

MARCH 2015

# Veritas

A PUBLICATION OF THE TEXAS PUBLIC POLICY FOUNDATION

*Liberty's New Address*  
*901 Congress Avenue*



Texas Public Policy  
FOUNDATION



# Veritas

## FEATURES

**4 Texas Transportation 2015**  
While the Legislature considers boosting transportation spending, it has the simultaneous opportunity to unleash billions in savings by freeing the Texas Department of Transportation (TxDOT) from outdated procurement rules.

**8 Liberty's New Address**  
The grand opening of the Texas Public Policy Foundation's new headquarters, just two blocks from the Texas State Capitol, is a signal event in the life of our state and its history.

**11 Visionary Spotlight**  
Stacy Hock is a native of Austin. She serves on the boards of several non-profits, including the Texas Public Policy Foundation. She shares her story of why she became one of TPPF's Visionary members and dedicated supporters.

**14 Restoring the Constitutional Balance of Powers**  
TPPF's Center for Tenth Amendment Action is working with state legislators to protect the freedom and economic well-being of Texans against illegitimate federal encroachments.

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## PRESIDENT'S MESSAGE

Dear friend and supporter,

Welcome to the latest issue of *Veritas*, the quarterly magazine of the Texas Public Policy Foundation. We are fortunate to be able to produce *Veritas* with the support of liberty-loving Texans and Americans like you—and with the content produced by our extraordinary staff of scholars, researchers, and activists who work tirelessly at the Foundation to keep the Lone Star State free and strong.

I am excited to report to you that thanks for your support, these champions of freedom will soon have a new home in which to do their work. As I write this letter, we are moving into our new headquarters building at 901 Congress Avenue—just two blocks from the Texas State Capitol. This building has been a long time coming: when we first contemplated a dedicated structure for the Foundation, we anticipated simply purchasing one of the smaller buildings within Austin's downtown area. If you had told me, when we first began, that we would eventually construct a six-story, \$22.5 million new building in the heart of downtown, I would hardly have believed you. But our continual growth, and our continual success, shaped events to an extraordinary degree.

And so, when we host our Grand Opening on April 21st, we will be doing more than simply dedicating a building: we will be consecrating a landmark.

Of course, none of this is possible without the time, talent, and treasure dedicated by our tremendous ranks of supporters and allies. In this issue of *Veritas*, you will learn about one of them: the distinguished and exceptional Stacy Hock, whom I am proud to call a friend—and even prouder to call a fellow Texan. Her story is the story that many of you share: an entrepreneur, a parent, and a patriot who decided it was high time to get involved, and do her part to save our country. She has achieved great things, and she has just begun. I am privileged to share her story with you here.

In these pages, you will also learn about two of the critical elements of our legislative-session agenda. Our Vice President for Policy Chuck DeVore has a must read piece on transportation funding—and how to get it right in Texas. And our Director of the Center for Higher Education will also report on his new job at the Foundation: no, Dr. Thomas Lindsay is not leaving the fight for higher-education reform—but he is taking on, in addition to that, the battle for state sovereignty under the Tenth Amendment. As our new Director for the Center for Tenth Amendment Action, Dr. Lindsay has an aggressive agenda that you'll read about here.

There is much happening at the Foundation—as you expect, and as you deserve. We hold ourselves accountable to two things: first, our posterity and the Texas future that we seek to secure for our children, and their children—and also to you, who sacrifice and give to support this work for our future. Thank you so very much for your generosity, and thank you for taking the time to read this issue of *Veritas*.

I look forward to seeing you, to hearing from you, and especially to welcoming you to liberty's new address at 901 Congress Avenue!



Brooke Rollins  
President and CEO





# TEXAS TRANSPORTATION 2015

by The Honorable Chuck DeVore

**G**overnor Greg Abbott and the Texas Legislature are looking to spend billions of dollars more on transportation—this, on top of voter approval last November of billions more from the state's savings account, the Economic Stabilization Fund.

While the Legislature considers boosting transportation spending, it has the simultaneous opportunity to unleash billions in savings by freeing the Texas Department of Transportation (TxDOT) from four outdated procurement rules.

## Reform #1: Do Nothing

The first reform is easy to accomplish: do nothing.

Section 223.242 of the Transportation Code restricts TxDOT to using no more than three design-build contracts per year at a value of \$50 million or more. The limit of three design build contracts per year expires on August 31, 2015. So, if the Legislature doesn't act, TxDOT can issue more than three design-build contracts per year beginning in September.

What is design-build contracting and why should TxDOT be able to do more of these procurements?

In traditional contracting, design engineering firms bid to design a segment of road or a bridge or the design is completed by TxDOT engineers or by outsourced design services. Once the design is completed, the procurement process starts over again with bids issued to build the completed design. This process is called "design-bid-build"—although, if a private design firm is used, it would more properly be called, "bid-design-bid-build."

Design-build combines the design and construction work into one contract, speeding the construction project by about 14 percent and saving up to 29 percent of the combined costs for design and construction.

