* OHIO REV. CODE ANN. § 1509.10 (West 2012) (modifying disclosure requirements).

that state lawmakers may try again soon to increase the severance tax to offset a proposed reduction in state income tax for residents.[294]

After experiencing a series of earthquakes in the Youngstown region over the course of a year, ranging in magnitude from 2.1 to 4.0, Ohio regulators in the state's Department of Natural Resources closed several disposal wells pending further assessment of the situation.[295] A handful of the nation's 144,000 injection disposal wells for nonhazardous oil and gas drilling waste are in Ohio.[296] About 30% of the waste injected into Ohio's 170 wells comes from outside state, which generates several million dollars for the state annually.[297] At least one seismologist has spoken out in support of the theory that injection wells lying close to fault lines may trigger earthquakes.[298] He has suggested that fracking does not cause earthquakes because fracking does not result in enough pressure for extended periods of time in gas wells; but the injection wells, which are subjected to high pressure for long periods, may have the potential to trigger small earthquakes.[299]

5. New Jersey

At present, there is no hydraulic fracturing activity in New Jersey, and no natural gas deposits in New Jersey are under consideration for large-scale exploration or extraction using hydraulic fracturing.[300] Almost none of the Marcellus Shale

294. *See, e.g.*, Julie Carr Smyth, *Cash-Strapped States Weigh Tax Policy On Drilling*, BLOOMBERG BUSINESSWEEK (Oct. 3, 2012), http://www.businessweek.com/ap/2012-10-03/cash-strapped-states-weigh-tax-policy-on-drilling#p1.

295. *See* Don Hopey, *Ohio Closes Wastewater Disposal Wells After Earthquakes*, PITTSBURGH POST-GAZETTE (Jan. 3, 2012), http://www.post-gazette.com/stories/local/region/ohio-closes-wastewater-disposal-wells-after-earthquakes-215992/; *Preliminary Report on the Northstar 1 Class II Injection Well and the Seismic Events in the Youngstown, Ohio, Area*, OHIO DEP'T OF NATURAL RES. (Mar. 2012), http://media.cleveland.com/business_impact/other/UICReport.pdf.

296. *Ohio Hydraulic Fracturing State Review*, OHIO DEP'T OF NATURAL RES. (Jan. 2011), http://www.dnr.state.oh.us/Portals/11/oil/pdf/stronger_review11.pdf.

297. *Direct Implementation Program*, EPA'S REGION 6 OFFICE (Aug. 20, 2012), http://www.epa.gov/region6/water/swp/uic/uicditribes.htm.

298. *Ohio Quakes Probably Triggered by Waste Disposal Well, Say Seismologists*, LAMONT-DOHERTY EARTH OBSERVATORY (Jan. 6, 2012), http://www.ldeo.columbia.edu/news-events/seismologists-link-ohio-earthquakes-waste-disposal-wells.

299. Henry, *supra* note 70.

300. Associated Press, *Gov. Christie Vetoes Fracking Wastewater Ban*, ABC ACTION NEWS (Sept. 21, 2012), http://abclocal.go.com/wpvi/story?section=news/politics&id=8819877.

formation underlies the state, and the Utica formation barely touches the northwestern corner of the state.[301] Nevertheless, fracking is a hot political issue in New Jersey. While New Jersey shares water-related concerns with its neighboring Mid-Atlantic states, of equal urgency are issues related to disposal of drilling waste and the development of pipeline infrastructure across the state to move gas from Pennsylvania wellheads to the eastern markets.[302] New Jersey voters have turned out in large numbers to oppose potential drilling activity in the Delaware River Basin,[303] and local communities have enacted symbolic fracking bans.[304] State lawmakers have proposed statewide fracking bans, and in June 2012, both the state assembly and the state senate passed legislation that would prohibit treatment of drilling wastewater in the state.[305] The bill was a toned-down version of previously proposed legislation that would have prevented transport or treatment of out-of-state fracking waste anywhere in the state.[306] The transport provisions were eliminated to avoid a potential constitutional challenge.[307] Nevertheless, in September, the Governor declined to sign the bill.[308] In January 2013, a statewide moratorium on hydraulic fracturing in the state

301. *See Marcellus and Utica Shale Formation Map*, MARCELLUS SHALE COALITION, http://marcelluscoalition.org/pa-map/ (last visited Apr. 17, 2013).

302. James M. O'Neill, *Moratorium on Fracking in New Jersey Expires*, NORTHJERSEY.COM (Jan. 18, 2013, 11:27 AM), http://www.northjersey.com/news/state/Moritorium_on_fracking_in_New_Jersey_expires.html.

303. Joan Hellyer, *Hundreds Protest Proposed Gas Drilling*, PHILLYBURBS.COM (Dec. 13, 2011, 5:55 AM), http://www.phillyburbs.com/my_town/hamptons/hundreds-protest-proposed-gas-drilling/article_08dfbd36-c5ff-5053-a1df-f3474e7c4ea2.html?mode=jqm.

304. *See, e.g.*, Adriana Rambay Fernández, *Seacaucus Bans 'Fracking,'* HUDSON REPORTER (Jul. 22, 2012), http://hudsonreporter.com/view/full_story/19312259/article-Secaucus-bans-'fracking'-Local-officials-also-call-for-statewide-and-national-ban.

305. Assemb. B. 575, 2012–2013 Leg., 215th Sess. (N.J. 2012), *available at* http://www.njleg.state.nj.us/2012/Bills/A1000/575_R1.PDF.

306. *See* Assemb. B. 4231, 2010-2011 Leg., 214th Sess. (N.J. 2011), *available at* http://www.njleg.state.nj.us/2010/Bills/A4500/4231_I1.PDF.

307. The Supreme Court in the 1970s struck down a similar measure that New Jersey had enacted in connection with transport and treatment of out-of-state solid waste. *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). In that case, the Supreme Court found that the prohibition on discrimination against out-of-state "articles of commerce" includes waste, and held that a New Jersey law prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State" was unconstitutional because it violated the Dormant Commerce Clause. According to the Court, "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."

308. Veto of Assembly Bill No. 575, *supra* note 290.

expired.[309] Some state lawmakers are moving once again to enact a statewide fracking ban, although it is questionable whether drilling companies have any interest in exploring New Jersey's shale gas reserves, at least in the near future.[310]

Additionally, there has been popular opposition to the expansion of major natural gas pipelines across state land, led largely by the New Jersey Sierra Club.[311] To date, however, efforts against pipeline construction or expansion have tended only to delay, rather than block, construction.[312]

6. Maryland

Only a very small percentage of the Marcellus Shale gas play underlies the State of Maryland.[313] Nevertheless, the state is cautiously evaluating the economic, environmental, and health impacts of developing the resource, based partly on its own studies and partly on lessons learned from other states.[314]

Maryland has a de facto moratorium on shale gas drilling, pending completion of work by a commission established by the Governor to study safety and environmental risks and to monitor the effectiveness of regulatory activity in neighboring Pennsylvania.[315] The Marcellus Shale Safe Drilling Initiative,[316] administered by the Maryland Departments of the Environment and Natural Resources, in consultation with an advisory

309. O'Neill, *supra* note 302.

310. *Id.*

311. *See* Press Release, Sierra Club N.J. Chapter, Coalition Voices Opposition to Natural Gas Pipeline Expansion in Princeton Area (Feb. 28, 2013), http://newjersey.sierraclub.org/PressReleases/0452.asp.

312. *See, e.g.*, Scott Fallon & James M. O'Neill, *Environmental Groups Ask for Stay of Pipeline Approvals*, NEWJERSEY.COM (Jan. 11, 2013), http://www.northerjersey.com/news/186423081_Environmental_groups_ask_for_stay_of_pipeline_approvals.html.

313. Evan M. Isaacson & Scott D. Kennedy, MD. DEP'T OF LEGIS. SERVS., Md. MARCELLUS SHALE: A PRELIMINARY LOOK AT ITS REVENUE POTENTIAL, Gen. Assemb. 429, at 1 (2012), *available at* http://dls.state.md.us/data/polanasubare/polanasubare_natresenvntra/Marcellus-Shale-Report-January-2012.pdf.

314. *Id.*

315. Darryl Fears, *Maryland Inches Closer to Decision Time on Hydraulic Fracturing*, WASH. POST (Dec. 8, 2012), http://articles.washingtonpost.com/2012-12 08/national/35701 181_1_drew-cobbs-release-gas-marcellus-shale.

316. Md. Exec. Order No. 01.01.2011.11 (June 6, 2011), *available at* http://www.governor.maryland.gov/executiveorders/01.01.2011.11.pdf. The program encountered some funding problems midstream, when attempts to fund the research through fees on oil and gas leases met heavy opposition from the industry. However, it appears that other funding sources have been identified to allow the program to remain on track.

commission comprised of a broad group of stakeholders, is tasked with determining whether and how gas production from the Marcellus Shale in Maryland could be accomplished without unacceptable risks to public health, safety, the environment, and natural resources.[317] A final report is expected in August 2014.

Dissatisfied with the de facto ban on fracking, some Maryland lawmakers have recently made attempts to establish a statutory moratorium on hydraulic fracturing, some favoring a moratorium just until the state completes its study in 2014,[318] while others have pushed for a permanent ban.[319] So far, those attempts have been unsuccessful.

In the meantime, the state legislature has taken less drastic steps to prepare for future natural gas development. Motivated by a desire to avoid a scenario like that in Dimock, Pennsylvania, the Maryland legislature passed a law in 2012 that holds drilling companies responsible for any water supply contamination

317. As part of this process, in February 2013, the University of Maryland Center for Environmental Science Appalachian Laboratory in Frostburg issued a report to the Maryland Department of the Environment on recommendations for best practices for fracking. *See* Keith N. Eshleman & Andrew Elmore, *Recommended Best Management Practices for Marcellus Shale Gas Development in Maryland*, UNIV. OF MD. CTR. FOR ENVTL. SCI. (Feb. 18, 2013), http://www.umces.edu/sites/default/files/al/pdfs/EshlemanandElmore-FinalReport-2013.pdf. Among the key recommendations made in this report are that the state:

- Develop regulations to efficiently exploit the gas resource while minimizing the most significant negative impacts.
- Select sites for well pads based on a pre-drilling environmental assessment and hazard mapping, and require two years of monitoring data prior to drilling, including groundwater testing and inventories of wildlife, to establish baseline levels for comparison and ongoing monitoring. Additional goals would include avoiding conflicts with existing land uses and conserving biological diversity.
- Establish state-of-the-art mitigation techniques (e.g., spacing multi-well pads in dense clusters to make maximum use of horizontal drilling technology and limiting total disturbance in key conservation watersheds) to reduce the overall impacts of gas development on cultural, historical, recreational, and biological resources.
- Require operators to adopt the American Petroleum Institute's "Recommended Practices" for maintaining well integrity and containing gas and other fluids within the well's infrastructure.
- Require a "closed-loop drilling system" on-site for handling drilling fluids, hydraulic fracturing chemicals, and wastewater, with an aim at minimizing both risk of contaminant leakage and impacts on downstream aquatic ecosystems.
- Establish a goal of 100% recycling of wastewater and encourage development and use of technologies for on-site treatment and recycling of wastewaters.

See Natural Gas Assessment, UNIV. OF MD. CTR. FOR ENVTL. SCI. (Feb. 18, 2013), http://www.umces.edu/al/node/7783.

318. *See, e.g.*, Maryland Hydraulic Fracturing Moratorium and Right to Know Act of 2013, S.B. 601, 2013 Leg., Reg. Sess. (Md. 2013).

319. *See* H.B. 337, 2013 Leg., Reg. Sess. (Md. 2013).

within a 2,500-foot radius of any vertical wellbore for a year after the last event of well drilling, completion, or hydraulic fracturing, unless the company is able to prove that the contamination is not the result of activities related to the gas well or that the contamination preexisted the drilling and was not aggravated by it.[320]

7. West Virginia

West Virginia law vests authority to regulate oil and gas activity in the state with the West Virginia Department of Environmental Protection (WVDEP).[321] With the exception of a statement of public policy enacted in 2011,[322] there is no formal legislation specific to shale gas production in West Virginia. Following an executive order issued by the Governor in October 2011,[323] the WVDEP promulgated regulations pursuant to its emergency powers that were directed at the natural gas drilling industry.[324] Under these rules, well operators must provide the agency with estimates of the amount of water they will use in drilling and fracturing their wells and develop water management plans for any wells that they estimate will use more than 210,000 gallons of water during any one-month period.[325] Since the average fracking job requires much more than this, the regulations will effectively apply to any company engaged in the activity in the state.[326] The rules also require disclosure of additives used in the fracking process, establish guidelines for well construction and disposal of drilling waste, and require thirty days advance public notice before a permit will be issued to drill a well within any municipality.[327]

State legislators are also considering air quality issues, casing standards, and increases in permit fees related to drilling, and

320. H.B. 1123, 2012 Leg., Reg. Sess. (Md. 2012); MD. CODE ANN., ENVIRON. § 14-110.1 (West 2012).

321. W. VA. CODE § 22-6 (2011).

322. *See* Marcellus Gas and Manufacturing Development Act, W. VA. CODE § 5B-2H-1 (2012).

323. W. Va. Exec. Order No. 4-11 (July 12, 2011), *available at* http://www.governor.wv.gov/Documents/20110713150559476.pdf.

324. W. VA. CODE R. §§ 35-1-1 to 35-7-4 (2011).

325. W. VA. CODE R. § 22-6A-7(e) (2011).

326. Galbraith, *supra* note 69 (explaining that hydraulic fracturing requires "roughly 4 million to 6 million gallons per oil or gas well").

327. Galbraith, *supra* note 69.

they are working on legislation that would limit the proximity of drilling activity to drinking water wells.[328]

In 2011, Morgantown, West Virginia enacted an ordinance banning horizontal drilling and hydraulic fracturing within a mile of the city limits.[329] The West Virginia court invalidated the ordinance because the WVDEP had exclusive jurisdiction to regulate oil and gas development in the state.[330]

8. North Carolina

Until 2012, North Carolina state laws prohibited horizontal drilling, and thus prohibited most deep shale gas drilling.[331] Drilling is generally permitted only within a very limited deviation of the vertical well, unless an exemption is granted by North Carolina's Department of Environment and Natural Resources.[332] There are strict well and water protection standards and a maze of other regulations related to hazardous wastewater.[333] Deep injection wells have also long been prohibited in the state.[334]

In 2011, the legislature directed the Department of Environment and Natural Resources, together with the Department of Commerce, the Department of Transportation, the Attorney General's Office, and the Rural Advancement Foundation International, to conduct a study of the potential development of shale gas in North Carolina and make recommendations regarding an appropriate regulatory framework.[335] The report was finalized in the spring of 2012.[336] Among the issues that the report flags is the management of water withdrawals, both in terms of timing and location.[337] There is no state permitting program for water withdrawals

328. *See* Marcellus Gas and Manufacturing Development Act, W. VA. CODE § 5B-2H-1 (2011).

329. Morgantown, W. Va. Ordinance 721.01 (June 21, 2011).

330. Ne. Natural Energy, LLC v. City of Morgantown, W. Va., slip. Op. at 8–9 (citing W. VA. CODE §§ 22-6 (1994), No. 11-c-411 (Monongalia Cty. Cir. Ct. Aug. 12, 2011).

331. 2012 N.C. Sess. Laws 143.

332. 15A N.C. ADMIN. CODE 5D.0107(e) (2013).

333. 15A N.C. ADMIN. CODE 5D.0107 (2013).

334. N.C. GEN. STAT. § 143-214.2 (2013); 15A N.C. ADMIN. CODE 2C.0209 (2013).

335. 2011 N.C. SESS. LAWS 2011-276.

336. *North Carolina Oil and Gas Study under Session Law 2011-276: Impacts on Landowners and Consumer Protection Issues*, N.C. DEP'T OF JUSTICE CONSUMER PROT. DIV. (May 1, 2012), http://www.rafiusa.org/docs/frackingstudy-ncag.pdf.

337. *Id.* at 3.

(groundwater and surface water) except in one area of the state that does not overlie shale formations. The state at times falls victim to periods of drought and has been involved in disputes with its neighbors about the use of river water sources, which raises significant concerns about the volume of water needed in drilling operations. North Carolina's geology differs from states further north in the Marcellus region. There is less separation between the gas-producing layers and the water table, with some water supply wells far deeper than is typical in the Northeast.[338] The report also finds that disposal of produced water could pose problems for the state, again, because of local geology.[339] Injection wells may not be feasible, so other solutions to waste would have to be developed and current state laws would have to be rewritten to address disposal of drilling waste.[340] The report also addresses air emissions, infrastructure impact, and other issues related to natural gas production.

The state is now considering lifting the temporary moratorium on horizontal drilling and hydraulic fracturing by March 2015, setting the stage to begin work in earnest to create a regulatory framework to oversee drilling in the state.[341] In the summer of 2012, the legislature reformed the state mining commission and gave it authority over oil and gas activities, including the promulgation of rules that set forth testing requirements and would hold energy companies accountable in the event of water contamination.[342]

9. Texas

Texas was the first state to enact legislation requiring public disclosure of chemicals, compounds, and water volumes used in hydraulic fracturing on a well-by-well basis.[343] Texas requires the

338. *Id.* at 3–4.

339. *Id.* at 69.

340. The report concludes that, due to gaps in state laws, much of the exploration and production waste could simply be disposed of in municipal solid-waste landfills even though those facilities are not designed for the disposal of hazardous waste. *See id.* at 6.

341. In July of 2012, the North Carolina legislature voted to override the Governor's veto of legislation that legalizes fracturing and horizontal drilling but delays permitting pending subsequent legislative action to put into place an adequate regulatory regime. *See* S.B. 820, 2012 Leg., Reg. Sess. (N.C. 2012).

