



# **Progressive Preemption: How the Defense Production Act Can Override Corporate Extraction, Boost Worker Power, and Expedite the Clean Energy Transition**

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# EXECUTIVE SUMMARY

This issue brief explores how the executive branch could use the Defense Production Act (DPA) to accelerate clean energy build-out, with or without the cooperation of Congress and subfederal authorities. In particular, we conduct a legal analysis of a rarely noticed element of the DPA Title III's authorities that allow industrial policy projects to be carried out "without regard to the limitations of existing law"—whether state, local, or federal. Reviewing the history of this provision and similar provisions in other statutes that have been used to override other laws, we outline how the DPA could instead be used to override corporate extraction, boost worker power, and expedite the clean energy transition. In particular, we look at the potential of the DPA to override Delaware state corporate law, federal regulations governing stock buybacks, and federal and state restrictions on labor organizing. Any or all of these uses could accelerate the build-out of clean industrial policy in a more sustainable and equitable manner.

## INTRODUCTION

In the weeks after the passage of the Inflation Reduction Act (IRA) and the midterm elections, one potential area of bipartisan cooperation was floated by some pundits: permitting reform for energy projects.<sup>1</sup> The suggestion is understandable: Many Republicans and some Democrats would like it to be easier for fossil fuel projects to be built, and many Democrats would like it to be easier for clean energy projects to be built. Indeed, rapid build-out of clean energy infrastructure is necessary for the US to meet its climate goals, and holds political appeal for those attracted to the idea of a "liberalism that can build."<sup>2</sup>

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<sup>1</sup> Josh Siegel and Kelsey Tamborrino, "Republicans Plan an Energy Agenda Designed to Keep Democrats on Their Heels," *Politico*, November 1, 2022, <https://www.politico.com/news/2022/11/01/house-gop-2023-energy-bill-00063739>. For an outline of a proposal from Sen. Joe Manchin (D-WV), see [https://www.manchin.senate.gov/imo/media/doc/energy\\_permitting\\_provisions.pdf?cb](https://www.manchin.senate.gov/imo/media/doc/energy_permitting_provisions.pdf?cb). As of publication time of this issue brief, this debate appears to be kicked to the next session of Congress. See Emma Dumain, "Manchin's Last-Gasp Permitting Effort Fails," *E&E News*, December 7, 2022, <https://www.eenews.net/articles/manchins-last-gasp-permitting-effort-fails/>.

<sup>2</sup> Ezra Klein, "Opinion | What America Needs Is a Liberalism That Builds," *New York Times*, May 29, 2022, sec. Opinion, <https://www.nytimes.com/2022/05/29/opinion/biden-liberalism-infrastructure-building.html>.

Yet it is important to think expansively about the sum total of barriers to clean energy build-out. While it is true that policies like the National Environmental Policy Act (NEPA) can slow down projects, recent academic evidence suggests that this effect is limited for the vast majority of projects, and may in fact help streamline and expedite the regulatory process in some instances.<sup>3</sup> And in addition to thinking through ways to improve environmental review barriers to infrastructure build-out, we should also consider other important factors that can impede sustainable economic and energy development, including corporate short-termism and anti-union agitation.

This issue brief explores one tool that can expedite projects with or without cooperation from Congress and state and local government: the Defense Production Act (DPA). In recent years, the DPA has emerged as a significant industrial policy lever at the president's disposal. In the first two years of the COVID-19 pandemic, the Trump and Biden administrations invoked the law to compel manufacturers to prioritize production of ventilators, masks, and other critical health-care goods. But the DPA can also be a powerful tool to fund and expedite clean energy in the United States,<sup>4</sup> through its Title III authority for the federal government to make investments and launch projects in critical industries.

DPA powers can be supercharged by the DPA's expansive command that certain Title III projects (namely those related to advance market commitments) be advanced "without regard to the limitations of existing law."<sup>5</sup> This enables the president and executive agencies

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<sup>3</sup> John C. Ruple, Jamie Pleune, and Erik Heiny, "Evidence-Based Recommendations for Improving National Environmental Policy Act Implementation," *Columbia Journal of Environmental Law* 47, no. S (April 11, 2022), <https://doi.org/10.52214/cjel.v47iS.9479>. John C. Ruple, Michael J. Tanana, and Merrill M. Williams, "Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of Over 600 Critical Habitat Rules," *Ecology Law Quarterly* 46, no. 3 (2020), <https://www.ecologylawquarterly.org/print/does-nepa-help-or-harm-esa-critical-habitat-designations-an-assessment-of-over-600-critical-habitat-rules/>. Smart targeted reform would seek to retain safeguards against harmful fossil fuel development, while streamlining the permitting process for the clean energy development needed to meet our decarbonization goals. For ideas on process reforms that maintain some of what works about NEPA, see Philip Rossetti, "What Policies Could Make It Into Permitting Reform" (Washington, DC: R Street, August 22, 2022), <https://www.rstreet.org/2022/08/22/what-policies-could-make-it-into-permitting-reform/>. See also Joel Dodge, "Why Liberals Should Embrace Permitting Reform," *Washington Monthly*, September 23, 2022, <http://washingtonmonthly.com/2022/09/23/why-liberals-should-embrace-permitting-reform/>.

<sup>4</sup> Todd N. Tucker, "Priorities and Allocations: How the Defense Production Act Allows Government to Mobilize Industry to Ensure Popular Well-Being" (New York: Roosevelt Institute, January 2, 2022), <https://rooseveltinstitute.org/publications/priorities-and-allocations-how-the-defense-production-act-allows-government-to-mobilize-industry-to-ensure-popular-well-being/>.

<sup>5</sup> Defense Production Act of 1950, 50 U.S.C. §4533(b) (2022).

to override laws that would otherwise hinder strategically important projects, including clean energy projects.<sup>6</sup> This power to override other laws can be used in three notable ways. First, it can be invoked to preempt federal procedural requirements and state contract laws that limit the government's ability to enter into agreements quickly and effectively. Second, it can be employed to make sure that government spending actually serves the goal of enabling long-term productive capacity investments in critical sectors like renewable energy generation and transmission. DPA advance market commitments could preempt corporate laws and securities regulations that prioritize short-term shareholder gains over such long-term investments. Third, DPA preemption power can be used to ensure that public investments are aligned with public purpose, steering resources to those firms and institutions which are effective partners in the vision for a "just transition." (Such aggressive use of the DPA could pose democracy concerns—a challenge we return to in the conclusion.)

Thanks to the IRA, the administration currently has more than \$500 million in funds at its disposal to dispense through the DPA.<sup>7</sup> With a divided Congress unlikely to enact any additional major climate legislation, the DPA is an important well of possible executive action to continue advancing a decarbonization agenda—and authority to stretch those funds farther by overriding other costly and burdensome legal impediments.<sup>8</sup>

In the sections that follow, we provide policy background on the DPA, and illustrations of ways the preemption power could be deployed to advance both the substantive goals of IRA and DPA investments and a broader vision of inclusive economic growth. After concluding remarks, an appendix provides legal analysis of the DPA's power to preempt state and federal laws.

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<sup>6</sup> Heidi M. Peters et al., "2022 Invocation of the Defense Production Act for Large-Capacity Batteries: In Brief" (Washington, DC: Congressional Research Service, May 27, 2022), <https://crsreports.congress.gov/product/pdf/R/R47124>.

<sup>7</sup> US Department of Energy, "Biden-Harris Administration Announces \$250 Million Investment From Inflation Reduction Act For Domestic Heat Pump Manufacturing," November 2, 2022, <https://www.energy.gov/articles/biden-harris-administration-announces-250-million-investment-inflation-reduction-act>.