## Reform #2: End Design-Build Contract Value Floor of \$50M

The second needed reform is in Section 223.242 as well: end the design-build contract value floor of \$50 million. Florida has saved

**A law limiting TxDOT to no more than three design-build procurements per year expires in 2015—allowing it to expire could save up to 29% on new projects while seeing the transportation projects completed 14% faster.**

30 percent on the cost of small projects while shaving 25 percent on the time to completion by using a variation of design-build that they call "design-build push-button." The work included a wide-range of road projects including adding a paved shoulder to a road, guardrails, traffic signals, crosswalks, skid-resistant pavement and other items. Interestingly, most these projects were under \$1 million,<sup>1</sup> thus, Texas law prevents TxDOT from using this sort of money-saving contracting tool for smaller contracts.

## Reforms #3 & #4: Eliminate Restrictions that Harm Competitive Bidding

The third and fourth recommended reforms are in Sections 223.246 and 370.406.

Each of these sections contain a requirement that TxDOT or regional mobility authorities must provide designs that are 30 percent complete to prospective design-build bidders. Two of Texas' large peer states, California and Florida, do not have a similar restriction in their transportation statutes. By forcing TxDOT to partially complete designs before a bid, the process is slowed and the flexibility for contractors to use innovative designs and materials is restricted. This reduces the ability of bidders to provide a lower cost bid to TxDOT. The 30 percent design requirement should be struck from state law.

Lastly, Section 223.246 contains a requirement that the cost proposal in a design-build bid must be at least 70 percent of the evaluation criteria. The problem with this restriction on TxDOT is that it discourages bidders from proposing road or bridge construction techniques that might cost more up front but may save millions of dollars down the road in maintenance costs—otherwise known as full life-cycle costs. Modifying this statutory language to allow or even encourage the consideration of full life-cycle cost considerations in determining contract awards will result in significant savings to Texans in the design, construction, and maintenance of their new roads and bridges.

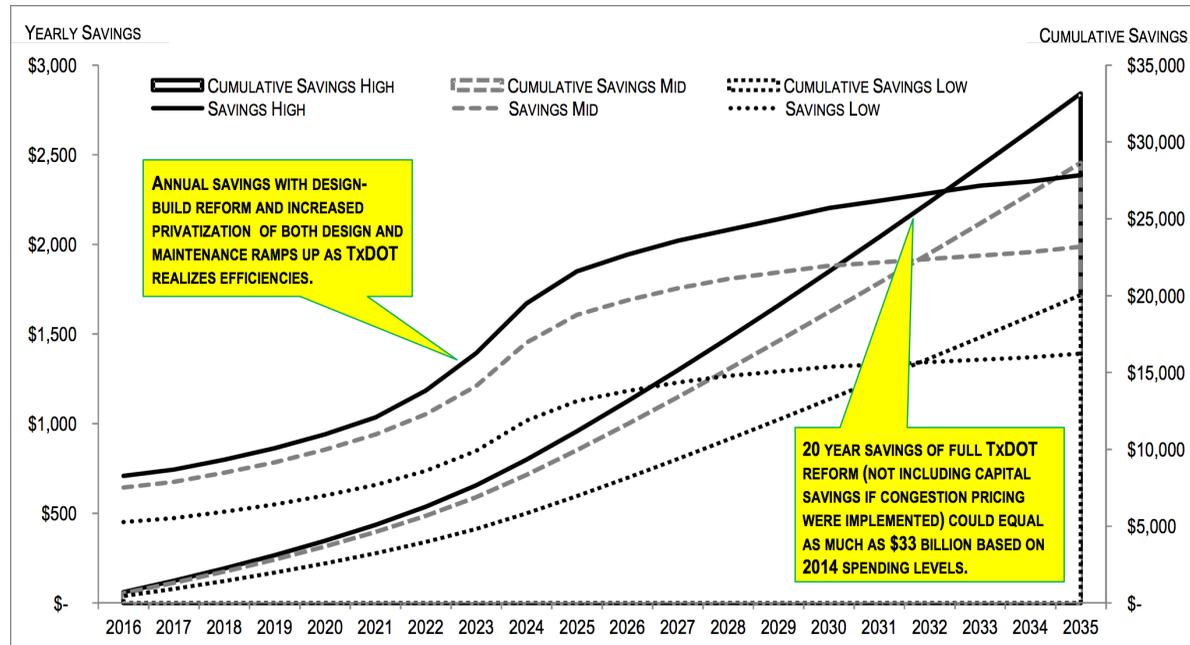
A recent high-profile example of design-build in Texas was the \$987 million DFW Connector Project. Design-build compressed the project's expected timeline by a year vs. the traditional bidding process, delivering the stretch of new

continued >>



A high-profile example of design-build in Texas was the \$987 million DFW Connector Project.

