

**Testimony of**

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**before the**

**Committee on Oversight and Government Reform  
United States House of Representatives**

**on**

**IRS: Enforcing ObamaCare's New Rules and Taxes**

**August 2, 2011**

Mr. Chairman and members of the Committee, thank you for the opportunity to present our views on the Internal Revenue Service's final rule concerning "premium-assistance tax credits" under the Patient Protection and Affordable Care Act. It is our contention that this rule exceeds the IRS's statutory authority under the PPACA and is illegal.

Contrary to the clear language of the statute and congressional intent, this rule issues tax credits in health insurance "exchanges" established by the federal government. It thus triggers a \$2,000-per-employee tax on employers and appropriates billions of dollars to private health insurance companies in states with a federal Exchange, also contrary to the clear language of the statute and congressional intent. Since those illegal expenditures will exceed the revenues raised by the illegal tax on employers, this rule also increases the federal deficit by potentially hundreds of billions of dollars, again contrary to the clear language of the statute and congressional intent.

The rule is therefore illegal. It lacks any statutory authority. It is contrary to both the clear language of the PPACA and congressional intent. It cannot be justified on other legal grounds.

On balance, this rule is a large net tax increase. For every \$2 of unauthorized tax reduction, it imposes \$1 of unauthorized taxes on employers, and commits taxpayers to pay for \$8 of unauthorized subsidies to private insurance companies. Because this rule imposes an illegal tax on employers and obligates taxpayers to pay for illegal appropriations, it is quite literally taxation without representation.

Three remedies exist. The IRS should rescind this rule before it takes effect in 2014. Alternatively, Congress and the president could stop it with a resolution of disapproval under the Congressional Review Act. Finally, since this rule imposes an illegal tax on employers in states that opt not to create a health insurance “exchange,” those employers and possibly those states could file suit to block this rule in federal court.

Requiring the IRS to operate within its statutory authority will not increase health insurance costs by a single penny. It will merely prevent the IRS from unlawfully shifting those costs to taxpayers.

In a paper forthcoming in *Health Matrix*, a health law journal, we show that the IRS rule finds no support in either the statute or its legislative history.<sup>i</sup> We summarize our findings below.

### **Background**

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act. A central objective of the PPACA is to prevail upon states to establish health insurance “exchanges” through which millions of Americans would purchase federally regulated and subsidized health plans.

The PPACA’s authors included multiple provisions designed to encourage states to establish Exchanges. Section 1311 commands that each state “shall” create an Exchange.<sup>ii</sup> The Act gives the Secretary of Health and Human Services the authority to make unlimited grants to states to assist them with start-up costs.<sup>iii</sup> The Act imposes a “maintenance of effort” requirement on each state’s Medicaid program that lifts only when a state establishes a health insurance Exchange.<sup>iv</sup> Section 1321 directs the Secretary to establish and operate Exchanges in states that fail to create one.<sup>v</sup>

Consistent with these provisions, the Act authorizes the Secretary of the Treasury to issue refundable “premium assistance tax credits” through Exchanges “established by a state under Section 1311.”<sup>vi</sup> There is no parallel language authorizing tax credits through Exchanges established by the federal government under Section 1321. During congressional consideration, the Act’s lead author, Senate Finance Committee chairman Max Baucus (D-MT), confirmed this asymmetry was intentional: the bill “conditions” tax credits on states establishing an Exchange.<sup>vii</sup>

Both the text of the statute and Congress’ intent are thus crystal clear. The Act authorizes tax credits only in Exchanges “established by a state under Section 1311,” and withholds tax credits in states that do not establish an Exchange. The section of the law that authorizes tax credits uses or refers to that restrictive language no less than six times. The remainder of the statute supports the plain meaning of that restriction, and there is nothing in the statute that conflicts with it. The only statement anyone has found in the legislative history on this point comes from Sen. Baucus, the Act’s chief sponsor, who confirmed this was by design. The incentive that this limitation produces is consistent with numerous other incentives that Congress created to motivate states to establish Exchanges.

Since the PPACA ties additional “cost-sharing subsidies”<sup>viii</sup> and penalties against employers<sup>ix</sup> to these premium-assistance tax credits, the statute likewise restricts those features of the law to states that establish their own Exchanges.

### **IRS Rule Taxes & Spends Hundreds of Billions of Dollars without Authorization**

On May 23, the IRS finalized<sup>x</sup> a proposed rule that offers premium-assistance tax credits through Exchanges “established under section 1311 *or* 1321 of the Affordable Care Act.”<sup>xi</sup> Those six characters—“or 1321”—constitute a dramatic rewriting of the statute. By issuing tax credits where Congress did not authorize them, this rule also triggers cost-sharing subsidies and imposes penalties on employers that Congress did not authorize.

According to the Congressional Budget Office, nearly 80 percent of the combined budgetary impact of these tax credits and subsidies is new federal spending.<sup>xii</sup>

The total cost of this rule depends on how many states decline to establish Exchanges, a decision that many states have yet to make. In the unlikely scenario that no states establish an Exchange, Congressional Budget Office [projections](#) indicate that over the 2012-2022 period the rule’s unauthorized employer penalties would exceed \$100 billion and the budgetary impact of its unauthorized tax credits and subsidies would be on the order of \$1 trillion.<sup>xiii</sup> Since the Obama administration estimates it may have to run Exchanges for as many as 30 states,<sup>xiv</sup> the cost of the rule could easily reach hundreds of billions of dollars.

Federal law and certain executive orders demand heightened scrutiny of major regulatory actions. For example, the Congressional Review Act enables Congress to block major rules, which it defines as any rule with an anticipated annual cost or economic effect of \$100 million or more.<sup>xv</sup> Yet the IRS concluded this rule would not have a significant economic effect.<sup>xvi</sup>

### **The Administration’s Defense of the Rule**

The administration’s public statements about this rule have been few, and are most notable for what they do not include. The administration cites no statutory authority for this move to offer tax credits in federal Exchanges—because there is no statutory authority. It likewise cites nothing from the legislative history to support its rewriting of the statute.

Instead of identifying any statutory language to support its position, the Treasury Department has said the IRS rule is “consistent with the intent of the law and our ability to interpret and implement it,”<sup>xvii</sup> when in fact it is inconsistent with both the text and the intent of the law. The Department has said “[t]he statute includes language that indicates”<sup>xviii</sup> that tax credits are authorized in federal Exchanges, when in fact the statute includes no such language. The Department of Health and Human Services has written that the rule is “supported by the statute”<sup>xix</sup> without actually citing any part of the statute that supports it. Indeed, the administration has yet to identify any language in the PPACA that could plausibly support the IRS’s assertion of authority to provide for tax credits and subsidies in federal exchanges. The IRS has merely assumed this power for itself.

