The Constitution, the Environment, and the Prospect of Enhanced Executive Power

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Environmental law poses many intriguing questions of constitutional law, including issues involving separation of powers. Separation-of-powers questions stemming from environmental law disputes have affected significantly the allocation of authority among the three branches of the federal government to determine the appropriate degree of restrictions to place on government and private conduct with the potential to harm the environment. The implications of judicial resolution of constitutional issues in environmental disputes are not confined to the environmental law arena, however. In some areas, such as the law governing standing to sue in federal court, environmental cases dominate the constitutional landscape, establishing landmark precedents that then apply to myriad other areas of law.[1] In other cases, separation-of-powers jurisprudence outside the arena of environmental law has the potential to alter the ways in which the government adopts and implements environmental law.

This Article addresses two aspects of the separation of powers that have the potential to enhance the powers of the executive branch of the federal government vis-à-vis the U.S. Congress and the courts in the implementation of environmental legislation. First, I address the role of the Take Care Clause of Article II[2] in restricting standing to sue in cases involving environmental law issues. Second, I address the potential for judicial invocation of the "unitary executive" theory to restrict congressional oversight of agency implementation of environmental laws. Although I focus on the impact of the unitary executive theory on the constitutionality of independent agencies, I also briefly address the theory's effect on presidential control of the exercise of agency discretion provided by statutory delegations of authority to agencies with environmental protection responsibilities. These two aspects of the separation of powers to date have been of relatively minor importance to environmental law. Increased reliance by the courts on the Take Care Clause to limit standing and on the unitary executive theory to loosen congressional control over the exercise of delegated authority to administrative agencies, however, has the potential to reshape environmental law in some potentially far-reaching ways.

I. The Take Care Clause as a Restriction on Standing to Sue

A. *Judicial Review, Constraints on Agency Discretion, and the Separation of Powers*

Congress has entrusted the responsibility to implement the nation's environmental statutes in agencies such as the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Interior (DOI). Because members of Congress typically are unable to develop the expertise needed to master the intricacies of the technical and policy aspects of environmental law, much of that legislation is necessarily general. The statutes often afford considerable discretion to the agencies to determine how best to achieve broadly stated statutory goals such as achieving air quality standards that are "requisite to protect the public health"[3] or "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[4] The breadth of discretion vested in the agencies creates ample opportunities for agencies to stray both from the broad, overall congressional

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1. *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 40 ELR 20167 (2010); Summers v. Earth Island Inst., 129 S. Ct. 1142, 39 ELR 20047 (2009); Massachusetts v. EPA, 549 U.S. 497, 37 ELR 20075 (2007); Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 30 ELR 20622 (2000); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 30 ELR 20246 (2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 28 ELR 20434 (1998); Bennett v. Spear, 520 U.S. 154, 27 ELR 20824 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 20 ELR 20962 (1990); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 8 ELR 20545 (1978); United States. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727, 2 ELR 20192 (1972).
2. U.S. Const. art. II, §3.
3. 42 U.S.C. §7409(b)(1).
4. 33 U.S.C. §1251(a)(2).

vision and from specific statutory directives. Recognizing the need for oversight of agency implementation of environmental legislation, Congress included in all of the environmental statutes judicial review provisions that allow regulated entities, nongovernmental organizations (NGOs), and other affected interests to challenge in court alleged agency noncompliance with their statutory responsibilities.[5] In addition, Congress has created citizen suit provisions so that NGOs and private entities can supplement government actions to enforce the environmental laws.[6]

If litigants bringing such challenges lack standing to sue, the reviewing courts cannot exercise the supervisory role Congress created for them as a means of ensuring that agency discretion is exercised within statutory confines, and citizen suits cannot supplement federal and state enforcement. Standing law is a mixture of constitutional, statutory, and judge-created rules. Most constitutional standing questions in environmental disputes have hinged on the application of Article III's limitations of the judicial power to cases or controversies.[7] As the Court has indicated in a nonenvironmental case, "the law of [Article III] standing is built on a single basic idea—the idea of separation of powers."[8] The Supreme Court has interpreted the Case or Controversy Clause to require a litigant challenging an agency decision to show that the litigant has suffered (or imminently will suffer) an injury-in-fact that is caused by the agency decision and that is redressable by the relief sought.[9] Over the last 40 years, the Court has applied these requirements expansively to allow courts to reach the merits in some cases[10] and narrowly in others in concluding that the judicial power did not extend to the disputes in question.[11]

B. *The Role of the Take Care Clause in Standing Law*

Article III is not the only constitutional provision with potential separation of powers bearing on standing questions. The other relevant provision, which has received less (and less definitive) attention from the Justices, is the provision in Article II delegating to the president the power to "take Care that the Laws are faithfully executed."[12] The Court referred to Article II as the source of constraints on standing in *Allen v. Wright*. In that case, Justice O'Connor identified as a limitation on standing the "structural principle" that "[t]he Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'"[13]