342. H.B. 1054, 2012 Leg., Reg. Sess. (N.C. 2012).

343. *See* 16 TEX. ADMIN. CODE § 3.29 (2012). Note that Wyoming was the first state to approve public disclosure rules, but that was done by means of a rule by the Oil and Gas

disclosure of fracturing treatment chemicals on FracFocus.org.[344] Exceptions are made for ingredients that are not intentionally added to the fracking process or that occur incidentally and for specific chemical ingredients protected as trade secrets, provided the trade secret has not been successfully challenged.[345] Regarding trade secrets, the law also requires health professionals and emergency responders to keep trade secret information that is disclosed in the course of diagnosis or treatment confidential.[346]

The Texas Railroad Commission, the primary body in Texas responsible for oil and gas regulation, is also considering implementing new requirements for well drilling, casing, completion, and other measures to address growing concerns about protection of water resources and safety during drilling and well-stimulation operations.[347] Texas law requires permits for drilling and mandates that well casings isolate the well from "usable-quality water zones."[348]

In Texas, drilling waste may be stored in pits, provided a permit has been issued.[349] Certain drilling waste may also be disposed of without a permit by spreading it across the land where the waste was generated.[350]

There has been a growing jurisdictional dispute between the Railroad Commission and the EPA regarding the contamination of drinking water sources. Following detection of elevated levels of methane and benzene in drinking water wells in Hood County, Texas, the EPA concluded that Range Resources Corporation's hydraulic fracturing activities in the area were to

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Conservation Commission. For a survey of state disclosure rules, *see* Matthew McFeeley, *State Hydraulic Fracturing Disclosure Rules and Enforcement: A Companion*, NATURAL RES. DEF. COUNCIL (July 2012), http://www.nrdc.org/energy/files/Fracking-Disclosure-IB.pdf.

344. *See* 16 TEX. ADMIN. CODE § 3.29 (2012). FracFocus is a national online registry for companies to publicly disclose the chemicals and additives used in their fracturing fluids. It was created through the joint efforts of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. *See* FRACFOCUS CHEMICAL DISCLOSURE REGISTRY, http://www.fracfocus.org/ (last visited May 14, 2013). Reported information is available on this website with respect to more than 39,000 wells.

345. 16 TEX. ADMIN. CODE § 3.29(d) (2012).

346. *Id.* at § 3.29(g).

347. *See Mem. from the Office of Gen. Counsel*, R.R. COMM'N OF TEX. (July 17, 2012), http://www.rrc.state.tx.us/rules/prop-amend-3-13-Aug21-2012.PDF.

348. 16 TEX. ADMIN. CODE §§ 3.5(a), 3.13(a) (2012).

349. *Id.* § 3.8(d)(2).

350. *Id.* § 3.8(d)(3)(C).

blame and ordered the company—under the authority of the Safe Drinking Water Act—to remediate the contaminated wells.[351] The agency also directed Range to investigate the integrity of its natural gas wells, to furnish local landowners with equipment to monitor methane levels, and to supply affected residents with potable drinking water.[352] Range asserted that the EPA had not proven that it was responsible for the pollution.[353] The suit made headlines when the Texas Railroad Commission cleared Range of any wrongdoing while the EPA was still pursuing its legal challenge against the drilling company for failing to comply with its order.[354] The EPA eventually dropped its lawsuit against Range after the agency reached an agreement with the company to monitor and share information on the impacts of energy extraction on drinking water resources.[355]

With respect to water use, Texas follows a regulated riparian water rights system.[356] As a general rule, groundwater in Texas belongs to the owner of the surface land and is available to the landowner in whatever quantity the landowner is able to capture, even to the extent of drying up a neighbor's well.[357] Surface water belongs to the state and can be used only by permit from the Texas Commission on Environmental Quality.[358] Shale gas operations in Texas, especially in the Barnett region, frequently use groundwater sources.[359] State and county agencies closely monitor volumes of water used, and a consortium of companies have developed "best practices" for water conservation.[360]

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351. *See* United States v. Range Prod. Co., 793 F. Supp. 2d 814 (N.D. Tex. 2011).

352. *Id.* at 818.

353. *Id.* at 820.

354. *See* Press Release, R.R. Comm'n of Tex., R.R. Comm'rs: "EPA's Vacate Order in Range Case Confirms Railroad Commission Findings Based on Scientific Evidence," (Mar. 30, 2012), *available at* http://www.rrc.state.tx.us/pressreleases/2012/033012.php.

355. *See* Mike Lee, *EPA Agrees to Dismiss Well Contamination Case Against Range*, BLOOMBERG (Mar. 30, 2012), http://www.bloomberg.com/news/2012-03-30/epa-agrees-to-dismiss-well-contamination-case-against-range-2-.html.

356. *See, e.g.*, Otis Templer, *Water Law*, TEX. STATE HISTORICAL ASSOC., http://www.tshaonline.org/handbook/online/articles/gyw01 (last visited May 14, 2013).

357. *Id.*

358. *See, e.g.*, *Rights to Surface Water in Texas*, TEX. COMM'N ON ENVTL. QUALITY 2, (Mar. 2009), http://www.tceq.texas.gov/publications/gi/gi-228.html.

359. *See Water Use in the Barnett Shale*, R.R. COMM'N OF TEX. (Jan. 24, 2011), http://www.rrc.state.tx.us/barnettshale/wateruse_barnettshale.php.

360. *See, e.g.*, *Texas Water Development Board Report 362: Water Conservation Best Management Practices Guide*, TEX. WATER DEV. BD. 1, 3 (Nov. 2004), *available at* http://www.conservewatergeorgia.net/resources/TX_BMP_Implementation_Report.pdf.

10. Wyoming

Hydraulic fracturing in Wyoming is regulated by the Wyoming Oil and Gas Conservation Commission.[361] Like Texas, Wyoming was among the earliest states to require disclosure of chemicals and additives used in connection with natural gas drilling. Wyoming has very detailed rules for drilling activity and in 2010 made a number of revisions specifically addressing hydraulic fracturing. Similar to recent amendments and additions that other states have made to their laws, Wyoming's 2010 revisions were aimed at (1) protecting groundwater; (2) wellbore and casing integrity; (3) the disclosure of chemical additives, compounds, and concentrations in stimulation fluids; and (4) the handling of recovered fluids.[362]

With respect to water use, Wyoming is a prior appropriation state.[363] There are three state agencies involved in regulation of water use. The state engineer issues permits for unappropriated water—surface water and groundwater—and monitors water use through district water commissioners.[364] As long as a requested use does not impair the value of existing water rights or harm the public welfare, the state engineer can grant a use request.[365] The Board of Control authorizes changes in the use of water rights, and the Water Development Commission controls the planning for and the development of Wyoming's water resources and in-stream flow rights.[366]

11. California

California regulators in December 2012 released draft regulations that would require oil and gas companies to disclose for the first time where in the state they use the hydraulic fracturing technique to stimulate production.[367] California has

361. *See* WYOMING OIL & GAS CONSERVATION COMMISSION, http://wogcc.state.wy.us/ (last visited May 14, 2013).

362. *See generally Wyoming Laws*, INTERMOUNTAIN OIL & GAS BMP PROJECT, http://www.oilandgasbmps.org/laws/wyoming_law.php (last visited May 14, 2013).

363. *See* Farm Inv. Co. v. Carpenter, 61 P. 258, 266–67 (Wyo. 1900).

364. *Frequently Asked Questions*, WYO. STATE ENG'RS OFFICE, https://sites.google.com/a/wyo.gov/seo/home/faq (last visited May 14, 2013).

365. *About the State Engineer's Office*, WYO. STATE ENG'RS OFFICE, https://sites.google.com/a/wyo.gov/seo/home/about (last visited Apr. 6, 2013).

366. *Id.*

367. *Pre-Rulemaking Discussion Draft*, CAL. DEP'T OF CONSERVATION, http://www.conservation.ca.gov/dog/general_information/Documents/121712Discussi

robust drilling regulations for the oil and gas industry,[368] but in response to rising public concern, the state Department of Conservation is considering a handful of measures that primarily deal with public disclosure and testing.[369] Among other things, the draft rules proposed the following: (1) the disclosure of hydraulic fracturing chemicals on fracfocus.org, (2) well casing and integrity testing similar to that enacted in other states where the oil and gas industry is active, (3) advance notice to the state and local regulators with jurisdiction and to landowners before beginning any hydraulic fracturing activities, and (4) monitoring during and after hydraulic fracturing operations.[370] Similar to the disclosure rules of Texas, Wyoming, and Pennsylvania, California has proposed a provision for the protection of trade secrets.[371] California is also reportedly considering a number of legislative proposals to regulate or tax operators in the state.[372]

12. Looking Ahead—Issues to Watch

Natural Gas Exports

As discussed above, the U.S. is currently examining its policy regarding natural gas exports. More than a dozen requests for export authorizations are pending before the Department of Energy,[373] many related to proposed projects to construct LNG

onDraftofHFRegs.pdf (last visited Apr. 14, 2013).

368. *See generally* CAL. PUB. RES. CODE §§ 3106, 3203, 3211, 3220, 3222, 3224, 3255 (West 2012); CAL. CODE REGS. tit. 14, §§ 1722.2 (2012).

369. *See Hydraulic Fracturing in California*, CAL. DEP'T OF CONSERVATION, http://www.conservation.ca.gov/dog/general_information/Pages/HydraulicFracturing.aspx (last visited Apr. 14, 2013).

370. Michael N. Mills & Robin B. Seifried, *California Lawmaker Demands Another Fracking Study, Threatens Industry with Moratorium*, CAL. ENVTL. LAW BLOG, (Mar. 28, 2013), http://www.californiaenvironmentallawblog.com/california-lawmaker-demands-another-fracking-study-threatens-industry-with-moratorium.

371. *Id.*

372. *See California Bills Seek More Disclosure, Oversight of Fracking*, CBS SACRAMENTO (Mar. 10, 2013, 3:22 PM), http://sacramento.cbslocal.com/2013/03/10/california-bills-seek-more-disclosure-oversight-of-fracking/.

373. *See* Applications Received by DOE/FE to Export Domestically Produced LNG from the Lower 48 States (as of May 24, 2013), DOE Office of Fossil Energy, http://energy.gov/sites/prod/files/2013/05/f0/summary_lng_applications_0.pdf; Pending Long-Term Applications to Export LNG to Non-FTA Countries - Listed in Order DOE Will Commence Processing, DOE Office of Fossil Energy, http://energy.gov/sites/prod/files/2013/05/f0/Pending%20LT%20LNG%20Export%20Apps%20%285-17-13%29.pdf (last visited June 3, 2013). *See also* Ayesha Rascoe, *Industry Group Campaigns to Limit Natgas Exports*, CHI. TRIB. (Jan. 10, 2013), http://articles.chicagotribune.com/2013-01-10/news/sns-rt-usa-lngexports-update-2l1e9ca78o-20130110_1_gas-exports-lng-

export terminals. While clearly not all of the projects will go forward, the volume of applications has caused the domestic manufacturing industry, as well as other U.S. consumers, to take notice and voice concern about how exports will affect domestic prices and supplies. The DOE has begun to issue export authorizations after a two-year hiatus, but the national debate continues. The DOE has said it will review applications with an eye to cumulative impacts, although it is unknown at this time if there will be a cap on the amount of LNG that will be authorized for export, or if the DOE will generally follow its longstanding policy of allowing the markets ultimately to determine how much will be exported.[374]

D. *Insurance Coverage of Drilling-Related Activity*

As noted above, insurance companies are examining their policies to determine whether and to what extent risks related to hydraulic fracturing—including water contamination and earthquakes—are covered.[375] While the insurance question will require investors to revaluate risk sharing, and may have some impact on financing, it is not likely to put a significant damper on drilling activity.

E. *Intellectual Property Issues: The Patenting of Fracking Formulas and its Relationship to Current and Future Impact Studies*

As the number of patents related to hydraulic fracturing formulas and methods increases, there is growing concern that the patents could be used to block the study of environmental or health impacts of the chemicals.[376] One professor at Pennsylvania State University has cautioned that while intellectual property protection does not appear to be hindering the studies that are currently underway, a problem could develop

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exports-export-proposals.

374. Smith, *supra* note 189; Freeport Order, *supra* note 189, at 6 and n.20. Prior to publication the applications were taken off hold by the Dep't of Energy. *Energy Department Releases Study on Natural Gas Exports, Invites Public Comment*, U.S. DEP'T OF ENERGY (Jan. 29, 2013), http://www.fossil.energy.gov/programs/gasregulation/LNGStudy.html.

375. *See*, e.g., Nationwide Press Release, *supra* note 292.

376. Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, 22(1) NEW SOLUTIONS 51, 67 (2012), *available at* http://www.psehealthyenergy.org/data/Bamberger_Oswald_NS22_in_press.pdf.

down the line.[377] The Patent and Trademark Office each year issues increasing numbers of fracking-related patents, mostly for chemicals used to aid or increase natural gas production.[378] Recent court decisions appear to allow patent holders to prevent unlicensed use even by scientists for noncommercial reasons, which could have a chilling effect on independent research to evaluate risks to human or environmental health.[379]

F. *Dwindling Global Supplies of Certain Fracking Ingredients, Bans on High-Volume Hydofracking, and Droughts Will Spur Development of Other Technologies*

Recently, guar—a key additive in hydraulic fracturing fluids—has been in short supply globally, driving up costs for well operators already stressed by low gas prices.[380] Guar, which is also found in common foods such as ice cream and in some hair products, is a gelling agent used by some companies to reduce friction in the water injected into oil and gas wells to stimulate production.[381] In response to the shortage, some companies are experimenting with alternative substances.[382]

With respect to water supply issues, the industry is prepared to withstand short-term suspensions of withdrawals, such as those that occur in periods of drought (mostly during the summer months) in the Marcellus region. In recent years, producers have been using less public water and reusing and recycling much of what they do withdraw from public sources.[383] However, sustained drought and general competition for water resources,

377. *See* DANIEL R. CAHOY ET AL., FRACKING PATENTS: THE EMERGENCE OF PATENTS AS INFORMATION CONTAINMENT TOOLS IN SHALE DRILLING 1 (2012), *available at* http://deg.aapg.org/Portals/0/documents/FrackingPatents.pdf.

378. *Id.* at 12–14 (noting that fracking fluids have played a large role in the marked increase of fracking-related patents since 2010).

379. *See, e.g.*, Madey v. Duke Univ., 307 F.3d 1351, 1364 (Fed. Cir. 2002) (holding that a university's research grant did not authorize use of a patent).

380. *See* Ryan Dezember, *Little Plant Proves a Big Pest*, WALL ST. J. (Apr. 19, 2012), http://online.wsj.com/article/SB10001424052702304331204577354212496562928.html.

381. *See* Zain Shauk, *Hydraulic Fracturing Chews into Guar Gum Supplies*, HOUS. CHRON. (July 5, 2012), http://www.chron.com/business/article/Hydraulic-fracturing-chews-into-guar-gum-supplies-3683020.php.

382. *See* Braden Reddall, *Frackers in Frantic Search for Guar Bean Substitutes*, REUTERS, (Aug. 13, 2012), http://www.reuters.com/article/2012/08/13/us-oilservices-guarsubstitutes-idUSBRE87C0DP20120813.

383. *See* Stephen Rassenfoss, *From Flowback to Fracturing: Water Recycling Grows in the Marcellus Shale*, SOC'Y OF PETROL. ENG'RS 48 (July 2011), *available at* http://www.spe.org/jpt/print/archives/2011/07/12Marcellus.pdf.

along with regional bans on high-volume hydraulic fracturing, is prompting some companies to develop various alternative methods to fracture wells, including the use of propane or dry fracturing.[384]

G. *Litigation Uptick, at Least in the Near Term*

In the short term, there may be an increase in hydraulic fracturing litigation. In addition to the recent high-profile well water contamination lawsuits, actions have been filed by workers alleging adverse effects in connection with exposure to chemicals like benzene and silica.[385] Expect to see lawsuits related to earthquakes allegedly triggered by drilling-related activity, actions to enforce municipal bans on hydraulic fracturing, challenges to state and federal regulations of hydraulic fracturing and related activity, lease disputes, and so forth.

VI. CONCLUSION

It is clear that natural gas will hold a prominent position in the nation's fuel mix for the foreseeable future. The U.S. energy mix is driven by fuel availability, policy, and regulatory decisions. None of the issues discussed herein is simple to address. However, as gas becomes more widely accepted in the U.S., in its own right as a cheap and abundant fuel and as a bridge fuel in the transition to more widespread use of renewable energy, the states and federal government will continue to craft a regulatory scheme that allows the industry to meet growing demand while protecting critical water supplies. The reach of the federal government will be of particular interest to observers in the energy industry. Will regulation be left primarily to states, as at present? Will the federal government instead step in to create a national policy? Or will technological developments in the industry continue to rapidly outpace regulation, both federal and state, leaving lawmakers scrambling to sort through what is science and what is myth in an ongoing game of regulatory catch-up?

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384. Kate Galbraith, *Waterless Fracking Makes Headway in Texas, Slowly*, TEX. TRIB. (Mar. 27, 2013), http://www.texastribune.org/2013/03/27/fracking-without-water-makes-headway-texasslowly/.

385. *See Worker Exposure to Silica During Hydraulic Fracturing*, U.S. DEP'T OF LABOR, http://www.osha.gov/dts/hazardalerts/hydraulic_frac_hazard_alert.html (last visited May 14, 2013).

JUSTICE HOLMES AND CONSERVATISM

ALLEN MENDENHALL*

David E. Bernstein's recent book, *Rehabilitating Lochner*,[1] is a careful work of historical revisionism that ought to both please and motivate libertarian and conservative jurists. From its cover, however, one might think that Justice Oliver Wendell Holmes Jr. has nothing constructive or commendable to offer libertarians and conservatives.

The cartoonish image is of a boxing ring in which Justice Peckham and Justice Holmes both appear white-haired and eminently mustachioed. They have apparently been fighting, and the former stands over the latter with his right fist raised in what could be either triumph or anticipation. The judges are wearing their robes and boxing gloves, and Holmes, looking worried and slightly pathetic, crouches on the ground as though about to crawl away. His eyes stare pleadingly at someone or something; they seem to be asking an out-of-frame referee to call the fight.

Although it is good advertisement, this caricature sets up a misleading binary opposition. It suggests that Peckham, who authored the majority opinion in *Lochner v. New York*,[2] an opinion generally understood as libertarian and protective of the freedom of contract,[3] supports individual rights whereas Holmes, the dissenter, supports government power over business.[4] Such

* Allen Mendenhall (M.A., J.D., LL.M.) is a staff attorney for Chief Justice Roy S. Moore of the Supreme Court of Alabama and a doctoral candidate in English at Auburn University. Visit his website at AllenMendenhall.com. The views expressed herein do not reflect those of his employer.

1. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

2. 198 U.S. 45 (1905).

3. *See* Robert M. Anderson, *The Judiciary's Inability to Strike Down Healthcare Service Certificate of Need Laws Through Economic Substantive Due Process*, 2 CHARLESTON L. REV. 703, 709–10 (2008).

4. *See id.* In *Lochner*, the Court held that a section of the New York labor law prohibiting bakery employees from working more than sixty hours per week violated an individual's freedom of contract. *Lochner*, 198 U.S. 45. The majority reasoned that while a state does have an interest in protecting the health of its citizens, it can only limit the freedom to contract if the statute has a direct relation to and substantial effect on employee health. *Id.* at 64.

was not the case.