## Potential Savings to Taxpayers if TxDOT Procurement and Administrative Reforms are Fully Implemented



Savings from reforms, up to 20 percent on capital costs, add up quickly—up to \$33 billion by 2035— if the Transportation Code is amended to allow transportation dollars to be spent most efficiently.

roadway 43 percent faster than would have otherwise been the case.<sup>2</sup> This saved \$43 million in construction inflation while allowing 180,000 cars to use the DFW Connector earlier than expected, saving a somewhere between 8.2 million and 11 million commuter hours for a total savings in excess of \$60 million.<sup>3</sup>

**McKinsey & Company, a U.S.-based worldwide consulting firm with revenue of \$7.8 billion in 2013, estimates design-build can save up to 29% on a large, complex project.**

McKinsey & Company, a U.S.-based worldwide consulting firm with revenue of \$7.8 billion in 2013, estimates design-build can save up to 29 percent on a large, complex project. They break the savings down as follows: 6 to 10 percent in engineering cost savings via design-to-value/design-to-cost; 6 to 8 percent in procurement through strategic sourcing, demand consolidation, contractor development, and frame contracts; 11 to 12 percent in construction costs with lean execution, project organi-

zation/governance and planning optimization for a total savings of from 23 to 29 percent.<sup>4</sup>

A federal study estimated that the time savings averaged 14 percent with 62 projects examined for schedule, 45 of which were completed ahead of schedule and seven taking longer than anticipated.<sup>5</sup>

A study by the Arizona Department of Transportation looking at 16 projects from \$12



**If these reforms are passed in 2015, the savings could add up to as much as \$33 billion over 20 years.**

million to \$184 million over the five years from 1999 to 2004 estimated an average time savings of 22 percent and a dollar savings of 4 percent.<sup>6</sup>

A 2009 Utah study indicated that change orders resulted in 6.5 percent of costs in design-build projects vs. 14 percent using the traditional method. The Utah study further noted that traditionally-run projects saw an average cost overrun of 11 percent, a cost borne by taxpayers, as compared to no cost overruns using design-build.<sup>7</sup>

If these reforms are passed in 2015, the savings could add up to as much as \$33 billion over 20 years and, with Texans seeing increased traffic congestion as a companion of the steady growth generated by the Texas

model of low taxes and a light regulatory climate, who turns down \$33 billion in additional “free” road construction? ☆

<sup>1</sup> “Safe Roads for a Safer Future, Investment in Roadway Safety Saves Lives,” Federal Highway Administration, Office of Safety (Aug. 2013).

<sup>2</sup> “The Dallas Horseshoe Project, Executive Summary,” Northgate Constructors proposal for TxDOT, p. 2.

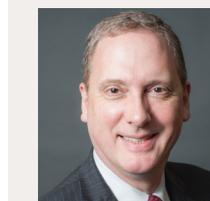
<sup>3</sup> Calculation derived from 10 minutes of time saved per commuter per “Federal Highway Administrator Mendez Celebrates Opening of DFW Connector,” United States Department of Transportation news release (21 Aug. 2013).

<sup>4</sup> “Infrastructure Productivity: How to Save \$1 Trillion a Year,” McKinsey Global Institute, McKinsey Infrastructure Practice (Jan. 2013) p. 39.

<sup>5</sup> “Using Public-Private Partnerships to Carry Out Highway Projects,” Congress of the United States, Congressional Budget Office (Jan. 2012) p. 23.

<sup>6</sup> Ibid.

<sup>7</sup> “Change Order Cost Percentages per Project and Cost Overruns per Project,” draft, Utah Department of Transportation (24 June 2009).



**The Honorable Chuck DeVore** is the vice president of policy at the Texas Public Policy Foundation. From 2004 to 2010, DeVore represented almost 500,000 people in the California State Assembly in coastal Orange County. He was the Vice Chairman of the Assembly Committee on Revenue and Taxation and served on the Budget Committee as well. In 2010, DeVore competed for the Republican nomination for U.S. Senate in California, earning more than 450,000 votes and raising more than \$2.6 million. He worked in the aerospace industry for 13 years as an executive. In the former role he analyzed technology developments and corporate capabilities while in the latter role he was in charge of investor and media relations, marketing, and Securities and Exchange Commission reporting. At the time of his election to the Assembly in 2004, he was a corporate vice president.



# Liberty's New Address



The grand opening of the Texas Public Policy Foundation's new headquarters, just two blocks from the Texas State Capitol, is a signal event in the life of our state and its history. When this Foundation was established a quarter-century ago, it could hardly be foreseen that it would ascend to the prominence that it enjoys today. But make no mistake: the reason the Foundation is influential and eminent today is because it is a voice for the Texas majority. That majority is still a nation—as Steinbeck said—that endorses and abides by the principles of liberty that undergirded our Revolution nearly two centuries ago. The Texas Public Policy Foundation shapes Texas, yes—but more important, it is shaped by Texas, and it therefore represents the very best of the Lone Star State.

