

# PERSPECTIVES

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## STORM CLOUDS BREWING ON THE ENVIRONMENTAL JUSTICE HORIZON

Recent events in Louisiana indicate that a storm may be brewing in the area of environmental justice, the social and political movement that aims to eliminate racial disparity in the location of environmentally undesirable industrial and waste facilities. Plans to construct a plastics plant and a uranium enrichment facility have been halted by the efforts of environmental justice advocates, who allege that those industrial projects will increase the disproportionate burden of pollution borne by the poor, minority communities where the plants are to be built.

Four years ago, President Clinton responded to the concerns of the environmental justice movement when he signed Executive Order 12898, which instructs all federal agencies to incorporate environmental justice considerations into their activities. The directive has not resulted in enforcement actions per se, in part because environmental justice has been poorly defined. A major impediment to environmental justice proponents' past efforts to limit facility siting in minority and poor areas has been the requirement that aggrieved parties prove "discriminatory intent"—that a facility's planners targeted a community because of its racial makeup.

But things are changing quickly. On 30 December 1997, the 3rd U.S. Circuit Court of Appeals ruled that individuals may pursue disparate impact claims in federal court under the Environmental Protection Agency's regulations to implement Title VI of the 1964 Civil Rights Act. Disparate impact, also known as discriminatory effect, only requires aggrieved parties to demonstrate that they are disproportionately affected by permitting decisions. Previously, challenges to environmental permits in federal court could only be brought under Title VI itself, which prohibits intentional discrimination by recipients of federal funds.

In another development, the EPA issued an interim guidance on 5 February 1998 for its Office of Civil Rights to use in hearing Title VI disparate impact complaints. The guidance document directs the Office of Civil Rights to consider the discriminatory effects of permits issued by agencies that receive EPA funding. To date, the EPA has not completed a Title VI investigation. Those two developments suggest that the definition of environmental justice is evolving, and the two cases in Louisiana may become the first applications of the new interpretation.

The first case involves the Shintech Corporation's siting of a polyvinyl chloride plant in a rural, predominantly black community named Convent in St. James Parish, Louisiana. Several outside groups, including Greenpeace and Tulane University's

Environmental Law Clinic, objected to the facility and petitioned the EPA to overrule the operating permits issued by the Louisiana Department of Environmental Quality (LDEQ). Ironically, there appears to be strong support for the plant among residents of Convent, who want the jobs and related economic benefits it will bring to their depressed economy.

The petitions argue that the permits issued do not meet all the requirements of the Clean Air Act. Separately, an environmental justice complaint was filed with the EPA against the Louisiana Department of Environmental Quality based on Title VI of the Civil Rights Act. The complaint alleges that the plastics plant would have a discriminatory effect on the minority community.

In September 1997, the EPA did, indeed, overrule the necessary air permits issued by the Louisiana Department of Environmental Quality for the plant. Although the EPA action was based on technical faults in the LDEQ's permit approval process, not on environmental justice claims, the charge of environmental racism is a strong undercurrent in the unresolved situation. The EPA's Office of Civil Rights is currently considering the discriminatory effect claim, and could use this new standard for the first time to block a facility, even if the amended air permits are approved by the state regulatory agency.

The second case involves the construction of a Louisiana Energy Services uranium enrichment facility in Claiborne Parish, Louisiana. Louisiana Energy Services, a consortium of five energy companies, planned the facility in 1989. The area surrounding the site contains two small communities of one hundred and 150 mostly African-American residents. The nuclear fuel plant would provide millions of dollars in tax revenue, and would create 180 desperately needed jobs in a parish where 32 percent of residents live in poverty.

A local activist group named Citizens Against Nuclear Trash, with help from the Sierra Club Legal Defense Fund, filed an environmental justice complaint with the Nuclear Regulatory Commission in an attempt to block the facility. In addition to alleging that the site selection process was discriminatory in nature, the group claims that the plant would create adverse social and economic impacts on the minority communities—in other words, a discriminatory effect. Specifically, they say, the plant would create hardships for elderly and ill pedestrians because a road connecting the two communities would be rerouted and lengthened by 0.38 mile to go around the facility.

On 1 May 1997, the Nuclear Regulatory Commission's Atomic Safety and Licensing Board (ASLB) denied Louisiana Energy Services the permit necessary for the plant. ASLB's decision cites Executive Order 12898 and concludes that a

more thorough investigation is necessary to determine whether racial discrimination played a role in the siting process. ASLB also found that the facility's adverse social and economic effects on the minority communities were not adequately considered. The decision is under appeal.

Either of those two cases may become the first successful attempt to block the siting of industrial facilities under a disparate impact standard. Such a standard is objectionable for at least two reasons.

