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Oversight of IRS's Legal Basis
for Expanding ObamaCare's Taxes and Subsidies

Subcommittee on Energy Policy, Health Care and Entitlements
Committee on Oversight and Government Reform
U.S. House of Representatives

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Mr. Chairman and members of this subcommittee, thank you for the opportunity to present testimony on the Internal Revenue Service rule purporting to extend the availability of tax credits and subsidies for the purchase of health insurance in federal exchanges under the Patient Protection and Affordable Care Act (PPACA), aka “ObamaCare.”

By way of background, I am the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach courses on administrative and constitutional law, among other subjects. I particularly appreciate the opportunity to appear before this subcommittee given my extensive work on this issue, including the law review article I co-authored with Michael Cannon.¹ I will draw upon this article in my testimony today.

This subcommittee has asked for my views on the legal basis for the IRS and Treasury Department rule purporting to extend the availability of tax credits and cost-sharing subsidies to federal exchanges. My conclusion is simple: There is none. The IRS rule is directly contrary to the plain language of the PPACA and is not otherwise authorized by this or any other statute. With this rule, the IRS has usurped the legislature’s role and assumed for itself the power to authorize tax credits and federal spending, as well as to trigger the imposition of penalties on employers and shift the incidence of the individual mandate tax penalty. Even worse, it appears that the IRS promulgated this rule without adequately considering the relevant statutory language or otherwise engaging in reasoned decision-making.

The PPACA

One of the central features of the PPACA is the creation of state-based health insurance exchanges, government-managed marketplaces in which consumers can shop for health insurance plans. Specifically, Section 1311 of the Act calls for each state to create its own “American Health Benefit Exchange” that will facilitate the purchase and regulation of qualified health insurance plans.² Section 1311’s requirement that states create exchanges is not enforceable, however, as the federal government may not commandeer state governments to implement a federal regulatory scheme.³ Rather, the federal government must give states a choice whether to cooperate. The federal government may offer various inducements for state cooperation, such as financial support or regulatory consequences, but states must be left with a meaningful choice.⁴

¹ See Jonathan H. Adler and Michael F. Cannon, *Taxation without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119 (2013).

² 42 U.S.C. § 18031(b)(1).

³ See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505 U.S. 144, 162 (1992) (“the Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress’s instructions”). For a brief discussion of this principle in the context of health care reform, see Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out: Federal Intervention and State Choices in Health Care Policy*, 20 KANSAS JOURNAL OF LAW & PUBLIC POLICY 199, 208-09 (2011).

⁴ See *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” (citation omitted)).

Despite the obligatory language of Section 1311, the PPACA gives states a choice of whether to take responsibility for (and bear the cost of) operating an Exchange. States that agree to set up an exchange are eligible for start up funds from the federal government. In addition, other provisions of the PPACA provide tax credits and cost-sharing subsidies to assist low-income residents of such states in purchasing qualified health insurance plans. Specifically, the Act offers refundable “premium assistance” tax credits to households with incomes between 100 and 400 percent of the federal poverty level (FPL).⁵ These tax credits are refundable, which means that if the credit is larger than a taxpayer’s tax obligations, the taxpayer is eligible for a payment from the Treasury. The Act further offers “cost-sharing” subsidies to help low-income individuals and families obtain more than the minimum level of coverage at no additional cost. Should a state refuse to create its own exchange, Section 1321 provides that the federal government is to create an Exchange in the state’s stead.⁶ In this respect, the PPACA embodies the sort of “cooperative federalism” common in many federal programs, from environmental regulation to Medicaid.⁷

As written, the PPACA only provides for the issuance of tax credits for the purchase of qualifying health insurance plans in Exchanges established by states under Section 1311 of the Act. The PPACA is quite clear on this point. The tax credits for the purchase of qualifying health insurance plans are provided for under Section 1401 of the PPACA, which creates a new section of the Internal Revenue Code – Section 36B.⁸ This provision authorizes tax credits for each month in a given year in which a taxpayer has obtained qualifying health insurance through a state-run exchange. As defined by Section 1401, a “coverage month” is any month in which the taxpayer is “covered by a qualified health plan . . . that was enrolled in through an Exchange established by the State under section 1311.”⁹ The amount of the tax credit is also calculated with reference to a qualifying health insurance plan “enrolled in through an Exchange established by the State under [Section] 1311 of the Patient Protection and Affordable Care Act.”¹⁰ Section 1311 further establishes the “requirement” that an “Exchange” be “a government agency or nonprofit entity that is established by a State.”¹¹ To further erase any doubt, Section 1304 of the PPACA also defines “State” as “each of the 50 states and the District of Columbia.”¹² The cost-sharing subsidies provided under Section 1402 are similarly limited as this section expressly provides that cost-sharing reductions are only allowed for “coverage months” for which the aforementioned tax credits are allowed.¹³

⁵ See 26 U.S.C. § 36B.