In promulgating the final rule, the IRS defended its position in the following manner:

The statutory language...of the Affordable Care Act *support[s] the interpretation* that credits are available to taxpayers who obtain coverage through a...Federally facilitated Exchange. Moreover, the *relevant* legislative history *does not demonstrate that Congress intended to limit* the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is *consistent with* the language, purpose, and structure of section 36B and the Affordable Care Act as a whole.<sup>xx</sup>

Not only did the IRS fail to identify any statutory authority for its position, it also misrepresents the text and history of the PPACA. The statutory language directly contradicts the notion that the IRS can offer tax credits through federal Exchanges, as there is no language in the statute authorizing such actions. Despite the word “relevant,” which seems calculated to exclude any inconvenient aspects of the legislative history, that history clearly demonstrates that Congress intended to limit tax credits to state-created Exchanges, as we document at length in our forthcoming *Health Matrix* article. Finally, the rule cannot be “consistent” with a statute that it contradicts.

### **Other Defenders of the Rule**

Some PPACA supporters outside the administration have offered a more detailed defense of the IRS rule, but their arguments do not support the IRS position.

Some claim that the IRS should be allowed to interpret the PPACA to authorize tax credits in federal Exchanges. Under the “*Chevron* doctrine,” courts generally defer to reasonable agency interpretations of ambiguous statutory language. Yet the relevant portions of the PPACA are crystal clear. Even the IRS rule’s most vocal defender concedes that the relevant provisions “clearly say” that tax credits are authorized only in state-established Exchanges.<sup>xxi</sup> Thus defenders of the IRS rule have sought to find other parts of the law that conflict with that clear language in order to create an ambiguity that could trigger *Chevron* deference. They have focused on two passages from the statute, neither of which authorizes tax credits in federal Exchanges or conflicts with the language limiting tax credits to Exchanges established by states.

The first passage occurs in Section 1321. That section provides that if a state fails to establish an Exchange, “the Secretary shall...establish and operate such Exchange within the State.”<sup>xxii</sup> Defenders of the rule claim that the words “such Exchange” refer to Exchanges established under Section 1311. Yet the statute clearly authorizes tax credits only through “an Exchange *established by the State* under section 1311.” Moreover, Section 1311 requires that for purposes of that section, “An Exchange shall be a governmental agency or nonprofit entity that is *established by a State*.”<sup>xxiii</sup> (Emphases added.) Finally, Sen. Baucus’ original bill contained similar language (“the Secretary shall...establish and operate *the exchanges* within the State,” emphasis added). Yet Baucus confirmed that tax credits were available only in states that established their own Exchanges.

The second passage is an information-reporting requirement that Congress added to the PPACA through the Health Care and Education Reconciliation Act of 2010 (HCERA), more commonly known as the “reconciliation” bill Congress passed immediately after the PPACA.<sup>xxiv</sup> That requirement directs all Exchanges, whether created by states (Section 1311) or by the federal government (Section 1321), to report information regarding each individual’s eligibility for tax credits, and the amount of any advance payment of those tax credits, to both the individual and to the Treasury Secretary.

This information-reporting requirement is clear and straightforward, and does not conflict with, but instead reaffirms the language limiting tax credits so state-created Exchanges. It refers to “the credit under this section” no less than four times. Since the credit authorized under that section—the new section 36B of the Internal Revenue Code—is limited to Exchanges “established by the state under section 1311,” this provision plainly requires federal Exchanges to report zero advance payments. Because it practically requires federal Exchanges to report to individuals the amount of the credit they would receive if their state were to establish an Exchange, and enables the Treasury Secretary to issue aggregate data on the tax credits that would be available to states that have yet to establish an Exchange, this provision serves the same goal as the language limiting tax credits to state-run Exchanges. Both provisions encourage states to establish an Exchange. This information-reporting requirement in no way conflicts with the plain meaning of the language restricting tax credits to state-run Exchanges.

There is simply no plausible way to argue this IRS rule is consistent with or supported by congressional intent, much less the statute. The most important indicator of congressional intent is the text of the statute itself. That text is clear. It was there for all to see before Congress approved it. It is not possible that someone who read the bill could have mistakenly thought that language authorized tax credits in federal Exchanges.

Even if—contrary to all the evidence—there had been a tacit understanding among congressional supporters that PPACA would authorize tax credits in federal Exchanges, the fact that Congress approved (and the president signed) a bill with no such authorization reveals that Congress’ *actual* intent was *not* to authorize tax credits in federal Exchanges but to enact a law without them, because the alternative was no law at all. Again, there is simply no plausible way to argue that this IRS rule is supported by the statute or congressional intent.

### **A Miscalculation, Not a Drafting Error**

The fact that the PPACA limits tax credits, cost-sharing subsidies, and penalties against employers to states that establish an Exchange was not a drafting error. If it were an error at all, it was an error of miscalculation.

To insulate the PPACA against charges that it was a “federal takeover,” its authors sought to give states a large role in implementing its regulatory scheme, most notably by operating its health insurance Exchanges. To achieve that goal, they offered tax credits as an incentive for states to establish Exchanges.

The flip side of that incentive, however, is that the PPACA's authors literally—and *intentionally*—gave states a veto over at least three major and essential provisions of the law. They believed, of course, the risk that states would exercise this veto was small.<sup>xxv</sup> But just as they misjudged the law's popularity, they miscalculated how states would respond.

Now that some experts estimate more than 30 states will decline to create an Exchange,<sup>xxvi</sup> the law's authors no doubt regret their miscalculation. But that does not alter the clear meaning of the statute. Nor does it give the IRS license to rewrite a statute, impose a tax that Congress did not authorize, or borrow and spend money that Congress did not authorize.

## Conclusion

The law is clear. Congress did not authorize tax credits, subsidies to private insurance companies, or penalties on employers in states with a federal Exchange. Nor did Congress grant the IRS the authority to create such credits, subsidies, and penalties, as this rule does. The Framers considered the power to tax sufficiently dangerous that the Constitution requires all revenue measures to originate in the House of Representatives, because the House is closer to the people than any other federal institution. With this rule, the IRS has put itself on a par with the Congress. It has assumed the power to rewrite a statute and alter the federal tax code.

The IRS's duty is clear. It should withdraw this rule and issue another rule that is consistent with its statutory mandate. If the agency fails to do so, Congress and the president can rescind this rule with a resolution of disapproval under the Congressional Review Act. Alternatively, employers in states that decline to create an Exchange could immediately challenge the rule in federal court.<sup>xxvii</sup>

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<sup>i</sup> Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX (forthcoming), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2106789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789).

<sup>ii</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1311, 124 Stat. 119, 173 (2010).

<sup>iii</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1311, 124 Stat. 119, 173 (2010).

<sup>iv</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 2001 (b), 124 Stat. 119, 275-276 (2010). It should be noted that there is some question whether this provision is enforceable due the Supreme Court's decision in *NFIB v. Sebelius*.

<sup>v</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1321, 124 Stat. 119, 186 (2010).

<sup>vi</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1401, 124 Stat. 119, 213-224 (2010) (Amended by the Health Care and Education Reconciliation Act).

<sup>vii</sup> *Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009), available at: <http://www.finance.senate.gov/hearings/hearing/download/?id=c6a0c668-37d9-4955-861c-50959b0a8392>; Video: *Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance* (C-SPAN broadcast Sept. 23, 2009), at 2:53:21, <http://www.c-spanvideo.org/program/289085-4>.