First, if environmental justice advocates are wrong, and flawed siting practices are not the cause of the observed disparity in the current location of industrial facilities, then siting restrictions based on the idea of disparate impact will not alleviate the disparity in the long term. Environmental justice advocates point to studies of current demographic patterns showing that undesirable industrial facilities are disproportionately located in poor, minority neighborhoods. A critical flaw in this evidence is its failure to consider the racial composition of areas surrounding industrial facilities at the time of siting. The question that needs to be answered with regard to any overall pattern of discriminatory siting is whether facilities were sited in disproportionately minority communities, or whether the populations of the communities became disproportionately minority after the siting decisions.

One alternative, and perhaps more plausible, explanation for current demographic patterns is that economic forces play a role in shaping the racial and economic characteristics of neighborhoods surrounding undesirable facilities. When an industrial facility is sited, property values in the surrounding areas may fall. Over time, relatively wealthy residents may leave the neighborhood, while the relatively poor, for whom it is more costly to leave, may remain. In addition, the increased affordability of housing may create an inflow of new, less-affluent residents. Several recent studies (including research on the St. Louis area conducted by the Center for the Study of American Business) that attempt to correct for the temporal shortcomings in the early research provide support for that explanation.

The implication of that finding is important: if economic forces induce minorities to "move to the nuisance," then a solution of prohibiting facilities that create a disparate impact on minority or poor communities cannot eliminate racial disparity in the location of undesirable facilities in the long run. The same demographic changes that have occurred around undesirable facilities in the past will most likely perpetuate perceived environmental inequities.

Second, the use of a standard based on discriminatory effect, rather than intent, would make locating industrial facilities in minority areas more difficult, even when a facility is sought by a community. Often it is minority and poor communities that need the economic benefits—jobs, tax revenue, patronage of local business—the most. Under a disparate impact standard, unfortunately, the decision would be taken out of communities' hands and entrusted to outside regulators and activists, who have played key roles in blocking both Louisiana projects. That outcome could be detrimental to communities seeking the economic benefits

associated with hosting industrial activity, and would hardly be "just" for the affected residents.

A crucial point in the environmental justice discussion is that neighborhoods wishing to host industrial facilities are not being "greenmailed" into accepting health risks for economic benefits. The facilities in question are subject to stringent federal and state environmental standards set to protect all people, poor or otherwise, from the health threats of pollution.

What should be done? An effective solution to the perceived problem of environmental injustice would encourage companies wishing to locate environmentally less-desirable facilities to compensate communities for hosting their operations. The objective is to empower communities to play a greater role in the siting process, and to decide for themselves what is in their best interests. By and large, that type of negotiation process is already taking place voluntarily.

Allowing compensation to take place will in many cases eliminate the uncompensated costs imposed on host communities by industrial facilities. Eliminating those costs, also known as externalities, in turn helps to eliminate the underlying causes of observed inequalities in the location of waste facilities by reducing or eliminating the incentive for individuals to leave. In the pursuit of environmental justice, policymakers and regulators ought to look beyond simple solutions to perceived environmental inequities and seek out "just" solutions that are compatible with the true problem.

**STEPHEN B. HUEBNER**

*Jeanne and Arthur Ansehl Fellow in Environmental Policy at the Center for the Study of American Business at Washington University.*

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## FDA'S TAXING AUTHORITY EXTENDED TO YEAR 2003

The 105th Congress might have balanced the budget, but it certainly has not reduced taxes, spending, or regulations. The recently enacted Food and Drug Administration Regulatory Modernization Act of 1997 (now Public Law 105-115) reauthorizes the Prescription Drug User Fee Act of 1992 (PDUFA) until year 2003. Euphemistically referred to as "user fees," these payments to the government supposedly speed up the slow FDA drug approval process. In fact, they are taxes, pure and simple, that force enterprises to pay for "services" that they may not want and for which the general public already pays. That tax burden falls especially on small and start-up pharmaceutical companies. And in the 1999 budget, the Clinton administration wants to expand the degree and scope of those taxes.

Since 1992, the FDA, then under David Kessler, was authorized to levy three types of user fees: (1) on companies based on each application for a new drug; (2) on companies based on all of its drugs that had already been approved by the FDA; and (3) on all drug companies registered with the FDA. The FDA also wanted authority to levy user fees on medical devices, but only received authority to charge for inspection and certification of

mammography facilities under the Mammography Quality Standards Act of 1992. The fee system to inspect and certify mammography facilities was implemented starting in 1995. The total fees for 1998 were approximately \$12.8 million.

