GLOBAL WARMING AND ORIGINALISM: THE ROLE OF THE EPA IN THE OBAMA ADMINISTRATION

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Abstract: Anthropogenic warming will devastate the world if it is not abated. Abating such warming will require a long-term strategy that starts with immediate and drastic action in the form of new laws designed to restrict greenhouse gas emissions. In the wake of *Massachusetts v. EPA*, President Obama is likely to issue an executive order requiring the EPA Administrator to issue strict regulations addressing greenhouse gas emissions from mobile sources under the Clean Air Act. However, such executive action will surely spark a flood of lawsuits challenging the scope of executive power. This Note addresses the merits of such lawsuits and uses unitary executive theory to argue that the President's executive power includes the power to control the EPA rule-making process.

INTRODUCTION

Barack Obama has assumed the presidency at a time when the consequences of global warming demand immediate action.[1] Unfortunately, immediate action is not likely to come in the form of legislation,[2] as any congressional climate change proposal will likely be thwarted because it is too costly to society, or it will be so diluted by legislative compromise that it will be ineffective.[3] A recent Gallup Poll highlighted that there is a growing number of Americans who are skep-

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[1] *See infra* Part I.

[2] John M. Broder, *As Time Run Short for Global Climate Treaty, Nations May Settle for Interim Steps*, N.Y. TIMES, Oct. 21, 2009, at A13.

[3] *See* David Epso & Andrew Taylor, *House, Senate Panels Take up Revised Obama Budget*, HUFFINGTON POST, Mar. 25, 2009, http://www.huffingtonpost.com/2009/03/25/house-senate-panels-take-_n_178932.html; Dan Froomkin, White House Watch: Obama Getting Tougher with Congress, http://voices.washingtonpost.com/white-house-watch/2009/03/obama_getting_tougher_with_con.html (Mar. 18, 2009, 10:32 EST); Manu Raju, *Moderates Uneasy with Obama Plan*, POLITICO, Mar. 3, 2009, http://www.politico.com/news/stories/0309/19587.html.

tical of the science underlying global warming.[4] Such polling is spurring some members of Congress to oppose climate legislation.[5]

However, the Obama Administration is aware of the threats posed by global warming.[6] The Administration is poised to act following on endangerment finding from the Environmental Protection Agency (EPA) declaring greenhouse gas (GHG) emissions from mobile sources to be a type of pollutant that is dangerous to public health and welfare.[7] In the wake of the endangerment finding, President Obama will most likely build on the Supreme Court's decision in *Massachusetts v. EPA*[8] by initiating the regulatory process to control GHG emissions in the United States under the authority of the Clean Air Act (CAA).[9]

President Obama's global warming agenda cannot be divorced from his larger progressive agenda.[10] Professor Michael Waldman, Executive Director of the Brennan Center for Justice at New York University School of Law, notes that even though Obama's election was a referendum for progressive change, his ability to achieve his policy agenda—including steps to address global warming—will depend on defeating constitutional challenges from conservatives.[11] In particular,

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[4] Lydia Saad, *Increased Number Think Global Warming Is Exaggerated*, GALLUP, Mar. 11, 2009, http://www.gallup.com/poll/116590/Increased-Number-Think-Global-Warming-Exaggerated.aspx.

[5] *See* Aaron Wiener, *Economic Crisis Sidelines Global Warming Concerns*, WASH. INDEP., Mar. 17, 2009, http://washingtonindependent.com/34049/economic-crisis-sidelines-global-warming-concerns. *But see* John Kerry & Lindsey Graham, *Yes We Can (Pass Climate Change Legislation)*, Op-Ed., N.Y. TIMES, Oct. 11, 2009, at WK11 (outlining five principles to provide a framework for passing climate change legislation).

[6] *See* Darren Samuelsohn, *Leaked EPA Document Shows Endangerment Finding on Fast Track*, N.Y. TIMES, Mar. 10, 2009, http://www.nytimes.com/gwire/2009/03/10/10greenwire-epa-document-shows-endangerment-finding-on-fas-10053.html; Ian Talley, *U.S. Climate Czar: C02 Regulation Ruling Coming Soon*, DOW JONES NEWSWIRE, Feb. 23, 2009, http://www.cattlenetwork.com/Content.asp?ContentID=293121; *see also* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 7 C.F.R. ch. 1).

[7] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496–97 (Dec. 15, 2009) (to be codified at 7 C.F.R. ch 1); Saumelsohn, *supra* note 6. The endangerment finding brings such emissions within the purview of the Clean Air Act. *See generally* DAVID W. KREUTZER & KAREN A. CAMPBELL, THE HERITAGE CENTER FOR DATA ANALYSIS, CDA08–10, CO_2-EMISSION CUTS: THE ECONOMIC COSTS OF THE EPA'S ANPR REGULATIONS (2009), *available at* http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_08_10.pdf (discussing the potential impact from EPA regulation under the CAA of GHGs).

[8] 549 U.S. 497 (2007).

[9] *See* KREUTZER & CAMPBELL, *supra* note 7, at 1 & n.2; Samuelsohn, *supra* note 6.

[10] *See* Wiener, *supra* note 5.

[11] Michael Waldman, *A Brewing Court Battle: Obama's Ambitious Agenda Will be Scrutinized and Second-guessed by Conservative Federal Judges*, NEWSWEEK, Mar. 23, 2009, at 35, 35; Newt

conservatives will likely contest Obama's constitutional authority to initiate a regulatory response to global warming.[12] Responding to attacks regarding presidential authority will be a formidable task because a majority of the judges in the federal judiciary are ideologically conservative.[13] Moreover, Professor Waldman notes that conservative federal judges tend to rely on the theoretical framework of originalism.[14] If the Obama Administration attempts to regulate GHG emissions, it will need to defend the constitutionality of the action on the basis of originalism or it will need to articulate an argument against originalism.[15]

Given that such an action, if taken, will inevitably receive polictical and legal criticism, this Note anticipates and answers such critiques in two ways. First, this Note presents a policy argument that President Obama should take immediate action to regulate GHGs from mobile sources by issuing an executive order instructing the EPA Administrator to initiate the rulemaking process.[16] Given the severity of the threats posed by global warming and its consequences if action is not taken now, Part I of this Note argues for immediate presidential action.[17] Parts II through VI of this Note defend the constitutionality of this policy proposal. Part II details unitary executive theory, as justified by originalism, as a framework for evaluating presidential action.[18] Section B of Part II extrapolates the limits of a unitary executive via Justice

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Gingrich, *Message to Copenhagen: Our Constitution Begins, 'We the People . . .'*, HUMAN EVENTS, Dec. 16, 2009, http://www.humanevents.com/article.php?id=34850 (responding to the EPA endangerment finding by noting that using the finding to use the agency to regulate greenhouse gasses "would be a breathtakingly anti-democratic and unconstitutional arrogation of power on the part of the President").

[12] Waldman, *supra* note 11, at 35; *see* Jon Anderson, *Indec Sues Regional Greenhouse Gas Initiative over Carbon Cap and Trade Program*, BOSTON ENVTL. POL'Y EXAMINER, Mar. 22, 2009, http://www.examiner.com/x-5908-Boston-Environmental-Policy-Examiner~y2009m3d22-Indec-sues-Regional-Greenhouse-Gas-Initiative-over-carbon-cap-and-trade-program; Stephen Ohlemacher, *Obama to Use Executive Orders for Immediate Environmental Impact*, HUFFINGTON POST, Nov. 10, 2008, http://www.huffingtonpost.com/2008/11/10/obama-to-use-executive-or_n_142595.html.

[13] Neil A. Lewis, *Stark Contrasts Between McCain and Obama in Judicial Wars*, N.Y. TIMES May 28, 2008, at A17; Jerry Markon, *The Politics of the Federal Bench: Obama's Appointments Are Expected to Reshape the U.S. Legal Landscape*, WASH. POST, Dec. 8, 2008, at A01; Waldman, *supra* note 11, at 35.

[14] *See* Waldman, *supra* note 11, at 35.

[15] *See id.*

[16] *See infra* Parts I, III.

[17] *See infra* Part I.

[18] *See infra* Part II.

Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer.*[19] Part III discusses how the Supreme Court's decision in *Massachusetts v. EPA*[20] provides the groundwork for the CAA to become a vehicle for addressing global warming.[21] Part IV provides background on administrative agencies, the Administrative Procedure Act, the EPA, and the CAA.[22] Part V uses unitary executive theory to define the proper roles of agencies, the EPA, and Administrator Lisa Jackson.[23] Part VI argues that President Obama would be constitutionally justified in using his executive power to address GHG emissions by ordering the EPA Administrator to issue GHG-reducing regulations under the authority of the CAA.[24]

I. The Dangers of Global Warming

Global climate change has the potential to be truly catastrophic.[25] The driving force behind climate change is global warming, which is caused by the greenhouse effect.[26] The greenhouse effect refers to the warming of the earth over time as a layer of insulating gases traps solar heat inside the earth's atmosphere.[27] There are both natural and human (anthropogenic) causes of GHG emissions.[28] Current studies indicate that there is a strong likelihood that the increase in the global temperature is primarily the result of human activities.[29] There is a virtual consensus among leading scientists that global warming is real and that the current rates of warming are largely attributable to human activities.[30]

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[19] 343 US 579 (1952) (providing a method for evaluating the constitutionality of exercises of executive power, principally unilateral presidential action); *see infra* Part II.B.