*In that light, then, this grand opening will revolve around the theme of the Texas future: what it holds, what it means, and how it will fulfill the freedom-based aspirations of the people of Texas. Though this building is, to be sure, a great accomplishment, and a monument to the achievements of the foundation, to regard it as a culmination for its own sake is to misunderstand its true meaning. To paraphrase Churchill, this grand opening is not the end, and it is not the beginning of the end—but it is the end of the beginning.*

The significance of this building is in what is to come: a movement for liberty more active, more influential, more prominent, more purposeful, and more effective than it has ever been. The

continued >>

## History of 901 Congress Avenue

1846 – land patent given to Issac McGary for property at 901 Congress Ave.

1866 – unknown when 901 Congress was built, but the earliest photograph of Congress Avenue was in 1866 and you can see 901 Congress. This makes it older than the Driskill Hotel. It is believed the site was used as a Federal Courthouse during Reconstruction.

1872 – first documented evidence of buildings use. MM Long's Livery Stable. Austin Opera House was on the top floor, but moved to Austin Club location because of the smell.

1873 – Austin American–Statesman in rear building

1880s – Palace Saloon

1900 – H.P. Halderman Cigar and Tobacco

1905 – Spalding Drug Store

1916 – Capital Engraving on 2nd floor

1932 – Capital Pharmacy – one of city's first air conditioned buildings

1946 – Goodfriend's department store

1976- Capital Mortgage Bankers

1985 – Sneed Vine Perry law offices



1. Joe B. Hogsett Theater: seats 175 with a 13' x 7' video wall and two 75" monitors on each side.
2. Red McCombs Event Center: catering kitchen with multifunction ballroom space for 130 guests.
3. 6th Floor Balcony: views of the Capitol and Congress Avenue with a drink rail for reception use.
4. Governor Perry Liberty Balcony: wrap-around views of downtown and Capitol perfect for parade viewing.
5. Communications Studio: state-of-the-art sound, video, and editing capabilities.
6. Creighton Lomax Executive Board Room: Long leaf pine table with seating for 20, conference and wireless A/V capabilities.
7. Trisha & Chaz Neely Come and Take It Foyer: 8' in diameter "Come and Take It" seal on floor.

reason we built this building is because there is so much more work to be done to secure Texas, and the Texas future, for freedom. We expect that much of the hard work toward that end will take place right here. We hope that the lovers of liberty in Texas will consider

this a second home. And we expect that freedom's champions in every corner of America will regard this as a school for action: a place to learn what works, how do achieve it, and how to bring the lessons of Texas to the other 49 states. ★

### Please join us for our Open House!

**April 21, 2015 | San Jacinto Day | 901 Congress Avenue | 3:00-5:00pm**  
 Contact Cherish Schaffer for details: [cherish@texaspolicy.com](mailto:cherish@texaspolicy.com) (512) 472-2700



Stacy Hock is a native of Austin who met her husband, Joel, at MIT. Stacy is a small business owner in the financial services industry and an active philanthropist. She and Joel live on Lake Austin with their four young sons. Stacy serves on the boards of several non-profits and joined the board of the Texas Public Policy Foundation in mid-March. The following is her story of how she became involved with TPPF, shared during the dinner program at the Bullock Texas State History Meeting as part of the 2015 Visionaries Meeting.

“Good evening. It is my pleasure to be here with you at what I consider to be the kick-off of the 2015 Texas Legislative Session—the TPPF Policy Orientation! I am a native Austinite, and after a recent 7-year stint in New York City, Joel and I are thrilled to be permanently back in Texas, raising our four young boys.

In addition to managing our high-energy household, I have the privilege of overseeing our philanthropic endeavors. We are one of the many members of our generation who have found financial success in technology—in our case, in the financial industry. When financial fortune came our way, Joel and I understood the responsibilities that came with that and were excited and motivated by the potential impact we could have. We prioritized our charitable

goals and dove right in—feeding the hungry, providing shelter and clothing for the homeless, ensuring excellent education for impoverished children, equipping men and women in prison with skills and tools for a better footing when they re-enter society, and so on. We have partnered with dozens of organizations, and I have served on the board of numerous high-functioning organizations that I am very proud to have played a small part in.

However, shortly after we moved back to Texas a year and a half ago, a wise man pointed out that our desire to serve our community, especially the most vulnerable among us, and my passion for free markets and smart, limited government, need not be considered in silos.

continued >>



ABOVE LEFT: TPPF president Brooke Rollins welcomes Stacy Hock to the stage before her speech to fellow Visionaries at a 2015 Visionaries Meeting dinner. ABOVE RIGHT: Agriculture Commissioner Sid Miller with Stacy Hock at a Visionaries Meeting reception.

“Whether we like it or not, the public sector is only growing, and if you really want to raise everyone’s boat, effect policy.”