⁶ See 42 U.S.C. § 18041(c)(I).

⁷ *New York*, 505 U.S. at 167 (“where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . . This arrangement . . . has been termed “a program of cooperative federalism.”).

⁸ See 26 U.S.C. § 36B.

⁹ 26 U.S.C. § 36B(c)(2).

¹⁰ 26 U.S.C. § 36B(b)(2)(A).

¹¹ 42 U.S.C. § 18031(d)(1)

¹² 42 U.S.C. § 18024(d).

¹³ 42 U.S.C. § 18071(f)(2).

The textual limitation of tax credits to state-established exchanges has implications beyond the affordability of health insurance. Under Section 1513 of the PPACA employers with more than 50 full-time employees are required to offer “minimum essential coverage” to their employees.¹⁴ Failure to offer such insurance can subject employers to a \$2,000 fine for every full-time employee beyond the first 30 employees.¹⁵ This penalty is triggered when an employee becomes eligible for tax credits by obtaining a qualifying health insurance plan through a state-run exchange. In addition, because individual exposure to the individual mandate tax penalty is dependent upon the out-of-pocket cost of obtaining qualifying health coverage, the availability of tax credits alters the incidence of the individual mandate’s tax penalty.

Portions of the PPACA may not be models of clear legislative drafting, but the provisions authorizing tax credits for the purchase of qualified health insurance plans are abundantly clear. Tax credits are only authorized for qualifying coverage, and such coverage must be obtained through an Exchange “established by the State under section 1311.” This language identifies two conditions for the issuance of tax credits – that the Exchange is established “by the State” and that it is established “under section 1311” – each of which requires purchase of the qualifying health coverage in a state Exchange. Indeed, these requirements are part of the definition of what qualifies as eligible health insurance coverage. Coverage obtained anywhere else simply does not qualify.

The IRS Rule

In May 2012, the IRS adopted regulations concerning the availability of health insurance premium tax credits under the PPACA.¹⁶ Under the IRS rule, taxpayers would be eligible for tax credits (and, as a consequence, cost-sharing subsidies) upon purchase of a qualifying health insurance plan without regard to whether the plan was obtained through a state-based exchange under Section 1311 or a federal exchange under Section 1321. Neither the final regulation, nor the proposed rule issued by the IRS in August 2011, identified any specific statutory authority for redefining eligibility for premium assistance tax credits. Indeed, the IRS did not even address the fact that the PPACA expressly defines qualifying health insurance coverage as coverage purchased in an Exchange “established by the State under Section 1311.”

In response to concerns that such a rule would extend eligibility for tax credits beyond what was authorized by the PPACA, the IRS offered an extremely cursory response. The justification for the rule offered by the IRS, in its entirety, reads as follows:

The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and

¹⁴ 26 U.S.C. §4980H.

¹⁵ The PPACA provides, in the alternative, that if an employer provides “minimum value” insurance coverage that is not “affordable,” the employer is fined \$3,000 per employee that receives tax credits or cost-sharing subsidies or \$2,000 per employee after the first 30 employees, whichever is less.

¹⁶ 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>.

the 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.¹⁷

Although commentators had pointed out that the express language of the PPACA limits the availability of the premium tax credits to state-established Exchanges under Section 1311, no additional explanation was offered in the *Federal Register*.

The IRS did not identify any statutory language to justify its interpretation when it finalized the rule. There is a simple explanation for this: There isn't any. This is key because in the absence of such language, the IRS lacks the authority to extend tax credits where Congress has failed to do so. As the Supreme Court has noted repeatedly, it is “axiomatic” that federal agencies only have that authority which has been delegated to them by Congress.¹⁸

While the IRS claimed that “relevant” legislative history supports its interpretation, it has failed to identify a single statement prior to or contemporaneous with the passage of the PPACA indicating that tax credits were to be available in federal exchanges. Contrary to the IRS's suggestion, the burden is not on opponents of its rule to identify legislative history or statutory language prohibiting the issuance of tax credits in federal exchanges. As the U.S. Court of Appeals for the D.C. Circuit has instructed federal agencies on numerous occasions, Congressional failure to withhold power does indicate such power was delegated, nor does it constitute a statutory ambiguity of the sort that would trigger *Chevron* deference to the Agency's interpretation of the statute.¹⁹ A failure to delegate authority to an agency is just that: A failure to delegate authority.

The language of Section 1401 is crystal clear. Tax credits are available for the purchase of qualifying health coverage in Exchanges “established by the State under section 1311.” The failure of Congress to authorize tax credits in federal exchanges means that such tax credits are not authorized.

