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EPA's Unprecedented Power Grab

Mario Loyola

To reorganize and establish oversight of the banking sector, the Obama administration had to get Congress to pass Dodd-Frank. To reorganize and regulate the nation's health-care industry, it needed Congress to enact Obamacare. To reorganize and regulate the nation's energy providers, it needed Congress to legislate cap-and-trade. But on that last front, Congress refused, and the president's climate-change agenda hit a roadblock. To get around that roadblock, the Obama administration has sought to expand the regulatory reach of the Environmental Protection Agency far beyond the powers Congress delegated to it in the Clean Air Act.

Last summer, the Environmental Protection Agency proposed a new rule on carbon-dioxide emissions for existing sources. The "Clean Power Plan" leverages a rarely used section of the Clean Air Act to require each state to regulate its production, transmission, and consumption of electricity so as to meet certain numerical carbon-dioxide emissions standards. The standards are caps that vary from state to state. State participation is nominally voluntary, but "encouragement" is provided in the form of an unprecedented punitive threat, namely that of shutting down a significant fraction of resisting states' electrical generating capacity, potentially sentencing cities and whole regions to blackouts.

Complying with EPA's dictates will prove economically ruinous for many states and will result in a dramatic expansion of EPA authority, transforming it into something like Gosplan, the Soviet Union's old central economic-planning agency. EPA expects the proposal to be adopted as a final rule by July 2015. It will require that states submit "state plans" within 12 months; if approved, those plans will become enforceable by EPA as federal law. If states fail to file an approvable plan by the deadline,

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EPA will be required to file a "federal plan." So far, despite hundreds of pages of proposals and memoranda, there are few details revealing what such a federal plan would look like. But whether they file a state plan or allow EPA to impose a federal one, it is clear that most states will have to substantially reorganize their energy sectors (in areas outside of EPA's purview), or else EPA could shut down a significant number of the state's power stations in order to meet its emissions targets.

The rule has so many statutory and constitutional vulnerabilities, however, that many commentators doubt it will survive in its present form, if it survives at all. Looming above all of those vulnerabilities is a dangerous and unprecedented scheme to coerce the states into doing things that EPA admits it has no power to do directly under the Clean Air Act.

To be sure, federal coercion of the states is hardly unprecedented. In both the spending and regulatory contexts, the Supreme Court has already established that the federal government can threaten the states with onerous penalties if they do not "voluntarily" bow to federal dictates. The various schemes known as "cooperative federalism" have proven highly coercive of state governments, and they have significantly neutralized many benefits of both federalism and the modern economy. Scholars across the political spectrum now agree that as a result of these schemes, federal and state governments are more integrated than separate, and that the idea of dual federalism is practically dead, or nearly so.

But despite its hallmarks as a scheme of "cooperative federalism," the proposed rule departs from even that troubling pattern in one significant respect. In the regulatory context, federal-state cooperation generally presupposes that federal and state jurisdictions overlap on the subject matter to be regulated. But in this case, EPA is in effect trying to regulate well outside the scope of its Clean Air Act authorities, seeking to shape policy in areas that federal law explicitly reserves to the states and to the Federal Energy Regulatory Commission (FERC). EPA's solution to this problem is fiendishly clever: The proposed rule provides that approved state plans would be enforceable by EPA under federal law, resulting in an irrevocable delegation of those matters to EPA.

When imposing federal plans in those states that fail to file compliant state plans, EPA would most likely employ tactics it used with its 2010 greenhouse-gas permitting regulations, first claiming (and thereby establishing) the power to shut down essentially the whole economy,

and then "tailoring" the rule's impact to focus on its primary targets, in this case coal-fired power plants. EPA will most likely tailor the federal plan so as to shutter coal-fired power plants in those states, perhaps on a staggered basis, while giving them time, under duress, to find other sources of electricity. In so doing, EPA will be forcing states to cede power in a scheme Congress could never have imagined when it passed the Clean Air Act.

The rule's stated purpose is to stave off climate change, but even EPA admits that the effect on atmospheric carbon-dioxide levels (to say nothing of the climate) will be negligible. What the rule is actually designed to do, as evidenced clearly by its disparate treatment of states, is to eliminate the competitive advantage of regulation-light states by imposing on them the regulatory schemes of states that have established significant cap-and-trade and other onerous renewable-energy mandates. Texas, for instance, with a bit more than 8% of the nation's population, is expected to account for 18% of the overall national carbon-emission reduction contemplated by EPA. Texas's carbon efficiency is already better than the national average, but as the industrial engine of the nation's economy, it produces and consumes a disproportionate share of the nation's electricity.