[20] 549 U.S. 497 (2007).

[21] *See infra* Part III.

[22] *See infra* Part IV.

[23] *See infra* Part V.

[24] *See infra* Part VI.

[25] Ross Gelbspan, Boiling Point 1, 16–17 (2004).

[26] Pew Ctr. on Global Climate Change, Science Brief: The Causes of Global Climate Change 1 (Aug. 2008) [hereinafter Science Brief].

[27] *Id.* at 1–2.

[28] *Id.* at 1.

[29] *Id.* at 2; *see* Maureen D. Avakian et al., *The Origin, Fate, and Health Effects of Combustion By-products: A Research Framework*, 110 Envtl. Health Persp. 1155, 1155 (2002); Ari N. Sommer, Note, *Taking the Pit Bull off the Leash: Siccing the Endangered Species Act on Climate Change*, 36 B.C. Envtl. Aff. L. Rev. 273, 277-79 (2009).

[30] Working Groups I, II, & III to the Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report 5 (Rajenda K. Pachauri et al., eds. 2007); Science Brief, *supra* note 26, at 2; Avakian et al., *supra* note 29, at 1155; Naomi Oreskes, Essay, *The Scientific Consensus on Climate Change*, 306 Science 1686, 1686 (2004).

Human-induced-global warming is mostly attributable to the utilization of combustion-powered machines.[31] One way to categorize combustion-powered machines is by distinguishing whether the machine is stationary or mobile.[32] Stationary sources of GHGs include factories, power plants, and refineries.[33] Mobile sources, which are generally found in the transportation sector, include "passenger cars and light trucks, heavy duty trucks and off-road vehicles, and rail, marine, and air transport."[34] The latest research indicates that mobile sources account for at least one third of the total GHG emissions in the United States.[35]

Conservative projections indicate that global warming is happening rapidly and is irreparably changing the earth's ecosystems.[36] Many species will become extinct or will be pushed to the brink of extinction as a result of human-induced climate change.[37] James E. Hansen, Director of NASA's Goddard Institute for Space Studies, noted that the global climate system is approaching various tipping points.[38] If human emission rates continue at their current pace, the results could be very grim: sea levels will rise due to melting ice caps and hundreds of millions of people will be displaced from their homelands.[39] Mass extinctions will be as likely as they were during the previous warming periods in the earth's history.[40] Even assuming a gradual phase-out of all GHG emissions by the year 2300, scientific models predict dire consequences

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[31] Avakian et al., *supra* note 29, at 1155.

[32] *See* Pew Ctr. on Global Climate Change, Congressional Policy Brief: Policies to Reduce Emission from the Transportation Sector 1 (Nov. 2008) [hereinafter Policy Brief], *available at* http://www.pewclimate.org/docUploads/Transportation.pdf; Avakian et al., *supra* note 29, at 1155.

[33] Policy Brief, *supra* note 32, at 1.

[34] *Id.*

[35] *Id.* Given that the United States is the second largest emitter of GHGs, mobile source emissions in the United States represent a significant portion of global GHG emissions. Brad Knickerbocker, *China Now Biggest Emitter*, Christian Sci. Monitor, June 28, 2007, at 12; s*ee also Climate Change: The Big Emitters,* BBC News, July 4, 2005, http://news.bbc.co.uk/2/hi/science/nature/3143798.stm.

[36] Gelbspan, *supra* note 25, at 1, 36; John Roach, *By 2050 Warming to Doom Millions Species, Study Says,* Nat'l Geographic News, July 12, 2004, http://news.nationalgeographic.com/news/2004/01/0107_040107_extinction.html.

[37] Gelbspan, *supra* note 25, at 1, 36; Roach, *supra* note 36.

[38] James Hansen, Dir., Nat'l Aeronautics & Space Admin. Goddard Inst. for Space Studies, Address at National Press Club: Global Warming Twenty Years Later 1–2 (June 23, 2008), *available at* http://www.columbia.edu/~jeh1/2008/TwentyYearsLater_20080623.pdf.

[39] *Id.*

[40] *Id.* at 2.

unless immediate action is taken.[41] Reports show that some effects of global warming are already irreversible.[42]

The effects of global warming also have the potential to spill over into the realm of national security and politics.[43] Global warming may deplete precious resources; result in infrastructure-destroying weather that will wreak economic havoc; create large numbers of refugees and migrants; and make weak governments susceptible to extremist takeovers.[44] Consequently, civil, regional, and international war may become more common.[45]

Presently, the American public is divided on the importance of global warming,[46] and the government's position on international climate agreements has hurt the United States' credibility abroad.[47] Domestically, the lack of a concerted effort to change Americans' consumption patterns has eviscerated the possibility of climate consciousness for most of the population.[48] A new Pew Center survey of twenty national priorities for 2009 indicates that global warming ranks lowest.[49] Furthermore, since global warming is a worldwide problem, international cooperation will be imperative in order to achieve any meaningful reduction in GHG emissions.[50] The United States' refusal to commit to any binding international climate treaties or agreements compromises its credibility and interferes with global efforts to combat

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[41] Andreas Schmittner et al., *Future Changes in Climate, Ocean Circulation, Ecosystems, and Biogeochemical Cycling Simulated Simulated for a Business as Usual CO2 Emission Scenario Until Year 4000 AD*, 22 Global Biogeochemical Cycles 1, 16 (2008), *available at* http://mgg.coas.oregonstate.edu/~andreas/pdf/S/schmittner08gbc.pdf.

[42] *See* Susan Solomon, *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 Proc. Nat'l Acad. Sci. 1704, 1704 (Feb. 10, 2009) (noting that climate change due to carbon dioxide emissions is irreversible for at least 1000 years).

[43] *See* CNA Corp., National Security and the Threat of Climate Change 13–18 (2007), *available at* http://www.npr.org/documents/2007/apr/security_climate.pdf; Gelbspan, *supra* note 25, at 1, 37.

[44] *See* CNA Corp., *supra* note 43, at 13–17.

[45] *See id.* at 18; s*ee also* Walter Russell Mead, *Markets Biggest Threat to Peace*, L.A. Times, Aug. 23, 1998, at M1 (arguing that the collapse of the global economy would be the biggest risk of a new World War).

[46] Pew Res. Ctr. for the People and the Press, Economy, Jobs Trump All Other Policy Priorities in 2009 (Jan. 22, 2009) http://people-press.org/report/485/economy-top-policy-priority [hereinafter Jobs Trump].

[47] *See* Gelbspan, *supra* note 25, at 1, 37.

[48] *See* Jobs Trump, *supra* note 46; Juliet Schor, *The New Politics of Consumption: Why Americans Want So Much More Than They Need*, Boston Rev., Summer 1999, at 4, *passim*, *available at* http://bostonreview.net/BR24.3/schor.html.

[49] Jobs Trump, *supra* note 46.

[50] *See* Gelbspan, *supra* note 25, at 1, 37.

global warming.[51] Other major GHG-emitting countries simply will not take action without such commitments from the United States.[52]

Current proposals to address global warming fail to take immediate action to curb U.S. emissions from mobile sources.[53] A recent congressional proposal dealing with climate change was the Boxer-Lieberman-Warner Resolution.[54] Two problems were immediately evident with this proposal. First, the proposed action would have been gradual, unfolding over the course of years, and GHG emissions would not have immediately been impacted.[55] Second, the proposal completely ignored mobile sources of GHGs, focusing exclusively on implementing a cap-and-trade program for stationary sources.[56] The severity of global warming demands that the government act quickly, and mobile sources are prime targets for emission reductions given their substantial contributions to warming.[57] Furthermore, the American public's ambivalence toward global warming[58] and its opponents' suc-

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[51] *See id.*; Nigel Purvis, U.S. Global Leadership to Safeguard Our Climate, Security, Economy 5, 6–7(2008), *available at* https://www.policyarchive.org/bitstream/handle/10207/10917/ClimateChange.Purvis.FINAL.pdf. By a vote of 95–0, the Senate passed the Byrd-Hagel Resolution, which prohibits the United States from becoming a signatory to any treaty or international agreement designed to limit GHG emissions unless developing countries—including China and India—do not receive exemptions from such agreements. *See* S. Res. 98, 105th Cong. (1997).