So, I looked into it, and, sure enough, if that dang Phil Gramm doesn’t know what he’s talking about ...

whether it’s supporting innovation, entrepreneurship and small business growth through a reasonable regulatory climate that keeps barriers to entry low and competition healthy;

or a tax policy that creates jobs and keeps capital in the hands of workers;

or great education for the millions of children in our public school system;

or a more effective, humane, restorative, and fiscally responsible criminal justice system.

When you change the law, you change society.

I asked Governor-Elect Gregg Abbott recently how we could best support him, and he said what he and the slate of public officials rolling into office this month most need at this point are great ideas. Well, the Texas Public Policy Foundation is the thought leader for great policy ideas in Texas.

But, we all know an idea, even a well-thought-out, well-researched one, is purely academic until someone acts on it. Once TPPF has identified the biggest areas for concern in the public sector, and has researched and developed policy positions around those concerns, they grab the bull horn and make sure EVERYONE KNOWS ABOUT IT.

They are thoughtful, measured, and researched in their policy, but they are also fearless—diving into criminal justice reform before the political climate was friendly toward it; changing their position on the margin tax when they decided it was net detrimental for Texas rather than net positive; raising the alarm on Texas’ mounting local debt; and respectfully challenging legislators on points of contention.

At this point I am hard pressed to find another organization that has the strong potential for such wide-spread impact, dollar-for-dollar, as the Texas Public Policy Foundation.

I hope you enjoy this special evening, and milk the policy orientation for all its richness.

TPPF has an aggressive, wide-reaching agenda for this 2015 legislative session—thank you for all you have done and will do to support their important work!”

“Once TPPF has identified the biggest areas for concern in the public sector, and has researched and developed policy positions around those concerns, they grab the bull horn and make sure EVERYONE KNOWS ABOUT IT.”

**Visionaries Meeting** occurs concurrently with Policy Orientation and offers exclusive programming for our donors who contribute \$2,500 or more per year. In addition to all Policy Orientation events, Visionaries Meeting participants attend closed-door, off-the-record meetings with every keynote speaker, as well as exclusive off-site dinner programs. The 2015 Visionaries Meeting included:

- Dinner at the Bullock State History Museum with Governor Rick Perry and Former Congressman Allen West;
- An advance screening of the upcoming film, *My All American*, with an introduction by acclaimed director Angelo Pizzo;
- A guided tour of TPPF’s new headquarters building, followed by dinner at the historic Austin Club with Attorney General Ken Paxton and Americans for Tax Reform President Grover Norquist;
- A private reception with all newly elected statewide officials; and much more!

Please become a Visionary donor today and reserve your place at the next Visionaries Meeting, January 6-8, 2016! If you have questions, please call Sarah French, Vice President of Development, at 512-472-2700.

## Contribute to the Texas Public Policy Foundation today!

\_\_\_\_ I would like to advance freedom in Texas by contributing to the Texas Public Policy Foundation (TPPF). I would also like a free subscription to:  *Veritas*  *Texas Public Policy News (TPPN)* electronic newsletter.  \$\_\_\_\_\_.

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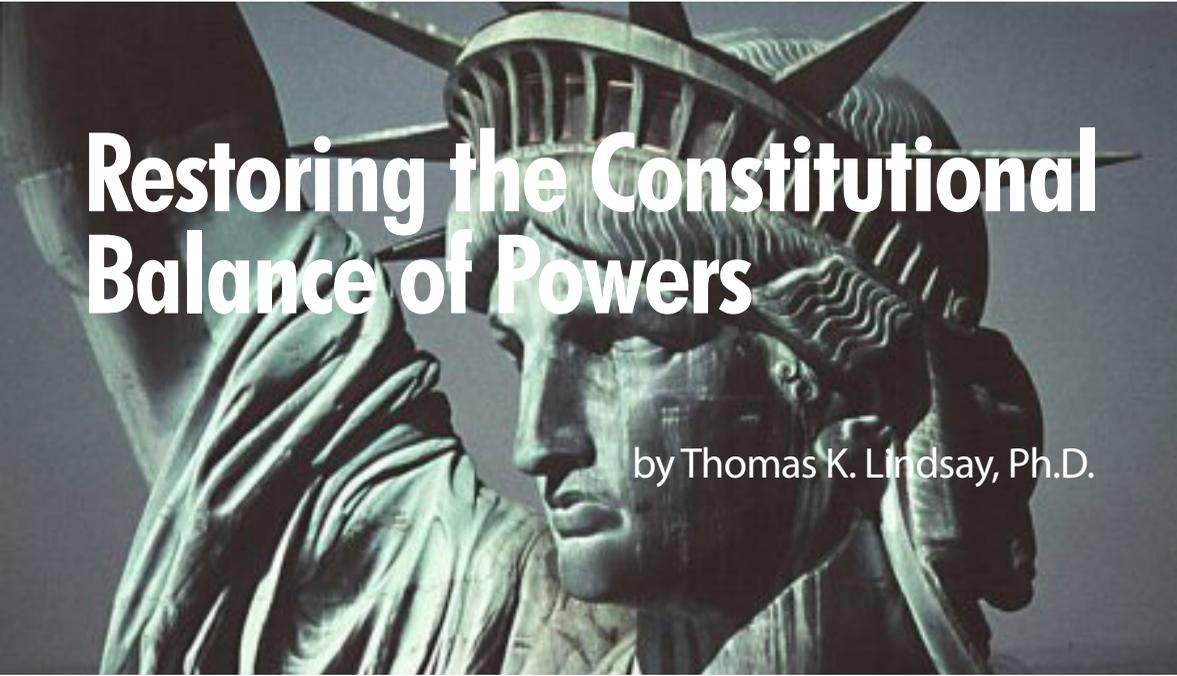
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Your generous donation is tax-deductible under Section 501(c)3 of the Internal Revenue Code and helps ensure our continued work. Donate online at [www.TexasPolicy.com](http://www.TexasPolicy.com) or mail to Texas Public Policy Foundation, 901 Congress Ave., Austin, TX 78701.