<sup>8</sup> For further ideas on how to leverage funds for the DPA and IRA, see Arnab Datta et al., "Seven Ways the Executive Branch Can Turbocharge Green Industrial Policy" (Washington, DC: Roosevelt Institute, August 18, 2022), <https://rooseveltinstitute.org/publications/seven-ways-the-executive-branch-can-turbocharge-green-industrial-policy/>.

# SECTION 1: BACKGROUND ON THE DPA

Congress first passed the Defense Production Act (DPA) on September 8, 1950,<sup>9</sup> although many of the authorities it conferred had precedents in the World War I and II eras, including the Second War Powers Act of 1941 of the Roosevelt administration. In addition to mobilizing national defense, part of the impetus behind the DPA was to ease inflation and supply constraints in the domestic economy that emerged as conflicts flared abroad. In its midyear economic report, President Truman's Council of Economic Advisers told Congress that critical commodities had seen sharp price increases in 1950, and that "action is needed now to direct the use of some commodities essential to the national defense, and in some cases to increase the output . . . to reduce inflationary pressures."<sup>10</sup> The DPA was Congress's response to this presidential call to action. In the report of the Senate Committee on Banking and Currency accompanying the DPA, the committee stated that "Congress would be remiss in its duty if it did not provide the President with adequate authority to meet these potentially serious inflationary pressures."<sup>11</sup> The committee further specified that Title III of the DPA in particular was intended to "attack . . . various types of bottlenecks" that "act as effective limits on the supply of specific essential commodities."<sup>12</sup> Congress has reauthorized the DPA over 50 times, most recently in 2019. The current authorization is due to expire in 2025.<sup>13</sup>

While the DPA sounds to laypersons' ears like it would be narrowly related to military concerns, that has long since ceased to be an accurate depiction. Since the 1970s, maximizing domestic energy production has been a mandate. After 9/11, emergency preparedness was added as an objective. And in 2009, Senator Sherrod Brown (D-OH) and former senator Chris Dodd were instrumental in adding in as mandates maximizing the domestic supply of renewable energy and permitting the government to engage in direct public production of energy.<sup>14</sup> Including all of the amendments over the years, today's DPA defines "national defense" as:

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<sup>9</sup> PL 81-774: 64 Stat. 798, <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/64/STATUTE-64-Pg798b.pdf>.

<sup>10</sup> Council of Economic Advisers, "The Midyear Economic Report of the President," at 9 (July 1950), <https://fraser.stlouisfed.org/title/economic-report-president-45/midyear-report-1950-8119>.

<sup>11</sup> S. Rep. No. 81-2250, at 5 (1950).

<sup>12</sup> S. Rep. No. 81-2250, at 16-17 (1950).

<sup>13</sup> Michael H Cecire and Heidi M Peters, "The Defense Production Act of 1950: History, Authorities, and Considerations for Congress" (Washington, DC: Congressional Research Service, March 2, 2020).

<sup>14</sup> Sebastian Sprenger, "Bill Would Repeal Federal Energy 'Production' Ban," *Inside the Pentagon*, September 24, 2009.

[P]rograms for military and **energy production or construction**, military or critical infrastructure assistance to any foreign nation, homeland security, **stockpiling**, space, and **any directly related activity**. Such terms include **emergency preparedness activities** conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 et seq.] and **critical infrastructure protection and restoration**" (emphasis added).<sup>15</sup>

Note that "critical infrastructure" encompasses 16 sectors, from communications to critical manufacturing, that make up a large share of the economy. The preamble to the DPA identifies still further goals, including "to support continuing improvements in industrial efficiency and responsiveness," to "produce internationally competitive products and operate profitably while maintaining adequate research and development," to support "efficiency and competition," and to "encourage the geographic dispersal of industrial facilities in the United States." In short, the breadth of these provisions means that the Defense Production Act could just as well be called the "Important Production Act."

The DPA contains dozens of different authorities. In this issue brief, we focus on those under Section 303 of the act, which include:

To create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, the President may make provision—

(A) for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale;

(B) for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials;

(C) for the development of production capabilities; and

(D) for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies—

(i) from Government-sponsored research and development to commercial applications; and

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<sup>15</sup> Defense Production Act, 50 U.S. Code § 4552(14).



(ii) from commercial research and development to national defense applications.<sup>16</sup>

Let's take these subsections one at a time. The first authority, under subsection (A), allows for what are called "advanced market commitments" (AMCs). In recent years, the government has used AMCs to support industries such as graphite fiber, gallium arsenide, COVID-19 vaccines, and more.<sup>17</sup> Here's how the DPA could be used for green products and energy. The government could announce that it will buy a specified amount of solar panels or green steel, either presently or by 2030 (or some other date in the future), at a specified price, if private-sector buyers can't be found. This last feature—which could be called "buyer of last resort"—is notable because it means that the government may not end up needing to spend any money at all if there are willing buyers on private markets. AMCs are the most likely—but perhaps not only—way that the IRA's DPA projects would be put to use. The climate law appropriates \$500 million for clean energy manufacturing under the DPA, half of which the Department of Energy has determined it will use for heat pump manufacturing.<sup>18</sup> The other half might be used for transformers and electric grid components; solar photovoltaics; insulation materials; and electrolyzers, platinum group metals, and fuel cells for clean hydrogen, which were subjects of June 2022 announcements.<sup>19</sup> Alternatively, other reports suggest the balance could be used by the Department of Defense for critical mineral production.<sup>20</sup>

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<sup>16</sup> Section 303 of the DPA also includes authority to install government-owned equipment in private facilities. Those authorities are explored in Tucker 2022 (see fn. 4).

<sup>17</sup> US Department of Defense (DOD), "Defense Production Act Title III: Advancing the Industrial Base to Defend the Nation" (Washington, DC: Department of Defense, 2011), [http://www.surmet.com/pdfs/news-and-media/Title\\_III%202012%20Brochure.pdf](http://www.surmet.com/pdfs/news-and-media/Title_III%202012%20Brochure.pdf). US Government Accountability Office (GAO), "Defense Production Act: Foreign Involvement and Materials Qualification in the Title III Program" (Washington, DC: Government Accounting Office, 1994), <https://apps.dtic.mil/sti/pdfs/AD1173362.pdf>. Jo Ann McDonald, "DoD Funds Provide Timely Stimulus for US GaAs Producers," *III-Vs Review* 8, no. 1 (1995): 26–30. Chad P. Bown, "COVID-19 Vaccine Supply Chains and the Defense Production Act," Working Paper (Washington, DC: Peterson Institute for International Economics, June 2022), <https://www.piie.com/sites/default/files/documents/wp22-9.pdf>.

<sup>18</sup> "Biden-Harris Administration Announces \$250 Million Investment From Inflation Reduction Act For Domestic Heat Pump Manufacturing," Department of Energy, November 2, 2022, <https://www.energy.gov/articles/biden-harris-administration-announces-250-million-investment-inflation-reduction-act>.

<sup>19</sup> "Defense Production Act: Request for Information," Office of Manufacturing and Energy Supply Chains, Department of Energy, 2022, <https://www.energy.gov/mesc/defense-production-act-request-information>.

<sup>20</sup> While no announcement to this effect has been published in the Federal Register or included in the IRA text itself, a fact sheet accompanying the announcement of the Schumer-Manchin deal appears to split the \$500 million into heat pumps and critical minerals processing. See "Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022," US Senate Democrats, 2022,

The second authority—in subsection (B), to promote mining—is not necessarily attached to a funding mechanism. This may be the provision at issue when the administration invoked Section 303 in March 2022 for mining for batteries,<sup>21</sup> and/or the basis for partnerships that the Defense Department is exploring with miners in Canada.<sup>22</sup> The third and fourth authorities—to develop production capacities in subsection (C) and engage in technology transfer in subsection (D)—are even more open-ended. While we do not explore the last three authorities in this issue brief, it is conceivable that they could open the door to a wider range of projects than just AMCs to benefit from DPA flexibilities.

