CLIMATE COUP

GLOBAL WARMING'S INVASION OF OUR GOVERNMENT AND OUR LIVES

EDITED BY

PATRICK J. MICHAELS

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CATO INSTITUTE
WASHINGTON, D.C.

Library of Congress Cataloging-in-Publication Data

Michaels, Patrick J.
Climate coup / Patrick J. Michaels.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-935308-44-7 (hardback: alk. paper) 1. Climatic changes—Government policy—United States. 2. Environmental policy—United States. 3. Greenhouse gas mitigation—Government policy—United States. I. Title.

QC903.2.U6M53 2011
363.738′745610973—dc22 2011003309

Printed in the United States of America.

CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
www.cato.org

1. The Executive State Tackles Global Warming

Roger Pilon and Evan Turgeon

Roger Pilon and Evan Turgeon show how, contrary to the nation's first principles and the Constitution's plan for limited government, the modern ''executive state'' emerged over the 20th century such that the executive branch today has all the power it needs to implement a far-reaching global warming agenda—quite without any specific authorization from Congress.

Early in the century, Progressives laid the intellectual foundations for the executive state. Then, during the New Deal, Congress and the president brought it into being, aided by a Court that first reinterpreted the Constitution's limits on Congress's powers and then sanctioned Congress's delegation of those powers to the executive and to burgeoning executive branch agencies. In fits and starts, that process has continued to this day, with the Court's 2007 decision in *Massachusetts v. EPA* being the latest example of how the executive state has come to assume all but plenary power—here, through claims about global warming—over almost every area of life.

The result is rule by unelected, largely unaccountable bureaucratic ''experts'' making decisions that in the end are often value-laden and political. This pattern will not change, Pilon and Turgeon conclude, until Congress reclaims the authority that it alone was granted under the Constitution.

The chapters that follow in this volume will show that in recent years, ''global warming,'' however uncertain its scientific foundations or practical implications, has permeated and often distorted virtually every area of life and public policy in America, from science

to business, education, trade—even foreign policy. Law, and American constitutional law, in particular, is no exception. But long before global warming's massive regulatory agenda was upon us, more basic distortions afflicted American law, and those today are fertile ground for turning the global warming agenda into binding public policy.

More precisely, the ''executive state'' that emerged from the Progressive Era, as institutionalized by the New Deal Supreme Court and expanded through modern administrative law, affords the president today all the power he needs to execute global warming's agenda through his domestic and foreign affairs powers—powers so far-reaching that they would shock the Constitution's Framers, who thought they had checked executive excesses through the separation of powers. James Madison, whose plan for limited government the Constitution reflects, wrote in *Federalist 45* that the powers of the new government would be ''few and defined,'' yet today the executive branch alone, in the name of addressing global warming, is able to regulate virtually every human activity in this nation. Indeed, shortly before President Obama arrived at the December 2009 ''Climate Summit'' in Copenhagen, the Climate Law Institute's Center for Biological Diversity released a study, the title of which captures today's legal world perfectly: ''*Yes, He Can*: President Obama's Power to Make an International Climate Commitment without Waiting for Congress.''[1]

This chapter explains how we got to this state of affairs. We will begin by looking briefly at the original constitutional design, as ''completed'' by the Civil War Amendments, then at the Progressive Era and the New Deal ''constitutional revolution'' that followed, resulting in the demise of both the doctrine of enumerated powers, the very centerpiece of the Constitution, and the nondelegation doctrine, under which ''all legislative power'' is supposed to be vested in the Congress. After those principles were abandoned, owing to political forces and judicial deference, the courts themselves came to play handmaiden to the aggrandizement of executive power, as we will see next.

Against that background of general legal developments, we will then turn to the kinds of environmental issues that arose with the Industrial Revolution, which pose special but not unsolvable problems for our system of government. Those environmental issues are

best addressed, however, not by abandoning the Constitution's basic principles but by adhering to them. To illustrate how we have not done that, and how the modern executive state has come to rule over environmental matters, we will look finally at several recent statutory schemes that have delegated so much power to the executive branch as well as the judicial decisions that have sanctioned those delegations, often in the name of science trumping politics. Yet fundamentally, the issues are only partly scientific. In fact, in the end they are basically evaluative, involving balancing competing values. Thus, under our system of constitutional government, they should be decided not by ''experts'' but by the American people through the process the Constitution prescribes, or so we will conclude.

The Executive State Emerges

The Original Design, as ''Completed'' by the Civil War Amendments

The Constitution, written in the shadow of the Declaration of Independence, was designed to secure individual liberty and responsibility through limited government. To that end, it established a government of limited powers, leaving most power with the states or, even more, with the people, to be exercised in their private capacities. The Tenth Amendment, the last documentary evidence from the founding period, makes that clear, expressly.[2] But so does the Constitution's Preamble, which shows that all power rests originally with the people, only some of which they give up to government for greater convenience and security. In the very first sentence of Article I, we see that ''All legislative Powers *herein granted* shall be vested in a Congress . . . '' (emphasis added). By implication, not all power was ''herein granted.'' Article I, Section 8, enumerates Congress's main legislative powers, 18 in number—hence the doctrine of enumerated powers. Article II vests the executive power in the president, which in domestic affairs is mainly the power to ''take Care that the Laws be faithfully executed.'' Article III vests the judicial power in the Supreme Court and in such inferior courts as Congress establishes, the power to ensure that constitutional constraints are respected. Thus the separation of powers, each branch defined functionally.

The Bill of Rights was added two years later, for extra precaution. It limited more precisely the way in which the federal government

might exercise its enumerated powers. But the Bill of Rights applied originally only against the federal government,[3] reflecting the Framers' compromise over slavery, reached to ensure union. Their hope that slavery would wither away over time did not materialize. Instead, the Civil War, followed by the Civil War Amendments, ended slavery. Those amendments ''completed'' the Constitution by incorporating at last the grand principles of the Declaration of Independence.[4]

Progressivism and Planning

Practice has never matched promise, of course: there has never been a ''golden age'' of liberty and limited government—witness, among much else, the rise of Jim Crow in the South shortly after the Civil War Amendments were ratified. Nevertheless, for our first 150 years as a nation, we lived more or less under limited government. The great change came, as noted above, with the rise of the Progressive Era, the ideas of which the New Deal Court institutionalized some 40 years later. American elites, influenced by the rise of science and of the social sciences in particular, grew enamored with ''social engineering.'' Drawing from German ideas about ''good government''—Bismarck's social security scheme, for example—and British utilitarianism—the idea that policy and law should secure not our unalienable rights but the greatest good for the greatest number—those elites sought to ''plan'' all manner of human activities, mostly through government agencies staffed by ''experts.''[5]

Standing athwart that agenda, of course, was a Constitution designed for limited government, and the willingness of early 20th-century courts to uphold it, which they did—not entirely but in large measure. Things came to a head during the New Deal, however, especially after the landslide election of 1936, when President Franklin D. Roosevelt threatened to pack an uncooperative Supreme Court with six new members. The reaction in the nation was swift and intense: not even an overwhelmingly Democratic Congress would go along with the scheme.[6] But the Court got the message: it began rewriting the Constitution without benefit of constitutional amendment.[7]

Expanding Power, Contracting Rights

The Court did so in three main steps. First, in two decisions in 1937, the Court eviscerated the Constitution's legitimating principle

and main restraint on overweening government, the doctrine of enumerated powers. It held that under the so-called general welfare clause, a phrase in Congress's power to tax, Congress could tax and spend for the general welfare quite apart from any authority to do so under one of its enumerated powers or ends.[8] Thus was born the modern redistributive state. And it held that under the commerce clause, which was written to enable Congress to ensure free commerce among the states in light of state protectionist measures that had arisen under the Articles of Confederation, Congress had the power to regulate, for any reason, anything that ''affected'' interstate commerce, which of course is anything and everything.[9] Thus was born the modern regulatory state.

Second, because individual rights could still be invoked to check that expanded federal power, as well as state power, the Court in 1938 effectively bifurcated the Bill of Rights, distinguishing ''fundamental'' from ''nonfundamental'' rights.[10] If a law implicated ''fundamental'' rights like speech, voting, and, later, certain ''personal'' rights, the Court would apply ''strict scrutiny'' and most often find the law unconstitutional. By contrast, if a law implicated ''nonfundamental'' rights like property and contract, rights we exercise in ''ordinary commercial transactions,'' it need pass only the ''rational basis'' test: as long as there was some conceivable basis for the law, it would be found constitutional.