Holmes is enigmatic. He was no conservative, but he was no progressive, either. Misconstruing and mislabeling Holmes only leads to the confusion and discrediting of certain views that conservatives and libertarians alike seriously ought to consider. One must not mistakenly assume that because *Lochner*-era Fourteenth Amendment due process jurisprudence favored business interests,[5] Holmes stood against business interests when he rejected New York's Fourteenth Amendment due process defense. (I have avoided the anachronistic term "substantive due process," which gained currency decades after *Lochner*.)[6]

Holmes rejected a methodology, notwithstanding the end result. He resisted sprawling interpretations of words and principles—even if his hermeneutics brought about consequences he did not like—and he was open about his willingness to decide cases against his own interests.[7] As he wrote to his cousin John T. Morse, "It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits."[8]

What Holmes disliked about the Fourteenth Amendment was neither the Amendment itself nor due process, but the liberal reading and interpretation of due process that infringed upon the power and province of the several states. Holmes put it this way in his dissent in *Baldwin v. Missouri*:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower

5. *See* Anderson, *supra* note 3 ("During the Lochner era, the Supreme Court recognized economic liberties as protected by the Fourteenth Amendment's Due Process Clause.").

6. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999).

7. Letter from Oliver Wendell Holmes Jr. to John T. Morse (Nov. 28, 1926), *quoted in* LOUIS MENAND, THE METAPHYSICAL CLUB 67 (2001).

8. *Id.*

> reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words "due process of law[,]" if taken in their literal meaning[,] have no application to this case; and while it is too late t[o] deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.[9]

It has become commonplace to refer to Holmes as a progressive,[10] but Louis Menand points out that "[t]here have been hundreds of efforts since Holmes published *The Common Law* . . . to sew a political label on him. Commentators have tried to prove that he was a progressive, a liberal, a civil libertarian, a democrat, an aristocrat, a reactionary, a Social Darwinist, and a fascist."[11] Menand adds that

> Holmes has been called a formalist, a positivist, a utilitarian, a realist, a historicist, and a pragmatist (not to mention a nihilist). Commentators who cleave to one of these terms usually find themselves spending a good deal of time explaining why commentators who favor one of the other terms cannot possibly be right.[12]

Menand scoffs at these careless exercises in labeling, which merely assume that "[Holmes] was interested in the political consequences of his ideas."[13] Menand asserts, correctly, that "one thing that can be said with certainty about Holmes as a judge is

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9. 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

10. *See* Eric R. Claeys, *Takings, Regulations and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1619 (2003) ("*Mahon* was ironic because the Court's opinion was written not by any of the conservatives on the bench, but by progressive icon Justice Holmes, famous for dissenting in *Lochner v. New York*."); Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 736 (1999) (reviewing DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997)) ("Only after World War I did most Progressives, such as Holmes and Brandeis, suddenly discover the value of free speech."); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395 (2003) ("For Holmes and the Progressives and [the] legal realists who followed in his footsteps, the essence of property was exclusion . . . ."); Robert H. Whorf, *Civil Rights: Looking Back—Looking Forward*, 4 BARRY L. REV. i, i (2003) ("During this period, even the Court's early Twentieth Century legendary progressive, Oliver Wendell Holmes, 'in a cynical and disingenuous opinion . . . insisted that federal courts could do nothing about racial disenfranchisement.'").

11. LOUIS MENAND, AMERICAN STUDIES 33 (2002).

12. *Id.* at 35.

13. *Id.* at 33.

that he almost never cared, in the cases he decided, about outcomes . . . . [H]e was utterly, sometimes fantastically, indifferent to the real-world effects of his decisions."[14] In other words, Holmes did not reach his decisions because they would produce results he approved of; he reached them because he thought they were conclusions he had to reach in light of the facts, circumstances, and rules.

Holmes was not necessarily hostile to the workaday effects generated by the freedom of contract principles espoused by the majority in *Lochner*,[15] instead, he was hostile to the federal–judicial regulation of citizens based upon the vagaries of an ideal like "liberty," a word so vacuous that it could be appropriated, as it is today, by disparate ideological camps supporting vastly different political agendas.[16]

The pragmatist in Holmes disliked making decisions that were not rooted in lived experience or based upon observable, concrete phenomena relating to commonplace interactions among regular people.[17] Holmes also disliked any tendency to marry morality and law, since law, for him, was nothing more than "the prophecies of what the courts will do in fact."[18] Holmes considered a judge's positions to be subject to the restrictions of the Constitution, which he believed only on rare occasions permitted federal judges and Supreme Court Justices to overturn the legislative acts of state governments.[19]

Holmes was not an opponent of big business or industry.[20] He claimed that "the man of the future is the man of statistics and the master of economics,"[21] and he adored titans of industry and once remarked that "if they could make a case for putting

14. *Id.*

15. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating that it is not his "duty" to give his opinion on the matter).

16. *Id.* at 76 ("'[L]iberty' . . . is perverted when it is held to prevent the natural outcome of a dominant opinion . . . .").

17. *See* OLIVER W. HOLMES, THE COMMON LAW 1 (1881) ("The life of law has not been logic: it has been experience . . . . The law embodies the story of a nation's development through many centuries.").

18. Justice Oliver W. Holmes, The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 460–61 (1897).

19. Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

20. Letter from Oliver Wendell Holmes Jr. to Lewis Einstein (Oct. 28, 1912), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 141 (Richard A. Posner ed., 1992).

21. Holmes, *supra* note 18, at 469.

Rockefeller in prison I should do my part; but if they left it to me I should put up a bronze statue of him."[22]

Menand points out that Holmes's "personal sympathies were entirely with the capitalists" and that Holmes "thought that socialism was a silly doctrine."[23] Richard Posner submits that Holmes had "made laissez-faire his economic philosophy" years before *Lochner* and that Holmes "doubtless thought the statute invalidated in *Lochner* [was] nonsense."[24]

Posner doubts "whether the Fourteenth Amendment was intended to authorize the kind of freewheeling federal judicial intervention in the public policy of the states that *Lochner* has come to symbolize,"[25] and libertarians and conservatives who lately have decided to deride Holmes's position in *Lochner* would do well to remember that what Holmes feared was the tendency of federal judges to invalidate state laws with theories not explicit in the Constitution.[26]

None other than Robert Bork has sided with Holmes and referred to *Lochner* as an example of "judicial usurpation of power."[27] Justice Scalia, who with Justice Thomas rejects the substantive due process theories emanating from *Lochner*, has used the same word—"usurpation"—while discussing liberal readings of the Fourteenth Amendment.[28]

If Holmes was an unashamed capitalist, he also did not think that unelected, immensely powerful federal judges should bring about a flourishing of capitalism from their comfortable government perches.[29] Posner goes so far as to say this about Holmes:

> Holmes's reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—what should have been but was not apparent from his judicial opinions and his occasional pieces—

22. Holmes, *supra* note 20.
23. MENAND, *supra* note 7, at 65.
24. RICHARD A. POSNER, LAW AND LITERATURE 344 (3rd ed. 2009).
25. *Id.* at 347.
26. Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 433–34 (1927) (Holmes, J., dissenting).
27. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990).
28. McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring); City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).
29. Lochner v. New York, 198 U.S. 45, 75–76 (1905).

> that, so far as his personal views were concerned, he was liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance and were doomed to fail . . . . Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding.[30]

This passage is all the more remarkable in light of Holmes's claim in *Lochner* that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statistics."[31] What Holmes meant, as he makes clear elsewhere in the dissent, is that the Constitution must apply to all citizens despite their differing views.[32] Holmes felt that his job did not entail spreading his beliefs about economics; those beliefs were irrelevant to judging.[33]

Holmes has been called "as profound, as civilized, and as articulate a conservative as the United States has produced."[34] Max Lerner marks Holmes as "an aristocratic conservative who did not care much either for business values or for the talk of reformers and the millennial dreams of the humanitarians."[35] Nevertheless, many progressive jurists—Roscoe Pound, Benjamin Cardozo, Jerome Frank, and Learned Hand among them—idolized Holmes.[36] How can this be explained?

All labels for Holmes miss the mark. Holmes defies categorization, which is a lazy way of affixing a name to something in order to avoid considering the complexity and nuances, and even contradictions, inherent in that something.

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30. Richard A. Posner, *Introduction* to OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., at xv (Richard A. Posner ed., 1992).

31. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

32. *Id.* at 75–76 (stating that the Constitution "is made for people of fundamentally differing views . . . .").

33. *Id.* at 75.

34. Irving Bernstein, *The Conservative Mr. Justice Holmes*, 23 NEW ENG. Q. 435, 435 (1950).

35. Max Lerner, *Introduction* to OLIVER WENDELL HOLMES, JR., THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS, at xxviii (Max Lerner ed., 2nd ed. 2010).

36. *See* Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 685, 687 (2012) (citing examples of Pound, Hand, and Cardozo praising Holmes); Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119, 119 (1999) (quoting Frank's praise of Holmes).

"Only the shallow," said Justice Felix Frankfurter, "would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification."[37]

Holmes's position regarding the Fourteenth Amendment was put best in his dissent in *Truax v. Corrigan*: "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the se[veral] states . . . ."[38] Holmes was careful to qualify that he would maintain this position on the Fourteenth Amendment "even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."[39]

Holmes was not a relativist; he simply thought that his position on the Supreme Court did not give him license to prescribe moral beliefs for the rest of the country.[40] He reasoned that a judge should not impose his personal ideology onto a populace; he did so in part because his experience as a soldier in the Civil War led him to disdain avoidable conflicts between different cultures trying to impose their norms on each other and intensely disliked those who claimed to know what was true or right with absolute certainty.[41] His devotion to judicial restraint and his fear of judicial tyranny were such that he once wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[42]

Holmes tended to give state law the benefit of the doubt when the Constitution was not clear on an issue. In *Giles v. Harris*, he refused to grant relief from an Alabama law that disqualified many blacks from voting.[43] In *Bartels v. Iowa*, he dissented from the majority by reasoning that Iowa's ban on foreign language education in school was constitutional.[44] His dissent in *Tyson &*

37. Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 698 (1916).

38. Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

39. *Id.*

40. Lochner v. New York, 198 U.S. 45, 75 (1905).

41. MENAND, *supra* note 7, 61–62; *see also* Thomas R. Healy, *Holmes and the Battle of Ball's Bluff: Touched with Fire*, OR. ST. B. BULL., Aug./Sept. 2009, at 40, 42 (discussing Holmes's involvement in the Battle of Ball's Bluff during the Civil War).

42. Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, at 249 (Mark DeWolfe Howe ed., 1953).

43. Giles v. Harris, 189 U.S. 475, 488 (1903).

44. Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

Brother v. Banton asserts that

> a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[45]

A common mistake is to take Holmes's deference to the mores and traditions of states and localities as evidence of his shared belief in those mores and traditions. Holmes did not have to agree with the opinions of states and localities to say that federal judges and Supreme Court Justices should not inject their own worldview into the life of a community with an opposing one. As Frankfurter said of Holmes, "He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom."[46]

These stances do not make Holmes a constitutional conservative; they make him a pragmatist in the judicial sense. Holmes's position on judging is analogous to William James's suggestion that a person is entitled to believe what he wants so long as the practice of his religious belief is verifiable in experience and does not infringe upon the opportunity of others to exercise their own legitimate religious practices.[47] James exposited the idea of a "pluralistic world," which he envisioned to be, in his words, "more like a federal republic than like an empire or a kingdom."[48] Holmes likewise contemplated the notion of a federal republic in his opinions and dissents.[49]

Holmes's deference to state legislatures may have had

45. Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)

46. Frankfurter, *supra* note 37, at 686.

47. *See* WILLIAM JAMES, *The Varieties of Religious Experience, in* WILLIAM JAMES: WRITINGS 1902–1910 436–38, 459–60 (Bruce Kuklick ed., 1987) (arguing that it is not regrettable that there are many different religious sects and creeds and that others should be tolerant of these differences).

48. WILLIAM JAMES, *A Pluralistic Universe, in* WILLIAM JAMES: WRITINGS 1902–1910, *supra* note 47, at 625, 776.

49. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory.... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.").

something to do with the majoritarianism of John Dewey as some critics have alleged,[50] or, as I prefer to think, it may have had to do with his hesitance to encroach upon the sovereignty of localities. Either way, Holmes resisted the temptation to command faraway people on the grounds of supposed rights and liberties about which there was much disagreement.[51]

In light of Holmes's opinion in *Buck v. Bell*,[52] which upheld Virginia's eugenics statute,[53] libertarians and conservatives have associated Holmes with eugenics and eugenics with progressivism; however, a belief in the biological inferiority of certain groups and the concomitant call for human sterilization were not exclusive to progressives.[54] Nor were they conservative.[55] Although controversial from the beginning, ideas supporting eugenics were simply what many in that era, be they progressive or conservative, supposed to be scientifically correct and politically prudent.[56]

The eugenics movement was progressive in the broadest sense of the word in suggesting a utopian genetic vision toward which humans ought to advance, but that is the very sense of the word that is difficult to apply to Holmes. Holmes was no doubt insensitive (to put it mildly) when he declared that "[t]hree generations of imbeciles are enough,"[57] yet his opinion is tough to reconcile with the ideas of eugenicists like Charles Davenport.[58]

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50. *See* Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1468 (1994); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 184 n.67 (1982).

51. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

52. 274 U.S. 200 (1927).

53. *Id.* at 208.

54. *See* Robert E. Mensel, *The Antiprogressive Origins and Uses of the Right to Privacy in the Federal Courts 1860–1937*, 3 FED. CTS. L. REV. 109, 117–18 (2009) (stating that the many reforms of the time were diverse and were not wedded to a particular party or ideology).

55. *See id.*

56. *See id.*

57. *Buck*, 274 U.S. at 207 (reasoning that the interest of the state in a "pure" gene pool outweighed the individual interest in bodily integrity).

58. *See, e.g.*, CHARLES BENEDICT DAVENPORT, HEREDITY IN RELATION TO EUGENICS 255–59 (1911) (proposing ways to eliminate undesirable traits in people, including sterilization and segregating the feeble-minded from everyone else unless it can be shown that the feeble-minded are in their condition because of their environment rather than their heritable genes); *id.* at 260 (suggesting that controlled mating can enhance the species); *id.* at 266 (proposing that criminals be restricted in their right to mate); *id.* at 267 (proposing that just as the state has the ability to take life, it also has the right to sterilize or segregate certain people from marriage); *id.* at 268–269 (proposing that the state use the census to collect data about heritable traits so that families can advise their

Holmes's dissent in *Lochner* owes to the influences of C.S. Pierce, William James, and Chauncey Wright and has as its aim an opposition to federal intrusion upon state law as well as a protest against abstractions such as "rights" or "freedoms" and other appropriable signifiers.[59] It wasn't that rights or freedoms did not exist (Holmes discussed rights at length in *The Common Law*[60]); it was that unelected judges should not be in the business of defining them for everybody else.

Holmes explained that a judge's "first business is to see that the game is played according to the rules whether [he] like[s] them or not."[61] A judge does not or should not attempt to legislate or mobilize political action based on what he thinks is right; he must decide particular cases based on what the rule is because rules evolve out of the natural and gradual unfolding of the common law or else are voted upon by the people through their representatives. Holmes most likely agreed with the principle of freedom of contract that the *Lochner* majority delivered, but he was not about to dictate his belief to a state or local government, especially on such a liberal reading of the Constitution.[62]

Conservatives and libertarians ought to avoid the knee-jerk demonization of Holmes. Rather than trying to state what Holmes stood for, Holmes's critics ought to acknowledge that his thought reflects a multiplicity of influences, any one of which might have prevailed in one writing or another. There is much in Holmes that will excite and inform conservatives and libertarians, if only they would take the time to read him closely and to put his ideas into the appropriate context. To pass judgment on a man and his ideas without being familiar with them is precisely the type of thing Holmes cautioned against and labored to avoid. From that effort, at least, we can glean his conservatism.

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children about how to marry).

59. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
60. OLIVER W. HOLMES, THE COMMON LAW *passim* (1881).
61. Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915).
62. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

THE FEDERALIST SOCIETY
2012 NATIONAL LAWYERS CONVENTION

SHOWCASE PANEL IV: AN EXAMINATION OF SUBSTANTIVE DUE PROCESS AND JUDICIAL ACTIVISM

PANELISTS

HON. J. HARVIE WILKINSON III
PROF. STEVEN G. CALABRESI
PROF. MARK V. TUSHNET
WILLIAM H. "CHIP" MELLOR
HON. WALTER E. DELLINGER III
PROF. NELSON R. LUND
HON. EDITH H. JONES, *MODERATOR*

JUDGE JONES: Welcome to our panel, the final Showcase Panel this afternoon, the subject of which is "An Examination of Substantive Due Process and Judicial Activism."

This is always a timely topic with regard to the exploration of the powers and assumptions of the federal Judiciary. I might add, however, that from the perspective of some of us, we have been in an era of unprecedented executive and legislative activism, and surely that has some consequences for what the Judiciary has to do. But if my panelists get into that subject this afternoon, I might be forced to comment myself.

[Laughter.]

JUDGE JONES: But they're much better prepared than I am. I am Edith Jones. I am on the Fifth Circuit Court of Appeals. Our distinguished panelists are Judge Wilkinson of the Fourth Circuit, Professor Steven G. Calabresi, Professor Tushnet, Mr. Chip Mellor, former Solicitor General Walter Dellinger, and Professor Nelson Lund. I will give you better bios of them in just a second.

The format of the discussion is going to be that Judge Wilkinson will lead off with his comments, followed by the other gentlemen in order, and then we will have a round of responses. Because Justice Scalia is scheduled to speak at 4:15, be advised that if the panel discussion goes too long, we are going to terminate and not keep the Justice waiting. I have seen that happen at the Fifth Circuit. It is rude from the standpoint of the moderators and justices don't like to be kept waiting.

ATTENDEE: Oh, he won't mind.

JUDGE JONES: Maybe if he had a bourbon.

[Laughter.]

JUDGE JONES: Let me introduce the panel here. I don't need to take very long because most of these people are well-known to this audience. Judge Wilkinson has had a distinguished career on the bench, having ascended at the age of sixteen—

[Laughter.]

JUDGE JONES: —after matriculating through Yale and the University of Virginia and being a newspaper editor and a law professor. In the meantime, in this lengthy biography, he is also currently a Fellow of the American Academy of Arts and Sciences and has written several books.