PDUFA authorized the collection of more than \$300 million over the 1992-1997 period. For each year, the FDA obtains congressional approval for a total amount of user fees. That total amount is then divided among the three categories of user fees. For example, in 1997 the FDA was authorized to collect \$84 million in user fees—\$28 million per fee category. Then, anticipating the number of possible applications for that year and taking into account how many drug products and drug establishments already exist, the FDA set the fee rates for each category.

The application fee applies to requests for the FDA to review proposed new drugs applications (NDA), product license applications (PLA), supplemental applications (e.g. new indication and other labeling changes), and prescription to over-the-counter applications. Applications with no clinical data and for supplements are charged 50 percent of the full application fee. The full application fee was \$233,000 in 1997.

Companies must pay product fees on each of its FDA-approved prescription drugs whose application was pending with the FDA on or after September 1992. The companies had to pay \$14,000 per product in 1997. The fee applies to two thousand products and payment is due on 31 January of each year. Establishment fees must be paid annually by any company that manufactures at least one prescription drug. Set at \$138,000 (in 1997) on about two hundred companies in 1997, this tax also must be paid annually by 31 January.

The pharmaceutical fees established for each fiscal year between 1994 and 1997 were merely targets and the FDA was authorized to adjust the amounts. According to Sheila Shulman and Kenneth Kaitin, researchers from Tufts Center for the Study of Drug Development, the FDA exercised its discretion by increasing target fee revenues by 4.23 percent in 1994, by 3.22 percent in 1995, and by 2.54 percent in 1996.

One would think that pharmaceutical companies would have resisted the creation of user fees. But large companies embraced the fees as a means to speed up the FDA's slow approval process. The Tufts Center scholars found the mean overall time to put a new drug on a store shelf has decreased by ten months. Other scholars maintain that the overall time for a new product to go from the drawing board to the market has actually increased. That is because before companies officially apply to have a new product certified, they must spend time negotiating with the FDA concerning what kind of tests and procedures will be acceptable.

In effect, companies are forced to pay off FDA bureaucrats in order for them to do their jobs. And the fees are in addition to the FDA's \$900 million annual budget. Further, the FDA does not actually test products. That is done by the producers or by private labs. The FDA simply shuffles the papers to certify the tests. Many companies, especially smaller ones, would like all testing and certification to be done by the private sector, the way the private Underwriters Laboratory certifies the

safety of consumer products. But they do not have that option.

The fees on products on the market are particularly unjustified. After all, the "user fee" allegedly facilitates and expedites the certification of new products. But once a product is on the market, the FDA's work is supposedly done. The FDA cannot claim that charging a company to pay annually for an inspected and approved product is a means to facilitate inspection. An alternative reason for the fees is to feed the FDA's insatiable appetite to expand, rather than decrease, its size and power. According to Dr. Kessler, three types of user fees rather than one were created to "Ensure that in a year when applications decline, sufficient fee income is still available through the other two registration fees, which would be relatively constant, to sustain the new [FDA] employees and services."

The Clinton administration is expanding this government-operated protection racket. It is seeking to levy user fees, now only charged on mammography facilities, on other medical devices. Such fees, in addition to adding costs to devices and further bloating the FDA bureaucracy, could serve as an anti-competitive barrier to small and start-up companies. Jeffrey Kimbell, Executive Director of Medical Device Manufacturers Association, says "Some large multinational, multibillion dollar companies believe that paying FDA user fees to the tune of \$52,000 per premarket approval . . . may be an appropriate way of eliminating the bureaucratic sloth at the [FDA's] Center for Devices and Radiological Health. The vast majority of medical device companies (77 percent of which have fewer than fifty employees) do not." Kimbell further states that, "taxing small business and giving more money to an agency with a documented management problem will not solve anything."

The Clinton administration wants to expand the use of user fees. The FDA is seeking authority to levy total user fees on pharmaceuticals totaling \$132.27 million for fiscal year 1999. Mammography and other user fees were proposed at \$14.385 million for FY 1999. Other user fees include \$4.79 million for certification of color additives and \$1 million for exports. Further, the FDA is seeking authority to collect \$127.7 million in new user fees applied to medical devices, import inspections, and review of generic and animal drugs.

Congress touts the new FDA reform law as a great way to hasten the drug approval process. In fact it is a recipe for bigger, more bureaucratic government. In the name of speeding up approval of new products, the FDA will continue to raise fees, expand its staff, and expand its authority to inspect and certify products, devices, facilities and medical processes. In order to accomplish that, they will levy still more fees. Forcing producers to pay special fees to get the FDA to do its job is legalized bribery. Thus, one may conclude that any acceleration in the FDA drug approval process time is the result of financial bribes, not a leaner, more efficient FDA.