The Clean Power Plan constitutes perhaps the most virulent form of federal coercion the states have ever faced. States should adamantly refuse to file state plans. Instead, they should force EPA to remain within the confines of its statutory authority as it imposes a federal plan. Even if EPA cleverly resorts to "tailoring" its rule, a federal plan will simply not be practicable without threatening to shut down a large fraction of a state's electrical capacity, leaving entire cities without electricity and endangering the health and safety of millions. For example, EPA lists dozens of power plants that will have to close in Texas alone, leaving whole regions virtually without any electricity. It's hard to imagine that EPA would actually risk the political consequences of making good on its coercive threat. States should call the agency's bluff.

If federal courts do not block the proposed rule, however, and the states generally play the part that EPA intends them to, the proposed rule will allow EPA to expand its power over the nation's economic activity dramatically. That would cause irreparable damage to our constitutional system by establishing the precedent that, within the ambit of "voluntary" cooperative federalism, the federal government is allowed

to secure a state's obedience to its dictates even outside its statutory authority by threatening the health and safety of its residents. Congress should recognize both the danger of the proposed rule and the urgent need to curtail EPA's authority under the Clean Air Act in general.

STRUCTURE AND STRATEGY

The Clean Power Plan justifies itself under Section 111(d) of the Clean Air Act, which authorizes EPA to issue emissions guidelines for existing sources (in this case, power plants). Under the law and its implementing regulations, states are required to develop standards of performance for the relevant sources in accordance with the "best system of emission reduction," or BSER, that EPA has determined to be "adequately demonstrated" for that source category, taking costs and other factors into account.

Section 111(d) is one of the most obscure and little-used provisions of the Clean Air Act, chiefly because the EPA's main authorities are in other sections that apply to major pollutants. It has been used only 13 times, almost half of which related to solid-waste incinerators, including, in one case, a cap-and-trade scheme authorized for nitrogen-oxide emissions.

This subsection might easily have escaped the notice of all but a handful of environmental lawyers for another 40 years. But EPA has plucked the modest provision from obscurity, drawing from it one of the most ambitious regulations in the history of the administrative state. The key to this previously unimagined power is EPA's discovery of almost infinite elasticity in its definition of "best system of emission reduction." This term had always been understood to apply to some specific technological device used within the facility to reduce emissions. But now EPA is stretching it to encompass virtually the whole economy of each state. EPA reasons that if a state adopts the right economic regulations, including the regulation of electrical dispatch and energy *use* by consumers, the state's power plants will achieve EPA's ambitious carbon-emission goals.

Under the Clean Power Plan, the BSER consists of four building blocks. Block 1 involves "heat-rate improvements" (i.e., efficiency improvements) for coal-fired power plants. Block 2 involves switching from coal-fired to natural-gas-fired electricity. Block 3 involves switching from coal-fired to nuclear and renewable sources. And Block 4 involves "demand-side" energy-efficiency measures focused on consumers of electricity.

Of these, only Block 1 is something EPA can regulate on its own under the Clean Air Act. Blocks 2 and 3 concern the regulation of "dispatch"—the technical term for a utility's protocols for operating the electrical grid and decisions about what source of energy to draw upon at any given time. Such decisions are left to states under federal law, with only certain aspects reserved to the jurisdiction of FERC. The EPA has no jurisdiction over them. Block 4 is the furthest from EPA's statutory purview because it doesn't concern emissions or pollutants at all: "Demand-side" energy efficiency refers to such things as the kind of insulation in your house, the temperature setting on your thermostat, and the efficiency of your refrigerator.

Hence, the linchpin of the proposed rule is its manipulation of the term "best system of emission reduction." As EPA explains:

> [T]he EPA is proposing two alternative BSER. The first is the measures in building blocks 1 through 4 combined. This includes operational improvements and equipment upgrades that the coal-fired steam EGUs [power plants] in the state may undertake to improve their heat rate...and increases in, or retention of, zero- or low-emitting generation, as well as measures to reduce demand for generation, all of which, taken together, displace, or avoid the need for, generation from the affected EGUs. This BSER is a set of measures that impacts affected EGUs as a group. The alternative approach to BSER is building block 1 combined with reduced utilization from the affected EGUs in the state as a group, in the amounts that can be replaced by an increase in, or retention of, zero- or low-emitting generation, as well as reduced demand for generation.