[52] *See* Purvis, *supra* note 51, at 5, 6–7; Broder, *supra* note 2.

[53] *See, e.g.*, Press Release, Greenpeace et al., Broad Coalition Criticizes Climate Bill (May 22, 2009), *available at* http://www.greenpeace.org/usa/press-center/releases2/broad-coalition-criticizes-cli (criticizing the American Clean Energy and Security Act , H.R. 2454, 111th Cong. (2009)).

[54] *See* Pew Ctr. on Global Climate Change, Economy-wide Cap-and-Trade Proposals in the 110th Congress as of December 1, 2008, at 1(2008) [hereinafter Cap-and-Trade Proposals], *available at* http://www.pewclimate.org/docUploads/Chart-and-Graph-120108.pdf; Deborah Sliz & Karen Zanoff, *The Congressional Stalemate on Energy Policy: Can It Be Broken?*, Bulletin (Nw. Pub. Power Ass'n, Vancouver, Wash.), Sept. 1, 2008, http://www.allbusiness.com/government/elections-politics-politics-political-parties/11568698-1.html.

[55] *See* Cap-and-Trade Proposals, *supra* note 54, at 1; Sliz & Zanoff, *supra* note 54.

[56] *See* Cap-and-Trade Proposals, *supra* note 54, at 1; Sliz & Zanoff, *supra* note 54.

[57] Policy Brief, *supra* note 32, at 1. Mobile emissions are particularly high in the United States, where artificially cheap gasoline has led to a disproportionately high rate of automobile usage compared to other developed countries. Robert Bryce, *Gasoline Is Cheap: Four Dollars a Gallon Is Outrageous! We Should be Paying Much More*, Slate, May 15, 2008, http://www.slate.com/id/2191491/. Like the Boxer-Lieberman-Warner proposal, President Obama's latest call for Congress to implement fuel efficiency standards is inadequate in light of the severity of global warming; his proposal focuses on long-term, gradual action by the auto industry rather than on making immediate cuts in emissions from mobile sources. John M. Broder & Peter Baker, *Obama's Order Likely to Tighten Auto Standards*, N.Y. Times, Jan. 26, 2009, at A1.

[58] Jobs Trump, *supra* note 46.

cessful filibuster of the Boxer-Lieberman-Warner proposal, suggests that any proposal will face a tough battle in Congress.[59]

II. A Framework for Executive Action

A. *Theoretical and Legal Underpinnings*

One prominent theory regarding presidential power is the unitary executive theory.[60] It is based on the Vesting Clause in Article II, Section 1 of the United States Constitution,[61] which states that "[t]he executive power shall be vested in a President of the United States of America."[62] The unitary executive theory posits that the President has complete power to execute the law and, consequently, has complete control over the actions of all executive agencies.[63] Conversely, the theory states that, since power has not been vested in either of the other two branches of government, the President alone has the power to execute the laws of the land.[64]

Unitary executive theory is premised on constitutional originalism (originalism), which is the notion that the text of the Constitution should be understood as it was understood when it was ratified and that this original understanding should be the sole meaning given to the text.[65] There are four methodological steps in employing originalism, the last three of which are used successively only if the meaning of the text in question is still elusive.[66] The first methodological step examines the "plain meaning" of the constitutional text in question and "construe[s] [the words] holistically in light of the entire document."[67] The goal with this step is to ascertain the meaning of the text under review from the perspective of a person living at the time of the Constitution's

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[59] Sliz & Zanoff, *supra* note 54.

[60] *See generally* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive By Steven G. Calabresi and John Christopher Yoo*, 12 U. Pa. J. Const. L. 593 (2010) (book review) (providing background on the unitary executive theory.

[61] *Id.* at 3.

[62] U.S. Const. art. II, § 1.

[63] *See* Pierce, *supra* note 60, at 3.

[64] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 549 (1994).

[65] *See id.* at 551.

[66] *See id.* at 552–53.

[67] *See id.* The call to read the text in light of the whole document is consistent with the theory of intertextuality. *See infra* notes 111–116 and accompanying text.

ratification.[68] Thus, a dictionary or grammar manual germane to the time of the Constitution's ratification should be the only tool necessary to determine the plain meaning of the text.[69]

If such a tool does not clarify the plain meaning of the text, then one should proceed to the second methodological step: a review of any publicized or widely dispersed explanatory statements about the text that were disseminated contemporaneously to Constitution's ratification.[70] If "ambiguity still persists," one then reviews the private statements made prior to or at the time of the ratification of the Constitution.[71] Finally, if the plain meaning of the text cannot be ascertained from the three preceding steps, the analysis should then consider postratification history.[72] However, it is important to note that when employing originalism, the focus is on what the public would have understood at the time of ratification, not on the private thoughts of the drafters or others close to the process.[73]

Thus, under originalism, the term "vested" from the Vesting Clause of Article II, Section 1 means "'[t]o place in possession' of an individual or entity."[74] The plain meaning of the Vesting Clause is that the President is given the sole responsibility of executing the laws of the United States; it is an explicit grant of power to the President as the chief executive.[75] This understanding of vested is also consistent with the word's use in Article III, which states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[76] Article III can be interpreted to mean that judicial power is exclusively granted to the Supreme Court and other congressionally created courts.[77] Conversely, if the definition of "vested" is not interpreted as an exclusive grant of judicial power, the Supreme Court and the inferior courts lack any con-

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[68] *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990); Calabresi & Prakash, *supra* note 64, at 553.

[69] Calabresi & Prakash, *supra* note 64, at 553.

[70] *See id.*; *see also* Bork, *supra* note 68, at 144.

[71] Calabresi & Prakash, *supra* note 64, at 553.

[72] *See id.*

[73] Bork, *supra* note 68, at 144; *see* Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 725–27 (1988).

[74] Calabresi & Prakash, *supra* note 64, at 572 (citing 2 Samuel Johnson, A Dictionary of the English Language 2102 (Librairie du Liban ed. 1978) (4th ed. 1773)).

[75] *See id.* at 562, 574, 579; *see also* Harold H. Bruff, Balance of Forces: Separation of Powers Law in the Administrative State 448–49 (2006).

[76] U.S. Const., art. III, § 1.

[77] *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 714.

crete authority.[78] Applying the same logic to Article II, since it does not vest executive authority in any other branch of government, no other branch has any power to execute the laws of the United States because "vested" is understood to be an exclusive and explicit grant of power to the President.[79]

As the first of three arguments favoring originalism, several prominent constitutional scholars support originalism as the most appropriate method of constitutional interpretation.[80] As noted by former Court of Appeals Judge Robert H. Bork, the law is supposed to function as a neutral yardstick, providing guidance and settling disputes.[81] Consequently, interpretation of the law, particularly the Constitution, should not include judgments based on personal morals and values.[82] Former United States Attorney General and constitutional law scholar Edwin Meese III notes that an originalist methodology ensures the law's neutrality and freedom from personal bias because it is based on the assumption that each word in the Constitution has a discrete and concrete meaning.[83] Originalism facilitates the ascription of definitive meaning to the Constitution.[84] For instance, when the Constitution states in Article II that to be President an individual must be at least thirty-five years old, it literally means that any President must have lived for at least thirty-five years; it does not mean that the person must have obtained maturity equivalent to that of the average thirty-five-year-old.[85] The descriptions of the organization of the House and Senate are also very specific.[86]

Some scholars suggest that this line of reasoning is problematic because the words of the text are vague in many instances and require judgment calls regarding their level of abstraction.[87] Originalist doctrine accounts for this by constraining abstractions to the likely scope during the time of ratification.[88] One prominent scholar, Professor

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[78] *See id.*

[79] *See id.*; Calabresi & Prakash, *supra* note 64, at 571.

[80] *See generally* Bork, *supra* note 68; Bruff, *supra* note 75; Edwin Meese III, *Interpreting the Constitution*, *in* Interpreting the Constitution: The Debate over Original Intent 13 (Jack N. Rakove ed., 1990); Calabresi & Prakash, *supra* note 64; Prakash, *supra* note 77.

[81] *See* Bork, *supra* note 68, at 143–46.

[82] *See id.* at 146–47.

[83] *See* Meese, *supra* note 80, at 15–17.

[84] *See id.*

[85] *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291, 305 (2007).

[86] *See* U.S. Const. art. I; Meese, *supra* note 80, at 15–17.

[87] *See* Bork, *supra* note 68, at 148–49.