Professor Calabresi, one of the founders of the Federalist

Society, is a Professor of Law at Northwestern University. He is Chairman of the Federalist Society's Board of Directors. He clerked for Justice Antonin Scalia and for Judges Robert H. Bork and Ralph K. Winter and served in the Reagan and the first Bush Administrations. He advised Attorney General Meese, Kenneth Cribb, and Vice President Dan Quayle. He has published extensively in areas of constitutional law.

Professor Mark Tushnet, the William Nelson Cromwell Professor of Law at Harvard, clerked for Justice Marshall on the Supreme Court and has had a teaching career that included the University of Wisconsin, Georgetown, and many visiting professorships. He is the author of numerous articles and more than a dozen books. He, too, is a fellow of the American Academy of Arts and Sciences, and he was the President of the Association of American Law Schools in 2003, when people were still hiring lawyers at a rapid clip.

Mr. Mellor is the President and General Counsel of the Institute for Justice, which he co-founded in 1991. He litigates cutting-edge constitutional cases nationwide protecting economic liberty, property rights, school choice, and the First Amendment. The Institute for Justice has litigated five Supreme Court cases, winning all of them but one. Mr. Mellor coauthored a book called *The Dirty Dozen* regarding the twelve Supreme Court decisions that have radically changed American life. Early in his career, he was the Deputy General Counsel for Legislation and Regulations in the Department of Energy, won the Bradley Prize in 2012, and was named a "Champion of Freedom" by John Stossel.

I've known Walter Dellinger for many years. He has deep ties to the Fifth Circuit having early in his career been a professor at the University of Mississippi School of Law at Oxford. He is a member of the appellate practice at O'Melveny & Myers. He is also on leave from his position at Duke University School of Law. He's argued many times in the U.S. Supreme Court. He is a prolific author and lecturer, and his clerkship dates back to Hugo Black on the United States Supreme Court. We'll hear a lot about literalism from Mr. Dellinger, no doubt.

And then finally, Professor Nelson Lund, whom I've known since he was only six feet tall.

[Laughter.]

JUDGE JONES: After completing a Ph.D. in political science

at Harvard University, he was on the faculty of the University of Chicago before he went to law school. He clerked on the Fifth Circuit for my colleague Patrick Higginbotham and then for Justice O'Connor. He was in the White House Counsel's office from 1989 to 1992, has been on the faculty of George Mason University, and is also a prolific author, lecturer, and supporter of, among other things, the Second Amendment.

So, we will start with Judge Wilkinson's comments and move down the line.

JUDGE WILKINSON: It's a great pleasure to be with you today, and I am particularly pleased to be on a panel with such distinguished panelists. It's wonderful to see all of you. I would like to issue an invitation to my co-panelists, which I am sure will be rejected peremptorily, to join me in the cause of judicial restraint and a restrained view of the Fourteenth Amendment in particular. I promise if you do that, it won't hurt. It won't bite. You might even find it quite pleasant.

It's important, I think, to look at the Fourteenth Amendment as a whole—not only substantive due process, which we are going to discuss today, but also the Equal Protection and the Privileges or Immunities Clauses.[1] And the difficulty is that we have three very vaguely and amorphously worded prongs of the Fourteenth Amendment. Over time, the Judiciary has been hopping back and forth between the three. And so, well, if this one doesn't work in terms of smuggling our rights through, we'll try this other one; and if the other one doesn't work, then we'll try this one. So we have different rights coming in under substantive due process, under strict scrutiny in equal protection, or under the Privileges or Immunities Clause.

The problem I have from the bench is that all this stuff is so fuzzy and so vague, and the Fourteenth Amendment is so vague. It has a core purpose which must be respected, and that is to redress our history of discrimination with respect to African-Americans. But a lot of the time, given the vagueness of the Fourteenth Amendment's phrasing, I simply have no idea what standards I am applying, and that makes me very nervous.

Now, everybody is pushing their own favorite set of rights into the Fourteenth Amendment, and these rights sound great when you express them in the abstract. Everybody says, "Yeah, that

1. U.S. CONST. amend. XIV, § 1.

sounds fine," and they do have a strong basis oftentimes in public policy and in the kinds of things that legislatures ought to address. But my question is, "What in the world is the legal basis for smuggling these into the Constitution?" Both liberals and conservatives are guilty of this out-of-thin-air rights creation. We have liberals who tend to emphasize autonomy rights, rights to reproductive choice, as well as rights to same-sex marriage. And lest we forget, in the early 1970s, the liberal Justices were pushing through the fundamental rights prong of equal protection: a right to certain levels of public assistance, a right to a certain level of housing, a right to certain levels of education, and I suppose what was going to follow on that is that the Judiciary was going to be policing adequate levels of domestic appropriations. So you have that history.

But, as opposed to these autonomy rights, conservatives are pushing a set of economic rights. They are not as well developed jurisprudentially, but many people hope they will be. These include the right to pursue a calling, right to bear arms, right to contract, perhaps free of minimum wage restrictions, and the right to hold property, to a certain degree free of zoning regulations. So this list of fundamental rights that both sides are pursuing is literally endless, and there has to be some halt to it. The problem here is that everybody loves their own rights; it's just the other person's rights that we have qualms about. Frankly, we are all activists until our own ox is gored.

Now, why is this development so terribly wrong? Well, for one thing, by using these vague and fuzzy prongs of the Fourteenth Amendment and moving away from its core purpose of protecting the rights over which we fought a civil war, we are forsaking the rule of law as a rule of words. These rights that are created have very little connection to what we regard as the traditional ingredients of law: text, history, and structure. They are really what judges want to do. So we are exchanging the rule of law for what is to be, quite honestly, more and more the rule of judges.

This is inconsistent with self-government and it is inconsistent with the fact that the Constitution creates several forms of liberty. We think *individual* is the only adjective that can possibly modify the word *liberty* in our founding document. That is not true. Our framers created a model of democratic liberty and it's important that we not forsake that.

Another thing that is wrong with this creation of rights: it is not only inconsistent with self-governance, or the fact that life-tenured judges simply don't have the eyes and ears of legislators and are not accountable through elections, but this is rule by one profession only. And I ask you, suppose you got out of bed one morning and found that a bunch of accountants or schoolteachers or plumbers or financial analysts had ruled on the questions that were most important to your moral, philosophical, and religious views. How happy would you be if another profession suddenly started calling the shots for something that you felt very deeply about on a fundamental, moral, and philosophical level? Well, don't you think other professions have qualms about lawyers asserting this sort of professional control over their personal lives?

This creation of rights is wrong on so many levels, not just one. It is inconsistent with our federal system. Those of you who were concerned in the health care debate about Congress exceeding its enumerated powers, should you not now be equally as concerned about affording the Judiciary a blank check with respect to unenumerated rights? Both represent the aggrandizement of central power over states, and why is it that these rights strike the heart of residual state powers under our system? They say Texas and Rhode Island no longer have the right to go their separate ways and to approach problems of great moment and controversy in ways that suit their own citizens. So we are preempting our federal system and we are disenfranchising Americans by the millions with the creation of these rights.

Let's face it—pro-life and pro-choice camps have a legitimate point to make. They have good arguments at the bottom. But on something that is so intimate a subject as this, and where we feel as strongly about things as we do about the life of a fetus or about a woman's reproductive rights, why should two hundred million American citizens be disenfranchised by a 5–4 ruling of the United States Supreme Court? That is not what self-governance is about.

And you take the question of same-sex marriage. It is a very difficult issue, and as a policy matter, I would argue that it is good and just to recognize that gay Americans make such wonderful contributions to our society and that they are after traditional ends, such as service in our military and the tradition

of marriage. It is not a radical movement. I think an argument can be made, and a strong one, that same-sex marriage is something that we should approve as Maryland and Maine and Washington State did in recent referendums.[2] They went about it the right way and they said there is a right to gay marriage here.[3] But there is also a strong argument on the other side, which is that for hundreds of years it has been thought in this country, and through millennia in other societies, that men and women have something distinctive and valuable to contribute to the family unit.

And so I ask myself: "What right do I have on this hard an issue and this difficult an issue to simply put my view into the Constitution?" I think it's far better to let Americans arrive at a just and inclusive social order on their own. These rights get politicized when decided in courts, folks. We were designed as the one politically transcendent branch. The political process is going to be partisan, but the Judiciary is much less so.

Now take *Roe v. Wade*.[4] I am a lower court judge, and I would do anything—no matter how much I disliked a decision—to follow the Supreme Court in letter and spirit. But I can't help but say how much damage this decision has inflicted upon our court system, how it has politicized judges, how it has diminished us in public esteem, and how it has been corrosive to the rule of law.

You say, "Well, judicial restraint is so boring. Let's just do something activist and first impressionist and sort of hit the newspapers tomorrow with a glitzy headline. Judge Wilkinson, you are sitting up here and asking for something that is so gray and dull." Well, that's what they said about budget deficits—that it was too much like castor oil, and we had to give people something more appetizing. But honestly, you don't have a great republic unless institutions live within bounds and unless institutions practice self-discipline. And I think you and I feel that's true with the Congress—that they should practice self-discipline—and I think many people feel that very same thing with respect to the Judiciary.

People say, "Well, but you'd have nothing to do if you didn't

2. ME. REV. STAT. tit. 19-A, § 650-A (2012); MD. CODE ANN., FAM. LAW § 2-201 (2013); WASH. REV. CODE ANN. § 26.04.010 (2012).

3. *Id.*

4. Roe v. Wade, 410 U.S. 113 (1973).

strike down these laws." Are you kidding?

[Laughter.]

JUDGE WILKINSON: Have you looked at the federal code and looked at all those statutes, looked at all those regulations, interpreting those, making sure agencies in their regulatory rulings follow the law? I don't know about the Code of Federal Regulations. I know it stretches across the country, may stretch around the globe. My only question is whether it goes up to the moon or not.

[Laughter.]

JUDGE WILKINSON: These things will keep us plenty busy. It's not rubberstamping to stand up for self-governance and the right of the people to determine their own destiny. Substantive due process is our topic for the day, but the term itself is a contradiction in terms. Maybe you learned on the first day of law school or maybe well before that process actually suggests procedure, but somehow we turned process into a big substantive doctrine.

Finally, my recent book is simply a *cri de coeur* to get back to a system of restraint.[5] I've read these "cosmic theorists," as I call them, from Bork to Scalia to Dworkin to Brennan to Ely to Posner, and they're all leading us down the primrose path. They're seducing us. They're saying, "We are going to give you an intellectually pleasing and an intellectually respectable path to do whatever you want." So the living constitutionalists take these capacious phrases and sort of pour their own meaning into them on the idea that they are updating this document for us all, overlooking the fact that the people themselves, through their legislatures, are quite capable of updating. And the originalists are saying they have an objective theory and ignoring the fact that there is sometimes scant evidence of what the original meaning even was, and sometimes there's so much evidence that you get perfectly selective about what evidence you can choose as evidence of original intent.

And under these theories, time after time after time again—we can cite the specifics—everybody on the bench ends up exactly where you would expect. And I think it's important to recognize these brilliant cosmic theorists, who are certainly far

5. J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012).

more creative than I am, are simply providing an intellectually respectable way to erode the power of the people in this country and augment the power of courts.

So restraint is a populist cry, it has public salience, and it is true to the rule of law. And honestly, folks, when you look at it, courts have gotten into abortion,[6] into firearms regulation,[7] into same-sex marriage,[8] into millennial presidential elections,[9] into zoning regulation[10] and health care reform[11] and counterterrorism strategy,[12] et cetera, et cetera. When is it going to end? We have a great judicial tradition in this country with Learned Hand, Oliver Wendell Holmes, Louis Brandeis, William H. Rehnquist, John Harlan, and Felix Frankfurter. They made the rule of law something of stature, something of neutrality, and something that was greater than the personal preferences of men and women on the bench. All I can say is we have moved away from the modesty of restraint, which many of our very greatest judges have embodied, and what I ask of you is, let's get back to some of that. We're heading in the wrong direction. We've been heading in the wrong direction. There surely is a better way. Thank you.

[Applause.]

PROFESSOR CALABRESI: Thank you. It's a great privilege to share this stage with so many distinguished commentators and most especially with Judge J. Harvie Wilkinson, who is both a good friend and one of the most distinguished judges on the federal bench. Judge Wilkinson is a paragon both of brilliance and of self-restraint, and he deserves all of our admiration and praise for his illustrious career. He will be remembered along with Judge Bork, Justice Scalia, Judge Posner, and Judge Easterbrook as one of the many fine academics appointed to the federal bench by President Reagan.

But, notwithstanding my deep admiration for Judge Wilkinson

6. *See* Roe v. Wade, 410 U.S. 113; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

7. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

8. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-144).

9. *See* Bush v. Gore, 531 U.S. 98 (2000).

10. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

11. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

12. *See* Boumediene v. Bush, 553 U.S. 723 (2008); *see also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

personally, I have to say that I read his new book *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*,[13] and I found myself in very sharp disagreement with some parts of it.

I want to respond in particular to Judge Wilkinson's criticisms of several of his conservative colleagues on the bench for being too active in striking things down and then explain at a more theoretical level why I disagree with Judge Wilkinson's book. I should mention by way of example that Judge Wilkinson criticizes the Supreme Court for applying the Second Amendment as an individual right in the *Heller* case[14] but then incorporating the Second Amendment to apply against the states through the Fourteenth Amendment.[15] He criticizes the attacks on the health care mandate and argues that judicial restraint counseled leaving the health care mandate in place.[16] And, he is skeptical of some of the religious liberty and economic liberty arguments that many conservatives have advanced in recent times.[17]

I have to say fundamentally, at the beginning, I just do not think that it is judicial activism for a court to strike down a law or overrule a precedent that itself violates the Constitution. The reason judges in our legal system have the power of judicial review is because We the People of the United States have limited the power of our legislatures and executive officials in a written Constitution, which is the supreme law of the land.[18] The Constitution itself says that only laws made pursuant to it are the supreme law of the land, and the judicial power extends to all cases in law and equity arising under the Constitution.[19] It violates the Constitution to create a right, as happened in *Roe v. Wade*[20] or as happened in the *Dred Scott* case,[21] but it also may violate the Constitution not to enforce a right that is textually guaranteed or that is deeply rooted in history and tradition.[22]

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13. WILKINSON, *supra* note 5.
14. District of Columbia v. Heller, 554 U.S. 570 (2008).
15. *Id.* at 49, 57–58.
16. *Id.* at 51–52.
17. *Id.* at 108.
18. U.S. CONST. art. VI, cl. 2.
19. U.S. CONST. art. III, § 2, cl. 1.
20. Roe v. Wade, 410 U.S. 113 (1973).
21. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.
22. See Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

I fear that my friend Judge Wilkinson's call for judicial restraint is really a call for judicial inaction and rubberstamping and that it means the Constitution will not have as much practical impact in our life as it was supposed to have. And I want to mention to you some of the many famous examples in American history of what has happened when courts have *failed* to enforce the Constitution. We all know about judicial activism in *Roe v. Wade* and in *Dred Scott v. Sandford* where the Supreme Court created new rights out of thin air, but there have been some pretty bad instances of courts doing the opposite—instances of judicial rubberstamping of legislative and executive actions that were constitutionally flat out unconstitutional.

Let me just quickly list off ten cases in which judges were restrained in Judge Wilkinson's sense in that they did not strike down a legislative act or an executive act that violated the Constitution: 1) *Korematsu v. United States,*[23] 2) *Buck v. Bell,*[24] 3) *Wickard v. Filburn,*[25] 4) *Goesaert v. Cleary* (holding that sex discrimination is subject to the rational basis test),[26] 5) *Plessy v. Ferguson,*[27] 6) *Pace v. Alabama* (upholding laws against miscegenation),[28] 7) *Kelo v. City of New London,*[29] 8) *Christian Legal Society v. Martinez,*[30] 9) *Morrison v. Olson,*[31] and 10) or the health care decision of last June, *National Federation of Independent Business v. Sebelius.*[32] In all of those cases, U.S. Supreme Court Justices rubberstamped whatever the political branches wanted to do, and in each instance, there was a great injustice. The injustices done in *Plessy v. Ferguson* and in *Korematsu* are now widely recognized as inexcusable instances of judges rubberstamping whatever the political branches wanted to do.

Less appreciated is the injustice that was done, for example, in *Buck v. Bell,* in 1927. In *Buck v. Bell,* U.S. Supreme Court Justice Oliver Wendell Holmes, whom Judge Wilkinson just cited to you moments ago with the greatest admiration, wrote an opinion

23. 323 U.S. 214 (1944).
24. 274 U.S. 200 (1927), *abrogated by* Skinner v. Oklahoma, 316 U.S. 535 (1942).
25. 317 U.S. 111 (1942).
26. 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190 (1976).
27. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
28. 106 U.S. 583 (1883), *overruled by* McLaughlin v. Fla., 379 U.S. 184 (1964).
29. 545 U.S. 469 (2005), *superseded by statutes,* MO. ANN. STAT. §§ 523.253, 523.256, *as recognized in* Planned Indus. Expansion Auth. v. Ivanhoe Neighborhood Council, 316 S.W.3d 418, 426 (2010).
30. 130 S. Ct. 2971 (2010).
31. 487 U.S. 654 (1988).
32. 132 S. Ct. 2566 (2012) (plurality opinion).

upholding a State of Virginia eugenics law that provided for the compulsory sterilization of an eighteen-year-old woman, Carrie Buck, who was alleged to be mentally retarded as, allegedly, was her mother.[33] Justice Oliver Wendell Holmes said in the course of upholding that law,

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[34]

Judge Wilkinson's hero, Justice Oliver Wendell Holmes, ended his restraintist opinion with the ringing words: "Three generations of imbeciles are enough."[35] In the wake of *Buck v. Bell*, over 30,000 people in the United States were subjected to compulsory sterilization by the government.[36] This is the kind of injustice that happens when judges *rubberstamp* whatever the political branches want to do even when it violates the Constitution. It is for these reasons that I just do not find persuasive the argument that judges should always be deferential to the political branches. I think that judges should be guided by the law and by the Constitution, which is the supreme law. I think judges should follow and enforce the Constitution wherever it applies.

My second big point of disagreement with my friend Judge Wilkinson is with his biting criticism of the need for theory in constitutional law. This argument seems surprising from a former law professor who is now a judge because it has a whiff of anti-intellectualism to it.