In other words, a state may establish pervasive regulations that include measures in all four building blocks, meaning the state may regulate private and public entities throughout the economy, in addition to the facilities that are actually subject to Section 111(d). Or, alternatively, the state may regulate the emissions rate of those facilities exclusively, with the rest of the state's economy and regulations adjusting to replace the retired generating capacity. This second alternative appears to accommodate a cap-and-trade scheme, because all the power plants are held to emissions targets "as a group."

States would be required to file a state plan setting forth "standards of performance" under one of the alternative BSERs within 12 months of final adoption of the rule. For states that do not file approvable state plans by that deadline, EPA would be required to file a federal plan. This federal plan, about which little detail has been provided, is perhaps the most interesting part of the proposed rule. EPA has announced that it will issue advance guidance on what federal plans would look like when it publishes the final proposed rule (along with the proposed rule's statutory predicate, a corresponding permitting scheme for new and modified power plants known as the "new source performance standards") by July 2015, the statutory deadline.

The EPA's first alternative BSER proposed above would not lend itself to a federal plan, because EPA does not have, and does not claim, authority under Section 111(d) to determine BSER for a "standard of performance" that applies to entities outside of the narrow range of facilities subject to that subsection. Presumably, the federal plan would have to rely on some form of the second approach, imposing emissions rates on "existing sources" exclusively. In practice, this would mean retiring at least that amount of coal-fired generating capacity that could be substituted for by implementing the measures contemplated in Blocks 2, 3, and 4. States would be forced to make up the difference however they saw fit, which would achieve roughly the same effect as a state plan using the first alternative BSER. States that refused to adapt would simply have to learn to live with massive long-term blackouts.

The binding emission goals for each state are sufficiently stringent that states will be unable to meet them without going beyond the traditional, "inside-the-fenceline" Block 1 measures and significantly altering their energy policies generally.

A CONSTITUTIONAL CHALLENGE

At the Philadelphia Convention of 1787, James Madison noted the Convention's categorical rejection of the federal government's "making laws, with coercive sanctions, for the States as political bodies," a stand that the Supreme Court has repeatedly affirmed. In *South Dakota v. Dole*, a 1987 Spending Clause case, the Court noted, "Our decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" As the Court explained in 1997 in *Printz v.*

United States, federal and state governments occupy separate spheres in a "structural framework of dual sovereignty" and states must remain "independent and autonomous within their proper sphere of authority." If a federal law offends "the structural framework of dual sovereignty," it is categorically unconstitutional.

More specifically pertinent to EPA's proposed rule, the U.S. Supreme Court has repeatedly affirmed that Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Where federal law makes demands of state governments subject to a coercive penalty, there is commandeering.

Unfortunately, the Supreme Court has allowed precisely that sort of coercion to stand so long as it constituted mere "encouragement," without crossing some imaginary line into compulsion. As the Court said in *New York v. United States* in 1992, "[W]here 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."

According to the Court's New Deal decisions, such as *Wickard v. Filburn* in 1942, Congress arguably has authority to pass legislation regulating all private activity. But the activity that is the principal subject of EPA's proposed rule lies almost entirely outside EPA's legal authority to regulate under the Clean Air Act. This is not simply a case of overlapping federal and state jurisdiction, as in *New York* and *Printz*. EPA is leveraging its power to affect one sector of industry in order to influence state regulation of other sectors—and then on top of it all requiring states to delegate enforcement authority over the resulting state regulations to EPA.

In the Supreme Court's controlling precedents, *Hodel v. Virginia Surface Mining* and *FERC v. Mississippi*, the challenged statute merely created "preconditions to continued state regulation of an otherwise pre-empted field." EPA's proposed rule can be readily distinguished from the statutes in *Hodel* and *FERC*: It seeks to use EPA's power to shape state policies in areas *not* subject to federal pre-emption under EPA's regulatory authority. In *New York*, the Court warned, "Accountability is… diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." The proposed rule would prevent

state officials from regulating in accordance with the views of the local electorate in matters that not only *are not* pre-empted by federal regulation, but which EPA *could not* pre-empt under the authorities that it claims under the Clean Air Act.