[88] *See id.*

Akhil Amar, has implied that conceptualizing the Constitution as a neutral document to be read for its plain meaning, free from personal values and morals, makes the most sense given that the Constitution was written by "the People" and is supposed to be accessible to ordinary citizens.[89] Many scholars have noted that maintaining a stable and consistent meaning for the people is essential to the continued legitimacy of the Constitution.[90]

Secondly, the historical context in which the framers of the Constitution operated also supports originalism.[91] Many prominent framers saw the Constitution as a neutral document with a precise meaning regardless of personal beliefs.[92] James Madison, who is thought of as the father of the Constitution,[93] concurred with Thomas Jefferson's belief that "[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."[94] Madison thus understood the Constitution not as a living document, but as a specific declaration of government and rights.[95] Furthermore, Madison thought that construing the Constitution based on nonliteral interpretation was a biased methodology and did not reflect the intended use of the document.[96]

In addition to the framers' understanding of the function of the Constitution, the public's general understanding of legal interpretation at the time of the Constitution's ratification affirms the primacy of originalism.[97] A largely Protestant people wrote the Constitution.[98] As Professor H. Jefferson Powell notes, the phrase *sola scriptura* captures a core belief of post-Reformation Protestants.[99] This phrase refers to the belief that "all things *necessary* for salvation and concerning faith and life are taught in the Bible clearly enough for the ordinary believer to

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[89] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 296–97 (1998).

[90] *See* Bork, *supra* note 68, at 159–60; Meese, *supra* note 80, at 20.

[91] *See* Meese, *supra* note 80, at 15–17.

[92] *Id.* at 17.

[93] Library of Congress, Wise Guide: Who's the Father of the Constitution?, http://www.loc.gov/wiseguide/may05/constitution.html (last visited Oct. 26, 2009).

[94] George Thomas, The Madisonian Constitution 16 (2008); Meese, *supra* note 80, at 17.

[95] George Thomas, The Madisonian Constitution 16 (2008); Meese, *supra* note 80, at 17.

[96] H. Jefferson Powell, *The Original Understanding of Original Intent*, *in* Interpreting the Constitution, *supra* note 80, at 53, 82–83.

[97] *See id.* at 55–57.

[98] *See id.*

[99] *See id.* at 56.

find it there and understand."[100] The Protestants rejected nonliteral interpretations of the Bible, focusing instead on the text's plain meaning.[101] Prior to coming to what is now the United States, Puritans in England criticized nonliteral interpretations of the law and protested against judges who inserted their own biases into their rulings.[102] Puritans demanded legal reform to ensure a stable law that could be discerned by looking to the plain meaning of the text of a statute, a method obviously similar to their adherence to *sola scriptura.*[103] While this call for reform did not lead to real change in Britain, it was an important "intellectual foundation" of the founders of the United States[104] It was in the context of this intellectual foundation that the founders encumbered the Constitution with their intent that its plain meaning controlled its interpretation.[105] The framers rejected the practice of asserting nonliteral meanings and subsequently applying subjective interpretations of the law, which had become commonplace in Britain.[106]

Common law at the time of the Constitution's ratification is also instructive in affirming the legitimacy of originalism.[107] In designing and drafting the Constitution, the framers drew from their experience with English common law, which required skill in determining a law's intent or intention.[108] John Marshall, writing under the pseudonym "A Friend of the Constitution," noted in an 1819 letter to the *Alexandria Gazette* that "*intention* is the most sacred rule of interpretation . . . ."[109] For the framers, the intent of a law did not come from a nonliteral interpretation of the law but, rather, from the plain meaning of the text.[110]

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[100] W. Robert Godfrey, *What Do We Mean by Sola Scriptura?*, *in* Sola Scriptura!: The Protestant Position on the Bible 1, 3 (Don Kistler, ed. 1995).

[101] Powell, *supra* note 96, at 56.

[102] *Id.* at 56–57.

[103] *See id.*

[104] *See id.* at 57.

[105] *See id.* at 56–57.

[106] *See id.*

[107] *See* Powell, *supra* note 96, at 55.

[108] *See id.* at 58.

[109] John Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 2, 1819, *reprinted in* John Marshall's Defense of *McCulloch v. Maryland*, at 167 (Gerald Gunther ed., 1969). At the time of the Constitution's ratification, the intent of the drafter of a law and the intent of the text were indistinguishable. Powell, *supra* note 96, at 58–59.

[110] *See* Powell, *supra* note 96, at 59.

A final justification for originalism is the Constitution's intratextuality.[111] Intratextuality refers to the Constitution's repeated use of certain terms and language structures.[112] Repeated uses of terms and language structures allow the Constitution to function as its own dictionary to the extent that meaning can be extracted by comparing the different uses of the same words.[113] Therefore, a "contested word or phrase that appears in the Constitution [is read] in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[114] Seeing the Constitution through the lens of intratextualism is advantageous because it understands the document as a complete statement on government, and not as a compilation of unrelated articles, sections, and clauses.[115] Moreover, since intratextualism is intuitive—identical words and phrases in the Constitution have identical meanings—it increases ordinary citizens' access to the Constitution and to the law, solidifying the democratic philosophy underlying the United States government.[116]

B. *Evaluating Executive Action:* Youngstown Sheet & Tube Co. v. Sawyer

The United States Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer* offers a framework for evaluating the legitimacy of presidential action.[117] North Korea invaded the Republic of Korea (South Korea) on June 24, 1950, and the United States interpreted the aggression as a Soviet Union-instigated power play on behalf of all communists.[118] Truman braced the country for protracted involvement, in part, by preparing the domestic economy to support a long-term war effort.[119] For Truman, greater United States involvement in Korea included passing the Defense Production Act of 1950, which was designed to spur increased production of strategic materials, including steel.[120]

Concurrently, steel industry labor unions and the steel companies disagreed about the terms of their most recent collective bargaining

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[111] *See* AMAR, *supra* note 89, at 296.

[112] *See id.*

[113] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999).

[114] *See id.* at 748.

[115] *See id.* at 795.

[116] *See id.* at 796.

[117] 343 U.S. 579 (1952); s*ee also* Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008); Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

[118] *See* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 1 (1977).

[119] *See id.* at 4–5.

[120] *See id.* at 4–6.

agreement.[121] After months of negotiations, the union gave notice of its intent to commence a nationwide strike.[122] Truman saw the strike as a danger to the United States' national security, as steel was necessary to carry on the war effort.[123] Truman issued an executive order directing the Secretary of Commerce to seize the steel industry.[124]

The steel companies sued the Secretary of Commerce in Federal District Court, arguing that the President did not have the legislative or constitutional authority to seize the steel industry.[125] Upon appeal, the Supreme Court ruled that Truman's executive order was an unconstitutional use of his presidential power.[126] Seven opinions were filed in *Youngstown*,[127] but Justice Jackson's concurring opinion has become the most widely cited opinion.[128]

Justice Jackson rejected Truman's seizure because Congress had never authorized it and he believed that there were no inherent constitutional powers allowing the President to do it.[129] Jackson laid the framework for evaluating presidential power by declaring that "[p]residential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."[130] Jackson laid out three categories of presidential action, each with its own degree of presumed constitutionality.[131] The first and least suspect category of action is when the "President acts pursuant to an express or implied authorization of Congress."[132] Specifically, the Court would likely uphold presidential action pursuant to an express or implied grant of power by Congress because it is this type of federal power arrangement that the Constitution explicitly envisions.[133] The second category of action is "[w]hen the President acts in absence of either a congressional grant or denial of authority."[134] This category of action is different from the first

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[121] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

[122] *See id.*

[123] *See id.*

[124] *See id.* at 583. The order instructed the Secretary of Commerce to assume control of the nation's steel mills, thereby conscripting the company presidents to be operating managers for the United States. *See id.*

[125] *See id.*

[126] Marcus, *supra* note 118, at 197.

[127] *Id.*

[128] *See* Medellín v. Texas, 128 S. Ct. 1346, 1350 (2008).

[129] *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

[130] *Id.*

[131] *See Medellín*, 128 S. Ct. at 1368.

[132] *Id.*; *see Youngstown*, 343 U.S. at 635.

[133] *Youngstown*, 343 U.S. at 635–37.

[134] *Id.* at 637.

category because the "Congress [and the President] may have concurrent authority," and legitimacy of such actions may hinge on the national and international circumstances at the time.[135] The third and final category of presidential action is "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."[136] This category is the most suspect since it indicates that the President may be disregarding the will of Congress and attempting to prevail on his own powers.[137]

On several occasions, the Supreme Court has utilized and extended Jackson's *Youngstown* methodology.[138] One important affirmation came in *Dames & Moore v. Regan*.[139] In response to a constitutional and statutory challenge by Dames & Moore, the Court evaluated the constitutionality of an executive order using Jackson's opinion in *Youngstown* as a guide.[140] The court upheld the presidential nullification of a judgment in favor of Dames & Moore.[141] However, the court ruled that Regan did not have the statutory or constitutional authority to prohibit Dames & Moore, or any other party, from further legal proceedings against the Iranian defendants or anyone else.[142] In upholding presidential nullification of orders of judgment and attachment, the court cited a specific authorization by Congress in the International Emergency Economic Powers Act (IEEPA).[143] Because the IEEPA did not authorize the President to prohibit the pursuit of legal rights in a court of law, Regan could not use an executive order to prevent Dames & Moore from suing the Iranian defendants.[144]

In addition to statutes, the Court has ruled that treaties also constitute a source of authority that Presidents can use to form and execute

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *See, e.g.*, Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188–89 (1999); Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

[139] *Dames & Moore*, 453 U.S. at 668-69.