Post-Hoc Defenses of the IRS Rule

Although the IRS failed to provide any statutory or other legal justification for its decision to extend the availability of tax credits to federal exchanges when it finalized the rule, federal officials and other defenders of the IRS rule have come up with several post-hoc justifications for the IRS decision. None of these arguments can overcome the plain tax of the PPACA.

Several defenders of the IRS rule argue that the language of Section 1321 effectively authorizes the provision of tax credits for the purchase of qualifying health insurance plans. So, for example, in October 2012 a Treasury Department official made the following argument:

¹⁷ *Id.* at 30378.

¹⁸ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

¹⁹ See, e.g., *American Bar Association v. Federal Trade Commission*, 430 F.3d 457 (D.C. Cir 2005); *Railway Labor Executives Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994).

section 1311 refers to an exchange being “established by a State.” Congress provided in section 1321, however that where a state was not proceeding with an exchange, HHS would establish and operate “*such* Exchange within the State,” making a federally-facilitated exchange the equivalent of a state exchange in all functional respects.²⁰

Others have made similar arguments.²¹

Under this interpretation, when Section 1321 directs the federal government to create “such Exchange,” it is authorizing the federal Section 1321 exchange to operate as a Section 1311 exchange. This is a clever argument, but it’s incomplete in that it ignores inconvenient portions of the statutory text. Just because a federal exchange created under Section 1321 is subject to all the same requirements as a state exchange created under Section 1311 does not mean that tax credits available in a state exchange must be available in a federal exchange as well, particularly when the plain text of the statute provides otherwise.

As noted above, Section 1311 expressly requires that an authorized Exchange must be “established by a State” and Section 1304(d) also expressly defines “state” as “each of the 50 States and the District of Columbia.” Later amendments to the PPACA also provide that Exchanges created by territories are to be treated as the equivalent of state-run Exchanges, but there is no such language concerning federally run Exchanges.²² If, as argued, this language of Section 1321 made federal exchanges the equivalent of Section 1311 exchanges, this additional language enacted during the reconciliation process would have been unnecessary.

Even if one were to concede, for the sake of argument, that a Section 1321 Exchange is the equivalent (or “stands in the shoes”) of a Section 1311 Exchange, this is still not enough to justify the extension of tax credits in federal exchanges. This is because, as noted above, when Section 1401 defines the coverage for which tax credits may be provided it identifies two relevant conditions: 1) that the insurance is purchased in a Section 1311 exchange, and 2) that the insurance is purchased in an Exchange “established by the State.” So one can read Section 1311 to incorporate Section 1321, but a federal Exchange is still not an Exchange “established by the State” as expressly and repeatedly required by Section 1401. To accept this argument in

²⁰ See Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Treasury Department, to the Honorable Darrell Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, (Oct. 12, 2012) (emphasis in original).

²¹ See, e.g., Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act’s Language and History*, HEALTH AFFAIRS BLOG, July 18, 2012, <http://www.healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history/>; Sam Bagenstos, *The Legally Flawed Rearguard Challenge to Obamacare*, BALKINIZATION (Nov. 27, 2012), <http://balkin.blogspot.com/2012/11/the-legally-flawed-rearguard-challenge.html>.

²² See 26 U.S.C. § 36B(f). This language was added by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1035 (2010).

defense of the IRS rule is to render this repeated language both redundant and surplusage and violate a fairly fundamental canon of statutory construction.²³

A second post hoc argument in defense of the IRS rule is that Congress indicated its intention to provide tax credits in federal exchanges by imposing reporting requirements on both state and federal exchanges that include a requirement to report information related to tax credit payment and eligibility. As a Treasury Department official argued in October 2012, the adoption of these requirements as part of the Health Care and Education Reconciliation Act “strongly suggests that all taxpayers who enroll in qualified health plans, either through the federally-facilitated exchange or a state exchange, should qualify for the premium tax credit.”²⁴ This argument also fails.

First, the fact that the authors of the HCERA felt the need to expressly identify both Section 1311 and Section 1321 exchanges shows that the two are not equivalent. If the “such exchange” language noted above were sufficient to make a Section 1321 exchange equivalent to a Section 1311 exchange in all respects, it would have been unnecessary to mention both. Second, the relevant HCERA provisions require the reporting of lots of information that will be of use to federal authorities even apart from the provision of tax credits, including the level of coverage obtained and premiums charged. Insofar as the PPACA is designed to encourage states to create their own exchanges, the collection of information in federal exchanges indicating the level of tax credits or subsidies for which individuals would be eligible under a state exchange would be useful. Third, even were this not the case, enacting a single list of reporting requirements for all exchanges is easier and more efficient than trying to separately delineate what information must be reported by what sort of exchange. Indeed, these reporting requirements apply to types of Exchanges, such as SHOP exchanges, in which the relevant tax credits and cost-sharing subsidies are not available, so the adoption of these reporting requirements *cannot* establish that tax credits and cost-sharing subsidies are available in all exchanges subject to these requirements.