## SECTION 2: THE DPA CAN OVERRIDE OTHER LAWS THAT CURRENTLY DELAY CLEAN ENERGY DEVELOPMENT

As noted in the introduction, the DPA has broad authorization for the executive branch to make advance market commitments “without regard to the limitations of existing law.” What does this mean? As we show in the appendix, “without regard” clauses—much like similar “notwithstanding” clauses in other statutes—empower policymakers to get around many legal limitations that would otherwise apply, provided the actions they take are consistent with the purpose of the underlying statute. The Biden administration has cited such statutory authorization as grounds for its student loan cancellation plan, while the Supreme Court has stated that courts “generally have ‘interpreted similar ‘notwithstanding’ language . .

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[https://www.democrats.senate.gov/imo/media/doc/summary\\_of\\_the\\_energy\\_security\\_and\\_climate\\_change\\_investments\\_in\\_the\\_inflation\\_reduction\\_act\\_of\\_2022.pdf](https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf).

<sup>21</sup> “Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended,” Executive Office of the President, April 6, 2022,

<https://www.federalregister.gov/documents/2022/04/06/2022-07421/presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended>. Notably, for our purposes, the executive order specifies “Nothing in this determination shall be construed to waive or supersede the requirement for mines or other industrial facilities to comply with all Federal and State permitting requirements and environmental health and safety laws.” Note that similar language was not included in the June 2022 announcements. See e.g., “Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, on Electrolyzers, Fuel Cells, and Platinum Group Metals,” Executive Office of the President, June 9, 2022, <https://www.federalregister.gov/documents/2022/06/09/2022-12585/presidential-determination-pursuant-to-section-303-of-the-defense-production-act-of-1950-as-amended>.

<sup>22</sup> Alexander Panetta, “U.S. Military Weighs Funding Mining Projects in Canada amid Rivalry with China | CBC News,” CBC, November 13, 2022, <https://www.cbc.ca/news/world/u-s-military-mining-projects-canada-1.6649522>.

. to supersede all other laws, stating that “[a] clearer statement is difficult to imagine.”<sup>23</sup> In other statutory contexts, courts have blessed use of these workarounds in cases involving projects ranging from merchant marine vessels to bridge development to national monument siting. In the clean energy context, the preambular portions of the DPA provide ample ammunition to justify action as consistent with the DPA’s policy goals. Indeed, as we show in the appendix, Congress intended for these kinds of actions by designing the DPA to give the president expansive powers to act swiftly to secure critical resources when it was passed in 1950, and expanding it still further in the years since. In one case, the government successfully invoked the DPA’s “without regard” language to argue that DPA projects supersede contrary state law. The US Court of Appeals for the Eighth Circuit agreed, recognizing that because the government entered into a contract with a mining company through the DPA, its “rights under its contract lawfully entered into can not be affected or limited by provisions of state law.”<sup>24</sup>

Looking forward, there are three notable ways that DPA agencies can use this authority to expedite the clean energy transition. First, they can preempt other laws to make it easier to enter into and enforce the terms of DPA contracts. Second, agencies can set requirements for counterparty firms’ behavior in order to ensure that investments under the DPA get the government the most bang for its buck. Third, agencies can direct DPA funds to ensure that public expenditures are aligned with a broader vision of public purpose—beyond the confines of the specific resiliency needs that the DPA transaction addresses.

This section gives examples of the ways that DPA agencies can use their preemption authority to serve these three goals. The discussion is meant to be illustrative, not comprehensive, and we make no definitive claim that any particular preemption would ultimately stand up to judicial scrutiny. Rather, we intend to give an overview of the expansiveness and flexibility of DPA project authority, highlighting how it can be used for creative problem-solving.

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<sup>23</sup> *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (citing *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (quoting *Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989)).

<sup>24</sup> *United States v. Latrobe Const. Co.*, 246 F.2d 357 (8th Cir. 1957), *cert denied*, 355 U.S. 890 (1957).

## A. Overriding Laws to Enable Easier Transactions

When the federal government enters into contracts with private parties for the provision of goods and services, it generally has to follow a detailed set of regulations concerning procurement.<sup>25</sup> For example, contractors must be selected through a competitive bidding process.<sup>26</sup> They must generally refrain from manufacturing their own materials.<sup>27</sup> If contractors are engaged in construction work, they must be sufficiently bonded, but otherwise, the government generally cannot require contractors to obtain performance bonds.<sup>28</sup> These regulations often serve important purposes, helping to prevent misuse of government funds or awarding contracts to firms that have engaged in malfeasance. But some provisions may stand in the way of using DPA authorities to get the government what it needs—and fast. In these cases, agencies can use the preemption power in the DPA to override these laws.

Likewise, the preemption power can be used to enable the federal government to employ whatever financing mechanism best serves its purposes. Federal rules generally limit agencies' ability to advance payment before work is completed, but this requirement could be overridden where necessary in the DPA context.<sup>29</sup> For example, the federal government could advance funds to support critical minerals exploration, taking a security interest in resulting mineral extraction. Likewise, the federal government could preempt any adverse state contract law that might limit a company's ability to secure private financing to meet DPA allocation orders. For instance, it could treat the DPA commitment as a re-assignable purchase order for state law purposes, potentially allowing the recipient firm to use the commitment as loan collateral. By the same token, if the federal government is worried that a loan guarantee recipient might default, it could preempt federal bankruptcy law to secure a "super-priority" lien on all of the firms' assets—placing the government ahead of other secured creditors in the bankruptcy distribution.

Finally, DPA preemption authority can be used to skirt other procedural barriers to transactions under the statute. The DPA explicitly preempts the procedural requirements of

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<sup>25</sup> See generally Federal Acquisition Regulation (FAR), codified at 48 C.F.R. 1 *et seq.*

<sup>26</sup> FAR Part 6.

<sup>27</sup> FAR Part 8.

<sup>28</sup> FAR Part 28.

<sup>29</sup> See Bateman et al., *Federal Procedure, Lawyers Edition*, § 39.701.

notice-and-comment rulemaking under the Administrative Procedure Act for regulations implementing the DPA,<sup>30</sup> and the procedures that agencies must ordinarily follow in order to set up advisory committees.<sup>31</sup> It stands to reason that the “without regard” clauses were thus intended to preempt other federal, state, and local procedural requirements as well. The National Environmental Policy Act, for example, lays out a series of steps that agencies must follow to assess the environmental risks of many projects undertaken using federal funds. While this planning exercise can serve an important information-gathering function,<sup>32</sup> in cases where it would cause an unacceptable procedural delay to clean energy projects, DPA preemption authority could be used to override or streamline it.

## B. Overriding Laws to Ensure Maximum Effectiveness

Next, preemption power can be invoked to ensure that expenditures under the DPA are used efficiently, giving the government the most bang for its buck. As we have described elsewhere, DPA authorities can be used to strengthen domestic productive capacity in key sectors and make supply chains better able to withstand economic shocks.<sup>33</sup> Advanced market commitments, in particular, are not simply a tool to secure key resources for the government in the future, but to encourage firms to invest in their capacity to *supply* such resources in the medium term to a wide range of purchasers. But while the government may want recipients of DPA funds to use the money for capital expenditures, firms may have other objectives in mind. Indeed, over the last year, CEOs of many publicly traded firms awash with cash have emphasized the need to engage in “capital discipline” to return this money to shareholders,

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<sup>30</sup> 50 U.S.C. § 4559(a). Note that such regulations are still subject to judicial review as to their reasonableness; *see* 5 U.S.C. § 701.