**Senator Ensign:** Is this bill, the underlying premise in this bill that...we are making states change their laws, their coverage laws? Aren't we doing that? And so why would not most of the coverage rules in this bill, underlying bill, be...only in the jurisdiction of the HELP Committee and not in the jurisdiction of this committee?...On certain minimum plans, exchanges. All those coverage things are state laws...How do we have jurisdiction over changing state laws on coverage?...

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**The Chairman:** There are conditions to participate in the Exchange.

**Senator Ensign:** That is right.

**The Chairman:** For setting up an Exchange.

**Senator Ensign:** These would be conditions to participate—

**The Chairman:** And states—an Exchange is, essentially is tax credits. Taxes are in the jurisdiction of this committee.

<sup>viii</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1402, 124 Stat. 119, 223 (2010).

<sup>ix</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1513, 124 Stat. 119, 253-256 (2010) (Amended by the Health Care and Education Reconciliation Act of 2010 ).

<sup>x</sup> Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30377 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

<sup>xi</sup> Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 FEDERAL REGISTER 50934 (Aug. 17, 2011), available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf> (emphasis added).

<sup>xii</sup> Congressional Budget Office, unpublished data. (Available on request from the authors.)

<sup>xiii</sup> CONGRESSIONAL BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION (2012), available at: <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf>.

<sup>xiv</sup> J. Lester Feder, *Sebelius: Exchange funding request was anticipated*, POLITICO PRO, Feb. 14, 2012, <https://www.politicopro.com/go/?id=9220> [subscription only] (“We don’t know if we’re going to be running an exchange for 15 states, or 30 states.”).

<sup>xv</sup> See 5 U.S.C. § 804 (2).

<sup>xvi</sup> See Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30385 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf> (“It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required”).

<sup>xvii</sup> Sara Hansard, *Private Exchanges Could Impact Success of State Exchanges*, BNA HEALTH INSURANCE REPORT, Oct. 26, 2011.

<sup>xviii</sup> Letter from Douglas H. Shulman, Commissioner, Internal Revenue Service, to David P. Roe, Representative, U.S. House of Representatives (Nov. 29, 2011), [http://roe.house.gov/UploadedFiles/IRS\\_Response\\_to\\_letter\\_on\\_PPACA\\_Exchange.pdf](http://roe.house.gov/UploadedFiles/IRS_Response_to_letter_on_PPACA_Exchange.pdf).

<sup>xix</sup> CENTERS FOR MEDICARE AND MEDICAID SERVICES, CENTER FOR CONSUMER INFORMATION AND INSURANCE OVERSIGHT, STATE EXCHANGE IMPLEMENTATION QUESTIONS AND ANSWERS 8, (November 29, 2011), available at: [http://cciio.cms.gov/resources/files/Files2/11282011/exchange\\_q\\_and\\_a.pdf.pdf](http://cciio.cms.gov/resources/files/Files2/11282011/exchange_q_and_a.pdf.pdf).

<sup>xx</sup> Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf> (Emphases added).

<sup>xxi</sup> Timothy S. Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH, Sept. 11, 2011, <http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchange-can-offer-premium-tax-credits/>.

<sup>xxii</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1321, 124 Stat. 119, 186 (2010).

<sup>xxiii</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1311 (d), 124 Stat. 119, 176 (2010).

<sup>xxiv</sup> Health Care and Education Reconciliation Act, Pub. L. No. 111-152, Sec. 1004 (c), 124 Stat. 1029, 1035 (2010) and the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1401, 124 Stat. 119, 219 (2010).

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<sup>xxv</sup> Supporters of the PPACA confidently predicted all states would establish Exchanges. Prior to enactment, Secretary of Health and Human Services Kathleen Sebelius testified that states were “very eager” to create Exchanges and predicted most would do so quickly. *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2011: Hearing Before the H. Comm. on Appropriations*, 111th Cong. 170-171 (Mar. 10, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58233/pdf/CHRG-111hhrg58233.pdf>. Shortly after enactment, President Obama predicted, “by 2014, each state will set up what we’re calling a health insurance exchange.” Barack Obama, U.S. President, Remarks on Health Insurance Reform in Portland, Maine (Apr. 1, 2010), available at: <http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-portland-maine>.

<sup>xxvi</sup> J. Lester Feder and Jason Millman, *Few States Set for Health Exchanges*, POLITICO, May 21, 2012, <http://www.politico.com/news/stories/0512/76596.html> (“Many insurance experts and health policy consultants predict only a dozen or so states will be ready to run exchanges on their own — and a few say that projection may be too sunny”).

<sup>xxvii</sup> In light of the Supreme Court’s ruling in *NFIB v. Sebelius*, a strong case can be made that the Anti-Injunction Act would not delay employers’ ability to establish standing to challenge the IRS rule.



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#### **CASE WESTERN RESERVE UNIVERSITY, Cleveland, OH**

*Inaugural Johan Verheij Memorial Professor of Law*, 2011 – Present

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#### **Courses taught:**

Administrative Law  
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Environmental Law Seminar  
International Environmental Law  
International Environmental Law Seminar  
Property

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Standing Committee on Experiential Learning (2011-Present)  
Standing Committee on Washington, D.C. Program (2011-Present)  
Appointments Committee (2009-Present)  
Provost's Advisory Committee for Promotion and Tenure (2008)  
Ad Hoc Committee on Bar Passage (2007-2008)  
Promotion & Tenure Committee (2006-2007, 2008-09)  
Judicial Clerkship Committee (2004-Present)  
Building Committee (2003-2006)  
Rankings Evaluation Committee (2003-04)  
Library & Technology Committee (2002-2006, Chair 2002-03)  
Upper-Level Writing Requirement Committee (2002-2003)  
RAW Program Evaluation Committee (2001-2003)

*Director*, Center for Business Law & Regulation, January 2007 – Present

*Co-Director*, Center for Business Law & Regulation, July – December 2006

*Associate Director*, Center for Business Law & Regulation, July 2003 – 2006

#### **GEORGE MASON UNIVERSITY SCHOOL OF LAW, Arlington, Virginia**

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Administrative Law  
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## AWARDS AND HONORS

Inaugural holder of the Johan Verheij Memorial Professorship at the Case Western Reserve University School of Law (2011)

LAND USE AND ENVIRONMENT LAW REVIEW 2009-10 (compendium of ten best articles in land-use and environmental law), *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 BOSTON COLLEGE LAW REVIEW 301 (2008)

Finalist, LAND USE AND ENVIRONMENT LAW REVIEW 2008-09 (compendium of ten best articles in land-use and environmental law), *When Is Two a Crowd: The Impact of Federal Action on State Environmental Regulation*, 31 HARVARD ENVIRONMENTAL LAW REVIEW 67 (2007).

2007 Distinguished Teacher Award, Case Western Reserve University School of Law Alumni Association

Honorable Mention, Most Cited Law Professors by Specialty 2000-07 (Environmental Law), Brian Leiter's Law School Rankings, November 2007.  
(Only environmental law professor listed under age 40 at time of study.)