Lacking any statutory language with which to justify the extension of tax credits to federal exchanges, defenders of the IRS rule have argued that the agency’s interpretation should be upheld under principles of *Chevron* deference. So, for example, Professor Timothy Jost argued that the IRS rule is valid because an agency’s “official construction of an ambiguous statute should be accorded deference by any reviewing court.”²⁵ Simon Lazarus has likewise argued that the IRS rule represents a “permissible interpretation” of the statute and that “courts must defer to an agency’s interpretation of a law it is charged with administering, whenever its decision ‘is

²³ See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are . . . ‘reluctan[t] to treat statutory terms as surplusage’ in any setting” (citation omitted)); *Jones v. U.S.*, 529 U.S. 848, 857 (2000) (“Judges should hesitate . . . to treat statutory terms in any setting as surplusage” (citation and internal quotation omitted)). This principle is well established, and has been articulated repeatedly since the Marshall Court. See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 202 (1819) (per Marshall, C.J.).

²⁴ See Mazur letter *supra*.

²⁵ 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/>.

based on a permissible construction of the statute.”²⁶ Here again, arguments in defense of the IRS rule falter.

Under the *Chevron* doctrine, the first question is whether the relevant statutory text is clear. If so, there is no basis for according deference to an agency interpretation for the agency “must give effect to the unambiguously expressed intent of Congress.”²⁷ It is only when a statute is ambiguous that there is any cause to consider an agency’s interpretation of that statute, and even then the agency’s interpretation must represent a permissible construction of the relevant statutory text. Further, the question of whether a statute is ambiguous in the first place is one for which the agency receives “no deference” whatsoever.²⁸ And even a reasonable agency interpretation is only to be accorded deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²⁹

The biggest problem with the *Chevron* defense of the IRS rule is that there is nothing ambiguous about the relevant statutory text. Section 1401 is abundantly clear in basing the definition of an eligible coverage month on the purchase of a qualifying health insurance plan in an Exchange “established by the State under Section 1311.” The provision’s reference to the relevant statutory provision combined with the narrative description of the state-exchange requirement could not be any more clear. Thus there is no reason to even consider applying *Chevron* deference here. As the Congressional Research Service has written:

[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS’s authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid.³⁰

The IRS’ primary argument is that its interpretation is “consistent with” the statute and that there is no evidence in “the relevant legislative history” to “demonstrate that Congress intended to

²⁶ Simon Lazarus, *The Supreme Court Is About to Get Another Change to Gut Obamacare*, THE NEW REPUBLIC, May 13, 2013, <http://www.newrepublic.com/article/113194/affordable-care-act-another-supreme-court-challenge>.

²⁷ *Chevron USA v. Natural Resources Defense Council*, 437 U.S. 837, 842-43 (1984).

²⁸ See *Amer. Bar Assn. v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) (“The first question, whether there is such an ambiguity, is for the court, and we owe the agency no deference on the existence of ambiguity.”) (internal citation omitted); see also *Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

²⁹ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

³⁰ Memorandum from Jennifer Staman and Todd Garvey, Congressional Research Service, on the Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act” (July 23, 2012), available at: http://www.statereform.org/sites/default/files/premium_credits_and_federally_created_exchanges_copy.pdf. See also Stuart Taylor, Jr., *Analysis: Health Exchanges And The Litigation Landscape*, KAISER HEALTH NEWS, Nov. 29, 2012, <http://www.kaiserhealthnews.org/Stories/2012/November/29/health-law--litigation-and-exchanges.aspx> (“As even some health law supporters concede, the claim that Congress denied to the federal exchanges the power to distribute tax credits and subsidies seems correct as a literal reading of the most relevant provisions.”).

limit the premium tax credit to State Exchanges.”³¹ In effect, the IRS is arguing that since the PPACA does not preclude the agency’s interpretation, that interpretation should control. This rationale for the rule cannot satisfy *Chevron* step one. To claim that an agency action is consistent with a statute is not even an assertion, much less a showing, of ambiguity. A lack of evidence (in the “relevant” legislative history) that Congress intended to forbid an agency action is likewise not enough to demonstrate a statutory ambiguity, let alone to justify *Chevron* deference. Agencies have no inherent powers, only delegated ones.³² Agencies, including the IRS, “are creatures of statute . . . [that] may act only because, and only to the extent that, Congress affirmatively has delegated them the power to act.”³³ When Congress is silent on a question—such as whether an agency has authority to issue tax credits, authorize entitlement spending in the form of refundable credits or cost-sharing subsidies, or levy taxes on employers—one should presume that the authority does not exist.