Delegation and the Modern Administrative State

With those decisions, the Court institutionalized an approach to constitutional adjudication that in truth had been growing for a decade or two, ''constitutionalizing'' in the process the Progressive vision of active government—the very antithesis of the Framers' vision. But one step remained, which will bring us to our underlying subject, the emergence of the executive state. As legislative schemes were enacted, it became clear, of course, that Congress (or state legislatures, for that matter) could not manage all that they had brought forth. Thus was born the modern administrative state. But the problem here, once again, was with that troublesome Constitution, for recall that the very first sentence of Article I says that ''All legislative Powers herein granted shall be vested in a Congress.'' Not only were many of the powers Congress was now exercising never ''herein granted,'' but even those that were granted were being

delegated increasingly to the executive branch or to ''independent agencies.'' In fact, in the new executive state, administrative agencies—headed by members of the executive branch or by independent officials but filled with career and hence unaccountable civil servants—were performing legislative, executive, and even judicial functions, affecting virtually every aspect of life, from the jobs we have, to the food we eat, to the air we breathe. Powers the Framers had separated were now conjoined in one branch of government.

The demise of the nondelegation doctrine is best understood in the light cast by the doctrine of enumerated powers, which says, again, that Congress has only those legislative powers that the people have granted it. Not only are *all* those powers vested in Congress, but among them there is *no* power to delegate any of them in turn to another branch of government. Any such delegation is thus *ultra vires*.[11] The Supreme Court recognized that principle early on when Chief Justice Marshall wrote in 1825, ''It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative.''[12] Unfortunately, Marshall gave no further guidance on the meaning or scope of ''strictly and exclusively legislative.'' But he added that ''the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.''[13] Thus, he laid a foundation for what the Court would later call the ''intelligible principle'' standard: a delegation is constitutional, the Court said in 1928, if Congress lays down ''by legislative act an intelligible principle to which the person or body authorized. . . is directed to conform.''[14]

Judicial Deference

That standard, under which the Court in two separate decisions in 1935 found provisions of Roosevelt's National Industrial Recovery Act to be unconstitutional,[15] continues to guide courts today. But so deferential to the political branches has the Court been since the ''constitutional revolution'' of 1937 that the most amorphous congressional directives satisfy the ''intelligible principle'' standard—directives that regulations must serve ''the public interest,'' be ''just and reasonable,'' check ''unfair profits,'' and so forth. In fact, the Court has been so deferential that ''not a single post–New Deal

statutory program has been invalidated as an unconstitutional delegation of legislative power to the executive branch.''[16]

Indeed, not only has the Court deferred completely to Congress when Congress has delegated its legislative powers to executive agencies, but more often than not, the Court has deferred to those very agencies in their interpretations of Congress's broad statutory delegations. Although the record on this is mixed and often seemingly arbitrary, under the Court's main standard today, known as ''*Chevron* deference,''[17] the Court in 1984 set forth a two-step process for reviewing agency interpretations of statutes. First, the Court asks ''whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.'' But second, ''if the statute is silent or ambiguous with respect to the specific issue,'' which is often the case, the Court asks ''whether the agency's answer is based on a permissible construction of the statute. If Congress has explicitly left a gap for the agency to fill''—note well what follows—''there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such *legislative regulations* are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute'' (emphasis added). Finally, the Court concluded that if a legislative delegation is implicit, ''a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.''[18]

In sum, the New Deal Court's evisceration of the doctrine of enumerated powers and bifurcation of the Bill of Rights vastly expanded Congress's powers and contracted individual rights. But as those powers grew and federal programs multiplied, the Court abandoned the nondelegation doctrine, allowing Congress to delegate ever more power to executive branch agencies. Finally, having deferred to Congress on both counts, the Court most often deferred to the executive branch as well, granting it wide discretion to interpret statutes and enact ''legislative regulations.'' Thus did the modern expansive and powerful executive state come into being.

Environmentalism under the Constitution

Environmentalism and Private Law

Environmental issues were not unknown at the Founding. Isolated individuals and human communities alike use natural resources,

changing the natural environment as they do. It may sound heretical today to say it, but nature and the environment have no rights: *people* have rights—uniquely human constructs designed to order relationships through enforceable correlative obligations. They have rights to live and to use natural resources in the process, provided only that they take nothing that belongs to others. Thus, the law of *property*—broadly understood as ''lives, liberties, and estates''—underpins and defines those relationships.[19] And the Latin maxim *sic utere tuo, ut alienum non laedas* (use your own property so as not to harm another's) served early in our history, and continues to serve today, to guide common-law courts as they adjudicated what we would now call environmental complaints.

But ''harm,'' defined as taking what belongs free and clear to another,[20] will afford a court a bright line only in a certain range of cases—''physical'' trespass to person or property, for example. When the trespass involves classic nuisances—noise, particulate matter, odors, vibrations, and the like—or risks of various kinds, the line between one person's right to the active use of his property and another person's right to the quiet enjoyment of his is not as bright. How many decibels of noise, what quanta of particulate matter are needed before the line is crossed? Obviously, given the conflicting interests of the parties, absent an agreement between them, they cannot be judges in the case. A ''public'' line of some sort is needed. But that line is not written in stone, nor can it be. At different times in our history, we have drawn the lines at different places. Early on, we tended to favor active uses. Later, as we've grown wealthier, we've moved in the other direction (or we've made private or public accommodations like industrial parks to allow for a variety of tastes). But there is no precise right or wrong place to draw that public line: it reflects the tradeoffs we've wanted to make as a people at a particular time.

Closely related is the issue of the supersensitive person. Under common law, the rule in ordinary torts rightly was that you take your victim as you find him. Thus, if A hit supersensitive B, producing injuries beyond those that would have been suffered by the average person, A was liable for the full costs of making B whole. In nuisance, however, the supersensitive plaintiff did not get relief, and rightly so. For if he were to prevail in his complaint that, for example, the noise or particulate matter was injurious to him but

not to others due to his sensitive condition, he could, in principle, shut down the world. Thus in nuisance cases, the ''average man'' standard prevailed—a reflection of the need, again, for a *public* line, one that favors neither side but reflects instead a public consensus about where to draw the line.

Environmentalism and Public Law

In a great range of cases, then, the common law, grounded in reason and custom,[21] served to adjudicate especially those environmental harms we would call ''pollution.'' But not all environmental problems lend themselves to case-by-case common-law resolution. The Industrial Revolution, in particular, brought forth pollution affecting large numbers of people, even though none might be in a position to adjudicate the matter. And the large-numbers problem was especially acute when automobile pollution became an issue, when polluters and victims were usually the same people. All that and more marked the need to draw those public lines not on a case-by-case basis through private law but rather through statute and regulation—the need for *public* environmental law. But the move to public law did not change the underlying principles, at least in principle. Parties still had no right to pollute beyond a certain line. And they still had a right against pollution, again beyond a certain line. Although that line was now a matter for public, not private, law to determine, it still needed to reflect, more or less, the tradeoffs that might be reached by the ''average man,'' favoring neither the active nor the quiet user, much less the supersensitive person.

Under the Constitution this public law rested mainly with the states, of course, because that is where the general police power resides—the power to secure rights and hence to protect against environmental wrongs. And there is no reason even today why much if not most environmental law should not have remained with the states, both to respect our federalist principles and to better reflect local conditions and values. Stationary sources of pollution, for example, can easily be regulated by states; and if states are insufficiently sensitive to the rights of neighboring state residents, interstate suits can address that. But state and local solutions, however much to be presumed, may be inadequate for some environmental problems, or may prove less efficient than national solutions. Thus, in at least some cases, we may want to move to national solutions.

A Federal Problem: Where's the Power?

But there is a constitutional problem in doing so: Where among Congress's 18 enumerated powers do we find the power to address environmental issues, including through means that are both necessary and proper, as required by the last of those powers?[22] Except in federal enclaves, there is no general federal police power of the kind that enables states to police environmental wrongs, much less a power to provide the public with environmental ''goods'' like lovely views or wildlife habitat. If the Constitution as written and amended is to be respected, and if federal environmental law is to be legitimately grounded, that is no small problem.

Federal environmental statutes today are ''authorized'' under the Constitution's commerce clause[23]—granting Congress the power to regulate international and interstate commerce—mainly because the Court since the New Deal has read that clause, as noted above, to enable Congress to regulate anything that ''affects'' interstate commerce, which makes it an open sesame for virtually anything.[24] The original understanding of the clause, however, as also noted above, was much narrower, in keeping with a Constitution for *limited* government. It was written against a background of states, under the Articles of Confederation, having erected tariffs and other such measures to protect local merchants and manufacturers from competition from out-of-state interests, which was leading to the breakdown of free trade among the states. Thus, Congress was authorized to ''regulate'' interstate commerce—to make it ''regular'' by negating state interference[25] and by doing whatever else might be necessary and proper to ensure a free and efficient national market.[26]

A Constitutional Solution?