[140] *Id.*

[141] *Id.* at 669–75.

[142] *Id.* at 675.

[143] *Id.* at 662 n.2. The Act authorized the President to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country . . . has any interest . . . ." *Id.*

[144] *Dames & Moore*, 453 U.S. at 675.

policy in the United States.[145] For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians* the Supreme Court ruled that treaties, "every bit as much as statutes, are sources of law and may authorize Executive actions."[146] However, in *Medellín v. Texas*, the Supreme Court clarified that non-self-executing treaties cannot authorize domestic implementation of treaty policy unless the Senate has consented to the treaty pursuant to Article II of the Constitution.[147] In *Medellín*, the court disallowed President George W. Bush's attempt to give domestic effect to an International Court of Justice (ICJ) decision that ruled that Medellín's Vienna Convention rights had been violated and that his state murder conviction should be reviewed.[148] The Court reasoned that because the ICJ ruling was premised on a non-self-executing treaty provision and the treaty provision lacked the consent of the Senate, the President could not implement treaty policy that would interfere with Texas's pursuit of justice.[149] The rationale for this decision is that if the President could implement such a treaty without the consent of the Senate, then the President would be creating law for United States in violation of Article II, Section 2 of the Constitution.[150]

Additionally, *Medellín v. Texas* illustrates two other principles related to Jackson's method. The first principle is that legitimate grants of authority to the President cannot authorize the President to act in ways that violate separation of powers principles.[151] The first principle is articulated when the Court suggests that non-self-executing treaties, without the advise and consent of the Senate, cannot authorize the President to implement treaty provisions domestically because that would eclipse Congress's constitutional duty to be the sole legislative body.[152] The logic becomes clear if one reframes the principle in the following way: the President is merely implementing the will of Congress if he executes a treaty previously consented to by the Senate.[153]

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[145] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 211 (1999); *see* Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008).

[146] *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 211.

[147] *See Medellín*, 128 S. Ct. at 1368–70.

[148] *Id.* Medellín alleged that his Vienna Convention right to alert the Mexican consulate in the United States of his arrest was violated because he was not notified of this right. *See id.* at 1354–59.

[149] *See id.* at 1368–70.

[150] *See id.*

[151] *See Medellín*, 128 S. Ct. at 1368–71.

[152] *See id.*

[153] *See id.*

The second principle is that grants of authority to the President are to be interpreted narrowly with regards to the scope of the powers granted.[154] The second principle can be seen in the Court's refusal to interpret a statutory grant of authority to the President to represent the United States before the United Nations, the ICJ, and Security Council as a simultaneous, implicit endowment of "unilateral authority to create domestic law."[155] Representing the United States before various international bodies does not extend to the President the authority to unilaterally implement international law unless specified by Congress.[156] This understanding follows from the Court's basing its interpretation of presidential duties arising out of treaty obligations on the plain meaning of a treaty's text.[157]

III. *Massachusetts v. EPA*: A Foundation for Immediate Action

The Supreme Court's decision in *Massachusetts v. EPA* opened a window for future EPA attempts to regulate GHG emissions under the CAA.[158] One issue in the case was whether the EPA had the authority and obligation to regulate GHG emissions from mobile sources under section 202 of the Act.[159] A group of states, local governments, and private organizations argued that the EPA—by not issuing regulations designed to curb pollution from mobile sources—had failed to comply with the mandates in section 202(a)(1) of the CAA.[160] The EPA's position was that GHGs did not fall within the CAA's definition of air pollution; therefore, the Act did not grant the EPA authority to address GHGs and climate change.[161]

Congress defined air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological,

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[154] *See id.*

[155] *Id.* at 1371.

[156] *Id.*

[157] *See Medellín*, 128 S. Ct. 1362–63.

[158] 549 U.S. 497, 532 (2007); Pew Ctr. on Global Climate Change, Massachusetts et al., v. EPA et al, http://www.pewclimate.org/epavsma.cfm (last visited Oct. 26, 2009); *see* Lisa Heinzerling, Commentary, *A Climate Change Agenda for the New President*, 107 Mich. L. Rev. First Impressions 58, 59–60 (2008), http://www.michiganlawreview.org/assets/pdfs/First Impressions/107-FI/heinzerling.pdf.

[159] Massachusetts v. EPA, 549 U.S. 497, 505 (2007). The Act states that regulatory standards "shall . . . [be] prescribe[ed] . . . [and applied] to the emission[s] of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Clean Air Act, § 202, 42 U.S.C. § 7521 (2006).

[160] *See Massachusetts v. EPA*, 549 U.S. at 505.

[161] *See id.* at 512–13.

radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[162] Given this definition, petitioners argued that greenhouse gases were a form of air pollution.[163] The Court agreed.[164] Responding to the EPA's argument that Congress did not intend for GHGs to be included within the purview of section 302's definition of air pollution, the Court noted that the Act was clearly antithetical to the EPA's understanding since the "definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' [GHGs] . . . are without a doubt 'physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.'"[165] Thus, the Court ruled that regulating GHG emissions was within the authority that Congress granted to the EPA in the CAA.[166]

IV. Understanding Agencies, the APA, and the EPA

At this point, there is a need to provide some background information about governmental agencies, particularly the EPA, to fully understand the scope of the President's executive power. This part of the Note first discusses the general role of administrative agencies and the Administrative Procedures Act (APA), and then discusses the specific role of the EPA and its Administrator.

A. *Agencies and the APA*

The basic function of administrative agencies is to transform congressional policies concrete action.[167] The administrative state in the United States can trace its roots to the late 1800s with the creation of the Interstate Commerce Commission (ICC).[168] Decades later, the Great Depression lead to increased governmental control of the economy, and Congress created many more commissions and agencies as

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[162] 42 U.S.C. § 7602(g).

[163] *Massachusetts v. EPA*, 549 U.S. at 528.

[164] *Id.*

[165] *Id.* at 529.

[166] *Id.* at 532.

[167] *See* Richard B. Stewart *Reformation of Administrative Law.* 88 Harv. L. Rev. 1667, 1675–76 (1975).

[168] Bruff, *supra* note 75, at 144–45; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1561 (1996).

part of President Franklin D. Roosevelt's New Deal.[169] Anti-New Dealers used the courts to challenge the dramatic growth of the government, but Roosevelt was able to thwart that strategy with the threat of packing the Supreme Court with justices sympathetic to New Deal policies.[170] Consequently, anti-New Dealers turned to Congress to pass legislation that would check the growth of government and bureaucracy.[171] Specifically, the anti-New Dealers wanted to prevent the rise of an "arbitrary, tyrannical government."[172] Congress passed the Administrative Procedure Act (APA) in 1946, designing it to function as "the bill of rights for the new regulatory state."[173]

With few exceptions, the APA exists today as it did in 1946.[174] It protects the American public from arbitrary and abusive governmental rule by requiring the agencies to provide due process rights in the course of rulemaking and law-applying activities.[175] In the rulemaking process, agencies must publish notices of proposed rule-making and final rulemaking in the *Federal Register* and provide opportunities for comment after giving notice of proposed rulemaking.[176] Additionally, agencies must respond to comments submitted in response to the notice of proposed rulemaking.[177] This process generates an administrative record[178] that can be reviewed in the court of appeals.[179] In the case of applying regulations to particular facts, agencies utilize both formal and informal procedures, ranging from "internal administrative procedures [to] . . . direct[] . . . judicial proceedings."[180] Agency action is subject to challenge on the grounds that the agency acted arbitrarily and capriciously in the rulemaking process.[181] Agencies can be sued for acting arbitrarily

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[169] Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 & n.9 (1987).

[170] *See* Shepherd, *supra* note 168, at 1562–65.

[171] *See id.* at 1564–65.

[172] *See* BRUFF, *supra* note 75, at 144.

[173] Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 238 (codified as amended in scattered sections of 5 U.S.C.); Shepherd, *supra* note 168, at 1557, 1678.

[174] *See* BRUFF, *supra* note 75, at 145.

[175] *See id.* at 145–46; John C. Deal, *Banking Law Is Not for Sissies:Judicial Review of Capital Directives*, 12 J.L. & Com. 185, 190 (1993).

[176] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 901 (2008).

[177] *See* BRUFF, *supra* note 75, at 145.

[178] *Id.* at 145–46.

[179] *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 383 (3d ed. 2004).

[180] *Id.* at 384.