**SUE A. BLEVINS**  
*President, Institute for Health Freedom*

**SUYONG MIN**  
*Research Associate, Institute for Health Freedom*

## ENVIRONMENTAL SCIENCE AND SOUND SCIENCE

Science is the process by which humans try to explain the nature and workings of the physical universe. It proceeds through skeptical inquiry, by developing theories and subjecting them to rigorous testing and analysis. Theories that do not survive testing are discarded. Correct ones can be used to formulate new theories or as the bases for technology to better humans' existence.

So-called "environmental science" does not fit the above description. Environmental science proceeds from unquestioned dogma and loud public alarms. Rather than testing theories, it selects "facts" that can be used to support dogma. Recent examples provide clear contrasts between science as done by scientists and science as done by environmentalists.

Cosmologists now have evidence that the universe is expanding faster than previously calculated. University of Chicago astrophysicist Dr. Michael Turner is confident that the reason is an "antigravity force," and his confidence is increased because two different groups of astronomers "that are very competitive and very good" have measured the expansion, and they "are getting the same results." The leader of one of the groups said, "My own reaction is somewhere between amazement and horror. Amazement, because I just did not expect this result, and horror in knowing that it will likely be disbelieved by a majority of astronomers, who, like myself, are extremely skeptical of the unexpected." Further observation and analysis no doubt will go on for years before most astronomers rank the new force as an established law of the universe.

The cosmologists and astronomers begin with evidence that the universe is expanding and then develop a theory to explain it. Environmental science begins with perceived truths, dispenses with observations and testing of theory, and ends by repeating the perceived truths.

For years, environmentalists have fostered the idea that chemicals, especially pesticides, in the human diet are a significant cause of human cancer. There is no evidence for that contention, and scientists who study human health understand the difference between the effects of chemicals at the high doses that cause cancer in laboratory rats and what can be expected when humans ingest tiny amounts of the same chemicals. A committee of the National Research Council, in its 1996 report *Carcinogens and Anticarcinogens in the Human Diet*, stated that:

[T]he great majority of individual naturally occurring and synthetic chemicals in the diet appears to be present at levels below which any significant adverse biologic effect is likely, and so low that they are unlikely to pose an appreciable cancer risk.

That report blunted attempts to ban pesticides based on the time-honored tactic of fanning cancer fears. But regulatory fervor required a new fear. In May, 1996, Dr. John MacLachlan and his colleagues from Tulane University reported that exposure to mixtures of two pesticides at levels currently allowed by the Environmental Protection Agency were sixteen hundred times as

risky as exposure to either pesticide alone. Without any validation by other scientists, the study was widely reported along with warnings that everyone was exposed to mixtures of pesticides that decreased sperm counts in men, increased behavioral disorders in children, contributed to breast cancer in women, and caused many other human maladies. It was all wrong.

Within six months, the two most important science journals in the world—*Science* in the United States and *Nature* in Great Britain—had published reports by well-qualified scientists that said they could not repeat MacLachlan's results. MacLachlan brushed the critics aside, suggesting the fault lay with the other scientists or their techniques or materials. But in July 1997, he threw in the towel. No one, not even MacLachlan, had been able to replicate the results reported from his lab.

So what? Scientists are out on the edge of knowledge. Hadn't MacLachlan simply joined the legion of scientists who made mistakes that are discovered and corrected through further testing and analysis? No real harm was done right? A lot of harm was done. Before MacLachlan's results were published, his report had been leaked to the EPA, and rumors about it floated around Capitol Hill. Questions were asked about the paper as Congress considered new legislation to regulate pesticides in food, but EPA staff declined to answer them. Congress passed a law requiring extensive testing of pesticides now on the market and of new pesticides. It could drive over half of all pesticides off the market because no manufacturer will pay for additional tests of "old" pesticides that are no longer patent-protected. The new tests will drive up the costs of pesticides that remain on the market. Food costs will increase, and consumption of the now more expensive fresh fruits and vegetables will fall.

Scientists, through inquiry, discovered MacLachlan's mistakes. But environmentalists are not acknowledging the error or calling for repeal of the legislation based on it.

Not all environmental science culminates in overly hasty regulation. Some of it simply confirms what "everyone knows" about the evils of chemicals.

Since 1995, there have been increasingly frequent reports of five-legged frogs and other deformed amphibians. There is no doubt the deformities occur; they have been reported for over two hundred years. The issue is whether they are becoming more common, and experts assembled by the National Institute of Environmental Health Sciences disagree. Some believe the more frequent reports represent an increase in the number of deformed animals. Others believe an increase in the number of people searching for deformed animals accounts for the increased reports.

In December 1997, the Proceedings of the National Academy of Sciences published a paper that provided an explanation for deformed amphibians. Professor Andrew R. Blaustein of Oregon State University and three colleagues placed blame on chlorofluorocarbons (CFCs), the chemicals found in all air conditioners produced before the mid-1990s. Now banned, CFCs persist in the stratosphere where they are believed to cause a thinning of the stratospheric ozone layer. Thinner ozone means

more ultraviolet (UV) radiation gets to the earth's surface.