Interestingly, however, under that original understanding, one can make a plausible case for at least some federal environmental regulation, provided the facts warrant it, unlike with so much else that today is thus ''authorized.'' To be sure, there is no general federal police power, beyond federal enclaves, that would enable Congress to directly protect the rights of Americans against environmental wrongs or to provide broader environmental goods. But if conflicting state environmental regulations in a given area—say, auto emission standards—were to impede a free national market by subjecting auto manufacturers to exorbitant compliance costs,

then Congress's power to regulate interstate commerce, understood functionally as it was originally understood, could authorize federal preemption of state regulation and hence indirect environmental protection. Given the national market in automobiles, Congress would be regulating ''commerce'' ''among'' the states to ensure a more efficient market, free from state interference. There may be other such examples that would be consistent with the Constitution as originally written. But except in federal enclaves, as authorized under Article I, Section 8, Clause 17, the provision of environmental *goods* would remain with the states, consistent with state constitutions and the need to pay just compensation to owners when regulatory takings were required to provide the public with such goods.

Respect for the Constitution as written is not what we have today, however. After the New Deal constitutional revolution, the floodgates were opened for Congress to do pretty much what it wanted. And so we turn at last to a brief but critical look at how the general pattern of executive aggrandizement, discussed in the first section of this chapter, has played out more specifically in the environmental area, and then at what might be done, short of the suggestions just made, to begin restoring the separation if not the division of powers.

Federal Environmentalism Emerges

Judicial Deference, Executive Consolidation

As noted toward the end of the first section above, judicial scrutiny of agency ''lawmaking'' has been mixed, although deference has generally been the rule—in part because when Congress early on codified the New Deal's delegation of regulatory power through the Administrative Procedures Act of 1946,[27] it specified that courts could overturn agency policy and fact-finding decisions only if they were ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.''[28] Thus, courts granted regulations the same presumption of facial validity that they were granting statutes, rarely finding any so arbitrary as to meet those criteria.[29] Add to that the Supreme Court's restrictive view of individual standing to challenge agency actions,[30] and the result is that ''in the half century following the start of the New Deal, the separation of powers doctrine effectively died out.''[31]

But not on all issues. With economic regulation, judicial deference to agency rulemaking was especially prominent. But in cases pitting

economic development against the emerging environmental agenda of the 1960s and 1970s, the courts began taking a ''hard look'' to determine whether administrators adequately considered environmental values in their rulemaking, relaxing standing requirements in the process to enable more plaintiffs to challenge agency rulemaking.[32] Cases decided during the period frequently demonstrate the courts' deference to environmental values and the short shrift they gave to economic values, including the costs of regulation. In *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*[33] in 1971, for example, the D.C. Circuit noted that ''several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.''' And in that same year, the Supreme Court interpreted environmental statutes similarly. Thus, in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[34] the Court rejected an agency plan to build a highway through parkland in Memphis, Tennessee, stating, ''The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.''[35] In so ruling, the Court expanded the Administrative Procedures Act standard for judicial review beyond ''arbitrary and capricious,'' holding that the reviewing court must make a ''searching and careful'' review of the entire record, not just the portion that supported the agency's position.[36] This strengthening of the ''arbitrary and capricious'' standard culminated ultimately in 1983 in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,[37] where the Court explicitly adopted the ''hard look'' standard for reviewing agency action.[38]

Yet a year later, as discussed earlier, the Court gave us *Chevron* deference, so it's difficult to find any ordering principle for the Court's degree of deference to executive agencies, save for the suspicion that there may not be any such principle and that the Court, in its often fractured opinions (*Chevron* was not one), may itself be subject to political winds. Rather than review the lengthy mixed record on that question, however, it may be best to go straight to the most recent environmental case that illustrates the point, the Court's 2007 decision in *Massachusetts v. Environmental Protection Agency*,[39] where five members of the Court were not at all reluctant to insinuate themselves into a political debate over the subject to which we come at last, global warming.

By way of background, in the years following *Chevron*, presidents of both parties took a number of steps, especially through executive orders, to consolidate their control over executive agencies. Pursuant to his deregulatory agenda, for example, President Reagan issued Executive Order 12,291[40] in 1981, requiring agencies ''to perform cost-benefit analyses for regulations and, within statutory limits, to select the policy that maximizes benefits compared to costs.''[41] In 1993, President Clinton issued Executive Order 12,866,[42] which delegated authority to the Office of Information and Regulatory Affairs to review agency rules to ensure that they conformed to the president's regulatory priorities. And in 2003, President Bush's Office of Management and Budget issued a bulletin that mandated rigorous peer review of all ''significant regulatory information'' on which an agency policy determination was based[43] and barred any scientist funded by the agency (but not industry scientists) from participating in the peer-review process,[44] which was widely seen as an effort to politicize agency science.[45]

Massachusetts v. the EPA

That sets the stage for *Massachusetts v. EPA*. Section 202(a)(1) of the Clean Air Act requires that the EPA administrator ''shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.''[46] In 1999, several environmental organizations and others petitioned the EPA, asking the agency to initiate rulemaking to regulate greenhouse gas emissions from new motor vehicles under that section. After lengthy considerations, based on extensive public comments on the petition and a report on the science of climate change from the National Research Council of the National Academy of Sciences,[47] the EPA declined, saying that it lacked statutory authority to do so.[48] And it added that even if it had authority, it would decline to regulate in order not to interfere with international climate change negotiations.

Those groups plus 12 states then appealed the EPA decision, losing in the D.C. Circuit. Before the Supreme Court, there were two main questions: Did at least one of the states or groups have standing to bring the suit? And if so, was the EPA's decision reasonable under *Chevron* such that the Court should defer to the agency's decision?

Justice Stevens, writing for himself, the Court's three other liberals, and Justice Kennedy, gave away the answers with his very first words: ''A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.''[49] From there it was a straight line to the conclusions. To have standing to get to the merits, Massachusetts had to show that it had a ''concrete and particularized'' injury that was ''actual or imminent'' and ''fairly traceable'' to the defendant, and that a favorable decision would redress it.[50] The state pointed to its shoreline, which might be threatened over the next 100 years by the effects of global greenhouse gas emissions, only a small fraction of which might be addressed by the EPA's regulation of mobile source emissions. That was good enough for Stevens.

On the merits, standing having been established, Stevens threw deference out the window, despite the lack of any evidence that Congress intended the Clean Air Act to address global air pollution issues like climate change or greenhouse gas emissions. In fact, Congress had repeatedly addressed climate change by authorizing and funding studies, ''by encouraging 'non-regulatory' measures to address greenhouse gas emissions, and by the Senate's unanimous expression of disapproval of the Kyoto Accord in 1997''; yet there was never any indication, through all of that, ''that anyone in Congress, for or against regulation of greenhouse gas emissions, thought that the Clean Air Act already authorized the EPA to regulate those emissions.''[51] Despite that, Stevens found that greenhouse gases like carbon dioxide are air pollutants covered by the act, that the EPA must determine whether they endanger human health, and, if they do, that the EPA must regulate them.

The Endangerment Finding

That ruling sent the EPA back to the drawing board. On December 7, 2009, with a new administration overseeing the agency and the Copenhagen climate change summit just getting under way, the EPA's much-anticipated ''Endangerment Finding'' was released, concluding that ''the evidence provides compelling support for finding that greenhouse gas air pollution endangers the public welfare of both current and future generations.''[52] Make no mistake, the implications of this finding are far-reaching. As stated by the Climate

Law Institute report we cited at the outset: ''The finding required in the context of automobile emissions is similar or identical to findings in other sections of the Clean Air Act that trigger regulation of greenhouse gas emissions from ships, aircraft, power plants, factories, and other sources. Such a finding also compels the issuance of nationwide pollution caps for greenhouse gases.''[53]

Thus has the Court played handmaiden to the aggrandizement of executive power. Judicial abdication during the New Deal enabled Congress to delegate its legislative powers to the executive branch. Judicial activism just now has compelled a president who hardly needed compulsion to turn the global warming agenda into binding public policy.

A President with All the Authority He Needs

Several statutes can now be read as authorizing President Obama's EPA to regulate greenhouse gas emissions in the name of preventing global warming. Especially in the wake of *Massachusetts v. EPA*, the Clean Air Act provides President Obama the most direct tool to limit carbon dioxide emissions from both stationary and mobile sources and likely far beyond. Atmospheric pollution controls in other statutes, including the Clean Water Act, the Endangered Species Act, and the National Environmental Protection Act, provide further sources of authority. In addition to domestic authority, President Obama could conceivably use his foreign affairs power to bind the United States to emission reductions, but given the president's considerable authority under domestic law, such measures are unlikely to be needed.