Thus the proposed rule constitutes commandeering of state governments in two ways. First, the requirement of a state plan is "enforced" with the cudgel of a federal plan about which the proposed rule provides almost no information, and which could well be implemented in a punitive way. Second, the federal plan itself would constitute commandeering in a sense the Supreme Court has never upheld: EPA could not pre-empt the field and implement the Clean Power Plan itself through a federal plan under its own authorities. The federal plan would merely shut down the electrical generating capacity that could be substituted under a state plan. It's a Hobson's choice because states must reorganize their energy sectors as required in an approvable state plan, whether they file an approvable state plan or not, in order to avoid the loss of a large fraction of their electrical generating capacity.

That is a clear violation of the prohibition articulated by the Supreme Court in *New York*:

> Because an instruction to state governments to take title to [radioactive] waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," . . . an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

In order to achieve the standards required in the proposed rule, states must adopt regulations that affect entities and other matters "outside the fenceline" of specific power plants, as envisioned by EPA's determination of BSER, even though EPA admits that Section 111(d) of the Clean Air Act applies only to a narrow range of facilities. Thus, state regulation of matters that fall outside of EPA's regulatory power is induced, in the case of a state plan, by the threat of a federal plan, and in the case of a federal plan, by the emissions limitations of the federal plan itself.

In both cases, EPA is using its power under one program — the power under Section 111(d) to enforce performance standards that apply to existing sources — in order to force state compliance with a program that involves things that do not fall within EPA authority — everything from state regulation of electric utilities to end-user efficiency. The Court recently rejected a similar scheme of leveraging federal power. In *NFIB v. Sebelius*, the Court held that where the conditions attached to one program "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.... The threatened loss of over 10 percent of a State's overall budget... is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."

The states face a similar "economic dragooning" whether they elect a state plan or a federal plan under the proposed EPA rule.

A HOST OF LEGAL PROBLEMS

Beyond its problems with the Constitution and Court precedents regarding federal authority over the states, the proposed rule faces a number of serious statutory hurdles, as it is quite clear that Congress never intended for the Clean Air Act to be used to confront the states with the choice the rule would force upon them.

The most serious challenge is the statutory division of authority among EPA, the Federal Energy Regulatory Commission (FERC), and the states when it comes to electrical-power generation. The Clean Air Act allows EPA to regulate emissions of pollutants *at their sources* — but under Section 111(d) it must share that authority with the states. EPA's power under that section is limited to the following: establishing "a procedure... under which each state shall submit... a plan which... establishes standards of performance for any existing source" of air

pollutants subject to that section's provisions; determining the BSER that states must take into account in devising the performance standards of an approvable state plan; approving or disapproving the proposed state plans; devising a federal plan in case of disapproval; and enforcing the state performance standards.

The Federal Power Act, meanwhile, specifically reserves the regulation of electricity markets to FERC and further specifically limits FERC's authority "only to those matters which are not subject to regulation by the States." The Act provides that "[t]he Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction [with certain exceptions] over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." FERC is also vested with exclusive authority to regulate wholesale rates for resale of electric power in interstate commerce — but, once again, not for sales of electricity generated and consumed entirely within one state.

Hence, FERC's authority over the market is exceptionally limited — particularly in Texas, where 90% of the electrical demand is served by the wholly intrastate Electrical Reliability Council of Texas (ERCOT). Because of this market structure, the Federal Power Act gives Texas exclusive jurisdiction over nearly all the wholesale and retail sale and transmission of electrical power in the state. During the nationwide movement to restructure electricity markets in the 1990s, it was this almost completely self-contained energy sector that allowed Texas to succeed where almost all other states came up short.

The state's resulting market structure maintains a clear separation of authority between environmental regulators (Texas Commission on Environmental Quality), utility regulators (Public Utility Commission of Texas and ERCOT), and the private sector. So while TCEQ can regulate source emissions, PUCT can regulate transmission and limited portions of the wholesale and retail markets, and ERCOT can manage the dispatch of electricity into the market, the vast majority of the activity in the market is handled in the private sector. Thus no state regulatory agency, alone or in concert, would be able to implement the proposed rule. And neither EPA nor FERC has the authority to require them to do so. Indeed if TCEQ files a state plan, the plan could only

address things within its purview, and that wouldn't come close to satisfying EPA.