# Restoring the Constitutional Balance of Powers

by Thomas K. Lindsay, Ph.D.

Across the country this year, state legislators have introduced over 200 measures aiming to prevent the enforcement of federal laws and regulations they find to be encroachments on the Constitutional rights and duties of the states. Here in Texas, TPPF's Center for Tenth Amendment Action—in collaboration with the Armstrong Center for Energy and the Environment, the Center for Economic Freedom, the Center for Education Freedom, and the Center for Health Care Policy—is working with state legislators to protect the freedom and economic well-being of Texans against illegitimate federal encroachments.

The reasons for this growing resistance are easily discerned. The growth of federal power emanating out of Washington, D.C. has been bought with a concomitant diminution in the powers of the states. Yet America's Founding Fathers deemed the states to retain all authority not listed by the Constitution as an "enumerated power" of the federal government, and they reminded the federal government of this fact by ratifying the Tenth Amendment ("The powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people"). The Founders would thus be shocked and disheartened to learn that, today, states find themselves laboring under the excesses of a federal government that apparently believes it can regulate nearly anything it wishes.

As a result, states are inhibited, often dramatically so, by Leviathan-like federal power. Worse, the reduction of state power carries with it—as Thomas Jefferson feared—the diminution of individual liberty. Jefferson's vision of a free republic will not be restored until the rightful authority of the states, as guaranteed by the Tenth Amendment, is also restored.

Just such a constitutional restoration is the overriding purpose of the Center for Tenth Amendment Action (CTAA). CTAA seeks to combat unconstitutional federal power and protect liberty and self-government in the states, in keeping with the Texas Public Policy Foundation's mission to restore limited government and economic freedom.

[T]he States can best govern our home concerns and the general government our foreign ones. I wish, therefore ... never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold at market.

~Thomas Jefferson, letter to Judge William Johnson

In light of its central purpose, the results CTAA seeks to accomplish are to:

- Stop the federal takeover of state governments through the schemes of "cooperative federalism"—conditional federal grants and conditional regulatory cooperation.
- Restore constitutional limits on the federal power to regulate economic activity.
- Restore constitutional limits on the federal spending power.

To accomplish these results, the Center is engaging simultaneously at the state and national levels. At the state level, it is working with the 84th Texas Legislature to advance measures that flow from the Center's research and policy work (e.g., EPA "non-cooperation" bills, Article V applications for a convention of the states, and Interstate Compacts limiting federal overreach). At the national level, the Center is engaging in the national debate in three important, inter-related dimensions—the legal/Constitutional/academic debate, related political commentary, and the federal courts (through the establishment of a litigation center).

At the most fundamental level, the Center's approach strives to craft a new consensus on the problems of our modern constitutional system and on how to reclaim the Constitution—and in so doing, reclaim individual liberty and the limited government on which individual liberty ineluctably depends.

Among the issues on which the Center is working are:

- Federalism and constitutional law
- Energy and the environment
- Health care
- Federal budget (burden of federal taxation and spending)
- Education (defending Texas education from federal overreach, including the centralized national No Child Left Behind-Common Core master plan and federal efforts to kill school choice for parents, students, and taxpayers).

## Battling for Individual Liberty against the EPA

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. ... But what degree of madness could ever drive the federal government to such an extremity. ~James Madison, *Federalist* 46

One of the chief concerns of state legislators here in Texas, and in other states as well, is the Environmental Protection Agency's proposed "Clean Power Plan." This plan is so beyond the pale constitutionally, in addition to being

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### What is EPA's "Clean Power Plan?"

In June 2014, the EPA proposed the Clean Power Plan, which provides "guidelines" for carbon emission reductions in the electric sector under Section 111(d) of the Clean Air Act. The EPA plans to issue a final regulation in June of 2015, which will require states to issue implementation plans for meeting these requirements by 2016. States will then be required to implement their respective plans by 2020.