<sup>31</sup> 50 U.S.C. § 4558(n); *see also* Federal Advisory Committee Act, Pub. L. 92—463, 86 Stat. 770.

<sup>32</sup> *See, e.g.,* John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENV'T. L. 39 (2016) (finding that environmental impact statements result in “final decisions that are substantially less impactful on the environment when compared to initially proposed projects”); Kevin DeGood, *The Benefits of NEPA: How Environmental Review Empowers Communities and Produces Better Projects*, CENTER FOR AMERICAN PROGRESS (Jan. 16, 2018), <https://www.americanprogress.org/article/benefits-nepa-environmental-review-empowers-communities-produces-better-projects/>.

<sup>33</sup> *See* Arnab Datta et al., “Seven Ways the Executive Branch Can Turbocharge Green Industrial Policy” (Washington, DC: Roosevelt Institute, August 18, 2022), <https://rooseveltinstitute.org/publications/seven-ways-the-executive-branch-can-turbocharge-green-industrial-policy/>.

rather than investing in capacity-building.<sup>34</sup> The federal government can use DPA preemption power to challenge this paradigm.

First, the government can prevent companies from sending their spare cash (including DPA funds) to shareholders by limiting their ability to pay dividends during the duration of the government's contract, and by preempting the federal "safe harbor" for stock buybacks for publicly traded firms.<sup>35</sup> Stock buybacks are a corporate finance transaction in which corporations repurchase their own previously issued shares on the open market, which increases the price of remaining shares and thus benefits those who sell their shares after the stock price has been inflated, serving to manipulate the market price of the company's stock and benefit corporate insiders.<sup>36</sup> The SEC regulation governing stock buybacks puts putative limits in place for the volume and timing of stock buybacks, but explicitly removes liability even if companies exceed the already-excessive limits.<sup>37</sup> The DPA could preempt this regulation so that companies engaged in DPA-related production could not engage in a virtually unlimited amount of stock buybacks. While such preemption would not explicitly make stock buybacks impermissible, it would make companies that engaged in a high volume potentially liable for market manipulation under the securities laws. And given the questionable economic value of stock buybacks to begin with, inducing companies to preemptively limit their use of such transactions would be a positive development.

More generally, agencies acting under DPA authority could preempt state corporate law where it is adverse to the goals of building domestic industrial capacity.<sup>38</sup> The majority of large US corporations are incorporated in the state of Delaware, and bound by its corporate law. In particular, Delaware law requires that corporate board fiduciary duties of care and loyalty be

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<sup>34</sup> See, e.g., Groundwork Collaborative, "Q3 2022 Corporate Profiteering Findings" (Nov. 11, 2022), <https://groundworkcollaborative.org/wp-content/uploads/2022/10/RESEARCH-Q3-2022-Corporate-Profiteering-Findings.pdf>.

<sup>35</sup> The safe harbor is granted by Securities and Exchange Commission Rule 10b-18 (codified at 17 C.F.R. § 240.10b-18).

<sup>36</sup> See Lenore Palladino, *Do Corporate Insiders Use Stock Buybacks for Personal Gain?*, International Review of Applied Economics 34(2), no. 2 (2020): 152–74.

<sup>37</sup> See Lenore Palladino, *The \$1 Trillion Question: New Approaches to Regulating Stock Buybacks*, Yale Journal on Regulation Bulletin 36 (2019): 89–106.

<sup>38</sup> See Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, Law and Contemporary Problems: Case Studies in Conservative and Progressive Legal Order 67(4), no. 4 (2004): 135–45.

directed toward maximizing shareholder value.<sup>39</sup> This dictum has meant that publicly traded corporations have prioritized using corporate net income for shareholder payments (like dividends and stock buybacks) as opposed to investment in their workforce, sustainability, and research and development.<sup>40</sup> And this focus has stymied innovation and resiliency in critical industries such as semiconductor manufacturing.<sup>41</sup> DPA agencies could limit firms from returning DPA funds to their shareholders through contractual limits on payment of dividends. But they could also head off judicial challenges to these contracts by *preempting lawsuits on state corporate law grounds* by shareholders concerned with maximizing short-term investment returns. DPA preemption can thus ensure that corporations can engage in the investments necessary to build long-term capacity—such as renewable energy transmission infrastructure—without fear of lawsuits from shareholders.

## C. Overriding Laws to Achieve Public Purpose

Third, DPA preemption power can be used to direct expenditures under the statute to institutions that serve broader goals of equity and inclusion. Federal rules set requirements for contractors to pay a minimum wage of \$15 per hour to all employees, engage in affirmative efforts to increase hiring of women and people of color, and meet other labor and antidiscrimination standards.<sup>42</sup> But DPA agencies can also set *higher* minimum standards for funding recipients by contract, and prioritize partnerships with high-road firms already engaging in such practices. To the extent that competitive bidding regulations limit the government's ability to do so, those regulations can be preempted.

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<sup>39</sup> The shareholder primacy framework for corporate governance is an incorrect understanding of how corporations produce and mistakes corporations as nexus of contracts rather than social institutions, but it remains the law of Delaware. For more discussion of shareholder primacy, see: Lenore Palladino and Isabel Estevez, *The Need for Corporate Guardrails in Industrial Policy*, Roosevelt Institute (2022), <https://rooseveltinstitute.org/publications/the-need-for-corporate-guardrails-in-us-industrial-policy/>. See also Leon Strine Jr., *Corporate Power is Corporate Purpose I: Evidence From My Hometown*, Oxford Review of Economic Policy 33(2), no. 2 (2017): 176–87 for an in-depth discussion of debates within corporate law scholars about the meaning of Delaware corporate law.

<sup>40</sup> Lenore Palladino and William Lazonick, *Regulating Stock Buybacks: The \$6.3 Trillion Question*, International Review of Applied Economics (2022): 1–25.

<sup>41</sup> William Lazonick and Matt Hopkins, *Why the Chips Are Down: Stock Buybacks and Subsidies in the U.S. Semiconductor Industry*, INET Working Paper no. 127 (2021), [https://www.ineteconomics.org/uploads/papers/WP\\_127-Lazonick-and-Hopkins.pdf](https://www.ineteconomics.org/uploads/papers/WP_127-Lazonick-and-Hopkins.pdf).

<sup>42</sup> See Exec. Order 14026, “Increasing the Minimum Wage for Federal Contractors,” (Apr. 27, 2021); *National Law Review*, “A Guide to Labor and Employment Obligations for Federal Contractors” (Feb. 13, 2020), <https://www.natlawreview.com/article/guide-to-labor-and-employment-obligations-federal-contractors>.



Similarly, agencies carrying out DPA projects can preempt federal and state laws where they act as a barrier to building worker power. In the 1990s, for example, President Clinton tried to use his power under the federal procurement statutes to prevent contractors from bringing on permanent replacements during a union strike. The DC Circuit struck down this action on the grounds that it conflicted with (and was thus preempted by) the National Labor Relations Act (NLRA).<sup>43</sup> But the DPA could be used to override the preemptive power of the NLRA at the federal level, allowing the administration to impose additional labor law requirements by executive order on firms receiving funds under the DPA. Similarly, the Supreme Court has held that union organizing activity protected by the NLRA is a field of exclusive federal regulation; states generally cannot pass laws that give workers additional rights or causes of action on top of federal law.<sup>44</sup> But DPA authorities could be used to overrule the preemption of state law in the NLRA, allowing states to give workers at DPA-funded firms additional rights.