The Clean Air Act

Since *Massachusetts v. EPA*, the Clean Air Act[54] provides perhaps the greatest source of authority to regulate carbon dioxide emissions.[55] The act was designed to empower the federal government to limit emissions of air pollutants from all sources. The act grants the EPA administrator the authority to designate a compound as an ''air pollutant,'' determine a maximum permissible level of that pollutant in the air, review state-level plans to control emissions of that pollutant from stationary sources, and set standards to regulate directly emissions from mobile sources.[56] The act defines an ''air pollutant'' as any ''air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance

or matter which is emitted into or otherwise enters the ambient air.''[57] The act does not specify each pollutant to be regulated but rather requires the EPA administrator to produce a list of ''criteria air pollutants'' that includes ''each air pollutant, emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.''[58]

Listing a pollutant as a criteria air pollutant requires the administrator to set National Ambient Air Quality Standards for that pollutant, delineating maximum allowable concentrations of that pollutant in the air.[59] These standards operate on a state and local level to cap the maximum permissible concentrations in those areas.[60] In response to those limits, each state must create a state implementation plan (SIP) detailing its plans to meet NAAQS standards.[61] Noncompliance with NAAQS standards allows the federal government to withhold highway funds otherwise provided to states and municipalities,[62] creating a strong incentive on states to develop SIPs meeting NAAQS requirements. Despite the significant rulemaking authority granted to the EPA administrator, the Supreme Court has previously upheld the NAAQS program as constitutional under the nondelegation doctrine.[63] Moreover, the Court has explicitly barred the EPA administrator from considering the economic cost of pollution regulations in promulgating NAAQS requirements.[64]

While EPA's ability to set NAAQS standards and to review state implementation plans for compliance gives EPA a great deal of control over the ultimate result of such regulations, it does not permit EPA to force states to implement a cap-and-trade system. The Clean Air Act allows, but does not require, states to use ''economic incentives such as fees, marketable permits, and auctions of emissions rights'' in their plans.[65] Of course, a state could always institute such programs of its own volition.

Stationary sources. The Clean Air Act includes several measures to control pollution emissions from both stationary and mobile sources. In addition to NAAQS requirements, the Clean Air Act regulates stationary sources of pollution directly under Title I's new source performance standards (NSPS) and new source review (NSR) program, as well as under Title V's permit requirements. NSPS requirements impose uniform emission standards on all stationary sources of pollution throughout the nation.[66] Similarly, the NSR program requires permits for emissions of noncriteria air pollutants

(the prevention of significant deterioration [PSD] program) and for emissions of criteria pollutants in areas where such emissions already exceed national caps (nonattainment new source review (NNSR).[67] Currently, as a noncriteria pollutant, carbon dioxide is subject only to the PSD program. Since the endangerment finding will require the EPA administrator to list carbon dioxide as a criteria air pollutant, however, if EPA decrees that current ambient air levels of carbon dioxide exceed maximum acceptable levels, the stricter NNSR requirements will apply to emitters of carbon dioxide.[68] Such requirements would likely impose large costs on emitters, handicapping industry significantly.

Since many stationary emitters of carbon dioxide, such as small manufacturing facilities, hospitals, hotels, retail stores, shopping malls, office buildings, and even commercial kitchens, do not emit significant concentrations of air pollutants other than carbon dioxide, regulating carbon dioxide under the Clean Air Act will expand the scope of federal regulation dramatically.[69] Under the text of the Clean Air Act, any source emitting more than 25 tons of air pollutants per year must obtain a permit from EPA. Since carbon dioxide is emitted in much greater quantities and by many more sources than other pollutants, applications for the permits required under the PSD program and under Title V will skyrocket once the government begins regulating carbon dioxide under the Clean Air Act.[70]

EPA is not equipped to handle that explosion in permit requests.[71] Accordingly, it has proposed a ''tailoring rule'' to accommodate its expanded regulatory activity. To limit the number of permit applications for EPA to review, the tailoring rule would temporarily increase the threshold permit requirement from the current level of 100–250 tpy (tons per year) of emissions to 75,000 tpy in 2013. That threshold would eventually be decreased to 25,000 tpy (and possibly even lower) over time.[72]

Although a tailoring rule would accommodate EPA's bureaucratic incapacity, allowing an administrative agency to amend the clear text of a statute passed by Congress would violate the separation of powers in a way never before permitted by the Supreme Court.[73] Citing this threat to the separation of powers, the Southeastern Legal Foundation has filed a lawsuit seeking to enjoin EPA's application of the Clean Air Act to carbon dioxide.[74] SLF argues that since Clean Air Act provisions are not severable, if EPA cannot enforce the act

as written, it cannot enforce it at all. But even if this suit is successful, voiding the tailoring rule would not prevent EPA from regulating carbon dioxide. At best, a victory would temporarily enjoin regulation of stationary sources until such time as the agency employs enough bureaucrats to handle the huge number of applications. At worst, a victory would empower the agency to prohibit emissions for however long it takes the agency to grant a permit, which would effectively destroy the American economy.

Mobile sources. As noted above, the Clean Air Act also grants EPA the power to regulate pollution from mobile sources, including cars, trucks, airplanes, and ships.[75] Section 202(a) provides for the regulation of air pollutant emissions from new motor vehicles,[76] while Section 213 reaches emissions from oceangoing vessels and Section 231 reaches emissions from airplanes.[77] Since EPA has long regulated motor vehicle emissions in a top-down fashion, imposing additional requirements on automobile manufacturers is a relatively simple task for the bureaucracy (although compliance by manufacturers may be a different story). Moreover, the Clean Air Act's interconnected statutory language means that an endangerment finding under one title all but requires regulation under other titles as well, including Title II, which addresses mobile emissions sources.[78] Given EPA's endangerment finding for stationary sources, ''the adoption of new vehicle emission standards is only a matter of time.''[79]

But President Obama's EPA has authority to regulate mobile emissions sources beyond that provided by the Clean Air Act. Until now, EPA has regulated motor vehicle emissions primarily through corporate average fuel economy (CAFE) standards. Since 1975, CAFE standards have required that automakers produce vehicles meeting certain fuel economy requirements.[80] In an effort to decrease gasoline consumption, Obama recently proposed to raise CAFE standards for cars, light trucks, and SUVs, to achieve an average fuel economy of 34 miles per gallon by 2016.[81] And more recently still, EPA published a notice of intent to raise that ''to as much as 62 miles per gallon by 2025.''[82]

The Clean Water Act

The Clean Water Act provides another vehicle through which President Obama can act unilaterally to try to prevent global warming.[83] Atmospheric carbon dioxide is eventually absorbed into rivers,

lakes, and oceans at a rate directly proportional to the rate of emissions into the air.[84] Waters become more acidic as a result of this absorption, threatening many species of marine life.[85] It is noteworthy, however, that for most of the past several hundred million years, atmospheric carbon dioxide concentrations have exceeded those of today and those projected for the 21st century.[86]

The Clean Water Act is designed to prevent such threats.[87] The act's stated purpose is to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.''[88] The act requires EPA to set water quality standards and orders states to implement plans in conformity with such standards ''for the protection and propagation of fish, shellfish and wildlife and for recreation.''[89] Under the Clean Water Act, states must also identify ''impaired'' waters exceeding EPA standards,[90] for which the state must set more stringent pollution limitations.[91]

EPA has begun to formulate new water quality standards that include measures to prevent ocean acidification.[92] These new standards will empower EPA to use Clean Water Act measures to restrict carbon dioxide emissions and will explicitly authorize the president to use his foreign affairs powers to the same end. This broad executive power to eliminate pollution, no matter the cost, typifies the absolutist legislation enacted in the name of the environment.[93]

The Endangered Species Act

The Endangered Species Act also provides a source of domestic authority useful in the president's crusade to stop global warming.[94] The act is administered by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. Those agencies are responsible for listing a species as ''threatened'' or ''endangered,'' depending on the degree of peril it faces from habitat loss, disease, or ''other natural or manmade factors affecting its continued existence.''[95] Every federal agency must use its authority to ''carry out programs for the conservation'' of listed species.[96] The Endangered Species Act defines ''conservation'' as ''recovery to the point where the Act's protections are no longer necessary.''[97]

The Endangered Species Act forbids anyone to ''take'' any listed species—a prohibition that applies with equal force on government-owned land and private property.[98] The statute defines the term ''take'' broadly to include any activities ''to harass, harm, pursue,

hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.''[99] The Supreme Court has also adopted an expansive reading of this mandate, holding in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* that this prohibition extends to incidental harm as a result of habitat modification or destruction.[100] These broad interpretations of government power reflect the act's absolutist mandate ''to halt and reverse the trend toward species extinction, whatever the cost.''[101]

Despite this expansive power, the Obama administration has denied having any intent to combat climate change through the Endangered Species Act.[102] The absolute authority granted under that statute, however, may prove an attractive option for the president should he encounter resistance in curtailing carbon dioxide emissions using other statutory tools.