Where did the big, cosmic constitutional theories that my friend Judge Wilkinson speaks of so disapprovingly come from? Well, they came from two very major episodes in our recent constitutional history. First, in the 1954 landmark opinion of all time, *Brown v. Board of Education*, the Supreme Court struck down compulsory racial segregation in public schools[37] in an

33. 274 U.S. 200 (1927).
34. *Id.* at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905).
35. *Id.*
36. *See, e.g.*, Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 867 (2004).
37. 347 U.S. 483 (1954).

opinion by Chief Justice Earl Warren that was widely regarded as a professional embarrassment, albeit an embarrassment that reached a correct result. Chief Justice Warren's opinion in *Brown* said that racially segregated schools had been constitutional until 1954 and that they only became unconstitutional in 1954 because of sociological evidence that had newly come to light. This opinion implied among other things that, conceivably, compulsory racial segregation could at some point again be constitutional if new sociological studies came along that justified it in the future.[38]

Professor Herbert Wechsler of the Columbia Law School and of Hart & Wechsler fame declared that Chief Justice Warren's opinion in *Brown* was an embarrassment.[39] Wechsler complained that the *Brown* opinion said nothing about racial segregation outside of schools and thus failed to provide lower courts with any guidance as to the principle that *Brown* stood for. Judge Robert H. Bork, in a famous 1971 law review article, echoed Wechsler in saying that constitutional law desperately needs theory. Judge Bork faulted the Warren Court not only for failing to state neutral principles in its opinions but also for failing to neutrally derive the principles it was applying from text and history. Judge Bork argued that we need to understand not only what is the principle that *Brown v. Board of Education* stands for, but also where is it derived from in the text or history of the Constitution, and what is its content?[40]

The embarrassment grew greater two years later with Justice Harry Blackmun's 1973 opinion in *Roe v. Wade*, which my friend Judge Wilkinson just mentioned and very rightly criticized. *Roe v. Wade* was, if anything, an even more embarrassingly, badly crafted opinion than the opinion in *Brown v. Board of Education.* Judge Bork and Justice Scalia and former Attorney General Edwin Meese III developed the constitutional theory of originalism to respond to constitutional theorists of the left like Ronald Dworkin who were calling for more decisions like *Roe v. Wade.* Constitutional theory on the right, and in response on the left, the very cosmic constitutional theories that Judge Wilkinson

38. *See id.* at 492–95.

39. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 31–35 (1959).

40. Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 1 (1971).

criticizes, arose to guide the Supreme Court in future cases like *Brown v. Board* and *Roe v. Wade* so that it would be able to speak more clearly and more consistently and more correctly. The whole purpose of constitutional theory is to help explain why *Brown* is right, why *Roe* is wrong, and what that implies for future cases. This is what originalism does. It is good constitutional theory that keeps judges honest and that ensures a principle requirement of justice, which is that like cases ought to be decided alike.

Without constitutional theory, every case would get decided very narrowly on its own peculiar facts pursuant to a totality of the circumstances balancing test. Litigants would have no guidance in future cases as to how they should expect that the Court might rule. The identity of the parties might even cause like cases not to be treated alike because of a Supreme Court unconstrained by law and rules, which require theory. Under my friend Judge Wilkinson's approach, constitutional law becomes simply an exercise in which litigants bring fact patterns to a group of nine wise old people sitting under a tree, and on the basis of the totality of the circumstances and the facts of that particular case, the court rules one way or the other, stating no principle that binds itself and no principle that will bind future cases such that like cases will be treated alike. Judge Wilkinson's book calls on judges not to root their decisions in text, or history, or law, or principle, and that ultimately would cause the Supreme Court to behave arbitrarily, capriciously, and lawlessly. I do not think that is a road that any of us should want to go down. Thank you.

[Applause.]

PROFESSOR TUSHNET: Thank you. At the end of Judge Wilkinson's presentation, he asked the question, "When it is going to end?" where "it" referred to a judicial reliance on ideas of substantive due process. I think the answer to that is never, and I want to elaborate on that briefly in the time I have available.

I come to this issue as an outsider in some sense. I'm not a judge. I'm not a litigator. For these purposes, I am a reasonably well-informed citizen who has views about substantive issues and about the issue of either judicial activism or restraint. More than a decade ago, I wrote a book called *Taking the Constitution Away*

from the Courts,[41] which nobody likes because everybody likes judicial activism when it's their judicial activism. That's actually what ordinary citizens want. I like judicial activism when my folks are in charge of the courts, and I don't like judicial activism when your folks are in charge of the courts—that's everybody's view, including, I think, most of the people in this room, but that may be overly cynical.

So why won't the ideas of substantive due process go away? Well, I think the answer is that it's too useful for everybody. Again, towards the beginning of his talk, Judge Wilkinson provided a long list of issues or questions for which the substantive due process doctrine provided answers, and the list was across the spectrum of ideological concerns. It's useful, no matter what your point of view is and no matter what your substantive commitments are.

Now, that's important in part because of something that Steve Calabresi just said. Some theoretical efforts are designed to impose what I'll call the discipline of a method, a theory, on the substantive commitments that people have. But my own view is that as a psychological matter, the methodological prescriptions have a weaker hold than the substantive commitments, at least when you take everybody's behavior in the aggregate. Sometimes judges or scholars will say, "I have to take this position because of my methodological commitment, even though I don't like the substantive outcome," and sometimes that may be honest. I mean, I am skeptical about it pretty often, but they may be sincere. But if you look at the wide range of things, the methodological commitments generally end up being subordinated to the substantive ones.

Why might that be? Well, the methodological stuff takes, as I would put it, a lot of work. You have to figure things out, get things into the right slots, make pieces of the theory fit together, and the gears mesh in the right kind of way; and that's typically difficult. It doesn't mean that given a methodological commitment, you can't come to some preferred substantive end. It just means that it's more work. It's a lot of work sometimes and not so much work at other times.

In contrast, using substantive due process is relatively easy. At least I think relatively easy. It still takes some work, but the work

41. MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

is not as substantial. So part of substantive due process involves invoking the traditions of the American people, or the Anglo-Saxon people, or the civilized people around the world; the formulation doesn't really matter.

When you think about tradition, we all know that an issue arises about the level of generality at which you are going to describe the tradition, which you are then going to invoke against the statute you're considering. Notwithstanding a variety of efforts to discipline the selection of the level of generality, those efforts have failed. My favorite example is from *Glucksberg* in which the disciplining method was to provide a careful description of the tradition and of the statute that was being challenged.[42] Well, I can carefully describe anything, if you want me to, in a way that will get me where I want to go.

So, part of substantive due process is the invocation of a tradition. For those of you who were at the discussion at lunch, there is a natural law tradition that can generate a whole bunch of things, many of them contradictory, which is, I take it, one of the issues in the debate.

What else is there as part of the methodology of substantive due process analysis? Well, invocation of precedent. In *Roe v. Wade*, Justice Blackmun notoriously relied on an 1891 decision involving, essentially, discovery of matters about a physical condition of a plaintiff.[43] Well, okay, so there's this precedent out there, and you use it in doing the kind of reasoning that you can do with substantive due process. And precedential reasoning is subject to a standard set of—I would call them—manipulations or moves. Lawyers know how to do them. Again, sometimes it's more work than other times, but when you put together tradition, precedent, and structure, which is also malleable, you are going to be able to go wherever you want to go. From the point of view of an outsider observing what judges do, that seems to be what they do. And from the point of view of somebody thinking about what judges are likely to want to do, I think the point about substantive commitments trumping methodological ones is borne out by the experience of our Supreme Court over its entire history.

So just to conclude on the same answer I gave to Judge

42. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

43. Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Wilkinson's question—Where is it going to end?—I think the answer is it's not going to end and we have to somehow get used to it. My preference, as I said, is taking the Constitution away from the court, but nobody is going to do that. So then we have to figure out, given the court is going to be doing this kind of stuff, what sort of stance should us outsiders take toward it? Thank you.

[Applause.]

WILLIAM H. "CHIP" MELLOR: Judge Wilkinson makes an eloquent case for the prospect that judicial activism is a big problem and that substantive due process inevitably leads to mischief. I respectfully dissent.

Whatever originally animated conservative concerns with judicial decision-making, whether it's *Roe v. Wade* or the Warren Court, I submit that today, the term "judicial activism" has become an all-purpose pejorative by which both conservatives and liberals attack judicial opinions with which they disagree. By making charges of activism, critics often seek to marginalize the court that made the ruling and oftentimes impugn the integrity of the Judiciary itself. The end result is to weaken the power of the courts across the board.

Rather than doing too much, courts have abdicated their role in enforcing constitutional limits on the other branches of government. That abdication began, of course, in the New Deal, when the Supreme Court ceded unprecedented levels of authority and power to the legislative and executive branches.[44] It has now been institutionalized by both liberals and conservatives—most egregiously through the rational basis test, pursuant to which courts routinely rubberstamp laws affecting economic liberty and property rights.[45] But it hasn't stopped there. The language in rational basis review, and the philosophy underlying it, has seeped into other dimensions of the courts' jurisprudence, notably federalism, with entirely predictable results.

The rational basis test, for the folks who aren't familiar with it, states that any reasonably conceivable set of facts will suffice to uphold an economic regulation, even if those facts did not exist when the law was passed and even if the government is unable to

44. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

45. *See, e.g.*, Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 490 (1955).

prove that those facts exist today.[46]

Furthermore, under the rational basis test, judges are expected to make up reasons to uphold the law when the government is unable to do so.[47] The court becomes not the neutral umpire that Chief Justice Roberts has described,[48] but instead an advocate on behalf of one party to the litigation: the government.

We should have, instead, judicial engagement. Engagement starts with a premise that the Constitution establishes a federal government of limited, enumerated, and separated powers, and that the Fourteenth Amendment limits state power, most notably by the Privileges or Immunities Clause—which sadly we know was effectively read out of the Constitution by the *Slaughter-House Cases* and replaced haphazardly with substantive due process.[49] Engagement recognizes that courts have a critical role in enforcing constitutional limits on the other branches, but it does not guarantee outcomes. I do believe, though, it enhances the prospects for liberty.

Let's look at what engagement means for the rational basis test and substantive due process. Engaged judges would make a sincere effort to determine the government's actual ends, something judges do routinely in matters involving real scrutiny. Then they would evaluate the legitimacy of those ends—for instance, if they were done for discriminatory or protectionist purposes. The courts would refuse to accept unsupported factual assertions and judges would maintain neutrality, no longer becoming the government's advocate of last resort. These practices both draw upon and enhance the court's truth-seeking function. They put litigants on equal footing and they ground cases in evidence. They also serve the important purpose of ensuring that judges' opinions are not driven by their personal policy preferences.

Now, all too often, critics of judicial activism advocate the elimination of substantive due process and everything associated

46. See Carolene Prods. Co., 304 U.S. at 152.

47. Fed. Commc'n Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

48. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, J. of the United States Supreme Court), available at http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.

49. *See* Slaughter-House Cases, 83 U.S. (1 Wall.) 36, 118–19 (1873).

with it. This is a mistake. "Substantive due process" is an unfortunate term for a very important concept, a concept that dates back to the Magna Carta's law of the land provision. It stands for the idea that government is limited, both in the ends it may pursue and the means it may use to achieve those ends. We should not lightly throw out that concept because modern theorists have saddled it with an oxymoronic name.

Indeed, I suspect that very few people would actually want to give up substantive due process entirely. For instance, who among us would like a rule of law under which the Constitution provided absolutely no protection for the unenumerated right to direct the upbringing of your own children or to have children in the first place? If the Judiciary is to have any allegiance to the concept of limited government and individual rights, it will have to wrestle with the concept underlying substantive due process and the Privileges or Immunities Clause. As an engaged Judiciary does this, it will ground opinions in the Constitution and in evidence. This will limit the potential for the sort of mischief that concerns conservative critics of substantive due process, and more importantly, hardworking people will no longer face a stacked constitutional deck when their economic liberties are violated.

On the other hand, as long as the rational basis test invites or even compels judicial abdication, Americans will continue to see increasingly unaccountable government. There has never been a more urgent time for limiting government power under the Constitution. The time for engagement is now.

[Applause.]

WALTER E. DELLINGER III: I was once asked by someone who was about to be a Supreme Court Justice what I thought would be the hardest part of the job. I responded that I thought the hardest part would not be deciding what you think is the right answer to any of the questions before you, but the hardest thing would be deciding when to impose your view of what the right answer is and substitute it for others'—whether it's state legislatures, the Congress, the President, or private actors who have reached their own judgment as to what the right answer is. I, therefore, think it's such a perfect panel discussion to think about both substantive due process and the issues of judicial activism and restraint in the same session.

Let me try to divide them and speak just for a few minutes

about the substance of due process itself and then about the issues of restraint. A few years ago, I gave the Simon Lecture at the Cato Institute as part of their Supreme Court review. My thesis, quite simply, was this: that the disparagement by almost all liberal scholars and jurists of the constitutional protection of economic rights had in fact weakened the constitutional foundations for the protection of personal liberty.[50] Conversely, the disparagement by some conservative jurists and scholars of unenumerated personal liberties had weakened the constitutional foundation of rights of property, contract, and occupational freedom. The Constitution, both written and in its enduring norms, protects both;[51] both are essential in my view, and each supports the other. That still is before you get to the issue of constraint.

But I do think it goes back to what, for me, is the Constitution of the United States in two sentences. This is actually the advanced class, Roger.

[Laughter.]

WALTER E. DELLINGER III: The first sentence is this: before the government can interfere with your liberty, it has to give a reason. That's the basic norm of western constitutionalism. The second is the corollary of that, which is: before the government interferes with a deeply important liberty, it has to have an especially good reason. That's the more contested part. The first sentence is simple. And of course, as we all understand, when the government gives a reason, it has to be a publicly regarded reason. If it gives a reason like a bad parent—which I was all too often—such as, "Just because I said so," that doesn't count as a reason.

I think what happened to our protection of liberty is that we had excessive protection of liberty in a way that interfered with the ability of government to ameliorate the harshness of the industrial workplace around the turn of the century. We had too great a fixation on a more absolutist view of property rights—an unwillingness to recognize or to accede to what were truly legitimate public goals.

What happened in reaction to that—and the Justice for whom I clerked, Hugo Black, was part of the countermovement—was, I

50. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2004 CATO SUP. CT. REV. 9, 9–10 (2004).

51. *Id.*

thought, a too wholesale repudiation of the protection of rights of economic liberty, so that in a case called *Lincoln Federal*, the court completely abandoned any scrutiny of economic regulation.[52]

There is a judge back in my state, a state supreme court justice named Sam Ervin, who later presided over the Watergate hearing.[53] Sam Ervin, at the very time the Supreme Court was repudiating, has a wonderful opinion in a case called *State v. Ballance*, where Owen Ballance was convicted by the State of North Carolina of a criminal misdemeanor for being in the business of taking family photographs for hire.[54] He had failed to be licensed by the state Board of Photographic Examiners—a board made up, as you might expect, of people who had themselves been licensed by the Board of Photographic Examiners for at least five years.[55]

[Laughter.]

WALTER E. DELLINGER III: And he says the state has no justification for this other than the protection of a small group of current photographers. He also said there's nothing special about this occupation; it's no different from being an archeologist or a beekeeper or a curtain maker, and he goes through the whole alphabet.[56] He says that there has to be some reasonable basis to advance the public good or to avoid a public evil,[57] and I think he had it exactly right. The state was left, in a sense, naked without a justification, and when you allow that, it becomes much harder to try to protect personal liberties. That's why the opinion in *Griswold* is such a mess by Justice Douglas. He can't say this is an important liberty and the State of Connecticut has offered no good reason, no publicly regarded reason, for denying married couples the right to make their own decision about contraceptives.[58] So he had to say it's in the penumbra of the Third Amendment and the Fifth Amendment and the Fourth Amendment because of the abandonment of substantive due process.[59] Whereas Justice John Marshall Harlan wrote a

52. Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525 (1949).

53. BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, Ervin, Samuel James, Jr., bioguide.congress.gov/scripts/biodisplay.pl?index=E000211.

54. 229 N.C. 764, 765 (1949).

55. *Id.* at 765–66.

56. *See id.* at 771.

57. *Id.* at 769–70.

58. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

59. *Id.* at 484.

much more honest opinion; he set out why he thought it was something of such central importance in our constitutional tradition that the state needed a very good reason indeed.[60]

And then also, it gives us a basis. Substantive due process, this principle that the state has to have a reason, finds its way into many clauses of the Constitution.[61] I thought during the debates in the Supreme Court over the Affordable Care Act that much of the questioning from the bench was really about substantive due process and not the Commerce Clause. When Justice Kennedy says this would fundamentally transform the relationship between citizen and government,[62] or when other Justices would ask if this is a subsidy from young and healthy to older and sicker; those are both different kinds of substantive due process concerns.[63] I'm not saying they are legitimate or illegitimate, but they seem to me to have much less to do with the Commerce Clause than with where we fit in the sense of either individual liberty or an anti-redistributionist sense.

I think, finally, of a case like *Moore v. City of East Cleveland*, where East Cleveland had a zoning ordinance that limited who could be in a family for purposes of living in a single family dwelling—a definition that excluded the ability of a grandmother to have in her home her two grandchildren, each of whom had lost its parents and who are cousins to one another.[64] They were illegal occupants, and the court ruled that she had to send one of them home.[65] Now, this is just the machinery of bureaucracy running over someone. Whatever reasons there were about school overcrowding or excessive parking to make you limited, they just didn't apply here. And in our court system, you get to go to a court and say, "Call the city officials to account. Tell us why you are going to break up this family." As Charles Black once remarked, the parade of horribles was alive and actually marching in downtown East Cleveland when seeing the facts of this case.

[Laughter.]

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60. *Id.* at 500 (Harlan, J., concurring).

61. *See id.* at 484 (discussing the substance of amendments in the Bill of Rights).

62. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (plurality opinion).

63. *See* Transcript of Oral Argument at 10, Dep't of Health & Human Servs. v. Fla., 132 S. Ct. 2566 (2012) (No. 11-398).

64. 431 U.S. 494, 495–98 (1977).

65. *Id.*

WALTER E. DELLINGER III: So I see the need to have this protection of liberty, and yet I'm quite chastened when I read J. Harvie Wilkinson's excellent *Cosmic Constitutional Theory*;[66] it makes me realize that the values I prefer are indeed activist values. I think it's important not to deny that. I think one of the most important chapters in the book says that originalism, certainly if it's mishandled, can be an avenue for activism because it gives you the certainty that someone else decided this.[67] Even when the Court is divided 5–4 with ample history on both sides about what was originally intended, it gives you the comfort and certainty that it's not your own decision. Whereas judges like Harlan, Henry Friendly, and Lewis Powell took more responsibility for their decisions when using more of a straight-up liberty by explaining why they thought a value was important.