Both a state plan and federal plan would require Texas to completely reorganize its retail electric-power market and wholesale intrastate power market in accordance with EPA dictates. This would be a commandeering not simply of state agencies but also of the state legislature, as well as a violation of the statutory limits on EPA power.

Another statutory problem lies in the determination of BSER, as the proposed rule includes entities and matters "outside the fenceline" of affected EGUs. Section 111(d)(1) of the Clean Air Act authorizes *states* to establish performance standards using the BSER determined by the EPA administrator, according to a specific procedure for assessing state performance standards as part of a state plan. EPA formalized this procedure in its "implementing regulations" of 1975, which allow the federal agency to establish "emission guidelines" for appropriate pollutants.

The proposed rule is such an "emissions guideline," but is unlike the others EPA has adopted under Section 111(d)(1). The BSERs in other emissions guidelines have almost always been limited to the affected facilities and the specific emissions-control technologies that were relevant to them. There is only one instance in which state plans may use cap-and-trade schemes to comply with a Section 111(d) rule, and it involves municipal waste incinerators' nitrogen-oxide emissions. Another cap-and-trade scheme, the Clean Air Mercury Rule, was vacated by the D.C. Circuit in *New Jersey v. EPA* in 2008, and even that scheme aimed to impose performance standards only on facilities actually subject to Section 111(d)—not the entire economy.

Yet another problem stems from the Clean Air Act itself. The regulation of power plants under Section 112 of the act pre-empts regulation under Section 111(d). So for its proposed rule, EPA must rely on what it calls an "ambiguity" created by differing amendments to 111(d) by the House and Senate in the 1990 Clean Air Act Amendments. EPA claims that its interpretation of this "ambiguity" is due deference under *Chevron v. Natural Resources Defense Council*. But the supposedly contradictory amendments can be fully incorporated into the Clean Air Act without any conflict at all; the amendments simply expanded the list of independent regulatory actions that would override regulations under Section 111(d).

Moreover, there are reasons to doubt that the precedent set in *New York* allowing "federal standards" for state regulations would even apply

to the proposed rule since it would hold each state to an entirely different standard, rather than a uniform federal standard.

In the case of Texas, the rule would force the dismantling of the country's most competitive electricity market. Beginning in 1997, the Texas legislature and the Public Utility Commission of Texas took a series of major steps to make market competition, rather than regulatory fiat, the main determinant of price, reliability, and adequacy in the largest portion of the Texas market, managed under ERCOT. Decisions to generate, sell, and buy electricity in ERCOT's energy market are almost entirely in the hands of municipalities, co-ops, quasi-public entities, and the private sector. Thus, economic factors are the primary force that determines which generating units and which fuels are called on to provide enough electricity to meet market demand.

Some states could comply with the proposed rule without drastically changing their current market structure. But others, including Texas, would be forced to abandon market competition and completely restructure their energy markets—with incalculable and potentially ruinous costs for businesses and consumers. Neither EPA nor any other federal agency has the authority to mandate the wholesale restructuring of the electricity market.

CLIMATE CHANGE OR STATE COMPETITION?

Furthermore, it appears that the motivation behind the damaging proposed rule is not at all what EPA claims. The rule highlights the main points of EPA's 2009 greenhouse-gas "Endangerment Finding," which designated carbon dioxide as a "pollutant" endangering public health, subject to the Clean Air Act. Yet EPA never claims that the Clean Power Plan would mitigate any significant aspect of the supposed danger. Anticipating this critique, EPA explains in a legal memo that the necessary endangerment finding for the Clean Power Plan is addressed in its other proposed rule for "new source performance standards," which it must adopt before or contemporaneously with the Clean Power Plan.

In the proposal for "new source performance standards," EPA makes two claims. First, having found that power plants' emissions of the specific pollutants under scrutiny endanger public health and welfare, it claims the authority to regulate any other pollutant from those power plants, without providing any evidence of a danger posed by that other pollutant. And second, in any event, it claims that its "endangerment

finding" for greenhouse-gas emissions from *mobile* sources suffices to establish endangerment from power plants' emissions of greenhouse gases, because the magnitude of greenhouse gases from power plants is the same as that from mobile sources.

Neither claim helps EPA, however, because Section 111(d) of the Clean Air Act requires the EPA to show that sources to be regulated under that section are significantly contributing to an identified danger. EPA simply has not made the requisite findings. Therefore, both the proposed rule and the proposed "new source performance standards" could be held to impose costs out of all proportion to benefits, without the rational basis that EPA must provide to support a rule under the Clean Air Act.