2004 Paul M. Bator Award in Recognition of Excellence in Legal Scholarship, Outstanding Commitment to Teaching and Law Students, and the Significant Public Impact of His Work, Federalist Society for Law & Public Policy Studies.

2001 Distinguished Young Alumnus Award, George Mason University School of Law.

Finalist, LAND USE AND ENVIRONMENT LAW REVIEW 2001-02 (compendium of ten best articles in land-use in environmental law), *Free and Green: A New Approach to Environmental Protection*, 24 HARVARD JOURNAL OF LAW & PUBLIC POLICY 653 (2001).

Finalist, LAND USE AND ENVIRONMENT LAW REVIEW 2001-02 (compendium of ten best articles in land-use in environmental law), *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001).

## PUBLICATIONS

### Books

LET FIFTY FLOWERS BLOOM: ENVIRONMENTAL FEDERALISM FOR THE 21<sup>ST</sup> CENTURY  
(manuscript in progress)

Editor, BUSINESS AND THE ROBERTS COURT (Oxford University Press, 2012, forthcoming)

Editor, REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011)

Editor, ECOLOGY, LIBERTY & PROPERTY: A FREE MARKET ENVIRONMENTAL READER (2000).

Editor, THE COSTS OF KYOTO: CLIMATE CHANGE POLICY AND ITS IMPLICATIONS (1997).

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*Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA LAW REVIEW 943 (2009).

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*Water Marketing as an Adaptive Response to the Threat of Climate Change*, 31 HAMLINE LAW REVIEW 730 (2008).

*Introduction: Common Law Environmental Protection* (w/ Andrew Morriss), 58 CASE WESTERN RESERVE LAW REVIEW 575 (2008).

*Reforming Our Wasteful Hazardous Waste Policies*, 17 NYU ENVIRONMENTAL LAW JOURNAL 724 (2008).

*Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 443 (2008).

*God, Gaia, The Taxpayer and the Lorax: Standing, Justiciability, and Separation of Powers after Massachusetts and Hein*, 20 REGENT UNIVERSITY LAW REVIEW 175 (2008).

*Massachusetts v. EPA Heats Up Climate Policy No Less than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NORTHWESTERN LAW REVIEW COLLOQUY 32 (2007).

*Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

*Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 NYU JOURNAL OF LAW & LIBERTY 987 (2005).

*Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005).

*Looking Ahead to the 2005-06 Term*, CATO SUPREME COURT REVIEW 2004-05 (2005).

*Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK LAW REVIEW 751 (2005).

*Frank Meyer: The Fusionist as Federalist*, PUBLIUS Vo. 34 No. 4 (Fall 2004).

*The Fable of Federal Environmental Regulation*, 55 CASE WESTERN RESERVE LAW REVIEW 93 (2004).

*Remarks on Regulating Genetically Modified Foods: Is Mandatory Labeling the Right Answer?*, 10 RICH. JOURNAL OF LAW & TECHNOLOGY (2004).

*Introduction: The Virtues and Vices of Skeptical Environmentalism* (with Andrew Morriss), 53 CASE WESTERN LAW REVIEW 249 (2002).

*Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS UNIVERSITY LAW REVIEW 9 (2002).

*Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVIRONMENTAL LAW & POLICY FORUM 39 (2001).

*The Cartagena Protocol and Biological Diversity: Biosafe or Bio-Sorry?* 12 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 761 (2000).

### **Book Contributions**

*Labeling the Little Things*, THE NANOTECHNOLOGY CHALLENGE (D. Dana ed., 2011, forthcoming).

*The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (J. Adler ed., 2011).

*The Problems with Precaution: A Principle without Principle*, CROP CHEMOPHOBIA (J. Entine ed., 2010).

*The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, PROPERTY WRONGS: THE LAW AND ECONOMICS OF TAKINGS (B. Benson ed., 2010).

*Perverse Incentives and the Endangered Species Act*, ISSUES OF THE DAY: 100 COMMENTARIES ON CLIMATE, ENERGY, THE ENVIRONMENT, TRANSPORTATION, AND PUBLIC HEALTH POLICY (Ian W.H. Parry & Felicia Day eds., 2010).

*Taking Property Rights Seriously*, THE ENVIRONMENT: PHILOSOPHY AND POLICY (Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., Cambridge University Press, 2009).

*Environment*, THE ENCYCLOPEDIA OF LIBERTARIANISM (R. Hamowy ed., 2008).

*Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS ON *RAPANOS* (K. Wroth ed., Vermont Environmental Law Journal, 2007).

*Marsh Madness*, in INCENTIVES AND CONSERVATION: THE NEXT GENERATION OF ENVIRONMENTALISM (D. Benjamin ed., 2004).

*Antitrust Barriers to Cooperative Fishery Management*, in THE EVOLUTION OF PROPERTY RIGHTS IN FISHERIES (D. Leal ed., 2004).

*Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW (J. Chen ed., 2004).

*Do Conservation Conventions Conserve? in SUSTAINABLE DEVELOPMENT: PROMOTING PROGRESS OR PERPETUATING POVERTY?* (J. Morris, ed. 2002).

*The Precautionary Principle's Challenge to Progress*, in GLOBAL WARMING AND OTHER ECO-MYTHS (R. Bailey, ed. 2002).

*Clean Politics, Dirty Profits*, in POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (T. Anderson, ed., 2000).

*Benchmarks* (w/ Peter Cazamias), in THE TRUE STATE OF THE PLANET (R. Bailey, ed., 1995).

*Clean Fuels, Dirty Air*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (M. Greve and F. Smith, eds., 1992).

### **Monographs**

*A More Modest Court: The Ohio Supreme Court's Newfound Judicial Restraint* (w/ Christina M. Adler) (Federalist Society for Law & Public Policy Studies, 2008).

*Let Fifty Flowers Bloom: Transforming the State into Laboratories Environmental Policy* (Federalism Project/American Enterprise Institute, 2001).

*Greenhouse Policy without Regrets*, Lead Author (Competitive Enterprise Institute, 2000).

*Environmental Performance at the Bench: The EPA's Record in Federal Court* POLICY STUDY NO. 269 (Reason Public Policy Institute, 2000).

*Free Market Environmental Bibliography*, 4<sup>th</sup> Edition, Editor (Competitive Enterprise Institute, 1996).

*Property Rights, Regulatory Takings, and Environmental Protection* (Competitive Enterprise Institute, 1996).

*Time to Reopen the Clean Air Act: Clearing Away the Regulatory Smog* (w/ K.H. Jones), POLICY ANALYSIS NO. 233 (Cato Institute, 1995).

*Property Rights Reader*, Editor (Competitive Enterprise Institute, 1995).

*Taken to the Cleaners: A Case Study of the Overregulation of American Small Business* POLICY ANALYSIS NO. 233 (Cato Institute, 1993).

### **Essays & Reviews**

*Will the REINS Act Rein in Federal Regulation?* REGULATION, vol. 34, no. 2 (2011).

*(Mostly) Realism on Global Warming* (review of R. Pielke Jr., *The Climate Fix: What Scientists and Politicians Won't Tell You about Global Warming*), REGULATION, vol. 34, no. 1 (2011).