The EPA proposed to set individual statewide carbon emission limits for fossil fuel plants in 49 states, estimating that its proposal will result in a 30 percent reduction in CO<sub>2</sub> emissions (relative to 2005 U.S. levels) from U.S. power plants by 2030. Source: [Balanced Energy for Texas.org](http://BalancedEnergyforTexas.org)

unworkable and disastrous for states, that opposition to it has begun to transcend partisan and ideological boundaries. Consider the fact that no less than Harvard law professor—and liberal icon—Laurence Tribe recently penned a *Wall Street Journal* editorial whose title conveys its conclusion: "The Clean Power Plan is Unconstitutional."

The Clean Power Plan (CPP) is a proposed regulation designed to reduce carbon emissions from the country's electric power plants—this with the view to combating "climate change." It would fix a target for carbon dioxide emissions for each and every state, requiring, in the process, that each state craft a suite of laws over the course of the next year to meet this imposed target.

Tribe rightly notes that the plan "would effectively dictate the energy mix used in each state and leave the state with essentially no choice in implementing its plan." But, in so doing, the EPA would flout "Supreme Court precedent settled over two decades ago in *New York v. United States* (1992) and reaffirmed by a 7-2 vote as recently as 2012 in *NFIB v. Sebelius*, the ObamaCare decision," which "holds that such federal commandeering of state governments defeats political accountability and violates principles of federalism that are basic to our constitutional order."

Tribe also is right to note that the plan engages in the constitutionally prohibited practice of exercising powers "Congress never delegated to it in the first place." Although the Obama administration has failed in its attempts to pass climate legislation in the U.S. Congress, the EPA is acting as though "it has the legislative authority anyway to re-engineer the nation's electric generating system and power grid. It does not."

The EPA's citation of Section 111(d) of the 1970 Clean Air Act as authority for its proposal is faulty, at best, and disingenuous, at worst, for Section 111(d) states unambiguously that it may not be employed to regulate power plants that already are being governed by Section 112 of the Clean Air Act, which regulates hazardous pollutants. This reading of the intentions behind the Clean Air Act has been supported by the U.S. Supreme Court twice since 2008. In one of these court cases, the EPA itself confessed that the Clean Air Act "appears by its terms to preclude" the Clean Power Plan. Moreover, in testimony before the U.S. Senate, EPA administrator Gina McCarthy identified the Clean Power Plan as "an investment opportunity" that is not truly "about pollution control." Hence, Tribe warns that the EPA is "circumventing the checks Congress deliberately built into the Clean Air Act and distorting it to justify a wide-ranging carbon rule in a way Congress never intended or authorized."

### What Is To Be Done?

In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to the federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. *Sometimes they have to act like it.* ~*NFIB v. Sebelius* (Supreme Court decision on ObamaCare, 2012; emphasis supplied)

Rightly alarmed over the looming threat that the CPP poses for individual liberty, opponents of the plan have identified five strategies:

1. Legislation at the state level that both blocks state agencies from cooperating with the plan through the submission of its required "State Implementation Plan" and places greater state controls on funds received from the federal government by all political subdivisions of the state.
2. The crafting of Interstate Compacts to give national force to each participating state's objections to the plan.
3. State legislative resolutions laying down a line beyond which the EPA may not cross.
4. Calling for a constitutional convention to address the CPP in particular and federal encroachment in general, through the states' power to call a constitutional convention under Article V of the U.S. Constitution.
5. Taking no action now, with the expectation that EPA's illegitimate power-grab will be ruled unconstitutional when legal challenges work their way up to the Supreme Court several years from now.

All five of the above strategies are currently being considered and/or advanced by Texas' 84th Legislature.

The first strategy—blocking Texas agencies from submitting implementation plans and giving states greater control over federal funds received by the state's political subdivisions—seeks to address the fact that, in recent years, federal funds have come with stipulations, mandates, and consequences designed to manipulate state and local governments to conform to the will of the federal government. Since the New Deal, states have lost a significant amount of power to the federal government through bargaining that takes the form of a *quid pro quo*: a trade of control for money. As the federal government increased regulations and continued to disburse funds to states, it slowly gained historically unprecedented control of the states through both regulatory jurisdiction and the increased deference of financially dependent states.

In this light, the Texas Legislature is considering legislation to prevent the EPA from further abusing its power. Under the CPP proposal, the deadline for Texas' submission of its State Implementation Plan (SIP) is June 2016. The Legislature is looking at measures that will give Texas greater leverage in negotiating the SIP with the EPA. Legislation being considered would prohibit any state agency from adopting rules or submitting a state plan to comply with the CPP that would in turn give the EPA jurisdiction over any person or enterprise not currently subject to Section 111(d) of the Clean Air Act.

In a kindred spirit, measures also being considered by the 84th Legislature would require that, prior to any of the state's political subdivisions accepting federal funds that may have an impact on the state's budget, the political subdivision must report the funds to the Legislative Budget Board, the Governor, and the Comptroller of Public Accounts. While this measure does not prohibit the acceptance of federal funds by political subdivisions, it requires review and approval from three separate offices. If various political subdivisions are tempted to accept co-

continued >>

Total annual cost of power and gas in Texas will grow to more than \$80 billion in 2020. This represents a:

**54% increase**  
→

in household  
electricity & gas bills



Source: Balanced Energy for Texas.org

And ultimately...