By the same token, preemption authority in the DPA can be used to give preference to worker-run and worker-owned organizations—for example, a cooperative of solar-panel installation workers. Generally, when small businesses that had previously received preference as federal contractors became employee-owned, they lost their preference status (though a pilot program was established by Section 874 of the NDAA in 2021 to remove this barrier).<sup>45</sup> The DPA can override the challenges that employee-owned small businesses face and enable federal contractors that are employee-owned and worker-run to maintain their preferences in government contracting.

Federal antitrust law presents challenges to workers seeking to coordinate their activities through organizations without centralized ownership or control.<sup>46</sup> But the DPA provides an

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<sup>43</sup> Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1338 (D.C. Cir. 1996).

<sup>44</sup> See San Diego Building Trades v. Garmon, 359 U.S. 236 (1959) (prohibiting state regulation of activities protected by the NLRA); Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) (holding that states may not regulate organizing activities which Congress intentionally left unregulated). See generally Curtis Mack et al., *The Fundamentals of Labor Law Preemption*, Presentation before the American Bar Association Section of Labor and Employment Law (Nov. 2020), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/2020/section-conference/materials/fundamentals-of-federal-labor-preemption.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/fundamentals-of-federal-labor-preemption.pdf); Moshe Z. Markovits, *The Way Forward for Labor Is Through the States*, The American Prospect (Sep. 1, 2017), <https://prospect.org/labor/way-forward-labor-states/>.

<sup>45</sup> See Kaufman & Canoles, “ESOP Client Alert”, January 7, 2022, <https://www.jdsupra.com/legalnews/esop-client-alert-game-changer-100-esop-9614146/>.

<sup>46</sup> See Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 UCLA Law Review 4, 33 (2020).



explicit affirmative defense against antitrust law violations for organizations coordinating through voluntary agreements to implement DPA orders.<sup>47</sup> For workers coordinating outside of a corporate structure who work as sole proprietors or independent contractors, or who are coordinating to improve their rights as workers, the DPA already preempts state antitrust laws and can ensure robust protections for such productive coordination.

Finally, DPA transactions can be engineered to ensure that any new resulting technologies or know-how remain in the public domain.<sup>48</sup> Federal agencies can design DPA contracts to require that recipient firms license intellectual property developed using those funds to other parties for a nominal fee, or allow the US government to use the intellectual property free of charge. Federal laws sometimes limit the government's ability to design such contracts: The Bayh-Dole Act, for instance, gives nonprofit organizations and small businesses the right of first refusal to patent inventions developing using government funds unless the government invokes a national security or other relevant exception.<sup>49</sup> But the "notwithstanding" language in the DPA can be used to preempt this and other such requirements, ensuring that inventions resulting from public investment remain part of the public domain.<sup>50</sup>

Using preemption power to align DPA fund expenditures with the vision of "public purpose" we have described here is not only intrinsically desirable, but also serves the statutory goals of the DPA.<sup>51</sup> Studies have shown that using federal contracting power to bolster worker power can yield efficiency gains for procurement projects.<sup>52</sup> Likewise, ensuring that technological know-how resulting from government investment remains widely accessible will lower costs for other firms competing for government contracts. Structuring DPA transactions with an eye to these outcomes would thus fulfill the DPA's statutory purpose of promoting "efficiency

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<sup>47</sup> 50 U.S.C. § 4558(j).

<sup>48</sup> 50 U.S.C. 4533(a)(1)(C).

<sup>49</sup> 35 U.S.C. § 202.

<sup>50</sup> At the same time, as explored in Datta et al. (2022), there could also be other instances where making it easier to transfer intellectual property to the private sector could be desirable.

<sup>51</sup> For a broader exposition of this view of "public purpose," detailing the government's affirmative role in structuring activity to enable economic dynamism and inclusive growth, see Felicia Wong, *The Emerging Worldview: How New Progressivism Is Moving Beyond Neoliberalism*, (Roosevelt Institute: January 2020), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_EmergingWorldview\\_report-202001-1.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_EmergingWorldview_report-202001-1.pdf).

<sup>52</sup> See work reviewed in Todd N. Tucker, "Seven Strategies to Rebuild Worker Power for the 21st Century Global Economy: A Comparative and Historical Framework for Policy Action" (New York: Roosevelt Institute, September 18, 2018), 21-22, <http://rooseveltinstitute.org/seven-strategies-rebuild-worker-power/>.

and competition” in strengthening the industrial base.<sup>53</sup> And in light of studies showing that building worker power lessens regional inequality,<sup>54</sup> directing resources to unionized firms would serve the DPA’s preambular goal of “[encouraging] the geographic dispersal of industrial facilities in the United States.”<sup>55</sup>

## CONCLUSION

The 2022 midterm elections were historic, with the party in power expanding their share of US Senate seats, while holding the margin of loss in the House to one of the lowest levels on record.<sup>56</sup> Preliminary analysis shows that the Biden administration’s pivot to industrial policy was a feature of the communications strategies of many successful candidates in tight races.<sup>57</sup> With a divided Congress unlikely to enact any additional major climate legislation, the administration’s agenda in its next two years in office will be limited to implementing laws on the books or legislative matters that can attract at least some bipartisan support.

This issue brief has outlined creative ways to use the Defense Production Act to accelerate the clean energy transition while constraining corporate extraction and building worker power—in particular by overriding contrary federal, state, and local laws that privilege corporate short-termism. Even if the DPA is not actually deployed in this way, the public and policymakers should know that it could be. Indeed, having the full range of industrial policy executive branch tools at the ready can serve to incentivize bipartisan cooperation in Congress for legislative strategies that are productive and do not lead to a race to the bottom in environmental protection. And while it is unknowable how courts will react to assertive use of DPA authorities along the lines we discuss, there is ample history of right-wing judges

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<sup>53</sup> 50 U.S.C. § 4502(b)(3).

<sup>54</sup> See John S. Ahlquist, *Labor Unions, Political Representation, and Economic Inequality*, 20 Annual Review of Political Science 409–32 (2017), <https://doi.org/10.1146/annurev-polisci-051215-023225>.

<sup>55</sup> *Id.* § 4502(b)(6).

<sup>56</sup> “Vital Statistics on Congress,” *Brookings Institute*, November 21, 2022, <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>.

<sup>57</sup> Sunny Malhotra and Todd N. Tucker, “Clean Energy Industrial Policy: A Go-To Issue with Nascent Bipartisan Appeal for Midterm Messaging” (New York: Roosevelt Institute, November 30, 2022), <https://rooseveltinstitute.org/2022/11/30/clean-energy-industrial-policy-a-go-to-issue-with-nascent-bipartisan-a-appeal-for-midterm-messaging/>.

deferring to presidentialist policy like the DPA,<sup>58</sup> so they may approve in order to set a precedent for a future right-wing president. Alternatively, policymakers can use bold policy action and court fights to “get caught trying,” which can help build support for judicial reform down the line.

Finally, there are some who would object that using the DPA to preempt contrary law is problematic from a democratic legitimacy perspective. However, it bears repeating that the people’s representatives in Congress have—from the very beginning—recognized the expansive nature of the delegation they made. Despite this, they reauthorized the DPA over 50 times and even expanded it, a delegation that has been repeatedly blessed by courts. Moreover, the president and vice president are the only two officers of the US government for which every voter in the US gets to vote, unlike members of Congress who are elected only in certain states or congressional districts. As such, this gives the president considerable democratic legitimacy to act on behalf of the country as a whole. With the incredibly truncated time frame on which the US has to act, policymakers should be using every tool at their disposal to meet the moment. If this authority is used irresponsibly, Congress will have an opportunity to add any needed guardrails when the DPA is up for reauthorization in 2025.

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<sup>58</sup> Note, “Nondelegation’s Unprincipled Foreign Affairs Exceptionalism,” *Harvard Law Review* 134 (January 11, 2021): 1132–61.