So I am chastened by the fact that every one of our constitutional theories and every one of our preferences that we have that is judicially enforced—and I would not abandon judicial enforcement—is acting contrary to a very fundamental value of our whole constitutional system, which is the value of self-government. And that is, Judge Wilkinson reminds us, something we can never lose sight of. As my colleague Jefferson Powell at Duke said, we need to abandon the dichotomy between bad politics and good law.[68] Law is not always good; politics is not always bad. And it's true that the realm of politics to which judges would be deferring is a realm in which the partial and the partisan, the angry, and the ill-informed all can have their sway. But at the end of the day, it's the way we as a people, for all our imperfections, organize and govern ourselves in a way that's not controlled by liberty. Thank you.

[Applause.]

PROFESSOR LUND: It's an honor to be here and an honor to be on such a distinguished panel.

Substantive due process is the purest form of judicial activism. It was made up out of some very thin air, and it has no basis in the Constitution. The Supreme Court's first use of this substitute for legal reasoning came in Chief Justice Taney's opinion in *Dred*

66. WILKINSON, *supra* note 5.

67. WILKINSON, *supra* note 5 at 33–59 (ch. 2, "Originalism: Activism Masquerading as Restraint").

68. *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).

Scott.[69] His entire analysis consisted of the following expostulation: "[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[70] In fact, of course, the slaveholder had committed an offense against the law. So what Taney really meant was that a law forbidding slavery could hardly be dignified with the name of due process of law. Res ipsa loquitur.

More recently, Justice Stevens wrote a dissenting opinion in which he purported to find substantive due process in the written Constitution.[71] Here is what he said:

> [T]he text can be read to "impos[e] nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law,' lest superficially fair procedures be permitted to 'destroy the enjoyment' of life, liberty, and property, and the Clause's prepositional modifier be permitted to swallow its primary command."[72]

In other words, if you delete the phrase "without due process of law" from the Due Process Clause, you are left with what Stevens calls the "Liberty Clause."[73] So judges can now do whatever they want. Res ipsa loquitur again.

I confess that I adhere to the simple-minded proposition that something that has no basis in the text of the Constitution, or in any historical evidence about the original meaning of the Constitution, is actually not in the Constitution. What I won't confess to is turning originalism into some kind of cosmic constitutional theory.

In the first place, there are lots of issues about which the evidence of the original meaning is highly uncertain. Substantive

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69. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

70. *Id.* at 450.

71. McDonald v. City of Chicago, 130 S. Ct. 3020, 3090 (2010) (Stevens, J., dissenting).

72. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 764 (1997) (Souter, J., concurring) (alteration in original) and Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)). Note the absence of any citation to any opinion of the Court.

73. *Id.* at 3091–92.

due process is not one of them, however, so that problem is not especially relevant here. What *is* relevant is that the original meaning of the Constitution implies that courts should adhere to some version of stare decisis. The contours of that principle were not fixed with any great precision when the Vesting Clause of Article III[74] was adopted, and the founding generation does not seem to have given much thought to how the doctrine should work under a written constitution. So there's room for reasonable debate about the application of the principle in particular cases.

It's in this context that the idea of judicial restraint might have some real value. But not as a buzzword for deferring to legislatures unless they do something the judge really, really dislikes. That's exactly the kind of thinking that gave us substantive due process in the first place, and I'm afraid I have to say that I think Judge Wilkinson's cosmic principle of selective judicial restraint leads in the same direction.

Here's what I think judicial restraint should mean in the context of stare decisis and substantive due process. Most of the Supreme Court precedents incorporating substantive provisions of the Bill of Rights should not be overruled. First, there is a colorable argument that the original meaning of the Privileges or Immunities Clause protected these rights against the state governments. I'm not sure the evidence supporting this conclusion is particularly strong, but the argument is at least not completely implausible. Second, incorporation began over a hundred years ago, there has been hardly any popular opposition to its most important features for at least fifty years, and there's essentially zero opposition to it among elected officials today. When you put these two factors together—a colorable argument about original meaning and extremely widespread and longstanding public acceptance—it seems to me that incorporation passes the most stringent test for the application of stare decisis.

So what about unenumerated rights? On this issue, it seems to me that the Court's 1997 decision in *Glucksberg* pretty well reflected judicial restraint properly understood.[75] The opinion in that case read the Court's precedents to mean that substantive

74. U.S. CONST. art. III, § 1.
75. Washington v. Glucksberg, 521 U.S. 702 (1997).

due process protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[76] Now, that certainly doesn't explain all of the existing precedents, but I think it does capture most of them fairly well. And if taken seriously, it would prevent significant new forays into substantive due process adventurism.

I would go one step further and suggest a way to operationalize the *Glucksberg* test. Since the Court has well-established precedents holding that the economic rights protected by the Court during the so-called *Lochner* era are *not* fundamental,[77] it should follow that a right can meet the *Glucksberg* test only if it can be demonstrated by objective evidence that the right is *more* deeply rooted in our history and tradition than those repudiated economic rights. Good luck finding many laws that are unconstitutional under that test. The result, I think, would be real judicial restraint with no cosmic theory required.

I should note in conclusion that I do not think the *Slaughter-House Cases*[78] should be protected by stare decisis. The Privileges or Immunities Clause is actually in the Constitution,[79] and the framers of the Fourteenth Amendment thought it was really important. The majority opinion in *Slaughter-House* is a masterpiece of judicial laziness and irresponsibility—

[Laughter.]

PROFESSOR LUND: —which effectively deleted a significant provision of the Fourteenth Amendment from constitutional law. I think it's about time that the Justices stopped rubbing away at the philosopher's stone of substantive due process and started paying some attention to what's actually in the Constitution. That would not require a cosmic theory, just some hard work. Apparently, however, there is exactly one member of the Supreme Court who wants to give it a try. Thank you.

[Applause.]

JUDGE JONES: The panel have admirably used their time well, so we'll start with a round of responses.

JUDGE WILKINSON: I want to say first of all how much I

76. *Id.* at 720–21 (citations and internal quotation marks omitted).

77. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

78. 83 U.S. (1 Wall.) 36 (1873).

79. U.S. CONST. amend. XIV, § 1.

appreciate my co-panelists' disagreement with what I've been saying.

[Laughter.]

JUDGE WILKINSON: They've shot some arrows from different directions, and I seem to be probably the only member of the panel who really digs judicial restraint.

[Laughter.]

JUDGE WILKINSON: There's an irony there because I'm the only judge. I mean—

[Laughter.]

JUDGE WILKINSON: I ought to be on their side, and they ought to be on mine.

My friend Steve started talking about how this is going to give us a method and we're going to have something objective when we adopt these cosmic theories. And that I don't think is true because, I can tell you, whether it's the term limits case in *Thornton*[80] or whether it's the *Heller* decision[81] or what have you, you get people ostensibly following originalism. The same five too often end up on one side, and the same four end up on another. Sometimes in determining original intent, the area of evidence expands so much that the judges are going across the ocean to find out what the original intent is. And they're going a century after the enactment, to post-enactment history, to discern what the original intent is. I have no idea what the boundaries of this inquiry are. They seem to be as elastic as the judges prefer them to be, and to say that this is some objective theory that's going to give us some objectively, certifiably-correct result is simply wrong. And the judges themselves recognize this. That's why they sometimes refer to it as "hot and cold originalism,"[82] which means sometimes it applies, sometimes it doesn't.

My friend Steve says to look at all these statutes that judges exercising judicial restraint would have let stand. And I hope it's clear that I think judges should be in the business of rights enforcement. Let's look at this founding document of ours as a scolding parent, okay? It tells government certain things you may not do. Just as you've wagged a finger at your children, the

80. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
81. District of Columbia v. Heller, 554 U.S. 570 (2008).
82. WILKINSON, *supra* note 5.

Constitution wags a finger at government, and it says, "Do not do these things. Do not impair free speech. Do not impair the free exercise of religion. Do not undertake unreasonable searches and seizures. Do not infringe the right of self-incrimination. Do not deny someone the right to counsel. Do not discriminate on the basis of race." And judges have a very important role in doing that.

So, cases like *Loving*[83] and *Brown*[84] enforce a constitutional "do not," and it seems to me that those cases were absolutely correctly decided by the Supreme Court. But when you go from the negative enforcement of "do nots" into the creation of positive rights, you are entering a whole different land. You are moving away from the Constitution's specific directions and instructions and into something where there's little guidance, and you are in the wilderness. This idea that judges have to have a theory to be doing their job doesn't hold water. It's not just Hand but Holmes, Rehnquist, Harlan, Brandeis, and Frankfurter. You can disagree with this or that decision, and Steve points out some that he disagrees with. That's fair enough, but these were great judges. These were great judges, and they didn't have a big theory. And this idea that judges have to have theories in order to do their jobs is just a modern misapprehension.

I really didn't hear any limits on what judges should get into. When we create these rights—just creating the rights and saying this right belongs—that's the easy part. We have a right to an abortion and a right to employment. We have a right to bear arms. We have a right of property and everything. It's so easy to just say that's the right. The hard cases come when you try to answer the subsidiary questions after the creation of that right.

For example, in the aftermath of *Roe v. Wade*, the Supreme Court generated the undue burdens test, which stated that you could have a law affecting abortion as long as it didn't impose an undue burden on the right to reproductive choice.[85] Well, what is that? I mean, what is an undue burden other than in the eye of the judicial beholder? Sometimes five judges would find an undue burden and four judges would not. So what is an undue

83. Loving v. Virginia, 388 U.S. 1 (1967).

84. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

85. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992) (plurality opinion).

burden on the right to a job or a right to employment? When is the law an undue burden on a property right or property owner's right? When is something an undue burden on the right to bear arms? And in answering these subsidiary questions, the judges augment the power of the courts and diminish the power of the people's legislature.

I reiterate these cases have two sides. And one of the things we need to do is listen more carefully to one another, because if you listen carefully to what's being said about the issue of same-sex marriage, or the issue of abortion, or the issue of environmental protection versus property rights, or the issue of zoning restrictions versus property rights, you realize, gosh, neither side has a monopoly on wisdom. Both sides have their legitimate points to make. And judges shouldn't just walk in and preempt them.

In the *Moore v. City of East Cleveland* case,[86] Walter takes the side of the individual plaintiff. There's a pull of justice in that case, but I tell you with every piece of legislation, somebody doesn't like it. Somebody may be disadvantaged. It's not a reason for overturning the whole law. Every time you have a law, it classifies citizens to some extent, and somebody is not going to like the outcome of the democratic process, but that doesn't mean you necessarily get to run into court and have your version of a controversy enacted.

Finally, I simply want to say we have to understand what we're doing to the energy of this country when we take the center of action away from the states and away from the legislative process and place it in the hands of judges. If you allow the states to play their role in the federal system and you allow the legislative process to play its role, you are going to have a far more energized polity than when you move the center of action to the arena of the courts where only lawyers get to argue and only lawyers get to judge. William F. Buckley said once that he would put his democratic faith in the first hundred names of the Boston phone book.[87] And you can understand what he's getting at. It's not a knock on anyone, but a compliment to the public. There is a truth to the fact that the diversity of trades and professions and regions and everything that gets thrown into the

86. 431 U.S. 494 (1977).

87. Interview by Edwin Newman with William F. Buckley, Editor, National Review, in Washington, D.C. (Feb. 27, 1965).

democratic process supplies this nation with vitality which gradually begins to lessen and diminish if the most momentous issues of our time are resolved in a purely judicial venue.

I do thank you so much for your attention, and I suppose I'll be on the receiving end of a second round of criticisms.

[Laughter and applause.]

JUDGE WILKINSON: It's what The Federalist Society is all about. It's one reason I love it so much.

[Applause.]

JUDGE JONES: I'm afraid comments are going to have to be about three minutes each to keep within our time limit.

PROFESSOR CALABRESI: I will keep this really brief.

One thing the Constitution clearly says, as Nelson Lund argued, is that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[88] The Privileges or Immunities Clause, I think, does in fact protect many, not all, but many of the rights that have been incorrectly protected under the doctrine of substantive due process.

I also thoroughly agree with Professor Lund's criticism of substantive due process. I think the phrase itself is, as John Hart Ely wrote in *Democracy and Distrust,* kind of like "green pastel redness,"[89] a sort of contradiction in terms.

[Laughter.]

PROFESSOR CALABRESI: But, the Privileges or Immunities Clause really is in the Constitution, unlike the doctrine of substantive due process.[90] We know what it meant because the words were borrowed from Article IV, Section 2, and the framers and ratifiers of the Fourteenth Amendment understood them to mean what Justice Bushrod Washington had said they meant in Article IV, Section 2. The Privileges or Immunities Clause of the Fourteenth Amendment refers to rights, i.e. privileges or immunities, that are deeply rooted in history and tradition, as the Supreme Court directly explained in *Washington v. Glucksberg.*[91] And it says the framers of the Privileges or Immunities Clause not only protected individual rights that were

88. U.S. CONST. amend XIV, § 1.

89. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 18 (1980).

90. *Id.*

91. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

deeply rooted in history and tradition, but they also said following *Corfield v. Coryell*[92] that those rights were "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole"—meaning that the state police power legislating in a nondiscriminatory way, not discriminating on the basis of race or gender or religion, can sometimes trump even privileges or immunities.[93] So I think there is a very clear and very easy legal answer to the question of judicial protection of unenumerated rights. I think *Washington v. Glucksberg* provides most of that answer.

I do think that, in applying these principles, *Williamson v. Lee Optical Co.*[94] is wrongly decided. That was a case that upheld essentially limitless state government power to prevent people from pursuing their occupation of choice so long as there was the slightest reason to deem the state law in question rational. *Williamson v. Lee Optical Co.* is similar to the case Walter Dellinger mentioned, *State v. Balance*, which also involved arbitrary and capricious state regulation of occupational licensure in a way that was not just and for the general good of the whole people. I think that in a case like that where there was a regulation of occupational licensure,[95] and the state could not produce any real reason as to why the regulation that it was arguing for was necessary, the courts ought to strike such occupational licensure laws down as being unconstitutional. I therefore disagree not only with the reasoning of the majority in the *Slaughter-House Cases*[96] but also with the outcome itself. So I would agree with my friend Walter Dellinger that *Williamson v. Lee Optical* is a questionable decision. And that is critically important because *Williamson v. Lee Optical* is the favorite citation of all the judicial rubberstampers.

[Applause.]

PROFESSOR TUSHNET: I just want to make two very brief points. One, in case it isn't clear or wasn't clear, I actually agree with somewhere between ninety and ninety-five percent of what Judge Wilkinson said. The disagreement is about whether it's going to happen, but not whether the prescription or diagnosis

92. 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).
93. *Id.* at 760.
94. Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).
95. *Id.* at 485–86.
96. Slaughter-House Cases, 83 U.S. (1 Wall.) 36 (1873).

is accurate.

Secondly, both Professor Calabresi and Mr. Mellor referred to the development of objective standards for the implementation of underspecified rights, whether they're located in the Due Process Clause or in the Privileges or Immunities Clause.[97] All I can say about that is good luck to you. If you want to make a bet on whether it's going to happen, I'm willing to take the bet.

[Laughter and applause.]

WILLIAM H. "CHIP" MELLOR: Notably absent in Judge Wilkinson's discussion of those prohibitions in the Constitution that he would be comfortable enforcing was the notion of eugenic sterilization. There's no written prohibition of that in the Constitution. Nevertheless, I suppose he'd be very uncomfortable with it. Is that something you just leave to the majority? I don't think so. I don't think anyone in this room would believe that. Similarly, I don't think anyone would believe that in regards to the ability to have children in the first place, regardless of your feebleness or imbecility, or the idea of raising your own children. I bet every one of us in this room can think of at least one unenumerated right we believe should not be trampled on by the government and should be protected by the Constitution. Once you start with that, then you look to places like the Privileges or Immunities Clause which, I agree with Steve, gives very firm guidance on how to begin to constrain some of the possibility for excess that Judge Wilkinson talks about, particularly when it comes to economic liberty.

Let me just talk about that for a minute. Can it really be the case—which it is now under the rational basis test as many judges would enforce it—that in this country, any prohibition, any condition, any constraint, any criminalization of a livelihood would be upheld regardless of its purpose, regardless of any evidence to the contrary, without any constitutional protection? That seems to me to be fundamentally at odds with the traditions of this country. After all, one of the key components of this country is the American dream, and earning a living is really the heart of that. So the idea that we are utterly unable to go into court and have a precious liberty like that protected simply because it's vague around the parameters seems to me to be unlikely to lead to liberty and, frankly, not consistent with the

97. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

role of the Judiciary.

And finally, to the extent there are concerns about limiting principles within substantive due process, and I admit on the margins there are, but what's the limiting principle of majority rule? There's even less of one. Everything we know about majorities and about elections shows that rarely do majorities vote.[98] The rational ignorance of voters limits what they actually know they're doing. Public choice theory shows the capture of agencies and the incentives that go into their decisions.[99] Incumbency is protected by everything from gerrymandering to campaign finance law. Why should we have such great comfort in the notion that democracy is a good in itself that will ensure the outcomes or even the consensus of community values that seem to be so important to Judge Wilkinson and, frankly, to Professor Tushnet?

[Applause.]

WALTER E. DELLINGER III: Just to stir things up a little bit, I thought we ought to return on the subject of judicial activism to the debates over the Affordable Care Act. And I want to make a statement that I think will surprise some of you, but probably not Randy Barnett; I think that the Affordable Care Act is the high watermark of recent substantive due process because the Court struck down the individual mandate.[100]

Do you agree with that?

ATTENDEE: Yes.

WALTER E. DELLINGER III: Yes. I think Paul Clement also agrees. In the Affordable Care Act, the Supreme Court held that the individual mandate was unconstitutional,[101] which is sort of surprising to many of you from the headlines. Let's look at two provisions: 5000A says that every covered person shall maintain minimum insurance coverage, and subsection (b) says that if you don't comply with subsection (a), you have to pay a penalty of $95 in 2014.[102] It goes up to a maximum of 2.5% as part of your

98. *Voting Hot Report 1996–2010,* U.S. CENSUS BUREAU, http://smpbff1.dsd.census.gov/TheDataWeb_HotReport/servlet/HotReportEngineServlet?reportid=767b1387bea22b8d3e8486924a69adcd&emailname=essb@boc&filename=0328_nata.hrml

99. *See generally* THE THEORY OF PUBLIC CHOICE–II (James M. Buchanan & Robert D. Tollison eds., 1972).

100. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (plurality opinion).