National Environmental Policy Act

The National Environmental Policy Act,[103] intended to ''prevent or eliminate damage to the environment and biosphere,''[104] imposes high procedural hurdles on many areas of federal activity. NEPA demands that the federal government prepare a detailed environmental impact statement (EIS) projecting and assessing the environmental consequences of every piece of proposed legislation and ''other major Federal actions significantly affecting the quality of the human environment.''[105] The EIS also mandates an analysis of alternatives to mitigate any potential environmental harm, requires a period of public comment, and typically delays federal action from 18 to 36 months.[106]

In addition to procedural requirements, NEPA includes an important substantive requirement—it specifically directs federal agencies to consider proposed activities' likely effects on climate change. NEPA orders agencies to ''recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, [to] lend support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.''[107]

The president exercises significant control over just which environmental impacts are considered in the NEPA process. He is thus empowered to inject carbon dioxide emission reductions into many

areas of government action. Although many federal agencies have their own NEPA regulations,[108] the President's Council on Environmental Quality issues guidelines on the implementation of the NEPA review process. Twelve environmental groups recently petitioned the council to set out regulations governing how global warming is analyzed under NEPA.[109] Including such considerations aligns with federal court decisions holding that NEPA requires an analysis of climate change impacts.[110]

Foreign Affairs Power

Unlike in domestic affairs, where the president's main function is to see that the laws are faithfully executed, in foreign affairs the president, who speaks and acts for the nation, has wide power to conduct foreign policy and make treaties and other agreements.

Treaties. Article II of the Constitution authorizes the president, with the ''advice and consent'' of the Senate, to ''make treaties'' with foreign nations.[111] To be binding, however, a treaty must be ratified by two-thirds of the Senate[112]—a high hurdle.[113] The Kyoto Protocol,[114] for example, the most recent major treaty on climate change, was not even submitted to the Senate for ratification, notwithstanding that the United States signed it.[115] Thus, absent Congress's overwhelming support, the ratification obstacle limits the usefulness of treaties to a president seeking to bind the United States to any international climate change initiative.

Moreover, many treaties are not ''self-executing,'' which is an added hurdle. A self-executing treaty needs no congressional action beyond ratification to take effect domestically: once Congress signs off, the treaty is the law of the land. By contrast, a non-self-executing treaty requires domestic legislation to take effect. Ratifying the treaty may bind the United States internationally, but it does not force Congress to pass the legislation necessary to give the treaty domestic effect.[116] That extra step exposes non-self-executing treaties to the delays and political compromises inherent in the legislative process.

But while President Obama may face difficulties in entering a new climate change treaty into force, several existing treaties provide the basis for executive agreements that would enable him to commit the United States to carbon dioxide emission reductions.

Executive agreements. The difficulties in ratifying treaties and the necessity of obtaining international participation in measures designed

to address global warming encourage presidents to pursue international cooperation using executive agreements.[117] Executive agreements circumvent the advice-and-consent hurdles imposed on the treaty process and allow the president to enter into binding arrangements with foreign powers with little congressional participation.[118] Despite the fact that the Senate Foreign Relations Committee has urged the president to negotiate international climate change agreements through the Article II treaty process,[119] the president's nearly unrestricted authority to bind the United States through executive agreements suggests that they will serve as his international instrument of choice. To develop the nation's climate change policy, President Obama could enter into a ''congressional-executive'' agreement based on authority delegated to him under existing statutes or treaties. Or he could enter into a ''sole executive'' agreement that may be enforceable domestically even in the face of congressional disapproval.

Congressional-Executive Agreements Pursuant to Statute

A ''congressional-executive'' agreement is a binding commitment made by the president pursuant to a statute or treaty passed by Congress. Because passing a statute authorizing the president to enter into an international agreement requires the approval of only a majority of both houses of Congress—rather than two-thirds of the Senate—congressional-executive agreements are easier to enact than treaties. Congressional approval can either precede the signing of such an agreement or be granted by a vote after the fact. On several occasions, however, the Senate has objected when *ex post* agreements have been submitted as executive agreements rather than Article II treaties.[120]

The existing domestic environmental laws previously discussed already provide several bases for congressional-executive agreements to limit carbon dioxide emissions. The Clean Air Act expressly directs the president to ''undertake to enter into international agreements'' to ''protect the stratosphere,''[121] although this provision is specifically targeted to prevent depletion of the ozone layer.[122] To protect international waters, the Clean Water Act includes a provision declaring that ''the President, acting through the Secretary of State and such national and international organizations as he deems appropriate, shall take such action as may be necessary'' to ensure that foreign countries act to prevent the contamination of national

and international waters ''to at least the same extent as the United States does under its laws.''[123] Likewise, the Endangered Species Act directs the secretary of the interior and the secretary of state to ''encourage . . . the entering into of bilateral or multilateral agreements with foreign countries to provide for'' the conservation of listed species.[124]

In addition, Congress set out a basic framework for U.S. climate change policy in the Global Climate Protection Act.[125] That act indicates that the United States should ''identify technologies and activities to limit mankind's adverse effect on the global climate'' by ''slowing the rate of increase of concentrations of greenhouse gases in the atmosphere in the near term'' and ''stabilizing or reducing'' those concentrations in the long term.[126] To reach these goals, Congress directed the president to ''work toward multilateral agreements'' on climate change[127] and ordered the secretary of state to work with the president and the EPA administrator to engage in multilateral agreements consistent with federal law.[128]

Statutes authorizing scientific and technological partnerships with foreign countries can also be interpreted as sanctioning agreements to prevent climate change. The 1979 Foreign Relations Authorization Act directs the president to ''assess and initiate appropriate international scientific and technological activities which are based upon domestic scientific and technological activities of the United States Government and which are beneficial to the United States and foreign countries.''[129] Similarly, the 1979 International Development Cooperation Act authorizes the creation of an Institute for Scientific and Technological Cooperation ''subject to the foreign policy guidance of the Secretary of State and whose task is 'to assist developing countries to strengthen their own scientific and technological capacity.'''[130] The act further directs the president to ''make and perform contracts and other agreements with any individual [or] institution, . . . and with governments or government agencies, domestic or foreign.''[131]

The International Development and Food Assistance Act of 1977 confers additional authority on the president, although it should be noted that programs authorized by this legislation would require congressional funding before taking effect.[132] The act empowers the president ''to furnish assistance . . . for developing and strengthening the capacity of developing countries to protect and manage their

environment and natural resources . . . including reforestation, soil conservation, and other activities to rehabilitate degraded forest lands.''[133] The act also grants the president authority to furnish assistance ''on such terms and conditions as he may determine, to enable [developing] countries'' to develop energy resources,[134] including ''renewable energy sources for rural areas.''[135]

While not authorizing emission caps, executive agreements on science and technology promote the development of renewable energy sources, efficient heating and cooling systems, and low-emission vehicles—investments designed to reduce the economic and political costs of future emissions restrictions in the United States.

Congressional-Executive Agreements Pursuant to Treaty

Existing treaties provide other sources of authority. Like statutes, treaties ratified by the United States represent Congress's blessing to enter into executive agreements in furtherance of treaty objectives.

The 1992 United Nations Framework Convention on Climate Change seems the most likely candidate to authorize executive agreements on climate change. That treaty, which has been ratified by Congress, established measurement, reporting, and verification requirements under which parties must develop, update, and report ''national inventories of anthropogenic emissions . . . of all greenhouse gases. . . , using comparable methodologies to be agreed upon by the Conference of the Parties,''[136] and must describe the country's mitigation actions and plans to implement the convention.[137] Despite this strong language, the UNFCCC is not self-executing, and Congress has not implemented legislation to give it domestic effect. In fact, when reviewing the UNFCCC for ratification, the Senate Foreign Relations Committee noted its expectation that any future decision applying legally binding emission reduction targets and timetables under the UNFCCC would require the Senate's advice and consent.[138] Although this resolution is not legally binding, it indicates Congress's disapproval of emission targets enacted without that body's consent, and likely discouraged Obama from seeking to bind the United States to emission reductions at the 2009 Copenhagen climate change summit.[139]

But existing domestic legislation does empower Obama to honor other UNFCCC obligations. The Energy Policy Act, for example, created a framework to implement the treaty's monitoring and

reporting requirements.[140] Insofar as this legislation represents congressional authorization to monitor and report emissions, Obama may use this approval to implement more robust monitoring and reporting requirements in future executive agreements.[141]

Treaties governing aviation, however, do currently empower the president to enact executive agreements in order to limit greenhouse gas emissions from aircraft.[142] Most notably, the Convention on International Civil Aviation, which entered into force in 1947, established the International Civil Aviation Organization as a UN agency responsible for coordinating and regulating international air travel.[143] The Aviation Convention requires parties to ''collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, standards, [and] procedures.''[144] As noted previously, the Clean Air Act requires EPA to issue emission standards for airplane engines emitting dangerous air pollution.[145] In combination with the Clean Air Act, then, the Aviation Convention requires the United States to promulgate airplane engine emission standards consistent with ICAO standards.[146] As a result, the Aviation Convention permits Obama to enter into executive agreements binding the United States to airplane engine emission reductions.