# Appendix: Legal Analysis of DPA Preemption Powers

*By Joel Dodge*

The DPA has long-overlooked provisions that empower the government to finance green infrastructure “without regard to the limitations of existing law.”<sup>59</sup> This gives the president and executive agencies powerful authority to override time-consuming legal barriers in order to expedite strategically important projects, including clean energy projects. As detailed below, this authority is supported by (A) the plain language of the DPA, together with statutory interpretations adopted by both courts and the Biden administration; (B) Congress’s purpose and intent in enacting the DPA; and (C) the DPA’s legislative history. Finally (D), the DPA likely also empowers the president and agencies to override state laws in addition to allowing projects to circumvent other federal legal impediments in the interest of speed and efficiency. This authority gives the Biden administration the ability to take executive action<sup>60</sup> to leverage the DPA to expedite the build-out of clean energy infrastructure.

## *A. The text of the DPA authorizes the president to override other laws.*

Title III of the DPA authorizes the president to make loan guarantees, loans, and advance market commitments to expand productive capacity and supply in support of the national defense (which includes critical infrastructure and energy production).<sup>61</sup> These financial authorities are each entitled to special exemptions under the DPA—specifically, they can be exercised “*without regard to the limitations of existing law* (other than section 1341 of Title 31)[.]”<sup>62</sup>

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<sup>59</sup> See 50 U.S.C. §§ 4531(a)(3), 4532(c)(2), 4533(b).

<sup>60</sup> A project initiated under Title III of the DPA exceeding \$50 million must receive congressional approval, but this requirement is waived if the president (or Congress) declares a national emergency. 50 U.S.C. §§ 4531(d)(1)(B)(i), 4532(d)(1)(B)(i), 4533(a)(7).

<sup>61</sup> 50 U.S.C. §§ 4531-4533; see also *id.* § 4552(14).

<sup>62</sup> This phrase is repeated three times in each of the first three subsections of DPA Title III: See 50 U.S.C. §§ 4531(a)(3), 4532(c)(2), 4533(b) (emphasis added). The exception for section 1341 of Title 31 prevents the president or agency from making an expenditure under the DPA that exceeds that amount appropriated by Congress. See 31 U.S.C. § 1341.

The plain meaning of the DPA empowers the president to override other limitations of existing law when initiating strategically important projects. When interpreting any law, the touchstone is the text Congress adopted, as courts “must enforce plain and unambiguous statutory language according to its terms.”<sup>63</sup> Title III’s “without regard” clauses<sup>64</sup> resemble “notwithstanding” clauses commonly used in statutes. Sometimes Congress will emphasize the primacy of a statutory power by stating that it applies “notwithstanding any other provision of law.”<sup>65</sup> Notably, this administration has interpreted a “notwithstanding” clause in another statutory context to support the secretary of education’s authority to cancel federal student loan debt.<sup>66</sup> And as the Supreme Court has recognized, courts “generally have ‘interpreted similar ‘notwithstanding’ language . . . to supersede all other laws, stating that ‘[a] clearer statement is difficult to imagine.’”<sup>67</sup>

While sweeping in textual scope, these statutory provisions do not necessarily supersede *all* other legal requirements; some courts note that “notwithstanding” clauses are “not always construed literally.”<sup>68</sup> Those courts examine the structure and purpose of the statutory context to determine the set of laws that a “notwithstanding” clause overrides.<sup>69</sup>

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<sup>63</sup> *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); see also *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (quoting *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004)).

<sup>64</sup> Similar “without regard” clauses appear in a number of state emergency laws. See, e.g., Nev. Rev. Stat. Ann. § 414.070(2) (empowering the governor to engage in emergency management-related transactions “without regard to the limitations of any existing law”); W. Va. Code Ann. § 15-5-6 (same); N.H. Rev. Stat. Ann. § 4:45 (same).

<sup>65</sup> See Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends*, 39 (2014), available at [https://www.everycrsreport.com/files/20140924\\_97-589\\_3222be21f7f00c8569c461b506639be98c482e2c.pdf](https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf).

<sup>66</sup> See, e.g., Defs.’ Mem. of Law in Opp. to Pls.’ Mot. for Prelim. Inj. at 34, *Nebraska v. Biden*, No. 4:22-CV-1040-HEA (E.D. Mo. Oct. 7, 2022) ([Dkt. #27](#)) (“notwithstanding” clause in the HEROES Act “empower[s] the Secretary to waive *any* statutory or regulatory provision applicable to federal student loan programs”); Office of Legal Counsel, *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*, 46 Op. O.L.C. \_\_\_, at \*12 (Aug. 23, 2022), available at <https://www.justice.gov/olc/file/1528451/download> (HEROES Act’s “‘notwithstanding’ clause makes clear that no other statutory provision implicitly limits the Secretary’s authority to waive or modify” student loan debt).

<sup>67</sup> *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (citing *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (quoting *Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989)).

<sup>68</sup> *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996).

<sup>69</sup> For example, in *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1168 (9th Cir. 2007), the Ninth Circuit held that a “notwithstanding” clause insulated a canal renovation project from environmental review lawsuits. But the court did recognize limits on the “notwithstanding” clause, emphasizing that its reasoning did not permit the agency to “act lawlessly in completing the project.” *Id.* at 1169. Instead, the court stated, “we have applied a common sense construction of the phrase to refer to those laws that would delay the commencement of a project in derogation of express Congressional directive[.]” *Id.*

For example, in *Liberty Maritime Corp. v. United States*, the secretary of transportation relied on the Merchant Marine Act's "notwithstanding" clause for authority to disregard other legal requirements when disposing of marine vessels.<sup>70</sup> The DC Circuit Court of Appeals affirmed this interpretation, finding that "[o]n its face, the 'notwithstanding' clause appears to give the Secretary the broadest possible discretion[.]" and that "[t]he legislative history and the structure and purpose of the Act support the Secretary's interpretation of its plain language."<sup>71</sup>

"Notwithstanding" clauses enable agencies to expedite nationally important projects by bypassing other generally applicable legal obligations. In *National Coalition to Save Our Mall v. Norton*, the DC Circuit held that a "notwithstanding" clause enacted to expedite the construction of the National Mall World War II memorial "demonstrate[d] Congress's clear intent to go ahead with the Memorial as planned, regardless of the planning's relation to pre-existing general legislation," including eliminating judicial review of agency action related to the memorial.<sup>72</sup> And in *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engineers*, a congressional appropriations act instructed the Army Corps of Engineers to construct a bridge in Everglades National Park "notwithstanding any other provision of law, immediately and without further delay." The Eleventh Circuit held that this was a "general repealing clause" that insulated the project from lawsuits brought under otherwise applicable federal statutes.<sup>73</sup>

By their own terms, the DPA's "without regard" clauses similarly authorize the president and agencies to bypass existing laws applicable to clean energy projects. As discussed below, overriding other laws is also consistent with the purpose and intent of the DPA to expedite

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<sup>70</sup> *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991).

<sup>71</sup> *Id.*

<sup>72</sup> *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001).

<sup>73</sup> *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engineers*, 619 F.3d 1289 (11th Cir. 2010) (rejecting claims brought under the National Environmental Policy Act and the Endangered Species Act).

production of critical materials. Elsewhere in both the DPA's original<sup>74</sup> and current<sup>75</sup> text, Congress explicitly limited the effect of other “without regard” clauses to specific statutes—implying that Title III's “without regard” clauses sweep more broadly. Because the text of the DPA makes clear that clean energy projects initiated under Title III may proceed “without regard to the limitations of existing law,” these projects should be exempt from otherwise-applicable legal requirements that hinder or delay their completion.