101. *Id.*

102. 26 U.S.C. § 5000A (2010).

federal income tax.[103] The Court held that the Commerce Clause did not allow the "creation of commerce"—and Charles Fried and I asked why not—I think it held that that was invalid. And what Chief Justice Roberts did was to say—looking at subsection (b) that says if you don't have adequate health insurance, you have to pay this extra sum with your tax—we read this just as if it says if you don't have coverage, you have to pay the tax; *not* you have to have coverage and then you have to pay the tax.[104] And I think everybody read that originally, and had it actually said that, it would be constitutional. I think that's probably not the best reading of those sentences, but the question is: Do you strike down something that has been part of the democratic process because Congress forgot to say "may I" in how they wrote subsection (a) and subsection (b)? That is, I think, what was really going on in the very effective arguments made by Randy Barnett and others is that this was a bridge too far in terms of individual liberty. But at the end of the day, by invalidating it, it really was a quite substantial measure for individual liberty. I didn't agree with the ruling, but it's quite an achievement for individual liberty to invalidate the individual mandate. And to hold that it is not invalid to say that when you're employed and have income and interstate commerce, you have to pay 7.5% for Social Security and 2.5% if you don't have adequate health coverage, that doesn't seem like the end of liberty as we know it. But I think many, many of you disagree. Thank you.

[Applause.]

PROFESSOR LUND: I'm just going to make a couple of brief comments in response to Judge Wilkinson's second set of remarks. He gave the *Term Limits v. Thornton* case[105] and the *Heller* case[106] as examples of where the history was so unclear and the majority and the dissent both had a lot of arguments about what the original meaning was. He offered these cases as examples of the impossibility of determining the original meaning in many cases, and pointed out the striking fact that you often get the same 5–4 division on the Court in recent years. Actually, Justice Kennedy joined the more liberal Justices in *Term Limits v. Thornton* and the more conservative Justices in *Heller,* so

103. *Id.*
104. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. at 2593–94.
105. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
106. District of Columbia v. Heller, 554 U.S. 570 (2008).

these were different 5–4 majorities.[107] But the more important point is that it's not enough to say that the majority and the dissent both have a lot of arguments. To say that they're equally balanced is not a sufficient way of approaching the cases. You have to look at the actual arguments, because some Justices and their clerks can pile up an enormous number of words without actually making powerful arguments.

[Laughter.]

PROFESSOR LUND: So, I think you have to look into specific examples before you make a judgment that it's impossible to find the original meaning or some relatively certain answer to what the original meaning is.

The second point is that Judge Wilkinson mentioned *Loving*[108] and *Brown*[109] as being rightly decided, and he gives some other examples, like *Miranda*,[110] in his book. *Miranda*, *Reynolds v. Sims*,[111] and a couple of other cases are examples of major activist decisions that he approves of. And so I think it's important to recognize that his approach to judicial restraint is not just judicial restraint, but it is *selective* judicial restraint, because he actually approves of some decisions that he regards as major activist decisions.

Then, I have just one quick comment in response to Steve Calabresi. I'm not so sure that we know exactly what the Privileges or Immunities Clause means. That is a really difficult question. I kind of endorsed the *Glucksberg* decision as an application of precedent. Whether the decision in *Glucksberg* is correct as a matter of original meaning or whether it correctly articulated the meaning of the Privileges or Immunities Clause in the name of due process, that I don't know. That is a very hard question but also one that is very much worth asking.

[Applause.]

JUDGE JONES: We have a minute.

WALTER E. DELLINGER III: I just wanted to say one thing. The book is called *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*, by Judge

107. Thornton, 514 U.S. at 779; Heller, 554 U.S. at 570.
108. Loving v. Virginia, 388 U.S. 1 (1967).
109. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
110. Miranda v. Arizona, 384 U.S. 436 (1966).
111. 377 U.S. 533 (1964).

Wilkinson.[112] It's by Oxford University Press. But if judicial restraint were as hot and sexy as Judge Wilkinson wishes it would be, they'd be selling it in drug stores and airports.

[Laughter.]

JUDGE JONES: And I'm a judge, not on the panel. I agree with judicial restraint, but I don't think I agree with all of what Judge Wilkinson said. So as long as there are disputes, there are going to be dissents, and whoever is in the dissent is going to think that the other side has been unrestrained.

[Laughter.]

[Brief question and answer portion of the panel omitted.]

JUDGE JONES: I'm sorry, but I'm getting the high sign that we need to conclude. Judge Wilkinson, you are very kind to put yourself on for a debate like this. We appreciate it.

112. WILKINSON, *supra* note 5.

RULES FOR RULERS: A WALL OF SEPARATION BETWEEN LAW AND POLICY

READING LAW: THE INTERPRETATION OF LEGAL TEXTS. Antonin Scalia & Bryan A. Garner. St. Paul: West, 2012. 567 pages. $49.95.

Reviewed by EVAN A. YOUNG*

* Senior Associate, Baker Botts L.L.P., Austin, Texas. All of the views in this review are those of the reviewer, and none may be attributed to Baker Botts, its partners or associates, its employees, or its clients. The reviewer thanks Chief Justice Thomas R. Phillips, formerly of the Texas Supreme Court and an exemplar of judicial craftsmanship, for his comments and suggestions regarding this review. In the interest of full disclosure, the reviewer was a law clerk to Justice Scalia in the Supreme Court's October Term 2005, and does not purport to be wholly neutral: caveat lector.

I. INTRODUCTION

Justice Scalia and Bryan Garner have written a treatise seeking to organize and defend the proper use of systematic principles for ascribing meaning to legal documents.[1] Even if learning how these "canons" work is the only reason someone wishes to read the book, it is reason enough. Like most treatises, it aggregates extraordinary amounts of technical information. Unlike any other treatise, the erudition in this one goes down more like an after-dinner liqueur than a dose of medicine.

But there is far more to this book than a mere list of principles of statutory construction, no matter how entertaining the presentation. It is also—perhaps even primarily—a meditation on the rule of law in America. On both the first and last pages of their treatise, the authors express concern that the rule of law has eroded. "Our legal system," they begin, "must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts."[2] The "neglect" of that traditional methodology has diminished the "predictability of legal dispositions" and "weakened our democratic processes."[3] They conclude, with guarded optimism, that in the future "the rule of law will be more secure," but only if judges "use proper methods of textual interpretation."[4]

In between these statements, Scalia and Garner offer 414 pages describing the ailment and the prescribed cure in careful detail. The "proper methods of textual interpretation" are laid out as fifty-seven canons, offset by thirteen legal heresies that courts often follow but should avoid.[5] Collectively, they generate what the authors call "the 'fair reading' method."[6] That deceptively simple-sounding label for textualism is simultaneously straightforward in theory and complex in application.

The authors emphasize fair reading that gives rise to fair meaning throughout the book, in part to rebut the straw man criticism of textualism that it is nothing more than "strict

1. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2012).
2. *Id.*
3. *Id.*
4. *Id.* at 414.
5. *Id.* at xi–xvii.
6. *Id.* at 33.

constructionism."[7] That charge has survived so long because too many conservatives cavalierly call for courts to practice, and the academy to impart, strict constructionism. Likely intended to signal their opposition to the *loose* construction of willful judges, Republican presidents like Richard Nixon (a lawyer) and George W. Bush made known their desire for *strict*-constructionist judges.[8] Scalia and Garner, by contrast, assert that "[t]extualists should object to being called strict constructionists," because "that is an irretrievably pejorative term."[9] They recount that "in the 19th century, a 'strict' construction came to mean a narrow, crabbed reading of a text."[10] They agree that it is "a hyperliteral brand of textualism that we . . . reject."[11] Scalia and Garner, echoing Justice Story, repeatedly emphasize that "what is needed is reasonableness, not strictness, of interpretation."[12] That is to say, they urge "[a]dhering to the *fair meaning* of the text," and call this "the textualist's touchstone."[13]

To outline the contours of a fair reading, Scalia and Garner borrow the "reasonable person" from first-year law school classes, and ask how that "reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[14] If that exercise did not involve considerable effort, there would be little need for a treatise explaining how to do it.

Assuming it is possible to achieve the goal by expending that effort, the benefits are clear. Reading a text from that perspective, and then applying it to a case's facts, permits little room for agonizing about what the law *ought* to be, or what its drafters *really* wanted to achieve, or how the law *might* have been better written. This focus on text seeks to maximize predictability and to minimize unforeseen outcomes. Legal rulings should not be surprises, whereas policy choices may be arbitrary. At base, Scalia and Garner focus on a corpus of neutral conventions for

7. *Id.* at 356.

8. *See, e.g.*, GEORGE W. BUSH, DECISION POINTS 97 (2010) ("I subscribed to the strict constructionist school: I wanted judges who believed the Constitution meant what it said."); Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 148 n.73 (1998).

9. SCALIA & GARNER, *supra* note 1, at 356.

10. *See e.g., id.* at 362 (arguing for a "fair meaning"); *id.* at 364 (arguing for a "fair reading").

11. *Id.* at 39.

12. *See e.g., id.* at 362 (arguing for a "fair meaning"); *id.* at 364 (arguing for a "fair reading").

13. *Id.* at 356.

14. *Id.* at 33.

the construction of texts as a way of keeping law separate from policy.

II. A PERCEIVED SYSTEMIC FLAW

Those familiar with Justice Scalia's opinions, especially his energetic dissents,[15] might expect this new book largely to be an attack on judges whose methods he finds wanting. That is not really the thrust of the treatise. Scalia and Garner do recognize that "willful judges have always been with us,"[16] and the many—many—illustrative examples drawn from case law are almost as likely to bestow censure on a court that decided poorly as to commend one that decided well. The authors do not attribute error to malice, at least as a general matter: "More serious, perhaps, than the fact that some judges knowingly persist in acting as lawgivers is the fact that many judges who believe in fidelity to text lack the interpretive tools necessary to that end."[17] (The same is true, of course, of many lawyers who make arguments before those judges.) The premise of the book is that the legal process suffers from a systemic defect, but not that there is a deficit of good faith.[18]

The lack of serious attention by authors of treatises to the field of statutory construction is not a new concern for Justice Scalia. He forecast his interest in this project years ago by lamenting that lacuna. "Despite the fact that statutory interpretation has increased enormously in importance," he observed, "it is one of the few fields where we have a drought rather than a glut of treatises—fewer than we had fifty years ago, and many fewer than a century ago."[19] The last new treatise on the subject came out in 1940.[20]

Responding to that vacuum, Scalia and Garner's new book focuses simultaneously on instilling greater technical skills in lawyers and judges *and* on achieving a legal regime more

15. They are so incisive, and often fierce, as to have inspired an entire book of their own. *See* SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE (Kevin A. Ring ed., 2004).

16. SCALIA & GARNER, *supra* note 1, at 405.

17. *Id.* at 7.

18. Any reader should at least read the meaty but fast-paced Introduction, which describes why, in the authors' view, "the field of interpretation [became] rife with confusion," and diluted the traditional focus of textualism that once prevailed. *Id.* at 9.

19. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 15 (1997).

20. *Id.* at 15 (citing EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES (1940)).

consistent with American democracy. It portrays the rule of law, at least so far as the judiciary is concerned, not merely as a positive externality of proper judicial methodology, but almost as its incarnation—the two are virtually coterminous. This fusion of the two goals makes the book interesting for theorists and practitioners alike.

The systematic and reticulated exposition of statutory construction—one that, as far as I can see, covers the waterfront, and indeed covers the construction of *any* legal text—is therefore filling a more exalted purpose than merely providing the correct answer to a legal question. The canons, with all their weighty, technical detail, are for Scalia and Garner the sinews of a system that maximizes the likelihood that judges, regardless of their personal views or the identity of the parties, will reach consistent conclusions in similar cases.

III. RULES FOR RULERS

The phrase "rule of law" gets a lot of lip service, but, Chief Justice Hughes's *bon mot* notwithstanding,[21] it must surely mean something more than "do whatever the courts say." With respect to the judiciary, the premise is that judges are following something other than their views of what is right. *Policy* is how these preferences are enacted; the rule of law has fairly little to do with policy.

What else would explain actual policymakers giving way when the courts speak? President Bush was skeptical of the Supreme Court's rationale in *Hamdan v. Rumsfeld*,[22] a national security case that mattered greatly to him. In his memoir, he wrote: "Justice John Paul Stevens ruled that a part of the Geneva Conventions known as Common Article III—written exclusively for 'armed conflict *not* of an international character'—somehow applied to America's war with al Qaeda."[23] Bush's skepticism of the rationale, skepticism which, without mentioning Bush, Scalia

21. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 172 (2010) ("We are under a Constitution, but the Constitution is what the judges say it is.").

22. 548 U.S. 557, 629–35 (2006) (plurality opinion) (addressing Common Article III). *Compare id.* (writing for a plurality, Justice Stevens argued that the Court must examine whether the President was justified in convening military tribunals, and ultimately concluded that he was not), *with id.* at 718–19 (Thomas, J., dissenting) (arguing that the Court should defer to the President's judgment and authority in wartime matters, particularly when it is backed by congressional statute).

23. BUSH, *supra* note 8, at 178.

and Garner apparently share,[24] may be well justified. However, Bush immediately proceeded to identify a structural rule of law that generated his compliance with *Hamdan*, notwithstanding his objections:

> I disagreed strongly with the Court's decision, which I considered an example of judicial activism. But I accepted the role of the Supreme Court in our constitutional democracy. I did not intend to repeat the example of President Andrew Jackson, who said, "John Marshall has made his decision, now let him enforce it!" Whether presidents like them or not, the Court's decisions are the law of the land.[25]

President Bush's point is that he recognized a neutral rule—one that could equally please or enrage liberal and conservative presidents—that prescribed presidential conduct: comply with Supreme Court decisions.

That compliance is such a well-established principle that Bush's invocation of it is commonplace, not remarkable. .[26] Scalia and Garner hardly dispute the notion of judicial review; they say that "[i]n the American system of separate and coequal powers, authoritative interpretation of the laws is the assigned role of the courts."[27] In our system, judges are "rulers," at least insofar as demanding the people's and the government's adherence to law. Yet Scalia and Garner are at least as demanding of judges as they are of the political branches. The implicit theme of the treatise is that judicial work product must be worthy of such truly extraordinary constitutional authority. Interpreting legal texts—whether constitutions, statutes, or private documents like contracts or wills—by hewing closely to the words of those texts, and not one's own lights, is what invests the judge's work with legitimate authority.[28] If presidents must follow rules, so should judges.

Judges cannot help but cross from declaring law to making policy, the authors contend, if they do not scrupulously interpret

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24. *See* SCALIA & GARNER, *supra* note 1, at 368 & n.6 (citing *Hamdan*, and nothing else, for the proposition that "even in some cases in which the ouster [of a court's jurisdiction] is quite clear, it has been disregarded").

25. BUSH, *supra* note 8, at 178.

26. Presidents are not always quite so restrained regarding the Supreme Court's rulings that they dislike. *See, e.g.*, Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12.

27. SCALIA & GARNER, *supra* note 1, at 243.

28. *But cf. id.* at 9–10.

text, but instead extend their inquiry into purpose,[29] intent,[30] or even "what they think is good."[31] "Purposivism" is the great villain of the story, incapable of providing certainty and predictability and lacking in legitimacy as well—because citizens should be bound by what law is enacted, not by some vague (or even clear) motivation.[32] Scalia and Garner would do away with the language of "intent" altogether: "[I]t is high time that further uses of *intent* in questions of legal interpretation be abandoned."[33] "The truth is that '[a]scertaining the "intention of the legislature" . . . boils down to finding the meaning of the words used.' If courts do otherwise, they engage in policy-based lawmaking . . . ."[34]

To many of those inclined to admire Justice Scalia even before reading this treatise, nothing stated above will seem particularly noteworthy. For others, it is mystifying; any separation between law and policy seems nebulous at best. An extreme example came in what, at least to me, was the most extraordinary statement in any of the 2012 presidential debates. Vice President Biden, a lawyer and long-time chair of the Senate Judiciary Committee, stated that:

> [T]he next president will get one or two Supreme Court nominees. That's how close *Roe v. Wade* is. Just ask yourself: With Robert Bork being the chief adviser on the court for—for Mr. Romney, who do you think he's likely to appoint? Do you think he's likely to appoint *someone like Scalia or someone else on the court, far right, that would outlaw Planned—excuse me—outlaw abortion?* I suspect that would happen.[35]

The premise of this statement is that abortion will either be legal, or illegal, whichever the Supreme Court chooses; there is no real distinction between law and policy at all. What that misses is the third option—that someone else gets to make the

29. "Purpose" is not a bad word for Scalia and Garner—so long as it is the text itself that generates the evaluation of purpose, and so long as the purpose so defined is used only to clarify meanings of words in the text, not to *override* those meanings. *See, e.g., id.* at 33–35, 56–57, 219.

30. If "intent" is appropriate at all, Scalia and Garner say "statutory intent" should replace "legislative intent." *Id.* at 394 (opining that "references to *intent* have led to more poor interpretations than any other phenomenon in judicial decision-making").

31. *Id.* at 10.

32. *See, e.g., id.* at 19, 38–39, 272, 276, 365–66.

33. *Id.* at 396.

34. *Id.* at 395 (quoting R.W.M. DIAS, JURISPRUDENCE 219 (4th ed. 1976)).

35. Transcript of Vice Presidential Debate, NPR (Oct. 11, 2012, 11:15 PM), http://www.npr.org/2012/10/11/162754053/transcript-biden-ryan-vice-presidential-debate, (comments of Vice President Biden) (emphasis added).

policy decision, which judges will enforce, whatever it may be, as a matter of law.

Justice Scalia, in particular, has made no effort to hide his unreserved willingness to sustain and apply properly enacted laws *favoring* any sort of abortion access. In a speech in Rome in 1996—and at a premier Roman Catholic university, of all places—Justice Scalia used abortion rights as the first example of what it means to allow the majority to rule in a democracy.[36] It is "incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done," he said.[37] "If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it."[38] He has made the same point in judicial opinions:

> The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.[39]

One need not call into question the validity of *Roe v. Wade*[40] or its progeny—all affirming the constitutional right to abortion under certain circumstances[41]—to recognize that there is something wrong with a knee-jerk assumption that judges are the right people to make the call, whatever the call will be.

The problem is merely methodological, not substantive. If a right to abortion were tethered to a binding legal text, then Justice Scalia clearly would uphold it—and if the text were in the federal Constitution, he presumably would agree with much of the result, though not the reasoning, of *Roe*. His assertion is that the methodology that supports the result is *not* based on a fair

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36. RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE 36 (2006) (quoting Antonin Scalia, Lecture presented at Gregorian University: Of Democracy, Morality, and the Majority (May 2, 1996)).

37. *Id.*

38. *Id. See also, e.g.*, Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17–18 ("[I]f a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter.").