[181] *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006); PLATER ET AL., *supra* note 179, at 383–87.

and capriciously in the rulemaking process and for misapplying and/or refusing to fulfill their statutory and regulatory duties.[182]

B. *The EPA*

The EPA is a unique agency, in that it was created by an executive order issued by President Nixon.[183] In his June 1970 Reorganization Memo to Congress, Nixon indicated that necessity was the impetus for the creation of the EPA and, that such action was "an exception" to the general rule against presidential agency creation.[184] The agency's mission was to assert "a coordinated attack on the pollutants which debase the air we breathe, the water we drink, and the land that grows our food."[185] The creation of the EPA was a response to the government's prior approach to dealing with pollution, which assumed that different parts of the environment were distinct entities.[186] Nixon's centralization of environmental rulemaking turned this assumption on its head by conceptualizing the environment as a singular entity with several interrelated parts and by granting to a single agency oversight of those parts.[187]

V. Unitary Executive Theory Applied to Agencies and the EPA

The Court's decision in *Massachusetts v. EPA* creates an opening for regulating greenhouse gases (GHG) under the Clean Air Act.[188] Section 202 of the Act grants authority to the EPA Administrator to create standards for the reduction of pollution from mobile sources.[189] Accordingly, the EPA recently made an endangerment finding that categorized GHGs as pollutants.[190] Action by Obama pursuant to such a finding will likely spark constitutional challenges.[191]

Specifically, opponents could challenge Obama's power to initiate the regulatory process via an executive order on the ground that it lacks

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[182] *See* 5 U.S.C. § 706(2)(A); Plater et al., *supra* note 179, at 383–87.

[183] *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970) (Dec. 2, 1970), *reprinted in* 5 U.S.C. app. at 643 (2006), *and in* 84 Stat. 2086 (1970).

[184] *See id.*

[185] *See id.*

[186] *See id.*

[187] *See id.*

[188] *See* 549 U.S. 497, 532 (2007); *supra* Part III.

[189] Clean Air Act, 42 U.S.C. § 7521 (2006).

[190] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496–97 (Dec. 15, 2009) (to be codified at 7 C.F.R. ch 1).

[191] *See supra* notes 7–15 and accompanying text.

statutory authority.[192] Indeed, the CAA specifically grants authority to the EPA Administrator, not the President.[193] Some constitutional scholars suggest that without an explicit statutory authorization from Congress, the President cannot initiate the rulemaking process.[194] This line of reasoning is bolstered by the fact that the EPA is often considered an independent agency[195] and has recently been criticized as being overly politicized.[196] *Massachusetts v. EPA* arguably creates an impetus for EPA independence from the President.[197] Such an interpretation lends itself to the argument that if the President initiated the EPA rulemaking process under the CAA, such behavior would fall into the third category of presidential action according to Justice Jackson's *Youngstown* opinion.[198] In essence, Congress's specification of the Administrator of the EPA, as the agent of action under the CAA, is an explicit exclusion of the President from rulemaking.[199] Arguably, an executive order should receive little deference in the courts because it is inconsistent with the express will of Congress.[200]

Given that the federal judiciary is primarily conservative and subscribes to originalist readings of the Constitution,[201] it is important for

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[192] *See* David J. Barron, *From Takeover to Merger: Reforming Agency Law in an Age of Politicization*, 76 GEO. WASH. L. REV. 1095, 1137–45 (2008). Jon Anderson, an environmental attorney and consultant to numerous state legislatures, governors, and Presidents Clinton and Bush, implies that the motive behind such suits will be to prevent the President from implementing a national plan to reduce GHG emissions or to delay the President from realizing his agenda long enough for opponents of such action to regain a majority voice in Congress. *See* Anderson, *supra* note 12; s*ee also* 154 CONG. REC. S7595, S7605–07 (2008) (statement of Sen. Whitehouse) (critiquing of the EPA under the Bush Administration shows that some policy makers are aware of the President politicizing the EPA) [hereinafter Whitehouse].

[193] 42 U.S.C. § 7521.

[194] *See* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997).

[195] Whitehouse, *supra* note 192, at S7605–07; Environmental Protection Agency, Agency Overview, http://www.epa.gov/history/org/origins/overview.htm (last visited Jan. 25, 2010); *see* USA.gov, Independent Agencies and Government Corporations, http://www.usa.gov/Agencies/Federal/Independent.shtml (last visited Jan. 25, 2010).

[196] *See, e.g.*, Whitehouse, *supra* note 192, at S7605–07.

[197] *See* Barron, *supra* note 192, at 1137–45. The argument is that *Massachusetts v. EPA* shows the Agency's independence from the President because it ruled the EPA would be required to regulate GHGs under the CAA if GHGs were classified as pollutants, which directly opposed President Bush's policy position. *See id.*

[198] *See id.*; *supra* Part II.B.

[199] *See* 42 U.S.C. § 7521; Barron, s*upra* note 192, at 1137–45; *supra* Part II.B.

[200] *See supra* Part II.B.

[201] *See supra* notes 7–15 and accompanying text.

proponents of the President initiating GHG regulations pursuant to the CAA to understand their position in relation to the dominant judicial ideology. This Note argues that the judiciary's ideology and reliance on originalism is compatible with presidential initiation of regulating GHGs under the CAA via an executive order. Under the unitary executive theory, executive agencies are not conceptually distinct from the presidency.[202]

A. *Unitary Executive Theory Applied to Agencies*

From a unitary executive framework, the Constitution grants the President the power to exert control over administrative agencies.[203] Article II "vests" the power to execute all laws of the United States with the President.[204] Consequently, agency Administrators must get their power from the President.[205] The fact that agencies can only be located within the executive branch supports this conclusion.[206] As Professors Steven Calabresi and Saikrishna Prakash explain, "[t]he administrative power, if it exists, must be a subset of the President's 'executive power' and not one of the other two traditional powers of government."[207] The Constitution creates three branches of government.[208] It does not provide for an administrative branch of government and it blocks members of Congress from concurrently serving in a law-executing function; therefore, administrative agencies logically fit exclusively within the executive branch.[209]

Moreover, the Constitution grants the President power to appoint all executive officers,[210] including agency Administrators, indicating that the President has the authority to command and control them. The Appointment Clause states that:

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall

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[202] BRUFF, *supra* note 75, at 441–49.
[203] *See* Prakash, *supra* note 77, at 713.
[204] *See* Prakash, *supra* note 77, at 714; *supra* Part II.B.
[205] *See* Prakash, *supra* note 77, at 720.
[206] *See* BRUFF, *supra* note 75, at 393–94.
[207] Calabresi & Prakash, *supra* note 64, at 569.
[208] *See id.* at 559–60.
[209] *See id.*
[210] U.S. CONST. art II, § 2, cl. 2.

> be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[211]

"President" is the subject of the Appointment Clause[212] and "shall" is a helping verb[213] that modifies the verb "appoint."[214] "Shall" has been used to express a command since the writing of the Torah, and this understanding of the word has continued into modern legal documents such as statutes and constitutions.[215] The plain meaning of the Appointment Clause is that the Constitution commands the President to appoint officers of the United States.[216]

However, that command is limited in two ways. The intervening prepositional phrase,[217] "with the advice and consent of the Senate,"[218] is the first limitation on presidential authority and the Excepting Clause is the second.[219] Neither of these limitations contradicts the understanding of agencies that has been elaborated thus far. In regards to the condition requiring the advice and consent of the Senate on all presidential appointments, constitutional scholars have shown that the drafters of Article II, Section 2 intended to give the President the broad power to appoint officials.[220] Evidence from notes taken during the Constitutional Convention suggests that there was no intent on the part

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[211] *Id.*

[212] *Id.* Clause Two only references the President as "he." However, the first clause of section two uses the word "President" once in the beginning, but uses "he" in all instances thereafter in the section. Consequently, we can presume that the second clause is referring to the President when it uses the pronoun "he." The fact that the entire Article is about the executive branch bolsters this inference. *Id.*

[213] Chicago Manual of Style, ¶ 5.103 (15th ed. 2003).

[214] *See id.*

[215] Webster's Third New International Dictionary (Unabridged) of the English Language 2085 (1986) (definition 2(a)).

[216] *See supra* Part II.A.

[217] Chicago Manual of Style, ¶ 5.162 (15th ed. 2003).

[218] U.S. Const. art II, § 2, cl. 2.