## *B. Overriding other laws is consistent with the purpose and intent of the DPA.*

The DPA's authority to override other laws is consistent with the broader purpose and intent of the statute. Legislative intent governs the interpretation of statutes, and individual provisions are construed to be consistent with a law's broader purpose.<sup>76</sup>

The DPA was, at its origin, meant to grant the president with extraordinary power to secure the country's industrial stock. At its enactment, the DPA “granted broad authority to the President to control national economic policy.”<sup>77</sup> The DPA was inspired by a July 1950 message to Congress issued by President Truman calling for “major changes in national economic policies” in order to secure the national defense, “while at the same time protecting essential civilian needs and combating inflation.”<sup>78</sup> In its report accompanying the DPA, the Senate Committee on Banking and Currency specified that “Title III is devoted to [the] objective” of

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<sup>74</sup> See Defense Production Act, Pub. L. No. 81-932, Sec. 703(a) (1950) (authorizing the president to make certain agency appointments “without regard to the Classification Act of 1949”); *id.* (agencies may employ civilian personnel “without regard to section 14 of the Federal Employees Pay Act of 1946”).

<sup>75</sup> See 50 U.S.C. § 4565(k)(4)(B) (agency heads on Committee on Foreign Investment in the United States “may appoint, without regard to the provisions of sections 3309 through 3318 of Title 5, candidates directly to positions in the competitive service”); *id.* § 4553(1) (“Any officer or agency head may— . . . appoint civilian personnel without regard to section 5331(b) of Title 5 and without regard to the provisions of Title 5 governing appointments in the competitive service”).

<sup>76</sup> See *King v. Burwell*, 576 U.S. 473, 492–93 (2015) (“We cannot interpret federal statutes to negate their own stated purposes.”) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 419–420 (1973)); *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (evaluating the “structure and purpose” of the Merchant Marine Act to discern the meaning of a “notwithstanding” clause).

<sup>77</sup> Cong. Research Serv., No. R43767, *The Defense Production Act of 1950: History Authorities, and Considerations for Congress*, 2 (2020), available at <https://sgp.fas.org/crs/natsec/R43767.pdf>.

<sup>78</sup> S. Rep. No. 81-2250, at 2 (1950).

“initiating with the least possible delay” the process of “accelerat[ing] the increase of available supplies of essential materials and products.”<sup>79</sup>

The DPA also contains a statement of policy stating that: “It is the policy of the United States that . . . plans and programs to carry out the purposes of this chapter should be undertaken with due consideration for promoting efficiency and competition.”<sup>80</sup> The DPA explicitly defines “national defense” to include “energy production or construction,” together with “any directly related activity.”<sup>81</sup> And since 2009, the DPA’s authorities have especially applied to promoting renewable energy: The current law includes a legislative finding that “to further assure the adequate maintenance of the domestic industrial base, *to the maximum extent possible*, domestic energy supplies should be augmented through reliance on renewable energy sources (including solar, geothermal, wind, and biomass sources), more efficient energy storage and distribution technologies, and energy conservation measures.”<sup>82</sup>

Finally, the Title III loan and purchase authority subsections each include a statement of purpose to expedite production of critical materials. For example, Section 4532 states that the purpose of Title III loan authority is “[t]o reduce current or projected shortfalls of industrial resources, critical technology items, or materials essential for the national defense[.]”<sup>83</sup> Toward that purpose, such transactions may be “made without regard to the limitations of existing law[.]”<sup>84</sup>

Putting this together, the purpose of the DPA is to accelerate the provision of critically important goods and materials, including clean energy—“with the least possible delay,” and “with due consideration for . . . efficiency” in order to “reduce current or projected shortfalls.” Allowing projects initiated under the DPA to bypass other legal hindrances is directly consistent with Congress’s intended purpose.

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<sup>79</sup> Id. at 16.

<sup>80</sup> 50 U.S.C. § 4502(b)(2).

<sup>81</sup> 50 U.S.C. § 4552(14).

<sup>82</sup> 50 U.S.C. § 4502(a)(6).

<sup>83</sup> 50 U.S.C. § 4532(a); *see also* 50 U.S.C. § 4531(a)(1) (same), 50 U.S.C. § 4533(a)(1) (purpose of other authorized presidential transaction authority “[t]o create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense”).

<sup>84</sup> 50 U.S.C.A. § 4532(c)(2).



*C. Legislative history supports the DPA's authority to override other laws.*

Legislative history can shed light on the meaning of statutory language.<sup>85</sup> The DPA's legislative history confirms that it takes primacy over other laws.

*First*, subsequent amendments to the DPA after its initial passage broadening Title III support its authority to override other laws. When the DPA was first enacted in 1950, the loan guarantee authority (Section 301(a) of the Act, originally codified at 50 U.S.C. § 2091)<sup>86</sup> empowered the President to “authorize . . . [agencies] . . . *without regard to provisions of law relating to the making, performance, amendment, or modification of contracts*, to guarantee in whole or in part any public or private financing institution . . . by commitment to purchase, agreement to share losses, or otherwise.”<sup>87</sup> That is, this original “without regard” clause applied narrowly to overriding contract law.

However, other provisions—§ 2092 (Loans to private business enterprises) and § 2093 (Purchase of raw materials and installation of equipment)—each used the broader current “without regard” clause, authorizing the president to act “without regard to the limitations of existing law.” When Congress recodified the DPA in 2009, it leveled up the “without regard” clauses across Title III, opting to use the broader language.<sup>88</sup> The differing language implies that Title III’s exemptions apply more broadly than just overriding contract law.<sup>89</sup>

<sup>85</sup> See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991).

<sup>86</sup> Available at <https://uscode.house.gov/view.xhtml?hl=false&edition=1999&req=granuleid%3AUSC-1999-title50a-node889-node891-title3-section2091&num=0&saved=%7C7C3JhbnVsZWlkOlVTQvOxOTk5LXRpdGxhLW5vZGU4ODk5bW9kZTg5MS10aXRzZTMrc2VidGlybjiwOTE%3D%7C%7C%7C0%7Cfalse%7C1999>.

<sup>87</sup> Section 2091's "without regard" clause was itself imported from Section 611 of the War Powers Act of 1941, which empowered the president "to enter into contracts and into amendments or modifications of contracts . . . *without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts* whenever he deems such action would facilitate the prosecution of the war." First War Powers Act of 1941, Pub. L. No. 77-593, Sec. 611 (1941), available at <https://tile.loc.gov/storage-services/service/l1/uscode/uscode1946-00405/uscode1946-004050a009/uscode1946-004050a009.pdf>.

<sup>88</sup> See Defense Production Act Reauthorization of 2009, Pub. L. No. 111-67 (2009).

<sup>89</sup> See *Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”); see also *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is

Indeed, at least one federal court has recognized that “Congress . . . specifically provided for the exemption of certain laws in the Defense Production Act.” See *In re J.F. Mulkey Co.*, 189 F. Supp. 716, 718 (E.D. Mich. 1960). (“[I]t appears . . . that subsections (a) and (b) authorize the President to purchase strategic materials without regard to the limitations of existing law. Subsection (c) authorizes the President to make subsidy payments ‘without regard to the limitations of existing law,’ while subsections (d) and (e) have no comparable provisions. Other sections of the Act make provision for the exemption from the anti-trust laws, the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., and general contract law (Sections 2158, 2159 and 2091, respectively).”). Thus, the current iteration of Title III enables the president to undertake financial support for strategic projects “without regard to the limitations of existing law” generally—not just contract law.