*The Constitutionality of the Individual Mandate in the Affordable Care Act* (with Erik Jensen), BAR JOURNAL OF THE CLEVELAND METROPOLITAN BAR ASSOCIATION, March 2011.

*The EPA's Carbon Footprint*, REASON (March 2010).

*The Record of the Roberts Court in Environmental Cases: Pro-Business or Pro-Government?* ENGAGE, Vol. 11, No. 1 (2010).

*The Clean Water Land Grab*, REGULATION, vol. 32, no. 4 (2009-2010).

*Kindler, Gentler Cost-Benefit Analysis* (review of R. Revesz & M. Livermore, *Retaking Rationality: How Cost Benefit Analysis Can Better Protect the Environment and Our Health*), REGULATION, vol. 32, no. 4 (2009-2010).

*Conservation without Regulation: Property-Based Environmental Protection* (transcript of talk at University of Cincinnati College of Law), ENGAGE, vol. 10, Issue 2 (2009).

*Warming Up to Water Markets*, REGULATION, vol. 31, no. 4 (2008).

*The Green Bridge to Nowhere*, (review of J. Speth, *The Bridge at the End of the World: Capitalism, the Environment, and Crossing from Crisis to Sustainability*), THE NEW ATLANTIS (Fall 2008).

*An Animal to Save the World*, THE NEW ATLANTIS (Summer 2008).

*Backing Up Words with (Intelligent, Targeted) Action*, THE NEW REPUBLIC ONLINE, January 30, 2008.

*Anti-Conservation Incentives*, REGULATION, vol. 30, no. 4 (2007).

*Can the Golden State Catch a Greenhouse Waiver?*, ENGAGE (2007).

*Devaluing Science*, review of R. Pielke, *The Honest Broker: Making Sense of Science in Policy and Politics*, THE NEW ATLANTIS (Summer 2007).

*Don't Politicize Science (Unless You're on My Side)*, review of C. Mooney, *The Republican War on Science*, REGULATION (Spring 2007).

*Standing in the Hot-Seat: Climate Change Litigation*, ENGAGE, Vol. 8, No. 1 (2007).

*Prosecuting Journalists Would be Unprecedented and Unwise*, NATIONAL SECURITY LAW REPORT, Vol. 28, No. 3 (September 2006).



Review of D. Schoenbrod, *Saving the Environment from Washington*, INDEPENDENT REVIEW, Vol. 10, No. 4 (Summer 2006).

*How to Protect Environmental Protections?* 25 ENVIRONMENTAL LAW REPORTER 10413 (2005) (roundtable transcript).

*A Vast-Right Wing Conspiracy: It's Neither Vast nor a Conspiracy. Discuss*, LEGAL AFFAIRS (May-June 2005).

*Conservation Cartels: How Competition Policy Conflicts with Environmental Protection*, REGULATION Vol. 27, No. 4 (2004).

*The Role of the Judiciary in Preserving Federalism*, 1 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY, Symposium Issue 49 (2002).

(Review) *Free Market Environmentalism Revised Edition*, 22 CATO JOURNAL 182 (2002).

*Judicial Federalism Not Anti-Environment*, ENVIRONMENTAL FORUM, vol. 19, No. 4 (2002).

*Waste & the Dormant Commerce Clause – A Reply* (response to Richard Epstein), 3 GREEN BAG 2D 353 (2000).

*Faux Market Environmentalism*, REGULATION, Vol. 23, No. 1 (2000).

*Swamp Rules: The End of Federal Wetlands Regulation?* REGULATION, Vol. 22, No. 2 (1999).

*There's No Justice in EPA's Environmental Justice Policy*, 6 CORPORATE ENVIRONMENTAL STRATEGY 183 (1999).

*A New Environmental Federalism*, FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY (Winter 1998).

*Bean Counting for a Better Earth: Environmental Enforcement at the EPA*, REGULATION, Vol. 21, No. 2 (1998).

*Rent-Seeking Behind the Green Curtain*, REGULATION, Vol. 19, No. 4 (1996).

Over 100 articles, reviews, and op-eds on environmental and regulatory policy have appeared in various magazines and newspapers, including (but not limited to) the following:

Magazines/Journals

*The American Spectator*

*Chief Executive*

*Consumer's Research*

*The Environmental Forum*

*The Good Society*

*Issues in Science and Technology*

*Legal Times*

*Liberty*

*The Next Progressive*

*PERC Reports*

*Policy Review*  
*The Public Interest*

*Reason*  
*The Weekly Standard*

Newspapers

*Arizona Republic*  
*Christian Science Monitor*  
*Cleveland Plain Dealer*  
*Detroit News*  
*Hartford Courant*  
*Indianapolis Star*  
*Investor's Business Daily*  
*Journal of Commerce*  
*Los Angeles Times*  
*Orange County Register*

*Oregonian*  
*Philadelphia Inquirer*  
*Phoenix Gazette*  
*Richmond Times-Dispatch*  
*San Diego Union-Tribune*  
*St. Louis Post-Dispatch*  
*Wall Street Journal*  
*Wall Street Journal Europe*  
*Washington Post*  
*Washington Times*

**CONGRESSIONAL TESTIMONY**

The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations, Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, January 24, 2011

The Clean Water Restoration Act of 2007, Committee on Transportation and Infrastructure, U.S. House of Representatives, April 16, 2008.

Examining the Case for the California Waiver, Committee on Environment and Public Works, U.S. Senate, May 22, 2007.

The Scope of “Waters of the United States” after *Rapanos v. United States*, Subcommittee on Fisheries, Wildlife and Water, Committee on Environment and Public Works, U.S. Senate, August 1, 2006.

Gas Price Act of 2005, Committee on Environment and Public Works, U.S. Senate, October 18, 2005.

National Fish & Wildlife Foundation Establishment Act Amendments of 1997, Subcommittee on Fisheries, Conservation, Wildlife, and Oceans, U.S. House of Representatives, September 25, 1997.

The Right to Own Property, Committee on the Judiciary, U.S. Senate, October 18, 1995.

Private Property Rights and Environmental Laws, Committee on Environment and Public Works, U.S. Senate, July 12, 1995.

Flow Control and Interstate Transportation of Solid Waste, Subcommittee on Superfund, Waste Control, and Risk Assessment, U.S. Senate, March 1, 1995.

Private Property Rights, Subcommittee on the Constitution, U.S. House of Representatives,  
February 10, 1995.

## **PEER REVIEW**

Have conducted academic peer review of manuscripts and proposals for the following journals and publishers.

- AEI Press
- Aspen Publishers
- Cambridge University Press
- ELECTION LAW JOURNAL
- ENVIRONMENTAL HISTORY
- GLOBAL ENVIRONMENTAL POLITICS
- JOURNAL OF AGRICULTURAL & ENVIRONMENTAL ETHICS
- Oxford University Press

## **CONFERENCES & SYMPOSIA**

Director, “Business Law & Regulation in the Roberts Court,” Center for Business Law & Regulation, Case Western Reserve University, Cleveland, Ohio, September 16-17, 2010.