UV can damage DNA, and Blaustein and his colleagues studied mole salamanders that lack an enzyme that repairs such damage. As would be expected, given their sensitivity to the UV in sunlight, the salamanders are nocturnal creatures, spending their lives in shade, shadow, and dark. Female salamanders anchor their eggs, which lack the enzyme, underwater in ponds, safely out of sunlight. Given all that is known about the biochemistry and behavior of those salamanders, dire consequences would be expected from exposing their eggs to sunlight.

That is exactly what Professor Blaustein and colleagues found. They collected eggs from an Oregon pond, and placed two hundred in mylar-covered containers and another two hundred in acetate-covered containers, and floated the containers on the pond's surface. The mylar effectively blocked UV, and only six percent of the sun's UV reached the eggs in those containers. Fully 90 percent of the sun's UV reached the eggs in the acetate containers.

The UV was devastating. Only twenty-nine of the two hundred salamander eggs under acetate hatched, while 190 of those under mylar hatched. Twenty-five of the 29 salamanders that hatched in the acetate-topped containers were deformed; only one of the 190 salamanders that hatched under mylar was deformed.

Blaustein and his colleagues wrote, "Our results show that ambient levels of UV-B adversely affect the development and induce deformities in some amphibian species in their natural habitat." The results show nothing of the sort, of course. In their "natural habitat," long-toed salamanders do not float their eggs on the surface of ponds. Neither do they have to be provided with mylar parasols to block UV.

The *Washington Post*, *USA Today*, *ABC News*, and other news outlets reported Dr. Blaustein's explanation. They did not report that there might be no increase at all in deformed amphibians, and they did not report a biologically sound explanation for deformities in amphibians.

Professor Stanley Sessions of Hartwick College, Oneonta, New York, has shown that the larvae of parasitic flatworms called trematodes cause deformities in amphibians. He is on solid ground. Dr. David Wake, director of Berkeley's Museum of Vertebrate Zoology, said "I'm quite satisfied that the parasite hypothesis does a lot of the work" to explain the extra limbs that are reported.

Dr. Session's work is good science, but do not expect it to make newspaper headlines. Natural parasites cannot compete with evil chemicals, such as CFCs, as the cause for deformities in amphibians.

In the absence of news about the conflicting interpretations of the increased reports of deformed amphibians and of alternative, and far more likely correct, explanations for the deformed animals that do occur, five-legged frogs are simply additional casualties in industry's war on nature.

Alchemists failed to transmute lead into gold. They might gaze in wonder at the authors of a textbook who have succeeded in transmutating all household chemicals into hazardous waste.

People live with household ammonia, detergents, bleach, drain cleaners, paints, paint thinners, and pesticides. They know that those chemicals require care in their use and storage, but they manage okay. Disposal often is not a problem. Consumers pay for the chemicals, and they prefer using them to throwing them away.

The authors of the high school textbook *Environmental Science: Ecology and Human Impact*, published by Addison-Wesley in 1996 suggest that students "Survey your home for examples of materials that are classified as hazardous wastes." Most people understand "waste" to mean materials that are without value and that are to be discarded. In context, it is abundantly clear that the textbook classifies every chemical in the home no matter what its intended use as "hazardous wastes." If, somehow, the student and his family have missed the point about how hazardous it all is, the italicized warning "Be sure to wear protective clothing," should snap them out of their languor.

It will be good news to some students. The work that can follow a parent's, "Scrub the sink," or "Help me clean these paint brushes," is easily avoided or at least delayed. "Sure, just let me get on my protective Moon suit."

The EPA has a program called "Sound Science." It accounts for only about five percent of the agency's 1998 budget, and it is slated for a cut in the 1999 budget. It is unclear whether the cut is being pushed because the EPA recognizes sound science as a drag on its programs or because it sees that science, whether sound or not, is of limited importance in the discovery of perceived truths.

**MICHAEL GOUGH**  
*Cato Institute*

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## IS EPCRA UNCONSTITUTIONAL?

On 27 June 1997 the Supreme Court issued an important ruling in *Printz v. United States* for the future of environmental law. By a 5-4 vote, the Court ruled that Congress could not command local sheriffs to conduct background checks of prospective handgun buyers. Through the Brady Act, Congress had sought "to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." That, the Supreme Court declared, was unconstitutional.

The Court found that the Brady Act was an affront to the Constitution's federalist design. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," wrote Justice Scalia for the majority. Such actions, the Court declared, "are fundamentally incompatible with our constitutional system of dual sovereignty."