*Second*, legislative statements around the time the DPA was enacted evince Congress’s willingness to grant the statutory authority to override other laws.<sup>90</sup> The 81st Congress does not appear to have engaged in any substantive discussion of Title III’s “without regard” clauses before passing the DPA in September 1950. However, it *did* discuss the meaning of parallel language in companion legislation debated and passed just months later, the Federal Civil Defense Act of 1950. The Federal Civil Defense Act (FCDA) was another Cold War emergency measure enacted by Congress in the fall of 1950, and was intended to “provide a plan of civil defense for the protection of life and property in the United States from attack.”<sup>91</sup> The FCDA authorized the administration in part to “procure . . . facilities for civil defense.”<sup>92</sup> Under Section 303, during emergencies the administration could “exercise[ ] [this] authority . . . *without regard to the limitation of any existing law*, including [several laws governing the lease and purchase of buildings and facilities].”<sup>93</sup>

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generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

<sup>90</sup> Courts generally interpret the same statutory language to have a fixed meaning across laws. See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

<sup>91</sup> Wilbur J. Cohen & Evelyn F. Boyer, *Federal Civil Defense Act of 1950: Summary and Legislative History*, Social Security Bulletin, available at <https://www.ssa.gov/policy/docs/ssb/v14n4/v14n4p11.pdf>.

<sup>92</sup> Federal Civil Defense Act of 1950, Pub. L. No. 81-1228, Sec. 201(h) (1951).

<sup>93</sup> *Id.* at Sec. 303.

During Senate debate, Senator Guy Cordon of Oregon raised that he was “bother[ed]” by the breadth of the phrase “any existing law.”<sup>94</sup> In response, Senator Estes Kefauver of Illinois, who chaired the Civil Defense Subcommittee of the Armed Services Committee and was the FCDA’s floor manager, explained that Section 303’s “without regard” clause “is the usual language employed when emergency power is given. The intent is that if some other statutes . . . which old line agencies have to deal with, are applicable, the Administrator will not have to act under them.” Kefauver said that without the breadth of the “any existing law” language, Congress “would be confronted with the problem as to whether it would be possible to pick out all the laws relating to advertising, and so forth” that might trip up the administrator in an emergency.<sup>95</sup>

Senator Leverett Saltonstall of Massachusetts added: “Let us assume that city X has been bombed. If we were to try to place any limitations in this provision it could tie up all the assistance which the Administrator wanted to give.” Kefauver concurred, saying that without Section 303, emergency action could be held up by “the Food and Drug Act, some sanitary provisions, the Public Health Act, and many other acts. It would relate back to the matter of procurement, construction, maintenance and use of some facilities.”

Kefauver also explained that the “without regard” clause was intended “not to tie the hands of the Administrator with restrictive provisions . . . which would apply to the Administrator during a time of normal operations.”<sup>96</sup> The FCDA was ultimately enacted with the “any existing law” language left intact.

For purposes of understanding the DPA, there are three key takeaways from the FCDA: First, Kefauver’s statement that the “without regard” clause is the “usual language” for emergency powers is almost certainly referring to the DPA, which Congress had passed just months earlier. This implies that Congress intended the clauses in the DPA and FCDA to have the same effect. Second, unlike the DPA, the FCDA included specific examples of laws that the administrator could disregard—suggesting that if anything, the DPA’s “without regard” clauses sweep *more* broadly. And third, Kefauver and Saltonstall confirmed that the “without

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<sup>94</sup> 96 Cong. Rec. 16976-77 (1950), available at <https://www.govinfo.gov/app/details/GPO-CRECB-1950-pt12>.

<sup>95</sup> 96 Cong. Rec. 16977 (1950).

<sup>96</sup> 96 Cong. Rec. 16977 (1950). Kefauver specifically mentioned the illustrative statutes pertaining to the lease and purchase of buildings and facilities listed in Section 303.

regard” clause was meant to “not . . . tie the hands of the Administrator with restrictive provisions” on the books elsewhere in order to avoid delaying critical action.

When applied to the DPA, all of this suggests that Title III anticipates the government to likewise have the power to circumvent business-as-usual laws in order to secure the completion of strategically important projects. Unlike the FCDA, the Title III of the DPA *does not* require an emergency for the administration to bypass existing law (although an emergency declaration does allow the president to dispense with other procedural requirements under the law).<sup>97</sup> Today, that means the DPA can be catalyzed to expedite clean energy projects.

### *D. In addition to overriding federal laws, the DPA likely overrides state laws.*

Under the Constitution’s Supremacy Clause, federal law supersedes contrary state law.<sup>98</sup> There is a general presumption against interpreting federal statutes to preempt state law, unless “that was the clear and manifest purpose of Congress.”<sup>99</sup>

As discussed above, the text of the original DPA evinced Congress’s intent to supersede state law. The law explicitly authorized the president to make loan guarantees “without regard” to contract law<sup>100</sup>—which is traditionally almost entirely the realm of state law.<sup>101</sup> Thus, the enacting Congress anticipated that the DPA would supersede at least some elements of state law. And as discussed above, other sections of the DPA utilized broader preemptive language—and that language remains law in the current statute. Overriding state law is also consistent with the DPA’s broader purpose of facilitating the expeditious provision of goods and materials in the *national* interest.

At least one court confirmed that the DPA overrides state law. In *United States v. Latrobe Const. Co.*, 246 F.2d 357 (8th Cir. 1957), *cert denied*, 355 U.S. 890 (1957), the Eighth Circuit heard a case

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<sup>97</sup> See 50 U.S.C. § 4533(a)(7)(A).

<sup>98</sup> U.S. CONST. art. VI, cl. 2.

<sup>99</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>100</sup> 50 U.S.C. § 2091.

<sup>101</sup> *Contract*, Cornell Law School Legal Information Institute, <https://www.law.cornell.edu/wex/contract> (“Contract law is generally governed by state common law”).

involving an advance market commitment that the federal government made under the DPA agreeing to purchase manganese from a mining company, advancing the company \$3.5 million toward its mining operation. After the company defaulted, the government foreclosed on the property. However, several of the mining company's creditors sued, alleging that state law entitled their liens priority over the government's. The government argued that because it entered into a contract with the mining company through the DPA, its "rights under its contract lawfully entered into can not be affected or limited by provisions of state law."<sup>102</sup> The Eighth Circuit agreed. It recognized that the DPA "authorizes the President or his representative to make loans to private businesses to expedite the procurement of strategic materials for national defense. Congress authorized such loans to be made upon such terms as the President deemed necessary."<sup>103</sup> Therefore, the court held, "the contract and mortgages specified that the Government should have a paramount lien on [the mining company's] assets."<sup>104</sup> The court specifically held that "*under the statute authorizing the loan*"—the DPA—the government "had authority to prescribe the conditions of the loan."<sup>105</sup> Thus, the DPA empowered the government to exercise an advance market commitment that superseded state law. (The other creditors sought review of the Eighth Circuit's decision from the Supreme Court, but the Supreme Court declined to take the case.)

In some modern cases, courts have also interpreted equivalent "notwithstanding" clauses in federal statutes to preempt state law.<sup>106</sup> Based on this authority, the DPA today can likely be used to overcome state and local legal impediments to green industrial policy.

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<sup>102</sup> *Latrobe Const. Co.*, 246 F.2d at 360.

<sup>103</sup> *Id.* at 362.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 363 (emphasis added).

<sup>106</sup> See *Orelski v. Pearson*, 337 F. Supp. 2d 695, 703 (W.D. Pa. 2004) (holding that the federal Aviation and Transportation Security Act's "notwithstanding" clause preempts state law tort and contract claims); see also *Potts v. Rawlings Co., LLC*, 897 F. Supp. 2d 185, 195 (S.D.N.Y. 2012) (holding that state law claims against Medicare Advantage insurers were preempted based in part on "notwithstanding" clause in Medicare Advantage statute).