These statutes and treaties provide President Obama ample authority to enter into binding congressional-executive agreements restricting greenhouse gas emissions. Although the current Congress may actually disapprove of carbon dioxide emission caps, these statutes constitute Congress's support for presidential action in the environmental sphere. As Justice Robert Jackson famously stated, when acting under an express delegation of power from Congress, the president's authority is ''at its maximum,'' and he may ''be said . . . to personify federal sovereignty.''[147]

Sole Executive Agreements

The president can also enter into binding international agreements without Congress's consent. The president's authority to enter into a ''sole executive agreement'' arises from the general vesting of executive power in the office of the president,[148] the president's duty to ''take care'' that the nation's laws be faithfully enforced,[149] and the president's ''foreign affairs'' power.[150] In the international realm, there is no dispute that sole executive agreements are as equally binding as Article II treaties.[151]

The weight of their authority under domestic law, however, remains a topic of much debate.[152] Although the Supreme Court has long held that sole executive agreements prevail over contrary state laws,[153] the Court's recent decision in *Medellín v. Texas*[154] suggested that a sole executive agreement might not be binding domestically unless it is self-executing. Indeed, there is consensus that the president's independent foreign affairs power in such situations is limited,[155] and the ''limits are difficult to determine and to state.''[156] Independent presidential power is at its greatest in agreements relating to the military, the recognition of foreign governments, and settling international claims. The power is more limited in other areas, including climate change.[157] Under Justice Jackson's delineation of presidential power, presidential action in the face of congressional silence occupies a ''zone of twilight'' where presidential and congressional powers overlap.[158] Jackson also noted that when the president acts contrary to Congress's express or implied will, his power is ''at its lowest ebb.''[159]

A review of previous sole executive agreements confirms that presidents typically employ such agreements in areas where presidential power is at its zenith. State Department records reveal that the most common areas in which executive agreements are used are the military (27 percent), international assistance and development (18 percent), nuclear energy and safety (9 percent), aviation (6 percent), and scientific cooperation (6 percent).[160] Another study produces similar findings: the military (14 percent), trade (9 percent), scientific cooperation (6 percent), postal matters (6 percent), and debts (6 percent) were most often the subject.[161]

With regard to global warming regulation, the Senate resolution disapproving of the Kyoto Protocol could be seen as an assertion of the Senate's authority over (and even objection to) executive agreements to reduce carbon dioxide emissions.[162] But that interpretation is challenged by the fact that the Senate resolution is limited in scope to international agreements ''which would require the advice and consent of the Senate to ratification,'' and therefore does not apply to executive agreements.[163]

Should President Obama sign a sole executive agreement pledging to cap carbon dioxide emissions, the Case Act would require him to notify Congress of any such agreement within 60 days of execution.[164] Congress could then pass legislation invalidating the agreement,

but it would likely need to do so with enough votes to override a presidential veto.[165] Given the president's ample authority to act both domestically and internationally under existing statutes, it seems unlikely that Obama would seek to wage such a war with Congress when less confrontational tactics are more than sufficient to achieve his policy goals.

Conclusion

In sum, with the demise of constitutional restraints during the New Deal and the massive expansion of congressional power that followed, much of it delegated to the executive branch, President Obama today faces very few obstacles in implementing the global warming agenda. The Progressive Era, enamored of science, sought to bring about rule by ''experts'' ensconced in government planning bureaus. We have that pretty much today. As a result, environmental decisions involving not simply science but, at bottom, value-laden tradeoffs are made by relatively few unaccountable bureaucrats concentrated in the executive branch, with only sporadic and uneven judicial and congressional review.

Yet those decisions and the questions they address arise in a political context. Concerning all the people, they are quintessentially political questions that should be decided by the most political of our branches of government, the Congress. To be sure, the president represents all the people, and he has legislative ''power'' in the form of the veto, but it is the Congress that represents the variety of interests in the nation; constitutionally, it is the Congress in which all legislative power is vested. Accordingly, although it may be necessary for executive agencies to administer, execute, and even draft environmental laws, regulations, and rules, it is also necessary that Congress give its final approval of those provisions and take responsibility for them if the Constitution's separation-of-powers principle, as originally understood, is to be respected.

In the short run, if it so chose, Congress could enact legislation to check executive actions with which it disagreed, or it could refuse to fund various regulatory schemes, even if that meant overriding a presidential veto. And of course the people can always elect representatives who will take their oaths of office more seriously. In the longer run, however, the problems are deeper and more systemic, as this review of history and law has shown. We have strayed far

from our Constitution of limited government with powers divided between federal and state governments and separated among the three branches of the federal government. There is nothing in the Constitution that precludes us from enacting measures to protect the environment, but it must be done in the right way, consistent with the Constitution's provisions for limited government. We need to revive not only the nondelegation doctrine but the doctrine of enumerated powers, including the division of powers between the federal and state governments. The resurrection of those principles would bring value-laden environmental questions closer to the people affected by them, restoring government of, by, and for the people.

17. Patrick J. Michaels and Robert C. Balling Jr., *Climate of Extremes: Global Warming Science They Don't Want You to Know* (Washington: Cato Institute, 2009).

18. Michael Sanera and Jane S. Shaw, *Facts Not Fear: Teaching Children about the Environment* (Washington: Regnery, 1999), p. 308.

19. National Climatic Data Center, ''Climate at a Glance,'' http://www.ncdc.noaa.gov/oa/climate/research/cag3/ca.html.

20. California Education and Environment Initiative, *The Greenhouse Effect on Natural Systems: Final Draft* (Sacramento: California EEI, 2009), p. 8, http://www.calepa.ca.gov/education/eei/curriculum/EarthScience/E4c/Teachers.pdf.

Chapter 1

1. Kevin Bundy, Brendan Cummings, Vera Pardee, and Kassie Siegel, ''*Yes, He Can*: President Obama's Power to Make an International Climate Commitment without Waiting for Congress,'' Climate Law Institute Working Paper no. 2, http://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/Yes_He_Can_120809.pdf.

2. ''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.''

3. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

4. Robert J. Reinstein, ''Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment,'' *Temple Law Review* 66 (1993): 361.

5. See, for example, John Louis Recchiuti, *Civic Engagement: Social Science and Progressive-Era Reform in New York City* (Philadelphia: University of Pennsylvania Press, 2007); and Steven J. Diner, *A Very Different Age: Americans of the Progressive Era* (New York: Farrar, Strauss & Giroux, 1998).

6. See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

7. See Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington: Cato Institute, 2006).

8. *Helvering v. Davis*, 301 U.S. 619 (1937).

9. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

10. *United States v. Carolene Products*, 304 U.S. 144 (1938).

11. For an expanded discussion of this issue, see Robert A. Levy and William Mellor, *The Dirty Dozen* (New York: Sentinel, 2008), ch. 4.

12. *Wayman v. Southard*, 23 U.S. 1 (1825).

13. Ibid.

14. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

15. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

16. Levy and Mellor, *The Dirty Dozen*, p. 72, citing Kermit L. Hall, ed., *The Oxford Guide to United States Supreme Court Decisions* (New York: Oxford University Press, 1999), p. 232.

17. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S 837 (1984).

18. Ibid., pp. 842–44.

19. John Locke, Second Treatise of Government, in *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor, 1965): ''Lives, Liberties and Estates, which I call by the general Name, *Property*.'' para. 123.

20. See Roger Pilon, ''Property Rights, Takings, and a Free Society,'' *Harvard Journal of Law and Public Policy* 6 (1983): 165.

21. See Edward H. Corwin, *The ''Higher Law'' Background of American Constitutional Law* (Ithaca, NY: Cornell University Press, 1955), p. 26: ''The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.''

22. Art. I, Sec. 8, Cl. 18: ''Congress shall have Power. . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . . ''

23. Art. I, Sec. 8, Cl. 3: ''Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.''

24. Witness the debate at this writing, and the suits by 21 states and others, over the putative power of Congress, under the recently enacted Patient Protection and Affordable Care Act, to order individuals to buy health insurance or pay a fine (or tax) for failing to do so, raising the question, is there anything Congress cannot regulate under the commerce clause?

25. In fact, the first great commerce clause case involved a conflict between a federal coasting statute and a state statute that granted a monopoly restricting interstate commerce in the ferrying business. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

26. See Randy E. Barnett, ''The Original Meaning of the Commerce Clause,'' *University of Chicago Law Review* 68 (2001): 101.

27. Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946).

28. 5 U.S.C. § 706(2)(A) (2009).

29. Harold H. Bruff, ''Legislative Formality, Administrative Rationality,'' *Texas Law Review* 63 (1984): 207, 210.

30. Thomas W. Merrill, ''Capture Theory and the Courts: 1967–1983,'' *Chicago-Kent Law Review* 72 (1997): 1039, 1075–76.

31. Patrick M. Garry, ''The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers,'' *Alabama Law Review* 57 (2006): 689, 699.