Why would EPA propose a rule that has no apparent health benefits? The motivation behind the proposed rule can be best gleaned from its design and likely effect. Since the start of the Progressive Era a century ago, officials in regulation-heavy and tax-heavy states have sought to use the federal government to eliminate the competitive advantage of states with low levels of regulation and taxation. The federal government has obliged by imposing a high level of regulation and taxation on everyone. This tradition was reinforced in the New Deal, a major objective of which was to neutralize the effects of mobile labor and capital in the farm and labor sectors by cartelizing those sectors on a national basis.

When cap-and-trade and other climate-change efforts failed in Congress, several states passed measures of their own, including statewide and coordinated multistate cap-and-trade laws and assorted renewable-energy mandates. Since the passage of such measures, these states have generally suffered significantly higher unemployment, with business activity and labor gravitating toward states with lighter climate-change regulations.

EPA's proposed rule is a naked attempt to foist the climate and energy policies of regulation-heavy states on regulation-light states. As mentioned above, states are treated differently under the proposed rule, and the states called upon to make nearly no sacrifices are those who have already adopted heavy climate regulations (such as California) and states with no significant industrial activity (such as Mississippi). The states that will have to meet onerous burdens are energy producing states with significant industry: Pennsylvania, Louisiana, and—above all—Texas.

time for action

FERC Commissioner Tony Clark said it best in his July 2014 testimony before the House Committee on Energy and Commerce: "[T]his EPA proposed rule has the potential to comprehensively reorder the jurisdictional relationship between the federal government and states as it relates to the regulation of public utilities and energy development."

Once approved by EPA, the state plans would result in a massive expansion of EPA's enforcement authority, particularly extending that enforcement authority, and its onerous penalties, into areas that do not fall within EPA's regulatory purview. The obligations created by the state plan would be enforceable by EPA, even against entities that should in no way be subject to it. Under a state plan's end-user efficiency standards, a state could theoretically regulate the thermostat settings of private citizens. Those citizens would then become "affected entities" subject to EPA enforcement, including potentially massive penalties under other sections of the Clean Air Act.

The imposition of a federal plan is another grave concern. States that intend to challenge the proposed rule will presumably either file intentionally un-approvable state plans or refuse to file a state plan altogether. When the federal plan is then imposed, those states may still be holding out hope that one of the court challenges will succeed, or that new political leaders will prevent EPA from fully implementing the proposed rule. States in this position will have no desire to adjust their regulations and invest in new electrical generating capacity, especially on the timetable that would be necessary to make up for the forced closing of existing coal-fired power plants that don't conform to the standards of the federal plan.

In the worst-case scenario in those states, the ultimate implementation of the federal plan would result in a catastrophic loss of electricity for state residents. The "gun to the head" in this case is therefore more than purely figurative: EPA is ultimately threatening the health and safety of the residents of states that refuse to play along. A more clear-cut, and more dangerous, example of coercion is difficult to imagine. Indeed, given the possible consequences, whatever they do, states will be running enormous risks from the moment the rule is adopted, and these risks may manifest as real problems well before the legal remedies for challenging the rule are exhausted. There

should be a strong case for an emergency stay as soon as the rule is finally adopted.

When a state is faced with a choice between implementing a federal regulation and letting the federal government pre-empt the field and implement the regulation itself, the state must be able to choose of its "unfettered will," not "under the strain of a persuasion equivalent to undue influence," according to the Court's decision in *Steward Machine Co. v. Davis*. The Court's doctrine of "cooperative federalism" presupposes that the federal government will not punish states that refuse to do its bidding. Perhaps more than any other agency, EPA has demonstrated the flaw in that premise, and this proposed rule dramatically expands the scope for EPA abuse of the states.

Like many progressive projects, the Clean Power Plan is simply a power grab motivated by the desire to eliminate the economic advantages of competitive states through federal rules meant to impose an uncompetitive regulatory baseline on everyone. As soon as the rule is adopted, Congress should use its power under the Congressional Review Act to kill the rule with a veto-proof resolution of disapproval. In the meantime, Congress should undertake the long-overdue task of amending the Clean Air Act and severely curtailing EPA's ability to embark on fantastical experiments in Soviet-style central planning.