Even if the IRS were able to satisfy *Chevron* step one by convincing a court that the relevant portions of the PPACA are sufficiently ambiguous to justify an IRS interpretation, the IRS rule would still fail. Reaching step two of the *Chevron* test does not give agencies free rein. For an agency’s interpretation to prevail at step two, it must still be consistent with the relevant statutory text. Thus, even if the IRS could demonstrate that the PPACA is ambiguous, it would have to argue that its rule is consistent with what Congress actually enacted and the President signed into law. Such an argument is tremendously difficult because no matter how much the IRS and its defenders try, there is no way to turn a federal exchange created under Section 1321 into an Exchange “established by the State,” let alone “established by the State under section 1311.”

A final argument made by defenders of the IRS rule is that there is no plausible reason why Congress would have limited the availability of tax credits to state exchanges. Professor Jost, for example, has argued that there “is no coherent policy reason why Congress would have refused premium tax credits to the citizens of states that ended up with a federal exchange.”³⁴ But of course there is. The PPACA, as enacted, is based upon the Senate health care reform bill. The authors of the Senate bill wanted states to create exchanges. As noted above, the statute even purports to require states to do it. But Congress cannot tell states what to do. Thus it needed to provide them with an incentive to play along, and committing to create a federal exchange as a fallback is not much of a threat, and the promise of startup funding, by itself, is not much of an inducement. So the Senate bill also threatened to withhold benefits – tax credits and subsidies – to citizens of states that did not cooperate by creating their own exchanges. And where did the Senate get this idea? Potentially from Professor Jost, who wrote in 2009 that Congress could try to induce states to create exchanges by, among other things, “offering tax subsidies for insurance

³¹ 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>.

³² See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

³³ *American Bus Ass’n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000) (Sentelle, j., concurring).

³⁴ 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/>.

only in states that complied with federal requirements.”³⁵ While less common than threatening to withhold funds (as was done with Medicaid) this approach is not unprecedented, and multiple pre-enactment Senate health care reform bills contained similar provisions explicitly designed to encourage state cooperation.

Contrary to the claims of some IRS rule supporters, there is nothing “absurd” or unusual with conditioning benefits on state compliance with federal objectives. Congress regularly conditions funding or other federal benefits on state cooperation, and regularly threatens to cut off support to valued constituencies in response to state intransigence. The most obvious example of Congress using this supposedly “absurd” tactic is the Medicaid expansion. Under the PPACA as written, states that refused to participate in the Medicaid expansion would forfeit federal funding for the expansion as well as all federal support for the pre-existing Medicaid program. So not only did Congress threaten to withhold new benefits in unconsenting states, it also threatened to further undermine the PPACA’s goals by withdrawing all existing Medicaid funding. In other words, if a state sought to undermine the PPACA by refusing to cooperate with the Medicaid expansion, this would trigger a sanction that would reduce health care coverage for needy populations — a result directly contrary to the stated goal of the PPACA. The Supreme Court ultimately concluded this deal was unconstitutional, but there is no question of what the statute sought to do. The PPACA also limits tax credits and subsidies to those making at least 100 percent of the poverty level, denying such benefits to those most in need. That some might find such a policy “absurd” does not make it any less the law of the land.

Defenders of the IRS rule would like this committee (and the courts) to believe that the language limiting tax credits and subsidies to state-run exchanges is a mistake, perhaps a drafting error. Yet the mistake, if there was one, was not in the drafting of the PPACA, but in the failure to anticipate the widespread resistance the law would face in the states. As the *Washington Post* reported earlier this month, PPACA proponents never even contemplated the possibility that numerous states would refuse to implement their own exchanges.³⁶ According to the *Post*’s report, when President Obama signed the PPACA into law “there was widespread expectation [states] would want to operate the new insurance exchanges.”³⁷

Supporters of the IRS rule have identified numerous statements indicating that PPACA supporters expected tax credits to be available in all fifty states. This is because it was universally expected that all states would create exchanges. Administration officials and members of Congress repeatedly said as much. The Congressional Budget Office scored the bill without considering whether tax credits would be limited to state-run exchanges, but it also scored the bill as if the federal government would not have to spend any money paying to implement federal exchanges. Indeed, the PPACA never authorized money for the creation of

³⁵ Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O’Neill Institute, Georgetown University Legal Center, no. 23, April 27, 2009, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers. (emphasis added). The earliest known version of this paper was posted online by the Robert Wood Johnson Foundation on January 1, 2009 (<http://www.rwjf.org/en/research-publications/find-rwjf-research/2009/01/health-insurance-exchanges.html>).