Guest Editor, *Health Matrix* (Special issue on commercial speech and public health), Spring 2011.

Director, “Regulation by Litigation Roundtable,” Center for Business Law & Regulation, Case Western Reserve University, Cleveland, Ohio, September 25, 2009. (Proceedings published as book review symposium in REGULATION GOVERNANCE (2011)).

Director, “Rebuilding the Ark: New Perspectives on Endangered Species Act Reform,” American Enterprise Institute, September 15, 2009.

Director, “Civil Liberties in Wartime,” Liberty Fund Colloquium, Cleveland, Ohio, June 26-29, 2008.

Co-editor (with Andrew Morriss), “Common Law Environmental Protection,” paper-only symposium, CASE WESTERN RESERVE LAW REVIEW (2008)

Director, “Private Property, Government Takings, and Individual Liberty, Liberty Fund Colloquium, San Antonio, Texas, February 28-March 2, 2008.

Chair, “Scheme Liability: Section 10(b), and *Stoneridge Investment Partners v. Scientific Atlanta*,” co-sponsored by the Center for Business Law & Regulation and the Corporate Law Practice Group of the Federalist Society for Law & Public Policy Studies, Cleveland, Ohio, October 5, 2007.

Director, “Frank S. Meyer and the Fusion of Freedom and Tradition,” Liberty Fund Colloquium, Miami, Florida, December 12-15, 2006

Conference Co-Chair (with Dean Reuter), “Eminent Domain, Urban Renewal & The Constitution,” cosponsored by the Center for Business Law & Regulation and the Property Rights and Environmental Law Practice Group of the Federalist Society for Law & Public Policy Studies, Cleveland, Ohio, February 4, 2005.

Director, “Civil Liberties in Wartime,” Liberty Fund Colloquium, Miami, Florida, January 13-16, 2005.

Co-editor (with Andrew Morriss), “The Virtues and Vices of Skeptical Environmentalism,” paper-only symposium on Bjorn Lomborg’s *The Skeptical Environmentalist*, 53 CASE WESTERN RESERVE LAW REVIEW (2002).

Director, “The Costs of Kyoto: Climate Change Policy and Its Implications,” Competitive Enterprise Institute, Washington, D.C., July 15, 1997.

## **SELECT LECTURES & PRESENTATIONS**

Panelist, “A New Wavelength? Carbon Tax, Cap & Trade, and Market Adaptation,” Canada-U.S. Law Institute annual conference on “Energy Security and Climate Change: A Canada-U.S. Common Approach?” CWRU School of Law, April 15, 2011.

“Health Care Reform and the Future of Federalism,” Federalist Society Birmingham Lawyers Chapter, Birmingham, AL, March 1, 2011.

Panelist, “Federalism and Interstate Competition,” 30th Annual Federalist Society Student Symposium on “Capitalism, Markets, and the Constitution,” University of Virginia, February 26, 2011.

“Cooperation, Commandeering, or Crowding Out? Federal Intervention and State Choices in Health Care Policy,” *Kansas Journal of Law and Public Policy* symposium on “The Role of States in Federal Health Care Reform,” University of Kansas School of Law, February 11, 2011.

“Alternatives to Cap and Trade,” Federalist Society Student Chapter, Environmental Law Society, and *Harvard Environmental Law Review*, Harvard Law School, February 3, 2011.

Panelist, “The Judicial Vacancy Crisis,” Federal Bar Association, Northern Ohio Chapter, November 18, 2010.

Panelist, *Regulating from Nowhere: Environmental Law & the Search for Objectivity* by Douglas Kysar, American Constitution Society, Washington, D.C., November 4, 2010.

“Is the Common Law the Free Market Solution to Pollution?” Workshop on “Tough Questions for Free-Market Environmentalism,” Property & Environment Research Center, Bozeman, MT, July 20, 2010.

Panelist, “Environmental Protection in a Climate of Change,” American Constitution Society 2010 Annual Convention, Washington, D.C., June 18, 2010.

Panelist, “The Global Warming Crisis: Property Law,” AALS Mid-Year Meeting Workshop on Property, New York, NY, June 12, 2010.

“Environmental Law and the U.S. Supreme Court,” Ohio State Bar Association’s 25<sup>th</sup> Annual Ohio Environmental Law Seminar in Newark, OH, April 30, 2010

“The Cuyahoga, the Common Law & Environmental Protection,” Judicial Symposium on the Expansion of Liability Under Public Nuisance, Searle Center Judicial Education Program, Northwestern University Law School, Chicago, IL, April 26, 2010.

“To Cap or Not to Cap,” a debate with Yale law professor Douglas Kysar on federal regulation of greenhouse gases, Federalist Society Student Chapter, Yale Law School, New Haven, CT, April 8, 2010.

“Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization,” Workshop on “Rethinking the Foundations of Climate Change Law and Policy,” University of Pennsylvania Law School, Philadelphia, PA, October 23, 2009.

“Public Lands & Public Choice,” “Free Market Environmentalism and Institutions of Liberty,” PERC and Liberty Fund Inc, Bozeman, MT, June 17, 2009.

“A Conversation on Climate Change Policy: A Look Ahead at 2009,” with Michael Vandenberg, Vanderbilt Climate Change Research Network & Nashville Lawyers Chapter of the Federalist Society for Law & Policy Studies, February 19, 2009.

“Standing Still in the Roberts Court,” *Case Western Reserve Law Review* symposium on “Access to the Courts in the Roberts Era,” Case Western Reserve University School of Law, January 30, 2009.

“The Roberts Courts and Business: A Look at the Environmental Cases,” *Santa Clara Law Review* symposium on “Big Business and the Roberts Court,” Santa Clara University School of Law, January 23, 2009.

“A More Modest Court: The Ohio Supreme Court’s Newfound Judicial Restraint,” Cleveland Area Civil Trial Attorneys, December 10, 2008.

“The Policy Implications of Reaction to Climate Change,” National Lawyers Convention of the Federalist Society for Law & Public Policy Studies, November 20, 2008.