[219] Tuan Samahon, *Are Bankruptcy Judges Constitutional? An Appointment Clause Challenge*, 60 Hastings L.J. 233, 249 (2008). The Excepting Clause allows Congress to appoint inferior officers or to vest the President, courts, or heads of departments with the power to appoint inferior officers without the consent of the Senate. U.S. Const. art II, § 2, cl. 2. "[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

[220] In fact, many scholars note that the choice to grant the President appointment power for executive officers was the product of compromise: one side favoring presidential control, the other side wanting a check on the executive. *See,* e.g., Bruff, *supra* note 75, at 390; Prakash, *supra* note 77, at 734; Samahon, *supra* note 219, at 248–49, 253–54.

of the framers to undermine the power of the executive branch.[221] Historical evidence indicates that some proponents of obtaining senatorial consent for appointments wanted a means by which the legislature could hold the President accountable for the actions of executive officers who report to the President.[222] Thus, it follows that the President would have authority over his appointees. Further, the Excepting Clause is not a threat to the broad power of the President to appoint executive officers.[223] The term "inferior officers," as it is used in the Clause, implies officers who are subordinate to the appointed principal officers that are subject to senatorial consent.[224] Historical research indicates that the Excepting Clause was inserted solely for administrative efficiency because it would have been arduous to subject every inferior officer to a senatorial appointment.[225]

Additionally, the President's ability to remove executive officers shows that the President has authority over administrative agencies.[226] The vesting and take care clauses only delegate executive power to the President.[227] While neither clause explicitly grants the President the power to remove executive officers,[228] appointment and removal of such officers is inherently an executive duty.[229] The historical record from the time period during and immediately following the ratification of the Constitution indicates that the average person would have understood the vesting and take care clauses as endowing the President with the power to remove executive officers at will.[230] Both the federalists and anti-federalists saw the President as having removal powers and relied on those assumptions in creating executive agencies.[231] President

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[221] *See* Prakash, *supra* note 77, at 723.

[222] *See* Samahon, *supra* note 219, at 249–52.

[223] *See id.* at 251–52.

[224] *See id.* at 250–52.

[225] Edmond v. United States, 520 U.S. 651, 660–61 (1997).

[226] *See* BRUFF, *supra* note 75, at 458–59; Saikrishna Prakash, *Removal and Tenure in Office*, 79 VA. L. REV. 1779, 1850 (2006); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 953–56 (1980).

[227] *See supra* Part II.B. The text of the Take Care Clause is as follows: The President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 4.

[228] *See* U.S. CONST. art II, § 4. In fact, the only mention of removal in Article II is in the Impeachment Clause. *See id.*

[229] *See* Myers v. United States, 272 U.S. 52, 117 (1926). The President must have the powers to both appoint and remove officers to fulfill his duty of executing the law; the President needs the power to assemble a staff of officers to execute his precise agenda. *See id.*

[230] Prakash, *supra* note 226, at 1825–27.

[231] *See id.* The agencies that were created were the Departments of Foreign Affairs and War, and the Treasury Department. *Id.* In what became known as the Decision of 1789,

Washington also believed that he had removal power over executive officers, terminating many officers himself.[232]

Additionally, the Supreme Court has confirmed that the President has the power to remove principal executive officers.[233] In *Myers v. United States*, the Court held that the President could remove Myers, an appointed Postmaster of the First Class, without the consent of the Senate.[234] The Court reasoned that even though the appointment power is subject to confirmation by the Senate, it does not mean removals also require confirmation.[235] The Court noted that the framers did not intend to limit the removal power of the President, and that the Senate Consent Clause was part of a compromise and applied only to appointments.[236] The Court also noted that the President's removal power was especially relevant to executive officers, since Congress could define removal terms for inferior executive officers.[237]

In *Humphrey's Executor v. United States*, the Supreme Court ruled that the President had to provide cause for the removal of the Commissioner of the Federal Trade Commission since he was not a principal executive officer but, rather, an inferior officer with quasi-legislative and quasi-judicial duties.[238] The Court held that Congress could determine and prescribe the method of removal for the Commissioner, not the President.[239] Thus, the President has absolute removal power over those executive officers whose term of service is at the pleasure of the President.[240]

In *Wiener v. United States*, the Court was asked to determine whether President Eisenhower had the power to remove Myron Wiener, an appointed member of the War Claims Commission.[241] While Congress had created the War Claims Commission and provided for appointments

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Congress agreed that the removal power would exist implicitly in the statutes creating the departments by way of not specifying removal procedures. *See id.*

[232] *See id.* at 1827–28; *see also Myers*, 272 U.S. at 119 (confirming this history).

[233] *See generally* Morrison v. Olson, 487 U.S. 654 (1988); Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); *Myers*, 272 U.S. at 52.

[234] *See Myers*, 272 U.S. at 117.

[235] *See id.* at 119.

[236] *See id.* at 118–20.

[237] *See id.* at 160.

[238] *See* 295 U.S. at 625–26, 629.

[239] *See id.*

[240] *See id.*

[241] 357 U.S. 349, 350–51 (1958). Congress created the War Claims Commission in 1948 to compensate American prisoners of war and civilian internees. Financial Management Service, U.S. Dep't of Treasury, War Claims: Unpaid Foreign Claims, http://fms.treas.gov/tfc/war-claims.html (last visited Jan. 25, 2010).

therein, it left out any directives regarding the removal process.[242] Consequently, the Court was forced to look at the duties of the Commission and determined that the Commission had an "intrinsic judicial character," given that its members were engaged in adjudication as part of their professional duties.[243] The Commission was designed in such a way as to be free from both presidential and congressional influence.[244]

Most recently, in *Morrison v. Olson*, the Supreme Court upheld an independent counsel provision in the Ethics in Government Act, which provided an opportunity for members of the Judiciary Committee to request that the executive branch, via the Attorney General, appoint an independent counsel for investigative purposes.[245] The Act provided that the Attorney General could remove such counsel only for good cause.[246] The Attorney General argued that this provision was unconstitutional and violated separation of powers principles because the removal provision prevented the President from fully exercising his executive duties.[247] The Court ruled that the independent counsel was an inferior officer; therefore, the removal restriction did not meaningfully interfere with the President's ability to execute his executive duties.[248]

This line of cases has presented a rule that "is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power.'"[249] Nonetheless, the contours of the rule are relatively clear. Executive officers can either be inferior or principal. In the case of inferior executive officers, the President has the power of removal that is granted to him by law unless removal restrictions impede the President from performing his executive duties.[250] In the case of principal officers, the President has the power of removal.[251]

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[242] *See Wiener*, 357 U.S. at 353–54.
[243] *See id.* at 355–56.
[244] *See id.*
[245] *See* 487 U.S. 654, 691–92 (1988).
[246] *Id.* at 663.
[247] *See id.* at 668.
[248] *Id.* at 691–92.
[249] *Id.* at 689–90.
[250] *Id.* at 689–91.
[251] *See Morrison*, 487 U.S., at 689-90.

B. *Implications for the EPA*

The EPA should be understood as an executive agency that is led by President Obama, who is in turn represented by the Administrator, Lisa Jackson.[252] The EPA is clearly an executive agency.[253] Since the President has the power to execute the law only and not the power to make law, the EPA must be seen as a vehicle for executing laws passed by Congress.[254] Consequently, legislative grants to the EPA represent congressional grants of authority to the President to execute policy goals through administrative agencies.[255]

The EPA's subservient position to the President is evidenced by the role of its Administrator. The EPA Administrator is a member of the President's cabinet.[256] Moreover, as with all EPA Administrators, Jackson's term runs concurrently with President Obama's.[257] Administrator Jackson's relationship with Obama is not unique in that the previous two Presidents both used the EPA Administrator to implement their policy objectives.[258]

Furthermore, EPA Administrators are subject to the appointment and removal powers and the case law favors conceiving of the Administrator as taking direction from the President.[259] Regarding the appointment power, the Administrator is appointed by the President.[260]

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[252] *See* Richard W. Waterman et al., Bureaucrats, Politics, and the Environment 11 (2004).

[253] *See supra* Part IV.B.

[254] *See supra* Part II.

[255] *See infra* Part VI.

[256] The White House, The Cabinet, http://www.whitehouse.gov/administration/cabinet/ (last visited Jan. 25, 2010). Indeed, Administrator Jackson has publicly pledged her cabinet-level loyalty to the Obama Administration. *See* Memorandum from Lisa Jacskson, EPA Adm'r, to EPA Employees (Jan. 23, 2009), *available at* http://blog.epa.gov/administrator/2009/01/26/opening-memo-to-epa-employees/.

[257] *See* Waterman et al., *supra* note 252, at 11.

[258] Marc Allen Eisner et al., Contemporary Regulatory Policy 167 (2000) (detailing how Clinton used the EPA to combat global warming); Prunes Online, Nat'l Acad. P. Admin, Environmental Protection Agency, Administrator, http://www.excellenceintransition.org/prune/prunedetail.cfm?ItemNumber=10705 (last visited Jan. 25, 2010) (describing how the George W. Bush Administration notoriously prevented the EPA from pursuing regulations designed to further the Endangered Species Act and to reduce GHG emissions); *see* Jo Becker & Barton Gellman, *Leaving No Tracks*, Wash. Post, June 27, 2007, at A01.

[259] *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2006) *and in* 84 Stat. 2086 (1970); Waterman et al., *supra* note 252, at 11. "The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level II of the Executive Schedule Pay Rates." Reorganization Plan No. 3 of 1970, 3 C.F.R. 199.