A \$1,060 increase in average annual household power and gas bills, with power bills increasing almost \$750 and gas heating bills rising over \$310.

receive federal funds, these offices can help make decisions that prioritize the well-being of the entire state.

Similarly, legislation is being considered in Texas that would require the Attorney General to review the State Implementation Plan for the CPP. The CPP is biased toward renewable energy and strongly discourages fossil fuels. In a state such as Texas, where the economy and livelihoods of the citizens are dependent on the flourishing fossil-fuel industry, these regulations and requirements would cripple the economic growth and prosperity of the entire state. Moreover, proposals such as the CPP fulfill the objectives of economically uncompetitive states. These uncompetitive states have submitted to federal over-regulation in favor of federal funds and aid, and thus now exist in substantial dependency on the federal government. As a result, citizens and businesses in these overregulated states have flocked to states with fewer regulations. Not surprisingly, these states are much more economically competitive, and Texas is leading the charge with 2.1 million jobs added in the last 15 years. If Texas allows these regulations to prevail here, we could quickly become as uncompetitive as the states currently losing business and economic opportunities to us.

To restore common sense—and, more importantly, the primacy of individual liberty—to

our regulatory environment, the Attorney General would be authorized to review the SIP, rendering his assessment based on the SIP's conformity to the U.S. Constitution, federal law, the Texas Constitution, and state law.

**The second strategy under consideration in the 84th Legislature, the Clean**

**Power Plan Interstate Compact**, seeks to address the fact that, individually, the voices of the states can be easily ignored. But, with many states formally articulating identical concerns, it would be much more difficult for Washington, D.C. to dismiss them. At least 12 states have introduced or enacted legislation, and 20 states have adopted resolutions, designed to push back against EPA greenhouse gases regulations such as the Clean Power Plan. More states are expected to follow suit. Texas is considering approving an Interstate Compact that would ensure that member states would have primary authority and responsibility over emissions of greenhouse gases.

**The third strategy, the Clean Power Plan Resolution**, would admonish the federal government that, by dictating specific regulations for energy generation, it has reached beyond its rightful powers. The CPP would dictate to state governments, despite its lack of direct Congressional approval, and its effect would be to close coal-fired power plants in favor of natural gas or renewable energy. Doubtless, the CPP would carry severe economic consequences for Texas: job loss as well as the undermining of Texas' free-market approach. The Resolution would demonstrate to the federal government that Texas is deeply committed to protecting its rights under the Tenth Amendment.

**“The Clean Power Plan would carry severe economic consequences for Texas: job loss as well as the undermining of Texas' free-market approach.”**

**The fourth strategy—calling for a convention of the states to address the Clean Power Plan** in particular and federal encroachment in general—is also under consideration in the Texas Legislature. At present, there are three prominent movements nationwide supporting an Article V convention of the states. While each differs in its process and content, all share what matters most—opposition to federal encroachment on the states and on the liberty and economic security of each state's citizens. Accordingly, the Center for Tenth Amendment Action believes that it is good public policy for the State of Texas to unite with its sister states in deploying all viable and constitutional means of reviving the principles of federalism. The Center believes that all well-crafted, state-initiated amendment efforts should be advanced alongside other viable and constitutional efforts to remedy federal overreach and irresponsibility.

**Fifth, there are some who, although they oppose the Clean Power Plan and federal overreach generally, hold that the best strategy is to take a wait-and-see attitude** in the case of the Clean Power Plan. They believe that the transparent unconstitutionality of the Clean Power Plan will bring its demise in the Supreme Court in the

next few years. The Center for Tenth Amendment Action worries that such an approach is based on the notion that time is on the side of the states and their citizens. It is not. Indeed, as this essay goes to press, coal-fired power plants are already shutting down, moving out of the country, or scrapping their strategic plans as a result of the EPA's proposed rule. Hence, even if the Supreme Court should strike down the CPP in the future, by then it will be too late: the EPA's overriding purpose—decimating coal power and the jobs it provides—will already largely have been accomplished.

Mindful of this danger, the Center for Tenth Amendment Action agrees with John Dickinson's 1788 pronouncement:

[T]he government of each state is, and is to be, sovereign and supreme in all matters that relate to each state only. It is to be subordinate barely in those matters that relate to the whole; and *it will be their own faults*, if the several states suffer the federal sovereignty to interfere in the things of their respective jurisdictions. (Emphasis supplied)

TPPF's Center for Tenth Amendment Action believes that the unconstitutional encroachments on the states and their citizens will not prevail through the states' "own faults." Across the country, a storm is rising in opposition to federal overreach. This opposition will succeed because states are taking it upon themselves to reclaim our Constitution and, with it, our liberties. ★



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