- “Compelled Commercial Speech and the Consumer Right-to-Know,” Penn State University Dickinson School of Law, State College, PA, September 19, 2008.
- Comment, “Viewpoint Diversity and Media Consolidation: An Empirical Study,” 3<sup>rd</sup> Annual Conference on Empirical Legal Studies, Cornell Law School, Ithaca, NY, September 13, 2008.
- “Taking Property Rights Seriously: The Case of Climate Change,” Social Philosophy and Policy Center/Liberty Fund conference, “Liberty and the Environment,” Orlando, FL, June 20, 2008
- “Federalism in the Roberts Court,” Conference on Constitutional Law, 2008 AALS Mid-Year Meeting, Cleveland, Ohio, June 4, 2008.
- “From Marshall to Scalia: The Role of the Courts in American History,” Bill of Rights Institute, Wichita, Kansas, April 24, 2008.
- “From Guns to Guantanamo: A Guide to Life in the Roberts Court Era,” Akron Press Club, Akron, Ohio, April 14, 2008.
- “Reforming Our Wasteful Hazardous Waste Policy,” Breaking the Logjam: An Environmental Law for the 21<sup>st</sup> Century, NYU School of Law, March 29, 2008.
- “God, Gaia, The Taxpayer, and The Lorax: Standing, Justiciability, and Separation of Powers after *Massachusetts* and *Hein*,” Keynote Address, Regent Law Review Symposium on Justiciability After *Hein* and *Massachusetts*: Where is the Court Standing?, Virginia Beach, VA, Nov. 30, 2007
- “Reforming Our Wasteful Hazardous Waste Policy,” Environmental Governance Seminar, New York University School of Law (co-sponsored by New York Law School), New York, NY, Nov. 28, 2007.
- “Water Markets as an Adaptive Response to the Threat of Climate Change,” Nevada Water Resources Association, Las Vegas, NV, Nov. 5, 2007.
- Comment, “The Complex Climate Change Incentives of China and the United States” by Cass Sunstein, Conference on Cost-Benefit Analysis of Regulations: Lessons Learned, Future Challenges,” sponsored by the Searle Center at the Northwestern University School of Law, Oct. 12, 2007.
- “Global Warming and Other Hot Topics,” Annual Convention, American Constitution Society for Law and Policy, Washington, DC, July 27, 2007.
- “Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings,” Symposium on Takings: The Uses and Abuses of Eminent Domain and Land Use Regulation,” Florida State University, April 21, 2007.

“Federalism after *Raich*: Up in Smoke?” to the student chapter of the Federalist Society at the Temple University School of Law, Philadelphia, PA, February 21, 2007.

“Hot Times in the High Court: Will the Supreme Court Dictate Federal Climate Policy,” Philadelphia Lawyers’ Chapter, Federalist Society, Philadelphia, PA, February 21, 2007.

“*Massachusetts v. EPA* Preview,” American Enterprise Institute, Washington, D.C., November 21, 2006.

“Property Rights and Environmental Protection,” Federalist Society Student Chapter, University of Kentucky School of Law, October 18, 2006.

“Jurisdictional Matching in Environmental Federalism,” Environmental Federalism: States, NGOs, and Environmental Quality for State Officials, Foundation for Research on Economics and the Environment and Montana State University, Bozeman, Montana, July 18, 2006.

“The Fable of Federal Regulation,” Skeptics Society Annual Conference, California Institute of Technology, Pasadena, CA, June 3, 2006.

“Blogging and Privacy,” Annual Computers, Freedom & Privacy Conference, Washington, D.C., May 4, 2006.

“Running on Empty – Energy in the 21st Century,” Research ShowCASE, Case Western Reserve University, Cleveland, Ohio, April 5, 2006.

“Institutional Mismatch in Environmental Federalism,” *New York University Environmental Law Journal* 2005 Colloquium on State Roles in U.S. Environmental Law and Policy, New York, N.Y. March 25, 2005.

“How to Protect Environmental Protections” Environmental Law Institute, American Constitution Society, and Center for American Progress, Washington, D.C., March 24, 2005.

“Why States Regulate: The Impact of Federal Action on State Environmental Regulatory Choices,” Faculty Workshop, George Mason University School of Law, Arlington, Virginia, January 19, 2005

“Speech: Protected and Unprotected,” Collegiate Network 25th Anniversary Student Editors Conference, Washington, D.C., December 4, 2004

Discussant, “The Election Is Over . . . Now What?” Third Annual Louis Stokes Leadership Symposium on Social Issues and the Community, Case Western Reserve University, Cleveland, Ohio, November 30, 2004.

“Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation,” Annual Meeting, Southern Economic Association, New Orleans, Louisiana, November 21, 2004.

“Wetland Federalism: Why States Regulate,” Faculty Workshop, Florida State University School of Law, Tallahassee, Florida, October 19, 2004.

“The Fables of Federal Regulation: Revisiting the Causes and Consequences of Environmental Centralization,” Mont Pelerin Society Annual Meeting, Salt Lake City, Utah, August 16, 2004.

“The Common Law and Environmental Protection,” Kinship Conservation Institute, Bozeman Montana, June 7, 2004.

“Frank Meyer, Fusionism, and Federalism,” *Publius* Symposium on Conservatives and Federalism, Washington, D.C., May 21, 2004

“Conservation without Regulation: Property Rights, Markets & Environmental Protection,” Federalist Society Student Chapter, University of Wisconsin School of Law, Madison, Wisconsin, April 14, 2004.

“Judicial Federalism and the Future of Federal Environmental Regulation,” Faculty Workshop, University of Pittsburgh School of Law, Pittsburgh, Pennsylvania, February 26, 2004.

“The Fable of Federal Environmental Protection,” Case Western Reserve University School of Law, Cleveland, Ohio, February 11, 2004.

“The Constitutional Limits of Federal Environmental Protection,” Federalist Society National Lawyers’ Convention, Washington, D.C., November 14, 2003.

“The Bush Administration’s Environmental Record,” Harvard Environmental Law Conference, Harvard Law School, Cambridge, Massachusetts, November 6, 2003.

“Terrorism and the Environmental Right-to-Know,” Terrorism, Energy Security, and Civil Liberties - A Seminar for Federal Judges, Foundation for Research on Economics and the Environment, Bozeman, Montana, August 5-10, 2003.

“The Erosion of Environmental Protection?” American Constitution Society National Convention, Washington, D.C., August 1, 2003.

“Constitutional Limitations on Mandatory Labeling of Biotech Foods,” Journal of Law & Technology Symposium, University of Richmond School of Law, Richmond, Virginia, March 14, 2003.

“Let 50 Flowers Bloom: Transforming States into Laboratories of Environmental Policy,” Congressional staff seminar, Cato Institute, Washington, D.C., December 13, 2002.

“The Precautionary Principle: More Sorry, Less Safe,” Congressional staff seminar, Political Economy Research Center, Washington, D.C., September 13, 2002.



“A Free Market Environment or a Regulated One?” (debate with Professor David Driesen),  
Federalist Society Student Chapter/Environmental Law Society, Syracuse University Law  
School, February 21, 2002.

“Conservation through Collusion: Antitrust Barriers to Cooperative Fishery Management,”  
Faculty Workshop, University of San Diego School of Law, March 1, 2002.

“Let Fifty Flowers Bloom: Transforming the States into Laboratories of Environmental Policy,”  
American Enterprise Institute, Washington, D.C., September 20, 2001.

“Environmental Federalism,” Environmental Economics and Policy Analysis - A Seminar for  
Law Professors, Foundation for Research on Economics and the Environment, Bozeman,  
Montana, July 12-14, 2001.

“International Environmental Regulation and the Precautionary Principle,” Roundtable on  
International Trade, International Council on Metals and the Environment, July 17-18, 2001.