The media's response to the *Printz* decision focused on the implications for gun control. A mandatory waiting period and background check had topped the agenda of gun control

groups for years. Yet the Court's opinion was not about guns. Rather it was about the relationship between Washington, D.C. and the states. Coming on the heels of several other Court decisions limiting the federal government's power to intrude upon the states, *Printz*'s impact could be significant indeed, not least in the area of environmental protection.

Most federal environmental programs rely to some degree on state agencies for their implementation. In most cases, those programs are nominally "cooperative." That is to say, the federal government employs various incentives, financial and otherwise, to induce state cooperation. So long as the incentives do not become unduly coercive, the Court has held, Congress is acting within its Constitutional bounds. In some cases, however, Congress resorts to direct commands, which the Supreme Court declared unconstitutional.

In the wake of the *Printz* decision, the most vulnerable federal environmental statute may be the Emergency Planning and Community Right-to-Know Act (EPCRA). Indeed, Justice Stevens's dissent in *Printz* cited portions of EPCRA among federal laws that are constitutionally indistinguishable from the Brady Act. If challenged in federal court, portions of EPCRA should fall.

EPCRA was enacted in 1986 to ensure that local communities are informed about potential environmental threats from hazardous materials. It requires local governments to develop emergency plans in case such threats materialize. Among other things, it requires businesses and governmental entities to inform local authorities of releases from their facilities.

Portions of EPCRA are constitutionally suspect under *Printz* because they impose concrete obligations on the governor of each state. Under EPCRA, each governor must appoint a "state emergency response commission" that will collect information from industrial facilities that use or store materials classified as "hazardous" by the Environmental Protection Agency. If the governor fails to appoint a commission, then EPCRA mandates that the governor himself fulfill the commission's duties.

The commission is required to designate "emergency planning districts" for regulated industrial facilities and appoint a local emergency planning committee in each district. In each district, the local committee is to develop an emergency response plan in case of an industrial accident. The commission must review those plans, ensure they are complete, and collect emergency and hazardous chemical inventory forms from covered facilities. The commission is also empowered to demand additional information about the risks of classified "hazardous" materials from covered industrial facilities. Finally, either the commission or the local planning committee must disseminate the information that it has gathered to the general public. Failure to fulfill those duties can subject the governor and/or the commission to citizen suits.

In sum, portions of EPCRA mandate that state executive officers, indeed the governor himself, take specific actions, including creating what are effectively new state agencies. That is an explicit violation of the Court's prohibition on con-

gressional mandates that state or local officials "administer or enforce a federal regulatory program." The fact that the requirements seem relatively minor, perhaps even ministerial, is immaterial, for the language in *Printz* delineates a strict line that Congress may not cross.

Unlike other environmental statutes, there is nothing in the provisions of EPCRA that gives states an option of complying or not. There is no regulatory scheme or pot of federal money that the State can forego in order to avoid EPCRA's requirement. Failure to comply, however, could subject state officials to citizen suits and court injunctions. Thus, under *Printz*, it is difficult to conclude that substantial portions of EPCRA are not flatly unconstitutional. (The remaining portions of EPCRA, such as those that mandate Toxics Release Inventory reporting by private firms, would have to be challenged on separate grounds.)

EPCRA would not be the first environmental statute to be voided on federalist grounds. In 1992, the Supreme Court invalidated portions of the Low-Level Radioactive Waste Policy Amendments that would have required states with inadequate nuclear waste disposal capacity to take title to and assume liability for low-level radioactive waste generated within the state. In *New York v. United States*, the Court voided this provision, finding that it infringed upon state sovereignty because it sought to coerce state legislatures into enacting a federally prescribed policy. Subsequently federal appeals courts struck down portions of the Forest Resources Conservation and Shortage Relief Act and the Lead Contamination Control Act on similar grounds. In both cases, Congress had sought to force states to enact specific policies.

*Printz* expands on *New York*, making it clear that state and local officials are as immune to Congressional commandeering as state legislatures. Had the *Printz* decision gone the other way, Congress could have circumvented the *New York* ruling by issuing environmental directives directly at state and local officials. Instead, if Congress wants to foist its will on the states, it must provide states with financial incentives to play along, or implement the desired program itself.

But even those measures may go too far if the financial incentives are too "coercive"—a qualification the Court has identified but not yet defined—or if the program exceeds Congress' delegated powers under Article I of the Constitution. Prior to *Printz*, two states, Missouri and Virginia, unsuccessfully challenged the "incentives" designed to ensure state cooperation with the Clean Air Act as unduly coercive. As the costs of Clean Air Act compliance escalate, more states should follow, using the *Printz* decision to buttress their case.

