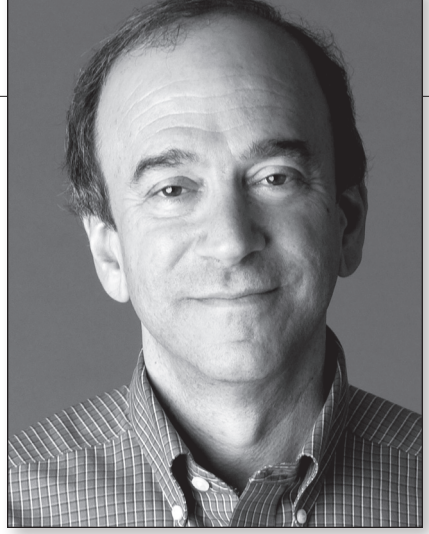

By Richard Lazarus

Texas Unconvincing in Clean Air Suit

On law school exams, I often reward students for creativity, even if their legal argument may ultimately lack merit. After all, they are still students and not yet judges responsible for the actual resolution of legal issues.

That is why I would have likely given high marks to a student exam that argued, like Texas lawyers before the D.C. Circuit in *Utility Air Regulatory Group v. EPA*, that the Supreme Court's recent ruling in *National Federation of Independent Business v. Sebelius* means that EPA violated the 10th Amendment when it notified 13 states of the legal consequences under the Clean Air Act of not revising state programs to regulate greenhouse gas emissions from certain stationary sources. But there is still no merit to that argument.

To be sure, the *NFIB* ruling was extraordinary. Five justices concluded that the Affordable Care Act's mandate that individuals purchase healthcare insurance (or pay a fee) was a valid exercise of Congress's taxing authority. The majority reached this result even though Congress had made clear it was acting pursuant to its Commerce Clause authority, which five justices said did not authorize the mandate, and the president had repeatedly rejected accusations that the mandate was a tax prior to its enactment. Chief Justice John G. Roberts Jr. also defied Court soothsayers by casting the deciding vote that saved the mandate.

But the *NFIB* ruling upon which Texas relies pertains neither to the Commerce Clause nor to Congress's taxing authority. Texas cites instead to the Court's conclusion — expressed in an opinion by the chief justice joined by Justices Stephen Breyer and Elena Kagan and a separate joint opinion signed by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito — that the act's Medicaid expansion violated the 10th Amendment by denying a state all of its existing Medicaid funding if it declined to agree to the expanded program. According to the chief justice, this was impermissibly coercive because states would have to give up 20 percent of their existing budget — the average supplied by existing Medicaid programs — to decide not to agree to the new program. Such a threat amounted to pointing a "gun to the head" of the states.

Texas claims that EPA is likewise being impermissibly coercive in telling states that the construction of all new and modified stationary sources that emit greenhouse gases within their borders will be barred unless they revise their Clean Air Act state implementation plans to regulate greenhouse gas emissions from those stationary sources. The problem with Texas's characterization of EPA's threat is that the Clean Air Act and EPA provide states with a third option: they could avoid both the need for a revised state plan and a construction ban by having EPA take over the permitting of new and modified stationary sources within its borders that emit greenhouse gases.

The analogy to the health care decision is nonexistent and the argument lacks merit

The analogy to *NFIB* is therefore nonexistent. Unlike in *NFIB*, states are not coerced to assume a new, expansive program they do not want to administer or pay for. If a state does not want to expand its permitting authority, then EPA will both pay for and administer that new, expanded permitting program. Nothing in the chief justice's opinion in *NFIB* suggests there would have been a 10th Amendment violation if the federal government had told the states that if they did not want to pay for the Medicaid expansion, the federal government would both pay for and administer the program for them. And the joint opinion filed by Scalia, Kennedy, Thomas, and Alito expressly relied on the absence of such a federally run "backup scheme" in *NFIB* in finding a 10th Amendment violation.

Unfortunately for Texas, the judges in its case before the D.C. Circuit are not grading a law student's exam. So whatever high marks the state's argument might deserve for inventiveness will not matter. Charged instead solely with addressing the merits of Texas's claim, the judges should find there is none.

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I erred in a recent column in detailing how the Clean Air Act's Prevention of Significant Deterioration program finds it origins in Justice Lewis Powell's recusal in *Fri v. Sierra Club*. Powell's recusal was, as I stated, linked to the filing of an amicus brief in *Fri* and to his former employer, Hunton & Williams, but not because that law firm itself filed the brief. It was instead because the brief was filed on behalf of an organization in which a major client of the firm served a prominent role. But Henry Nickel, who filed that brief, did not join Hunton & Williams, where he has been for more than three decades, until soon after he filed that brief. For this reason, the long overdue "thank you note" I previously suggested Sierra Club might owe to Hunton & Williams might be better directed to Nickel as well.

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