Additional fora include the following:

Air & Waste Management Association  
Akron Press Club

American Council on Germany

American Iron & Steel Institute

America’s Future Foundation

American Society of Civil Engineers

Cement Kiln Recycling Coalition

Cleveland-Marshall School of Law

Close-Up Foundation

Forest Landowners Association

Foundation for Research on Economics &  
the Environment

George Washington University Federalist  
Society Student Chapter

Georgetown University Law Center

Heartland Institute

Heritage Foundation

Industrial College of the Armed Forces

Institute for Humane Studies

Leadership Institute

Lewis & Clark College

National Association of Manufacturers

North American Association for

Environmental Education

Political Economy Research Center

Progress & Freedom Foundation

Rhodes College

Society of Environmental Journalists

Tennessee-Tombigbee Water Development  
Authority

University of Chicago Federalist Society  
Student Chapter

University of Michigan Federalist Society  
Student Chapter

University of Notre Dame Federalist Society  
Student Chapter

University of Pennsylvania

University of Texas Federalist Society  
Student Chapter

University of Virginia Federalist Society  
Student Chapter

U.S. Conference of Mayors

Vermont Law School

Williams College

World Presidents Organization (WPO)

Yale Political Union, Yale University

Yale School of Forestry & Environmental  
Studies

Young Presidents Organization (YPO)

## **MEDIA APPEARANCES**

Appearances on national radio and television programs including: *PBS NewsHour with Jim Lehrer*, *CNN World News Tonight*, *CNN Moneyline with Lou Dobbs*, *Fox News Channel O'Reilly Factor*, *Fox News Channel Hannity & Colmes*, *ABC World News Tonight*, *National Public Radio Talk of the Nation*, *National Public Radio Dianne Rehm Show*, *National Public Radio Living on Earth*, *CNN*, and *Entertainment Tonight*, among others.

Print media citations have included *The New York Times*, *Washington Post*, *Wall Street Journal*, *Los Angeles Times*, *The Economist*, *Newseek*, *National Law Journal*, *ABA Journal*, *Legal Times*, *Newsweek*, *Philadelphia Inquirer*, *Christian Science Monitor*, *U.S. News & World Report*, among others.

## **ADDITIONAL EMPLOYMENT EXPERIENCE**

PROPERTY & ENVIRONMENT RESEARCH CENTER, Bozeman, MT

*Lone Mountain Fellow*, Summer 2009, Summer 2011  
*Julian Simon Summer Research Fellow*, Summer 2004  
*Broadbent Summer Research Fellow*, Summer 1998

MERCATUS CENTER, Arlington, VA

*Visiting Senior Scholar*, August 2005 – July 2006.

U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, Washington, DC

*Clerk for The Honorable David B. Sentelle, Circuit Judge*, August 2000 – July 2001

KIRKLAND & ELLIS, Washington, DC

*Summer Associate*, Summer 2000  
*Law Clerk*, Fall 1999 – April 2000  
*Summer Associate*, Summer 1999

COMPETITIVE ENTERPRISE INSTITUTE, Washington, DC

*Senior Fellow in Environmental Policy*, September 1999 – May 2000  
*Director of Environmental Studies*, July 1995 – May 1999  
*Associate Director of Environmental Studies*, January 1994 – July 1995  
*Environmental Policy Analyst*, June 1991 – January 1994

CATHOLIC UNIVERSITY, Washington, DC

*Visiting Lecturer*, Spring 1999  
Course: Environmental Politics and Policy seminar

## **PROFESSIONAL ACTIVITIES**

FOUNDATION FOR RESEARCH ON ECONOMICS & ENVIRONMENT, Bozeman, MT  
Board of Trustees, 2008 – Present

ENVIRONMENTAL LAW INSTITUTE, Washington, DC  
*Environmental Law Reporter* and ELI Press Advisory Board, 2007 – Present.

CENTER FOR CONSTITUTIONAL JURISPRUDENCE, Claremont Institute, Claremont, CA  
Academic Advisory Board, 2004 – Present.

THE VOLOKH CONSPIRACY, Legal blog, <http://volokh.com>  
*Contributor*, 2002 – Present.

SMALL BUSINESS LEGAL CENTER, National Federation of Independent Business  
Advisory Board, August 2002 – November 2010.

*NATIONAL REVIEW ONLINE*  
*Contributing Editor*, July 2002 – Present.

*CATO SUPREME COURT REVIEW*, Cato Institute, Washington, DC  
Academic Advisory Board, February 2002 – Present.

AMERICA'S FUTURE FOUNDATION, Washington, DC  
*Member*, Board of Directors, July 2001 – September 2006

INSTITUTE FOR HUMANE STUDIES  
Felix Morley Journalism Competition Review Committee, 2001- 2009.

THE FEDERALIST SOCIETY, Washington, DC  
Executive Committee, Environmental Law and Property Rights Practice Group,  
July 2002 -- Present  
*Vice Chair*, Environmental Law and Property Rights Practice Group, 1998 – May 2000

## **BAR ADMISSIONS**

Virginia – October 2000

## EDUCATION

### GEORGE MASON UNIVERSITY SCHOOL OF LAW, Arlington, Virginia

Juris Doctor, May 2000

Graduated *Summa cum laude*; Class Valedictorian

*George Mason Law Review*, Articles Editor 1998-1999

Dean's Scholar (legal writing instructor) 1999-2000

Richard S. Murphy Prize (awarded for academic achievement in core courses), 1999

Adrian S. Fisher Award for best student law review article, 1997-98

First Place, First-Year Moot Court Competition, 1997

Senator Leroy S. Bendheim Scholarship, 1996-97.

### YALE UNIVERSITY, New Haven, Connecticut

Bachelor of Arts, History, May 1991

Graduated *Magna cum laude*

Distinction in Major

National Merit Scholar

## **Michael F. Cannon**

### **Director of Health Policy Studies**

#### **Cato Institute**

Michael F. Cannon (@mfcannon) is the Cato Institute's director of health policy studies. Previously, he served as a domestic policy analyst for the U.S. Senate Republican Policy Committee under Chairman Larry E. Craig, where he advised the Senate leadership on health, education, labor, welfare, and the Second Amendment. Cannon has appeared on ABC, CBS, CNN, CNBC, C-SPAN, Fox News Channel, and NPR. Cited by the *Washington Post* as "an influential health-care wonk at the libertarian Cato Institute," his articles have been featured in *The Wall Street Journal*, *USA Today*, the *Los Angeles Times*, the *New York Post*, the *Chicago Tribune*, the *Chicago Sun-Times*, the *San Francisco Chronicle*, *Huffington Post*, *Forum for Health Economics & Policy*, and the *Yale Journal of Health Policy, Law, and Ethics*. Cannon is coauthor of *Healthy Competition: What's Holding Back Health Care and How to Free It*. He holds a bachelor's degree in American government (B.A.) from the University of Virginia, and master's degrees in economics (M.A.) and law & economics (J.M.) from George Mason University.

<http://www.cato.org/people/michael-cannon>

Committee on Oversight and Government Reform  
Witness Disclosure Requirement - "Truth in Testimony"  
Required by House Rule XI, Clause 2(g)(5)

Name: JONATHAN H. ADLER

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

NONE

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2009, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.  
Signature: 

Date: 7/30/12

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*I certify that the above information is true and correct.*

Signature:

Michael F. Cannon

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Date:

7/31/12

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