32. Ibid., p. 710; and Alfred C. Aman Jr., ''Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency,'' *Cornell Law Review* 73 (1988): 1101, 1152.

33. 449 F.2d 1109, 1111 (D.C. Cir. 1971).

34. 401 U.S. 402 (1971).

35. Ibid., p. 413.

36. Ibid., p. 416. See also Garry, ''The Unannounced Revolution,'' p. 710 (discussing this shift).

37. 463 U.S. 29 (1983).

38. Ibid., p. 57. See also Garry, ''The Unannounced Revolution,'' pp. 710–11, quoting William F. Fox, *Understanding Administrative Law*, 4th ed. (New York: LEXIS Publishing, 2000), p. 325: ''When the Court wishes to invoke [the Hard-Look Doctrine], it will; when it wishes to be much more lenient with regard to an agency's action, the doctrine will be disregarded.''

39. 549 U.S. 497 (2007).

40. Exec. Order no. 12,291, 3 C.F.R. 127 (1981), reprinted as amended in 5 U.S.C. 601 (2000).

41. Bruff, ''Legislative Formality, Administrative Rationality,'' p. 234.

42. Exec. Order no. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. 601 (2000).

43. Office of Management and Budget, ''Proposed Bulletin on Peer Review and Information Quality,'' *Federal Register*, September 15, 2003, p. 54023-02.

44. Jody Freeman and Adrian Vermeule, ''Massachusetts v EPA: From Politics to Expertise,'' in *The Supreme Court Review 2007*, ed. Dennis J. Hutchinson, David A. Strauss, and Geoffrey R. Stone (Chicago: University of Chicago Press, 2007), pp. 57–58.

45. See, for example, David S. Caudill, ''Images of Expertise: Converging Discourses on the Use and Abuse of Science in Massachusetts v. EPA,'' *Villanova Environmental Law Journal* 18 (2007): 185, 195; Jeffrey Brainard, ''How Sound Is Bush's 'Sound Science'?'' *Chronicle of Higher Education*, March 5, 2004, p. A18; and OMB Watch, ''OMB Bulletin on Peer Review: Making Science Vulnerable to Political Manipulation,'' August 29, 2003, http://www.ombwatch.org/node/1562.

46. 42 U.S.C. § 7521(a)(1).

47. National Research Council, *Climate Change: An Analysis of Some Key Questions* (Washington: National Academy Press, 2001).

48. ''Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking,'' *Federal Register*, September 8, 2003, p. 52922.

49. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

50. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

51. Andrew P. Morriss, ''Litigating to Regulating: *Massachusetts v. Environmental Protection Agency*,'' in *Cato Supreme Court Review, 2006–2007* (Washington: Cato Institute, 2007), pp. 193, 200; and Brief of the Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents, 2006 WL 3043962 (2006).

52. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act, at 17 (December 7, 2009).

53. Bundy and others, ''*Yes He Can*,'' p. 13.

54. 42 U.S.C. § 7401.

55. The Supreme Court has previously upheld the Clean Air Act as constitutional under the commerce clause. *United States v. Ho*, 311 F.3d 589, 601–4 (5th Cir. 2002), rejecting commerce clause challenge to work practice standards for asbestos under the Clean Air Act; and *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 81–83 (D.C. Cir. 2000), rejecting commerce clause challenge to the Clean Air Act.

56. Michael Sugar, ''Massachusetts v. Environmental Protection Agency,'' *Harvard Environmental Law Review* 31 (2007): 531, 532–33.

57. Clean Air Act § 302(g), 42 U.S.C. 7602(g) (2000).

58. Id. § 108, 42 U.S.C. § 7408 (2000).

59. ''National Ambient Air Quality Standards for Particulate Matter,'' *Federal Register*, July 18, 1997, p. 38,652 (codified at 40 C.F.R. 50.6 [2003]).

60. Section 110 of the Clean Air Act requires states to submit state implementation plans to ensure that all metropolitan areas will meet NAAQS requirements. 42 U.S.C. § 7410. Jonathan H. Adler, ''*Massachusetts v. EPA* Heats Up Climate Policy No Less than Administrative Law: A Comment on Professors Watts and Wildermuth,'' *Northwestern University Law Review Colloquy* 102 (2007): 32, 39–40.

61. 42 U.S.C. § 7410 (2000).

62. 42 U.S.C. § 7509(b)(1) (2000): ''The Administrator may impose a prohibition, applicable to a nonattainment area, on approval by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants. . . effective upon the selection by the Administrator of this sanction.''

63. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001).

64. Ibid., p. 471. See also Thomas J. Stukane, ''EPA's Bubble Concept after *Chevron v. NRDC*: Who Is to Guard the Guards Themselves?'' *Natural Resources Lawyer* 17 (1985): 647, 669: ''The 1970 Amendments imposed Draconian mandates for the abatement of pollution, regardless of cost.''

65. 42 U.S.C. § 7410(a)(2)(A).

66. § 111(a)(1), 42 U.S.C. 7411(a)(1) (2006).

67. Before constructing a new ''major stationary [emissions] source,'' or modifying an existing source to increase emissions significantly, a company must first obtain a PSD permit. See 40 C.F.R. § 52.21 (2009); see also 42 U.S.C. § 7475 (2006). A source is ''major'' if it may emit 100 tpy (tons per year) of a pollutant and it falls within one of 28 categories, or if it is any other type of facility and has the potential to emit 250 tpy of an air pollutant. 40 C.F.R. § 52.21(b)(1)(i).

68. Bundy and others, ''*Yes He Can*,'' p. 16.

69. Roughly 1.2 million buildings and facilities—the vast majority of which are not currently subject to PSD regulation—emit at least 250 tpy of carbon dioxide. George F. Allen and Marlo Lewis, ''Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of *Massachusetts v. EPA*,'' *University of Richmond Law Review* 44 (2010): 919, 923–24, citing Portia M. E. Mills and Mark P. Mills, ''A Regulatory Burden: The Compliance Dimension of Regulating CO_2 as a Pollutant,'' U.S. Chamber of Commerce, September 2008, pp. 7–10, http://secure.uschamber.com/assets/env/regulatory_burden0809.pdf.

70. EPA estimates that PSD permit applications could jump from approximately 300 to 41,000 per year, ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule,'' *Federal Register*, October 27, 2009, p. 55,301. In addition, Title V permit applications would increase from 15,000 to 6.1 million per year. Ibid., pp. 55,295, 55,304.

71. EPA acknowledges that the ''enormous numbers of these permit applications'' would ''vastly exceed the current administrative resources of the permitting authorities.'' Ibid., p. 55,294.

72. Ibid., p. 55,292.

73. See *Clinton v. New York*, 524 U.S. 417, 438 (1998); and *INS v. Chadha*, 462 U.S. 919, 954 (1983): ''Amendment and repeal of statutes, no less than enactment, must conform with Art. I.''

74. *Southeastern Legal Foundation, Inc. v. United States EPA*, D.C. Circuit no. 01-1131.

75. Bundy and others, ''*Yes He Can*,'' discussing Title II.

76. 42 U.S.C. § 7521(a)(1) (2000).

77. Ibid. §§ 7547, 7571.

78. ''Regulating Greenhouse Gas Emissions under the Clean Air Act,'' *Federal Register*, proposed July 30, 2008, pp. 44,354, 44,432 (to be codified at 40 C.F.R. ch. 1).

79. Alder, ''*Massachusetts v. EPA* Heats Up Climate Policy,'' p. 37.

80. Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 (codified at 49 U.S.C. §§ 32901–19 [2000]).

81. ''Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards,'' *Federal Register*, September 28, 2009, p. 49454.

82. ''Notice of Intent to Develop New Greenhouse-Gas and Fuel Economy Standards for Light-Duty Vehicles, Model Years 2017-2025.'' EPA, September 30, 2010.

83. Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C.).

84. Bundy and others, ''*Yes He Can*,'' p. 17, citing Antarctic Climate & Ecosystems Cooperative Research Centre, *Position Analysis, CO_2 Emissions and Climate Change: Ocean Impacts and Adaptation Issues* (Hobart, Tasmania: ACECRC, 2008), p. 3.

85. Ibid., citing Glenn De'ath, Janice M. Lough, and Katharina E. Fabricius, ''Declining Coral Calcification on the Great Barrier Reef,'' *Science* 116 (2009); and A. Whitman Miller, Amanda C. Reynolds, Cristina Sobrino, and Gerhardt F. Riedel, ''Shellfish Face Uncertain Future in High CO_2 World: Influence of Acidification on Oyster Larvae Calcification and Growth in Estuaries,'' *PLoS ONE* 4 (2009): e5661.