*Printz* matters for environmental policy because of the vast array of federal environmental mandates, delegations of authority, and financial incentives bestowed upon the states. If the EPA cannot tell state bureaucracies what to do, much of existing environmental policy will need to be reconsidered. Some, such as EPCRA, may have to be junked altogether.

The key variable is the willingness of state officials to take on the federal government in court. The Brady Act was invalidated

because a handful of local sheriffs adamantly opposed taking orders from Washington, D.C. For *Printz* to fulfill its environmental potential, state environmental officials must do the same.

**JONATHAN H. ADLER**

*Director of Environmental Studies at the Competitive Enterprise Institute. His analysis of the environmental impacts of the Printz decision is forthcoming in the George Mason Law Review.*

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## INTERNET GAMBLING: IMPOSSIBLE TO STOP, WRONG TO OUTLAW

For better or worse, the Internet offers new ways of satisfying age-old human desires. For the most part it serves blandly virtuous ends, such as private correspondence, public discourse, and legal commerce. But clean living sells few stories and buys even fewer votes. Reporters and politicians thus tend to dwell on the Internet's salacious side, for example, pornography and gambling, both of which mix big money with powerful temptations.

In the eyes of over-eager regulators, however, Internet gambling presents something even more shocking than sex: the threat that entrenched gambling monopolies, nurtured and sometimes even run by government officials, might face new competition. But lawmakers can neither effectively stop Internet gambling nor justify their attempts to do so.

The Internet offers consumers cheap and easy access to a variety of gambling services, bringing competition to an industry that has long enjoyed the shelter of highly restrictive licensing practices. Thanks to the Internet, gamblers no longer have to fly to Las Vegas to play the slots, drive to the nearest authorized track to play the horses, or even walk to the corner store to play the state lotto. Consumers can now play those and other games at home via the many Internet web sites—over fifty and growing—that offer gambling services.

Americans, having already embraced traditional games of chance, will almost certainly extend a warm welcome to Internet gambling. At least 56 percent of Americans gambled in 1995. By current estimates, they will wager more than \$600 billion in 1998—nearly \$2,400 for every man, woman, and child. About \$100 billion of that sum will go toward illegal bets, demonstrating that Americans pay little heed to antigambling laws. Analysts calculate that of the \$1 billion wagered online worldwide in 1997, about \$600 million came from the United States. Online casinos will have worldwide revenues of some \$7.9 billion by the year 2001, \$3.5 billion of it coming from U.S. consumers.

Because the Internet offers bettors instant access to overseas gambling sites and relative safety from prosecution, online gambling will grow regardless of what lawmakers and prudes want. However, futility seldom bars bad public policy. Whether or not consumers will enjoy legal Internet access to new gaming services thus remains quite uncertain.

A variety of political forces push towards a ban on Internet gambling. Left-wing activists will probably not raise First

Amendment claims on behalf of Internet gambling. And conservatives, who nominally favor free markets, make notable exceptions for activities that, like gambling, smack too much of sin. Powerful lobbies will, for financial reasons, favor a ban on Internet gambling. The established, offline gambling industry has huge overhead costs and a corresponding fear of new competitors. It also brings very deep pockets to the debate.

State and municipal authorities, having grown fond of nurturing and taxing local gambling, worry that Internet gambling will put their cash cows out to pasture. States authorities alone collected taxes worth \$3 billion in 1996 from casinos and other licensed private gambling operations. Through their lottery monopolies, which in 1996 sold \$43 billion worth of tickets (up 12 percent from 1995) and earned revenues of \$14 billion, state authorities moreover have a direct stake in preventing citizens from shopping for better odds on the Internet; state and local officials collect no revenue from Internet gambling.

Even religious groups may have a conflict of interest when it comes to opposing Internet gambling. Charitable games raked in \$2.5 billion in 1995, holding a 3.4 percent share of the legal gambling market. Regardless of whether or not Internet gambling represents a moral scourge, it could pose a competitive threat to church bingo games, charitable lotteries, and the like. (It perhaps bears noting—given the fervor with which some self-appointed moral guardians attack gambling—that few Americans regard gambling as immoral. A 1993 survey found that only 25 percent of nongamblers cited moral or religious reasons.)

Separate bills before the House and Senate would impose draconian, unjust, and unenforceable restrictions on Internet gambling. Senator Jon Kyl (R-Ariz.), sponsor of the Senate bill, fairly well summed up how American politicians regard Internet gambling when he said, "I don't believe it can be regulated, so we have to prohibit it."

Sen. Kyl's Internet Gambling Prohibition Act of 1997 (S. 474) would ban every sort of online commercial contest, everywhere in the United States, for everyone involved. Sen. Kyl has defended his bill as merely an update of the Interstate Wire Act of 1961, the federal statute that already regulates wagering over the wires, for example, telephones. In fact, however, Sen. Kyl aims to penalize online gambling more harshly than offline gambling.