³⁶ Ezra Klein and Sarah Kliff, *Obama’s Last Campaign: Inside the White House Plan to Sell Obamacare*, WASHINGTON POST, July 17, 2013 (noting an “internal White House memo” detailing obstacles to PPACA implementation did not even identify “political opposition or widespread state resistance” as potential hurdles).

³⁷*Id.*

federal exchanges, likely because bill supporters did not expect that such funds would be necessary.

Substantial Consequences

The IRS rule at issue is not authorized by law and is thus illegal. By all appearances the IRS also failed to even consider whether there was an adequate legal basis for this rule until *after* the rule was issued. This sort of agency behavior should be enough to concern this subcommittee. The fiscal and other consequences of this rule provide even more reasons for concern.

This rule requires the provision of tax credits in over thirty states that opted not to create their own exchanges. Because these are “refundable” tax credits, this means that the credits do more than provide tax relief to eligible individuals. They result in payments from the U.S. Treasury. Because the Administration has announced that it will not require exchanges to verify eligibility for tax credits, the cost could be significantly greater than many have anticipated. Issuance of the tax credits triggers cost-sharing subsidies that are paid to insurance companies – another draw on the U.S. Treasury. Tax credit eligibility also triggers substantial penalties on employers who fail to provide qualifying health insurance. The availability of tax credits will also expose many individuals to the individual mandate tax penalty who would not otherwise have been so exposed.

In sum, the decision to extend tax credits to federal exchanges will have substantial fiscal and economic consequences. Whether or not extending tax credits and cost-sharing subsidies is a sound policy decision is beyond the scope of this testimony. What should be clear, however, is that this is the sort of policy decision that must be made by Congress, not an individual federal agency. If a majority in Congress believes such tax credits are worthwhile, then Congress may so provide in a statute. Unless and until it has done so, neither the IRS nor any other federal agency has the legal authority to do so.

Conclusion

There are many PPACA supporters who would like tax credits and cost-sharing subsidies to be available in all fifty states, whether or not states create their own exchanges. A bill providing for credits and subsidies nationwide may even have had sufficient support to pass Congress at one time. That is not the law that Congress enacted, however. The law Congress enacted only provides for tax credits and subsidies for the purchase of health insurance in Exchanges established by states. Insofar as the IRS rule purports to provide tax credits and subsidies in federal exchanges, it exceeds the IRS’s statutory authority and is contrary to law. The IRS rule is illegal, and should be withdrawn.

* * *

Mister Chairman and members of this committee, I recognize the importance of this issue to you, your constituents, and this nation. I hope that my perspective has been helpful to you today, and I will seek to answer any additional questions you might have. Thank you.

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, 2010. Include the source and amount of each grant or contract.

None.

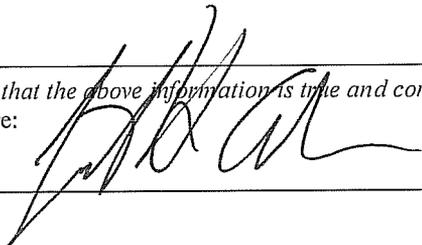
2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None. The opinions expressed in my testimony are my own.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, 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:

7/29/13

JONATHAN H. ADLER

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LAW SCHOOL FACULTY POSITIONS

CASE WESTERN RESERVE UNIVERSITY, Cleveland, OH

Inaugural Johan Verheij Memorial Professor of Law, 2011 – Present

Professor of Law (with tenure), July 2006 – Present

Associate Professor of Law, May 2004 – 2006

Assistant Professor of Law, July 2001 – 2004

Courses taught:

Administrative Law
Constitutional Law I
Constitutional Law II
Election Law Seminar
Environmental Law
Environmental Law Seminar
International Environmental Law
International Environmental Law Seminar
Property

Committees and Service:

Strategic Planning Executive Committee (Co-Chair, 2012-Present)
Standing Committee on Experiential Learning (2011-Present)
Standing Committee on Washington, D.C. Program (2011)
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

Visiting Associate Professor of Law, Fall 2005

Courses taught:

Administrative Law
Environmental Law

AWARDS AND HONORS

Distinguished Alumnus Award, Friends Central School (2012)

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 21ST CENTURY
(manuscript in progress)

Co-Author, A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE AFFORDABLE CARE ACT (Palgrave/Macmillan, forthcoming)

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

ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISM IN AMERICA (1995).

Law Review Articles

Learning How to Fish: Catch Shares and the Future of Fishery Conservation (with Nathaniel Stewart), UCLA ENVIRONMENTAL LAW & POLICY REVIEW (2013, forthcoming).

Taxation without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA (with Michael Cannon), 23 HEALTH MATRIX: JOURNAL OF LAW-MEDICINE 119 (2013).

Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization, 35 HARVARD ENVIRONMENTAL LAW REVIEW 1 (2011).
(Selected to be excerpted in annual ENVIRONMENTAL LAW AND POLICY REVIEW issue of ENVIRONMENTAL LAW REPORTER (2012)).

The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences (with Nathan Sales), 2009 UNIVERSITY OF ILLINOIS LAW REVIEW 101 (2009).

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

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

The Green Costs of Kelo: Economic Development Takings and Environmental Protection (with Ilya Somin), 84 WASHINGTON UNIVERSITY LAW REVIEW (2006).

Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation, 14 MISSOURI ENVIRONMENTAL LAW & POLICY REVIEW 1 (2006).

Judicial Federalism and the Future of Federal Environmental Regulation, 90 IOWA LAW REVIEW 377 (2005).

Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation, 61 WASHINGTON AND LEE LAW REVIEW 3 (2004).

Fables of the Cuyahoga: Reconstructing a History of Environmental Protection, 14 FORDHAM ENVIRONMENTAL LAW JOURNAL 89 (2002).

Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy, 31 ENVIRONMENTAL LAW REPORTER 11284 (2001).

The Ducks Stop Here? The Environmental Challenge to Federalism, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001).

(Finalist, LAND USE AND ENVIRONMENTAL LAW REVIEW, ten best articles on land use or environmental law in 2001; reprinted in ECONOMICS OF CONSTITUTIONAL LAW (R. Epstein ed. 2009)).

Free and Green: A New Approach to Environmental Protection, 24 HARVARD JOURNAL OF LAW & PUBLIC POLICY 653 (2001).

(Finalist, LAND USE AND ENVIRONMENTAL LAW REVIEW, ten best articles on land use or environmental law in 2001.)

More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol, 35 TEXAS INTERNATIONAL LAW JOURNAL 173 (2000).

Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation, 29 ENVIRONMENTAL LAW 1 (1999).

The Green Aspects of Printz: The Revival of Federalism at Its Implications for Environmental Law, 6 GEORGE MASON LAW REVIEW 573 (1998).

Symposium Contributions

Conservative Principles for Environmental Reform, 23 DUKE ENVIRONMENTAL LAW & POLICY FORUM 253 (2013).

Placing “Reins” on Regulations: Assessing the Proposed REINS Act, 16 NYU JOURNAL OF LEGISLATION & PUBLIC POLICY 1 (2013).

Wetlands, Property Rights, and the Due Process Deficit in Environmental Law, 12 CATO SUPREME COURT REVIEW 139 (2012).

Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization, 42 ENVIRONMENTAL LAW REPORTER 10712 (2012).

Water Rights, Markets, and Changing Ecological Conditions, 42 ENVIRONMENTAL LAW 93 (2012).

Interstate Competition and the Race to the Top, 35 HARVARD JOURNAL OF LAW & PUBLIC POLICY 89 (2011).

The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut, 2010-11 CATO SUPREME COURT REVIEW 295 (2011).

A Tale of Two Climate Cases, 121 YALE LAW JOURNAL ONLINE 109 (2011),
<http://yalelawjournal.org/2011/09/13/adler.html>.

Cooperation, Commandeering or Crowding Out? Federal Intervention and State Choices in Health Care Policy, 20 KANSAS JOURNAL OF LAW & PUBLIC POLICY 199 (2011).

Introduction – Symposium on Commercial Speech and Public Health, 21 HEALTH MATRIX 1 (2011).

Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration, 34 HARVARD JOURNAL OF LAW & PUBLIC POLICY 421 (2011).

Standing Still in the Roberts Court, 59 CASE WESTERN RESERVE LAW REVIEW 1061 (2009).

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

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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).

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

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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

(various), *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE AFFORDABLE CARE ACT* (Trevor Burrus ed., forthcoming).

The Future of Health Care Reform Remains in Federal Court, in *THE FUTURE OF HEALTH CARE REFORM IN THE UNITED STATES* (A. Malani & M. Schill eds., forthcoming).

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- The False Promise of Federalization*, in *SILENT SPRING AT 50: THE FALSE CRISES OF RACHEL CARSON* (A. Morriss, R. Meiners & P. Desrochers eds. 2012).
- Labeling the Little Things*, *THE NANOTECHNOLOGY CHALLENGE* (D. Dana ed., 2011).
- 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, 4th 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

The D.C. Circuit Is Hardly in Crisis, *THE ENVIRONMENTAL FORUM*, May/June 2013.

The Magic of the Market: The Advantages of Catch-Share Fishing (with Nathaniel Stewart), *THE MILKEN INSTITUTE REVIEW* (Fourth Quarter 2012).

How Not to Label GM Foods, *THE NEW ATLANTIS* (Summer 2012).