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

40. 410 U.S. 113 (1973).

41. *See, e.g.*, United States v. Vuitch, 402 U.S. 62 (1971) (broadly construing statute to allow abortion to protect the life or health of the mother).

reading of the text.[42] By the same token, Garner has stated that "[h]e is pro-choice," yet "finds nothing in the text of the Constitution that mandates th[at] polic[y]."[43] Making decisions based on something other than "the text" is the methodological evil that Scalia and Garner seek to expel—for them, it is something far worse than an actual policy result contrary to their deeply held views.[44]

It may seem unlikely that a determined reliance on ancient doctrines with Latin names could be the antidote to judicial policymaking. They are all there—"*noscitur a sociis*,"[45] "*ejusdem generis*,"[46] "*expressio unius est exclusio alterius*,"[47] and the others that invoke memories of law school legislation class. To some, that may sound like a yawn—the judicial equivalent of Melville's long march through the anatomy of whales, when the underlying story of Captain Ahab and Moby Dick was so thrilling. The exaltation of canons in Latin may sound like an unduly meek response to so great a problem. Scalia and Garner believe, however, that nothing could be more effective than creating a rubric that promotes neutral, predictable decision-making—creating, as it were, rules for rulers.

IV. How the Canons Enhance the Rule of Law

The rule that Scalia and Garner would adopt is that judges use the canons as a means of deciding cases—whatever the ultimate result—based on the governing text.[48] Canons have pithy titles to express the linguistic conventions they represent. Established conventions are valuable because they are the "generally agreed-on approach" to understanding the meanings for which the authors yearn.[49] If canons are "part of the accepted terminology of legal documents,"[50] then all eyes should read certain turns of

42. *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 345 (discussing *Roe's* invalidation of "state statutes that in no way contradicted any specific provision of the Constitution"); *id.* at 413 ("even [*Roe*'s] defenders acknowledge [that it] was an analytically unsound opinion").

43. *Id.* at 17–18.

44. *Cf. id.* at 18–19 (arguing that the manipulability of nontextual purposivism is its most destructive feature).

45. *Id.* at 195.

46. *Id.* at 199.

47. *Id.* at 107.

48. *See id.* at 414 (proposing that, combined with *stare decisis*, the "proper methods of textual interpretation" will produce more certain and secure rule of law).

49. *Id.* at xxvii.

50. *Id.* at 212.

phrase to convey the same meaning, and all parties should have a strong basis for anticipating how a judge will also read that text. Drafters, whether of contracts or statutes, can be far more efficient if they are confident that the conventions they use will be respected by the courts. To do their jobs, "[l]egislators must know what to expect."[51] The canons can drastically reduce indeterminacy.

Take one of many examples—*ejusdem generis*, the thirty-second of Scalia and Garner's canons.[52] The principle is that when a general term follows a list of specifics, then the generality is confined to a class similar to the specifics.[53] A South Dakota statute stated that "[n]o equine activity sponsor, equine professional, doctor of veterinary medicine, *or any other person*, is liable for an injury to or the death of a participant resulting from the inherent risks of equine activities."[54] What result, then, when a horse tripped because of a "cable trench that had been dug by AT&T," killing the rider?[55] AT&T argued that "any other person" amounted to blanket immunity—a purportedly "plain text" argument.[56] But the *ejusdem generis* canon (and the principle against surplusage, since if *everyone* was immunized, there would be little point to spelling out the three specific examples) required the opposite result. Anyone writing or reading the statute ought to know that "*any other person* included only those involved in equine activities."[57]

When everyone is on the same page about such a convention, there is far less room for mischief in litigation. That is not to say the result is always obvious. For example, what level of generality does *ejusdem generis* justify?[58] Or what should a judge do if a general term follows a series of specific words that (unlike in the South Dakota statute) have no common denominator?[59] The

51. *Id.* at 272 (giving an example in the context of the presumption against extraterritorial application—Canon 43—but a point that exemplifies the purpose of having canons and presumptions of any kind).

52. *Id.* at 199.

53. *Id.*

54. *Id.* at 201–02 (emphasis added) (internal quotation omitted).

55. *Id.* at 202.

56. *Id.*

57. *Id.*

58. *Id.* at 207 (noting that the canon suffers from "indeterminacy" and judges have "broad latitude in determining how much or how little is embraced by the general term").

59. *See id.* at 209 (noting that "the canon does not apply" in that circumstance, and the general term cannot be limited).

steady application of the canons—and not just one, but every canon that might reasonably apply—reduces the range of possible meanings, thereby making an eventual decision far more predictable.

As should be apparent, the canons themselves are not binding rules that Scalia and Garner would establish. Scalia and Garner distinguish between "a canon of interpretation" and "a rule of constitutional law," or really any sort of binding rule.[60] "[T]hey are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys."[61] To stick with our example, "like the other canons, *ejusdem generis* is not a rule of law but one of various factors to be considered in the interpretation of a text."[62] The canons are clues, which may point in contrary directions.[63] And despite the simplistic assumption that "textualism" simply means reading words in isolation and saying what they mean, Scalia and Garner repeatedly emphasize that "context is as important as sentence-level text."[64]

Not only is it true that a given "canon is hardly absolute,"[65] but it is also true that only rarely is a single canon sufficient to decide a hard case. That is why judging is still a weighty matter that cannot be entrusted to, say, a sophisticated computer programmed with all fifty-seven canons and the texts of leading dictionaries.[66] The sifting, sorting, and weighing require true judgment and hard work, but that work enhances "the values of certainty and predictability."[67] This is because it confines the judicial decision to principled choices that all focus on the

60. *Id.* at 262.
61. *Id.* at 51.
62. *Id.* at 212.
63. *Id.* at 59.
64. *Id.* at 323. *See e.g.*, *id.* at 20.
65. *Id.* at 327 (discussing presumption against implied repeal).
66. Examples of how textualism is not simplistic or always intuitive abound in the treatise. Scalia and Garner describe the Supreme Court's resolution of a foreign seaman's claim under the Jones Act, "which gave relief to '*any* seaman who . . . suffer[ed] personal injury in the course of his employment.'" *Id.* at 269 (emphasis added) (quoting Jones Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (current version at 46 U.S.C. § 30104 (2012)). A Danish seaman's only connection to America was that he signed on to a Danish ship (and signed a contract in Danish, with a provision selecting Danish law for any disputes)—but "any seaman" must mean "any seaman," he argued after being injured in Cuba. Lauritzen v. Larsen, 345 U.S. 571, 576–77 (1953). The Supreme Court unanimously rejected that ostensibly textualist argument, because the background presumption against extraterritoriality allows Congress to legislate using broad language subject to canons. SCALIA & GARNER, *supra* note 1, at 269 (citing Lauritzen v. Larsen, 345 U.S. 571 (1953)).
67. SCALIA & GARNER, *supra* note 1, at 388.

meaning of the text.

V. TEXTUALISM AND POLITICAL PREFERENCES

Given that textualism has the stated goals of keeping courts out of policy disputes and confining courts to stating what the enacted law actually is, a potentially devastating criticism of the treatise is that textualism actually *facilitates* judicial policymaking—it is a Trojan horse, in other words, that smoothes the way to conservative results.[68] If true, this would be particularly unfortunate for Garner, who "holds many opinions commonly seen as 'liberal,'" ranging from abortion to gun control to gay marriage.[69] He would be in the pitiable situation of shilling for not merely an illegitimate methodology but one designed to undermine his own views. The fact that Scalia (who describes himself as "a confessed law-and-order social conservative")[70] and Garner can disagree markedly about policy but apparently seamlessly agree about methodology is at least prima facie evidence that their exposition of textualism is not political.

The common association of modern textualism with conservatives cannot be denied, but that alone does not make it evidence that textualism favors conservative policy. The book offers as many examples of liberal results being compelled by an honest application of the canons as conservative ones, both in civil and criminal cases.[71] Scalia and Garner criticize a Supreme Court decision that held that homosexuals fell under a statute that allowed aliens to be excluded from admission to the United States if they were "'afflicted with psychopathic personality . . . or mental defect.'"[72] They also praise the dissent of archliberal

68. *See, e.g.*, Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism# ("text as such may be politically neutral, but textualism is conservative.").

69. SCALIA & GARNER, *supra* note 1, at 17–18.

70. *Id.* at 17.

71. *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 104–05 (commending a broad application of the Americans with Disabilities Act); *id.* at 175 (favoring landlords over tenants when the state court followed a "purposivist" approach to reach the opposite result); *id.* at 202 (favoring tort plaintiff over corporation that asserted statutory immunity); *id.* at 282–85 (favoring making it easier for plaintiffs to overcome sovereign immunity); *id.* at 299 (supporting more defendant-friendly rule of lenity); *id.* at 301 n.22 (listing a series of Scalia dissents urging results favoring a criminal defendant on the grounds of the rule of lenity). To be clear, this is a very incomplete list.

72. *Id.* at 389 (quoting S. REP. NO. 82-1137 (1952)) (discussing Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163, 182 (1952) (codified at 8 U.S.C.

Justice William O. Douglas because it grappled with the meaning of the actual text.[73] Scalia and Garner argue with Justice Ginsburg from the left about how hard it should be to find a waiver of sovereign immunity—they would be more favorable to plaintiffs.[74]

The supposed conservative slant must seem like cold comfort to parties bringing conservative positions to the Supreme Court, only to be shot down by Justice Scalia.[75] One can almost hear them asking, "Must you be *so* consistent?" Conservatives, after all, are no more immune from the desire "to do what they think is good" than anyone else, and on the bench may be equally attracted to "[l]iberation from text" that impedes the doing of good (by that conservative's lights).[76]

As described by Scalia and Garner, textualism is no gift to conservative orthodoxy, and conservatives should think hard about that before embracing the methodology as a political panacea. At most, the methodology of this treatise offers conservatives an opportunity to enact policy without undue judicial tinkering. However, it offers liberals the same opportunity. *Anyone* hoping for an edge based on a judge's policy preferences is destined for disappointment if that judge rules on a truly textualist basis. "Textualism," the authors emphasize, "is not well designed to achieve ideological ends . . . ."[77] While judges are still human and may experience temptation to pull a fast one here or there, textualism minimizes that risk more than any other methodology because, with a series of accepted conventions, gross deviations are much easier to identify and correct.

Although Scalia and Garner may not welcome this comparison, just as John Rawls proposes ordering substantive social policy based on asking what people would desire if they had no knowledge of their own status until the rules of the game were set (the "veil of ignorance"),[78] textualism invites lawyers, judges, and citizens to prioritize the rule of law over any

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§ 1182(a)(4) (2006)).

73. SCALIA & GARNER, *supra* note 1, at 389 & n.70.

74. *Id.* at 282 & n.2.

75. *See id.* at 17 (listing a variety of "liberal" Supreme Court decisions or dissents that Justice Scalia has written or joined as a result of his application of textualism, despite presumptively opposing the results of those decisions on policy grounds).

76. *Id.* at 10.

77. *Id.* at 16.

78. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 137–38 (rev. ed. 1999).

particular policy outcome that might matter to them. Those embracing textualism risk the possibility of losing what they hold dear in the political arena, and having judges refuse to interfere, but they also gain the ability to keep what they win through future exercises of the democratic process (subject, always, to judicial review). Textualism thereby re-centers policy debates in the political, and not judicial, arena. Whether that will help conservatives or liberals in any given circumstance cannot be foreseen.

IV. THE BOOK AS A TOOL

The larger war over the role of judges in policymaking should not detract from the question most lawyers will ask when deciding whether to shell out some $50 for the book. Most of us want to know if we will be able to use it and enjoy ourselves at the same time. I think the answer has to be yes in both cases. The book is scholarly but practical, aimed at resolving genuine problems that arise every day. I have consulted it for my own litigation work in several instances, and when reading it before writing this review, I came across several illustrations and explanations that would have been valuable in prior cases. While litigators are the most obvious beneficiaries, transactional lawyers generally draft the documents that are eventually interpreted in private litigation. The treatise is not about statutory construction alone—it is aptly subtitled *The Interpretation of Legal Texts.*[79]

Beyond the explanation of the canons, which are valuable enough, there are several features of the treatise that merit special attention.

First, as noted above, the Introduction is a powerful essay steeped in history and even philosophy. It addresses why the status quo is a problem, how non-textual methodology arose, and why a return to textualism is essential for the rule of law to thrive in the courts.[80] Every lawyer and law student should read that Introduction at the least.

Second, among the "thirteen falsities exposed,"[81] which follow the fifty-seven canons (all seventy appearing as sequentially numbered sections), is a devastating essay on the use and misuse

79. SCALIA & GARNER, *supra* note 1.
80. *See id.* at 1–46.
81. *See id.* at 341–410.

of legislative history.[82] That section alone would justify the purchase of the book. The development and use of legislative history on both sides of the Atlantic is itself surprisingly engrossing. While Justice Scalia has long been known as a fierce opponent of using legislative history to uncover hidden meaning in statutory text, it is far too simplistic to state that he or Garner opposes the citation of legislative history for *any* purpose. In response to a supporter of legislative history making the reasonable point that, at least in the context of a "technical statute," "the legislative history provides a window on the specialist world,"[83] Scalia and Garner reply: "We do not object to using legislative history for the same purpose as one might use a dictionary or a treatise. That has nothing to do with treating it as authoritative for the meaning of the text."[84] If a particular word were used repeatedly throughout the debates on the floor in a recognizable context, that—like a dictionary—is a clue to what that word meant. (Debates in Congress about some *other* bill at roughly the same time might be equally useful in that regard.) How that contrasts with attempting to divine the meaning of words not based on *the usage of the words* but on some extraneous statement untethered to the text is plain.

With respect to legislative history, like almost everything else in the book, the reason for the fierce opposition to allowing it to shade the meaning of the law is the same: predictability.[85] Because "legislative history has something for everyone,"[86] its use in actually influencing the binding meaning of a statute injects chaos, not predictability.[87] To Scalia and Garner, using legislative

82. *See id.* at 369–90.

83. *Id.* at 382 (quoting T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 55 (1988)).

84. *Id. See also id.* at 388 (elaborating on the "other purposes" for which legislative history, like any other source, may be used).

85. *See, e.g., id.* at 380 ("Judicial interpolation of the statute based upon legislative materials . . . has the potential to create a statute that the President would not have signed."); *id.* at 381 ("If a legislature speaks only through its statutes, then anyone subject to its rule should have to listen only to those statutes." (internal quotation omitted)); *id.* at 383 ("Citizens seeking to obey the law should not have to comb legislative history for covert drafting errors"); *id.* at 383 ("the language (however 'unfortunate') that the Members of Congress voted for . . . is also the language (however 'unfortunate') that citizens must obey").

86. *Id.* at 377.

87. The practical aspects of the objection to allowing legislative history to authoritatively influence interpretation include, for example, the perverse consequence that the more courts rely on legislative history, the less reliable it becomes—Congress, members' staffs, lobbyists, and others respond to the incentives to "manufacture" legislative history. *See, e.g., id.* at 376–77 & n.35.

history to change the meaning of otherwise clear text is illegitimate in the same way as conjuring the "spirit" of a law or generalizing to some larger "purpose" and is akin to a séance (with roughly equal reliability).[88] "[T]he judge as a telepathic time-traveler" is not a role consistent with the rule of law.[89]

Third, the authors offer a useful note on dictionaries, the use of which has become routine in defining the scope of a statutory or contractual term.[90] In addition to providing "primary principles" for the effective use of dictionaries,[91] they group sixty-four dictionaries into six eras and within each era sort them by type (English language or law), as "the most useful and authoritative" for lawyers' and judges' lexicographical research.[92]

Fourth, the treatise includes a "Glossary of Legal Interpretation," generally with cross-references to the sections in which each term appears.[93]

What about errors or mistakes? The treatise certainly has them—but there are probably fewer than in this short review. They are minor ones—the very sort of scrivener's errors that Scalia and Garner acknowledge as inevitable and which they conclude courts may correct without injury to a text.[94] They are mistakes that simply slip past the first publishing of any text. For instance, the text refers to an 1839 opinion of Chief Justice John Marshall—a mean feat for a man dead for four years.[95] (The footnote properly acknowledges the correct date—1830.[96]) Similarly, there are some citation inconsistencies—for instance, failing to note that a plurality opinion was not the opinion of the Court, despite generally adding a parenthetical whenever any portion of an opinion did not win at least five votes.[97] Additionally, Scalia and Garner usually tell us, as a parenthetical

88. *Id.* at 376.
89. *Id.* at 350.
90. *Id.* app. at 415–24.
91. *Id.* app. at 418–19.
92. *Id.* app. at 419 (noting that "*The Oxford English Dictionary* is also useful for each period because it shows the historical development of word-senses"); *id.* app. at 419–24 (listing the recommended dictionaries).
93. *Id.* app. at 425–41.
94. *Id.* at 234–35.
95. *Id.* at 360.
96. *Id.* at 360 n.11 (citing Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830)).
97. *See, e.g., id.* at 262 & n.9, (citing Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), without noting that Justice O'Connor's opinion was a plurality, not a majority). By contrast, they designate Justice Souter's opinion in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), as a plurality. *See* SCALIA & GARNER, *supra* note 1, at 298 n.8.

following the citation, the author of every Supreme Court opinion they cite—but not always.[98] The practice of including the Justice who wrote the opinion is extremely helpful for readers familiar with the Court's history, allowing for a preliminary assessment of an opinion's credibility.

And finally, Scalia and Garner frequently cross-reference their own book by citing a section rather than a page. That makes some sense for referring to the entirety of the section, like a particular canon. Unlike in many treatises, however, the section numbers do not appear at the top of each page, but only the first page of each section. If future editions correct this omission, it will make it far easier to flip quickly to the cross-referenced passage.

These objections, plainly, are minor. The treatise is an extraordinary effort, a scholarly but not pedantic aid to the profession that exemplifies what both partners bring to the table—Justice Scalia's vast knowledge of substantive law and legal reasoning and Bryan Garner's unrivaled expertise in legal writing and lexicography.

Legal resources—books, articles, CLE presentations, briefs, judicial opinions—are exploding in volume. Most of us, especially those in practice, have no hope of keeping up with any portion of them. This book is one of the rare ones that would be valuable to *any* lawyer—not merely to own, but to in fact read.

98. *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 298 n.9 (omitting both that Justice Souter was the author of *United States v. R.L.C.*, 503 U.S. 291 (1992), and that the opinion was in part a plurality); *id.* at 409 n.20 (omitting that Justice Kennedy wrote *Roper v. Simmons*, 543 U.S. 551 (2005), an opinion that the authors castigate).


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