Kyl's bill would, for the first time, subject amateur bettors to federal liability for gambling. The Wire Act, by contrast, applies only to those who, as a profession, "engaged in the business of betting or wagering." Email your picks to the office football pool, and under Sen. Kyl's bill you would face a \$2,500 fine and six months in jail. Phone in your picks and you would remain free.

Kyl's bill would also, for the first time, make it illegal to gamble between states that have legalized the games in question. The Wire Act, by contrast, exempts from prosecution bets transmitted between two states, or a state and a foreign country, so long as both jurisdictions permit such betting. The Wire Act rightly keeps the federal government out of otherwise legal business, whereas Sen. Kyl's bill would create a whole

new class of federal crimes.

Kyl's bill reaches to matters better left to state and local authorities. Its coverage includes "any information service" that "enables computer access by multiple users to a computer server." Even an in-office email system could fall within that broad a definition. The Wire Act that Sen. Kyl claims to take as his model modestly, and properly, limits its scope to transmissions "in interstate or foreign commerce."

Although it shares the name and aims of Sen. Kyl's bill, the Internet Gambling Prohibition Act of 1997 (H.R. 2380) that Rep. Robert Goodlatte (R-Va.) and Rep. Frank A. LoBiondo (R-N.J.) introduced in the House differs from the Senate bill in some important respects. Whereas Sen. Kyl's bill targets only Internet users, the Goodlatte-LoBiondo bill would expand federal law to reach all individual amateur bettors using other media of communications. It would thus for the first time make it a federal crime to telephone an old friend and casually bet a six-pack on the big game.

The Goodlatte-LoBiondo bill would require an interactive computer service provider, once given mere notice by law enforcement agents, to discontinue furnishing any facility that "is being used or will be used for the purpose of transmitting or receiving gambling information" in violation of law. In contrast to telephone communications, which typically travel over circuit switched networks, Internet communications use packet switching. Each Internet message is broken into discrete packets that travel over various and unpredictable routes until they are received and reassembled at the message's destination. That virtually ensures that Internet service providers would find it impossible to discriminate between illicit gaming information and other Internet traffic. Even if theoretically enforceable, moreover, such an intrusive new federal law would sorely compromise the cost, efficiency, and security of Internet communications.

Rep. Goodlatte has defended his legislation with the claim that gaming laws "have been turned on their head" by the Internet because "[n]o longer do people have to leave the comfort of their homes" to access casinos. In fact, however, nine states already allow their citizens to access professional gaming services at home, via telephone. Since many Americans already can use advanced telecommunications to gamble from home, Internet gaming hardly represents a wholly new and uniquely dangerous phenomenon. It thus hardly calls for untested, unenforceable, and unjust legislation.

Outlawing Internet gaming services domestically will simply push the business overseas. Federal law enforcement agents admit that they cannot stop overseas gaming operations. "International Internet gambling? We can't do anything about it," Department of Justice spokesman John Russell said, "That's the bottom line."

Because the Internet provides instant access to overseas sites, any domestic prohibition on gaming services would have to cover the whole planet to work. Smart operators will quickly learn to set up abroad and stay there.

Gaming services can find ample shelter overseas. A growing number of countries, including Australia, New Zealand, Antigua, and Costa Rica, have decided to legalize and license Internet gaming services. Principles of international law, which protect the sovereignty of each country, bar the United States from extraditing its citizens merely for violating domestic antigambling laws. Furthermore, the Sixth Amendment of the Constitution's Bill of Rights prohibits the criminal prosecution of those who remain overseas while operating Internet gambling sites. Law enforcement officials in the United States can thus neither arrest nor sentence anyone who offers Internet gambling services from a safe harbor abroad.

Those who would make wagering, on-line or otherwise, a federal crime should recall that gambling played a major role in the personal and political lives of the Founders of the United States. The infamous Stamp Act of 1765 infuriated colonists by taxing playing cards and dice. Thomas Jefferson, while drafting the Declaration of Independence, relaxed by gambling on backgammon, cards, and bingo. Benjamin Franklin used his era's most advanced technology to print a good portion of the colonies' playing cards. George Washington regularly bet on horses, gambled in card games, and bought lottery tickets. Washington managed public lotteries, as did Franklin and John Hancock. Lotteries even helped pay for the first home of the U.S. Congress, as well as for public buildings throughout the new U.S. capital.

The Founders embraced gambling as part of their inalienable right to "the Pursuit of Happiness." That historical record should give pause even to lawmakers willing to ignore the moral argument against interfering with the right to gamble.

**TOM W. BELL**  
*Cato Institute*