[260] Reorganization Plan No. 3 of 1970, 3 C.F.R. 199.

The President has the power to choose the EPA Administrator,[261] and the Administrator's term of appointment runs concurrently with the President's, meaning the sitting President has appointed any sitting Administrator.[262]

Administrator Jackson is also subject to the presidential removal power.[263] At the most basic level, Administrator Jackson—as a principal executive officer with cabinet-level rank—serves at the pleasure of President Obama.[264] Since the Court has held that the President can terminate principal executive officers at will,[265] it follows that Jackson must either obey directions from Obama or risk termination.[266]

Current case law on presidential removal power also supports this conclusion regarding Obama's power to terminate Administrator Jackson.[267] The Administrator is like the postmaster in *Myers v. United States* in that she is a principal executive officer appointed by the President with the consent of the Senate; therefore, consent for her removal is not required.[268] However, the EPA Administrator is not like the Federal Trade Commissioner in *Humphrey's Executor.*[269]

In the case of the EPA Administrator, Jackson is a principal executive officer because she has cabinet-level status, implements President Obama's policy agenda, and executes environmental legislation from Congress on behalf of the President. Additionally, the distinction between the Federal Trade Commissioner and the EPA Administrator is further evidenced by the positions' differing pay scales.[270] The appointment provision for the EPA Administrator indicates that the officer

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[261] *See id.*

[262] *See* WATERMAN ET AL., *supra* note 252, at 11.

[263] *See supra* Part V.A.

[264] WATERMAN ET AL., *supra* note 252, at 11; White House, The Cabinet, http://www.whitehouse.gov/administration/cabinet/ (last visited Jan. 25, 2010); *see* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

[265] *See* Morrison v. Olson, 487 U.S. 654, 689–90 (1988); Myers v. United States, 272 U.S. 52, 132–34 (1926).

[266] *See Morrison*, 487 U.S. at 689–90; *Myers*, 272 U.S. at 132–34; s*ee also* Verkuil, *supra* note 226, at 952 (explaining that the threat of removal is a powerful tool for Presidents to achieve their policy goals within agencies).

[267] *See, e.g.*, *Morrison*, 487 U.S. at 654; Wiener v. United States, 357 U.S. 349 (1958); *Humphrey's Ex'r*, 295 U.S. at 629–30; *Myers*, 272 U.S. at 52.

[268] *See Myers*, 272 U.S. at 132–34.

[269] *See* 295 U.S. at 629 (holding that the President did not have the power to remove the Commissioner because he was an inferior executive officer and had quasi-judicial and legislative duties created by Congress).

[270] *Id.*; s*ee* Positions at Level III, 5 U.S.C. § 5314 (2006); Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted in* 5 U.S.C. app. at 643 (2006) *and in* 84 Stat. 2086 (1970).

will be paid at level II on the executive pay scale.[271] The Commissioner is paid at level III.[272] Similarly, the EPA Administrator is not like the member of the War Claims Commission in *Wiener v. United States* because she is not an inferior officer and because her job does not require her to engage in adjudication.[273] Finally, the Administrator of the EPA is not like the independent counsel in *Morrison v. Olson* because her job is not independent from the President, and the President's having removal power over her is essential to his ability to execute the law.[274]

VI. The President Has Constitutional and Statutory Authority for Reducing GHG Emissions Under the CAA

Global warming is becoming an emergency that warrants immediate action by the United States.[275] President Obama has an obligation to lead the United States' response to the climate crisis because there is currently no viable GHG reduction policy—especially one targeting mobile sources—under the existing federal environmental law regime.[276]

President Obama can and should issue an executive order instructing EPA Administrator Jackson to create regulations pursuant to the CAA to drastically reduce GHG emissions from mobile sources.[277] Constitutionally, Justice Jackson's *Youngstown* framework justifies an executive order initiating EPA action; consequently, the Court would afford Obama's order the highest degree of judicial deference.[278] There is authority for such an executive order.[279] The Vesting Clause of Article II of the Constitution specifically grants executive power to the President.[280] Agencies and their Administrators—including the EPA and Administrator Jackson—take their direction from the President as subordinate members of the executive branch.[281] Therefore, statutory grants of authority to the Administrator can be interpreted as grants of

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[271] Reorganization Plan No. 3 of 1970, 3 C.F.R. 199.

[272] 5 U.S.C. § 5314.

[273] *See* 357 U.S. 349, 355–56 (1958).

[274] *See* 487 U.S. 654, 689–91 (1988).

[275] *See supra* Part I.

[276] *See supra* Part I.

[277] *See supra* Part I.

[278] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[279] *See* Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008); *Youngstown*, 343 U.S. at 635.

[280] U.S. Const. art. II, § 1, cl. 1.

[281] *See supra* Parts IV.A–B, V.

authority to the chief executive to use the specified agency to implement the policy goals set forth by Congress in the statute.[282]

In the proposed action, the CAA authorizes the EPA Administrator to create regulations to curb air pollution from mobile sources when it states that regulations "shall" be prescribed to "any" air pollutant that "may reasonably be anticipated to endanger public health or welfare."[283] However, the CAA does not state precisely what the regulations should entail.[284] The CAA delegates this responsibly to the EPA Administrator, provided that the rulemaking process is followed and that certain standards—including the requirement that only pollutants "reasonably . . . anticipated to endanger public health or welfare" can be targeted—regarding the content of the regulations are met.[285] The relationship between the President and the EPA Administrator and the CAA's grant of broad authority to the Administrator supports the conclusion that Congress's grant of power to the Administrator to design and implement pollution regulations is an implied grant of authority to the executive branch to use the EPA as a vehicle for creating an air pollution control scheme.[286] Therefore, under Justice Jackson's *Youngstown* framework, an executive order from President Obama instructing the EPA to begin curbing mobile sources of GHGs per the CAA properly fits within the first category of presidential action because authorization is "implied" from Congress's grant of authority to an executive officer who has cabinet-level status.[287]

Moreover, an executive order would not violate any constitutionally protected rights, including rights upheld by separation of powers principles.[288] The APA protects both substantive and procedural due process rights.[289] In particular, an order instructing the Administrator to act pursuant to the CAA is by definition an order to abide by the APA.[290] The CAA delegates authority to the Executive Branch via the instruction that the "Administrator shall" regulate air pollution.[291] Agencies must

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[282] *See supra* Part V.

[283] Clean Air Act, 42 U.S.C. § 7521 (2006).

[284] *See id.*

[285] *Id.*

[286] *See supra* Part V.

[287] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[288] *See* Medellín v. Texas, 128 S. Ct. 1346, 1368–71 (2008).

[289] *See supra* Part IV.A.

[290] *See supra* Part IV.A.

[291] Clean Air Act, 42 U.S.C. § 7521 (2006).

abide by the rulemaking process specified in the APA.[292] The administrative requirements, including notice of proposed rulemaking, opportunities for comment, and the EPA's written response to comments, secure the public's substantive and procedural due process rights.[293] Additionally, such an order would not jeopardize separation of powers principles because Congress delegated legislative duties to the executive in the CAA.[294]

Examples of executive orders that President Obama may issue could direct the EPA Administrator to (1) set strict emission standards for future automobiles that will compel technological innovations; (2) propose regulations that compel or encourage states to set strict emissions targets; or (3) establish an innovative permit scheme designed to both limit the use of mobile sources in the short-term and to fund research and development of new energy sources over the medium to long-terms.[295] Regardless of the avenue he pursues, President Obama has wide constitutional latitude to prescribe regulatory standards under the CAA to reduce GHGs from mobile sources.

Conclusion

Mapping the national and international response to global warming poses a major challenge to President Obama. Given the climate crisis, President Obama should not wait for Congress to take action. He should initiate the United States' climate policy through existing tools, particularly the CAA. While the CAA may not be an ideal vehicle for launching a national campaign to reduce GHG emissions, it is a vehicle that already exists and has congressional approval.[296]

Conservatives opposed to a progressive climate policy will challenge the President's agenda in the courts, where conservative judges who rely on originalist readings of the Constitution predominate. Therefore, the Obama Administration needs to justify its regulatory proposals in light of the judiciary's conservative jurisprudence. Based on a unitary executive theory, President Obama has the constitutional

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[292] *See supra* Part IV.A.

[293] *See id.*

[294] *See supra* Parts IV, V.

[295] *See* Scott Thill, *10 Global Warming Policy Recommendations for the Obama Administration*, Plenty, Dec. 31, 2008, http://www.plentymag.com/features/2008/12/10_globalwarming_policy_recomm.php.

[296] *See* Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?* 36 B.C. Envtl. Aff. L. Rev. 1, 1–15 (2009).

authority to issue an executive order instructing the EPA Administrator to issue GHG-emission-limiting regulations pursuant to the CAA.