Positive Steps, Silver Linings (with Nathaniel Stewart), *NATIONAL REVIEW*, July 30, 2012.

Is the Common Law the Free Market Solution to Pollution? *CRITICAL REVIEW* vol. 24, no. 1 (2012).

Some Shade of Green, NATIONAL REVIEW, December 31, 2011.

The Challenge of Regulating Objectively (review of D. Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity*), THE NEW ATLANTIS (Spring 2011).

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
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
USA Today
Wall Street Journal
Washington Post
Washington Times

CONGRESSIONAL TESTIMONY

IRS: Enforcing ObamaCare's New Rules and Taxes (with Michael Cannon), Committee on Oversight and Government Reform, U.S. House of Representatives, August 2, 2012.

The Endangered Species Act: Reviewing the Nexus of Science and Policy, Committee on Science, Space, and Technology Subcommittee on Investigations and Oversight, U.S. House of Representatives, October 13, 2011.

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.

CONFERENCES & SYMPOSIA

Director, “The Administrative Law of Dodd-Frank,” Center for Business Law & Regulation, Case Western Reserve University School of Law, April 5-6, 2012.

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

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

Director, “Regulation by Litigation Roundtable,” Center for Business Law & Regulation, Case Western Reserve University, 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

“The Firm, the Environment, and the Law,” Research Roundtable on Austrian Law and Economics at the George Mason University School of Law, Arlington, VA, April 23, 2013.

“Making Sense of the Supreme Court” City Club of Cleveland, Feb. 13, 2013

“Free & Green: Property Rights and Markets for Environmental Protection,” Annual Rogge Memorial Lecture, Wabash College, Crawfordsville, IN, Nov. 1, 2012.

“The Future of Health Care Reform Is Still in Federal Court,” Conference on “The Future of Health Care Reform in the U.S.,” Institute for Law and Economics, University of Chicago School of Law, Oct. 12, 2012.

“Judicial Minimalism, the Mandate, and Mr. Roberts,” Conference on “The Health Care Case: The Supreme Court’s Decision and Its Implications,” Columbia Law School, Sept. 28, 2012.

“Free Market Principles for Environmental Reform,” Conference on “Conservative Visions of Our Environmental Future,” Duke University, Sept. 25, 2012.

“Wetlands, Property Rights, and the Due Process Deficit in Environmental Law,” Symposium on “The Supreme Court: Past and Prologue—A Look at the October 2011 and 2012 Terms,” Cato Institute, Washington, D.C., Sept. 18, 2012.

“The Problems with Precaution: A Principle without Principle,” at the University of Maine at Machias, Sept. 13, 2012.

Panelist, “Global Warming and Political Cooling: Addressing Climate Change on Many Fronts,” 2012 National Convention of the American Constitution Society for Law and Policy, Washington, D.C., June 15, 2012.

Panelist, “Crisis in the Courts: The New White House Push on Judicial Confirmations and the Vacancy Rate's Impact on Justice,” Cleveland-Marshall School of Law, May 31, 2012

Panelist, “Free Market Approaches to Climate Change” Federalist Society student chapter at Stanford Law School, Apr. 18, 2012.

“Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization,” *Environmental Law and Policy Annual Review* Conference, Washington, D.C., Apr. 13, 2012.

Participant, 28th Annual Jefferson B. Fordham Debate, “Resolved: The Individual Mandate Provision of the PPACA is Constitutional,” University of Utah S.J. Quinney College of Law, Feb. 6, 2012.

“Compelled Commercial Speech and the Consumer Right to Know” University of North Carolina School of Law faculty workshop, Feb. 2, 2012.

“The Individual Mandate Litigation and the Future of Federalism,” Federalist Society student chapter, University of Michigan Law School, Jan. 25, 2012.

“Water Rights, Markets, and Changing Ecological Conditions,” *Environmental Law* Symposium on 21st Century Water Law, Lewis & Clark Law School, Portland, OR, Oct. 7, 2011.

“The Supreme Court Disposes of a Nuisance Suit: *American Electric Power v. Connecticut*,” at 10th Annual Constitution Day symposium, *Cato Supreme Court Review*, Washington, D.C., Sept. 15, 2011

“Climate Change Goes Back to Court,” Conference on Terrorism, Climate, & Central Planning: Challenges to Liberty and the Rule of Law, Foundation for Research on Economics and the Environment, Big Sky, MT, Aug. 31, 2011.

“The Firm, the Environment, and the Law,” workshop at the Property and Environment Research Center in Bozeman, MT, August 3, 2011.

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 25th 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,” 3rd 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 21st 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
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.

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

ADDITIONAL EMPLOYMENT EXPERIENCE

PROPERTY & ENVIRONMENT RESEARCH CENTER, Bozeman, MT

Senior Fellow, Fall 2011—Present
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