86. Thomas J. Crowley and Robert A. Berner, ''Enhanced CO_2 and Climate Change,'' *Science* 292 (May 4, 2001): 870–72.

87. Federal courts have previously upheld the Clean Water Act as constitutional under the commerce clause. *United States v. Deaton*, 332 F.3d 698, 705–8 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). But see *Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'rs*, 531 U.S. 159, 166–68 (2001), interpreting federal jurisdiction over isolated wetlands narrowly on federalism grounds.

88. 33 U.S.C. § 1251(a).

89. See ibid. § 1313; 40 C.F.R. § 130.3; 40 C.F.R. § 131.11(b).

90. 33 U.S.C. § 1313(d).

91. See ibid., at § 1313(e); and 40 C.F.R. §§ 130.6, 130.7(d)(2).

92. ''Ocean Acidification and Marine pH Water Quality Criteria,'' *Federal Register*, April 15, 2009, p. 17,484.

93. See Aman, ''Administrative Law in a Global Era,'' p. 1136, citing William H. Rodgers, *Environmental Law, Air and Water*, vol. 1 (St. Paul, MN: West Publishing, 1986), sec. 1.3, p. 19: ''Among the more salient examples of absolutism in environmental law are the goals in the Clean Water Act calling for fishable/swimming water everywhere by 1983 and no discharges anywhere by January 1, 1985.''

94. The Endangered Species Act of 1973, 7 U.S.C. § 136, 16 U.S.C. § 1531 et seq., P.L. 93-205, 87 Stat. 884 (1973).

95. 16 U.S.C. § 1533(a)(1).

96. 1536(a)(1). See Bundy and others, ''*Yes He Can*.''

97. Bundy and others, ''*Yes He Can*,'' p. 19, citing 16 U.S.C. §§ 1532(3).

98. Bradford C. Mank, ''Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?'' *Georgia Law Review* 36 (2002): 723, 731–32, citing 16 U.S.C. § 1538(a)(1)(B).

99. 16 U.S.C. § 1532, Pub. L. 97-304, §§ 4(b), 19, October 13, 1982, 96 Stat. 1420.

100. 515 U.S. 687, 698 (1995). But see *Lujan v. National Wildlife Federation* at 883, holding that the harm alleged must fall under the ''zone of interests protected by the statute'' in order for plaintiffs to have standing to sue under the ESA.

101. *TVA v. Hill*, 437 U.S. 153, 184 (1978).

102. ''Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States; Proposed Rule,'' *Federal Register*, October 29, 2009, p. 56,070: ''The underlying causes of climate change are complex global issues that are beyond the scope of the Act.''

103. National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (codified in scattered sections of 42 U.S.C.).

104. 42 U.S.C. § 4321.

105. Ibid. § 4332(C).

106. T. C. McKinney, ''Overview of NEPA Review Processes,'' http://www.efw.bpa.gov/environmental_services/NEPAProcessOverview.pdf. Moreover, the determination of whether federal action is likely to have significant environmental impacts requires the preparation of an environmental assessment—a process that also involves the public and takes 7 to 12 months. Ibid.

107. 42 U.S.C. 4322(2)(F).

108. Bundy and others, ''*Yes He Can*,'' p. 20.

109. Ibid., citing American Rivers, Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, Earthjustice, International Center for Technology Assessment, Marine Fish Conservation Network, Natural Resources Defense Council, National Wildlife Federation, Ocean Conservancy, Southern Environmental Law Center, the Wilderness Society, Letter to the Hon. Nancy Sutley, Chair, Council on Environmental Quality, November 24, 2009.

110. *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007), holding that the government's revision of CAFE standards requires the preparation of an EIS.

111. U.S. Const. art. II.

112. Ibid., § 2.

113. See Nigel Purvis, ''The Case for Climate Protection Authority,'' *Virginia Journal of International Law* 49 (2009): 1007, 1018, discussing obstacles to treaty ratification.

114. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, December 10, 1997, 37 I.L.M. 22.

115. Purvis, ''The Case for Climate Protection Authority,'' p. 1019.

116. *Medellín v. Texas*, 552 U.S. 491 (2008).

117. See Jonathan B. Wiener, ''Commentary, Think Globally, Act Globally: The Limits of Local Climate Policies,'' *University of Pennsylvania Law Review* 155 (2007): 1961, 1966–67, urging international action on climate change; and Robert R. Nordhaus, ''New Wine into Old Bottles: The Feasibility of Greenhouse Gas Regulation under the Clean Air Act,'' *New York University Environmental Law Journal* 15 (2007): 53, 54, stating that the Clean Air Act cannot control global carbon dioxide levels.

118. Purvis, ''The Case for Climate Protection Authority,'' p. 1021, noting that since World War II, executive agreements have made up almost 90 percent of all international pacts signed by the United States.

119. S. Exec. Rep. no. 102-55, at 14 (1992).

120. Louis Henkin, *Foreign Affairs and the United States Constitution*, 2d ed. (New York: Oxford University Press, 1996).

121. 42 U.S.C. § 7671p(a).

122. Inimai M. Chettiar and Jason A. Schwarz, ''The Road Ahead: EPA's Options and Obligations for Regulating Greenhouse Gases,'' New York University School of Law, Institute for Policy Integrity, April 2009, pp. 55–57.

123. 33 U.S.C. § 1251(c).

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126. Ibid. § 1103(a)(3).

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128. Ibid. § 1103c.

129. 22 U.S.C. §§ 2656c(a), 2656d.

130. Hannah Chang, ''International Executive Agreements on Climate Change,'' Columbia Law School Center for Climate Change Law working paper, November

2009, http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163020, quoting 22 U.S.C. §§ 3502–3.

131. 22 U.S.C. §3504.

132. Chang, ''International Executive Agreements on Climate Change,'' p. 17.

133. 22 U.S.C. §§ 2151p(b), p-1(c).

134. Ibid. § 2151d(b)(1).

135. Ibid. § 2151d(b)(2).

136. U.N. Framework Convention on Climate Change, arts. 4, 12, May 9, 1992, 1771 U.N.T.S. 164.

137. Chang, ''International Executive Agreements on Climate Change,'' p. 12.

138. S. Exec. Rep. 102-55, 102d Cong. (1992), p. 14.

139. See John Harwood, ''Mixed Bag for Obama on Climate Change Deal amid the Recession,'' *New York Times*, December 21, 2009: ''The agreement the United States reached with Brazil, China, India and South Africa lacked commitments to achieve its stated goals, was nonbinding and was not formally affirmed by participants, in any case.''

140. Energy Policy Act, 42 U.S.C. § 13388, establishing the Global Climate Change Response Fund.

141. Chang, ''International Executive Agreements on Climate Change,'' p. 13.

142. Convention for the Unification of Certain Rules for International Carriage by Air, S. Treaty Doc. No. 106-45, May 28, 1999.

143. Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

144. Ibid., p. 37.

145. § 231, 42 U.S.C. 7571(a)(2)(A).

146. Chang, ''International Executive Agreements on Climate Change,'' p. 14, citing Control of Air Pollution from Aircraft and Aircraft Engines; Emission Standards and Test Procedures, *Federal Register*, December 30, 1982, pp. 58462, 58464.

147. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

148. U.S. Const. art. II, § 1.

149. Ibid. § 3.

150. Ibid. §§ 1–3. See Bundy and others, ''*Yes He Can*,'' p. 9, discussing such authority.

151. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), 1155 U.N.T.S. 311.

152. Bundy and others, ''*Yes He Can*,'' p. 10, comparing Michael D. Ramsey, ''Executive Agreements and the (Non)Treaty Power,'' *North Carolina Law Review* 77 (1998): 134, 218–35 (arguing that executive agreements have no domestic effect), with Purvis, ''The Case for Climate Protection Authority,'' p. 1028 (asserting that sole executive agreements carry the same force as a federal statute). See also Congressional Research Service, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate*, study prepared for the Committee on Foreign Relations, 106th Cong. 2d sess., 2001, Committee Print 106-71, pp. 93–95, noting inconsistencies in case law regarding whether sole executive agreements override prior, contrary federal statutes.

153. Bundy and others, ''*Yes He Can*,'' p. 10, citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *U.S. v. Pink*, 315 U.S. 203 (1942); and *U.S. v. Belmont*, 301 U.S. 324 (1937); but see *Medellin v. Texas*, 128 S. Ct. at 1371–72 (2008), suggesting that the effect of these cases may be limited to the

international claims settlement context, where presidential power is ''supported by a particularly longstanding practice of congressional acquiescence.''

154. 552 U.S. 491 (2008).

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158. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

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160. Chang, ''International Executive Agreements on Climate Change,'' p. 11, summarizing Office of the Legal Adviser, U.S. Department of State, Int'l Agreements Other than Treaties Reported to Congress under Case Act, http://www.state.gov/s/l/treaty/caseact/.

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