Since that time, the Court has invoked the Take Care Clause in its standing analysis only sporadically, most frequently at the behest of Justice Antonin Scalia. In *Lujan v. Defenders of Wildlife*,[14] Justice Scalia rejected an environmental group's assertion that it had standing based on procedural injuries it suffered as a result of the DOI's alleged noncompliance with the consultation provisions of the Endangered Species Act (ESA)[15] by inquiring whether the public interest in "proper administration of the laws" can be converted by statute into an individual right that permits all citizens to sue. He answered his own query, stating that "[i]f the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious." If Congress can convert "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts," Congress could "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[16] According to Justice Scalia, allowing private citizens to sue to enforce agency compliance with the law without requiring a showing of concrete substantive injury would thrust the courts into the role of continuing monitor of the wisdom of executive action. Justice Harry A. Blackmun, in dissent, took issue with what he called "the Court's anachronistically formal view of the separation of powers" and charged that the main effect of foreclosing judicial enforcement of the ESA consultation process "is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates."[17]

C. *The Potential Impact of Article II on Executive Power and Environmental Law*

Taken to its logical conclusion, the view that courts infringe on the president's exclusive authority to ensure proper execution of the laws when they enforce federal law at the behest of nongovernmental entities casts doubt on the constitutionality of one of the mainstays of American environmental law—citizen suit provisions. These provisions, found in almost all of the federal environmental statutes,[18] allow suits by private individuals or entities against regulated entities alleged to be in noncompliance with their regulatory responsibilities or

5. *See, e.g.*, 33 U.S.C. §1369(b); 42 U.S.C. §7607(b).
6. *See, e.g.*, 33 U.S.C. §1365(a); 42 U.S.C. §7604(a).
7. U.S. Const. art. III, §2, cl. 1.
8. Allen v. Wright, 468 U.S. 737, 752 (1984). *See also* Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) (explaining that the Article III component of standing doctrine "has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not").
9. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 22 ELR 20913 (1992).
10. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 37 ELR 20075 (2007); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 30 ELR 20246 (2000); United States. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).
11. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 39 ELR 20047 (2009); *Defenders of Wildlife*, 504 U.S. at 555.
12. U.S. Const. art. II, §3.
13. *Allen*, 468 U.S. at 761.
14. 504 U.S. 555, 22 ELR 20913 (1992).
15. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
16. *Defenders of Wildlife*, 504 U.S. at 577.
17. *Id.* at 602 (Blackmun, J., dissenting).
18. *See, e.g.*, 16 U.S.C. §1540(g) (ESA); 33 U.S.C. §1365 (Clean Water Act); 42 U.S.C. §6973 (Resource Conservation and Recovery Act); 42 U.S.C. §7604 (Clean Air Act).

against agencies alleged to have failed to perform nondiscretionary duties.[19] Justice Scalia has invoked the same concerns in cases other than *Defenders of Wildlife*. In one nonenvironmental case, for example, he argued in dissent that "[a] system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts," not the president, are primarily responsible for faithfully executing the law, and concluded flatly that "[w]e do not have such a system . . . ."[20] In other cases, Justice Scalia has been curiously more equivocal, remarking in a footnote in his majority opinion in the *Steel Company* case that "courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches," and that standing jurisprudence "may sometimes have an impact on Presidential powers," but that it "derives from Article III and not Article II."[21]

Justice Scalia is not the only current member of the Court to treat seriously the question of whether citizen enforcement of environmental and other statutes infringes on exclusive presidential prerogatives. In *Laidlaw*, Justice Anthony M. Kennedy, concurring, referred to the

> [d]ifficult and fundamental questions" that arise "when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States . . . . [T]hese matters are best reserved for a later case.[22]

That case has not yet arrived at the Court's doorstep. The question of whether an expansive interpretation of the Take Care Clause would put the constitutionality of citizen suit provisions in jeopardy is not idle, however. In one environmental case, Justice Scalia concluded that Article III posed an obstacle to recognition of a relator's standing in a *qui tam* suit. He pointedly expressed no view on whether *qui tam* suits violate the Take Care Clause, primarily because no litigant raised the question.[23] Prof. Cass Sunstein postulated shortly after the decision in *Defenders of Wildlife*, in which Justice Scalia raised take care concerns in connection with alleged procedural injuries, that "[r]ead for all it is worth, the decision invalidates the large number of statutes in which Congress has attempted to use the 'citizen-suit' device as a mechanism for controlling unlawfully inadequate enforcement of the law."[24] Professor Sunstein argued there that Article II is irrelevant to standing law in citizen suits,[25] and the Supreme Court obviously has not since *Defenders of Wildlife* invalidated any citizen suit provision on the basis of its infringement on executive power. Nevertheless, at least two members of the Court have expressed concerns about the propriety of citizen enforcement in at least some environmental contexts in light of the Take Care Clause. These views preclude easy dismissal of the possibility that the Court may at some point invoke the Take Care Clause to restrict citizen enforcement of environmental statutes.[26]

Reliance on the Take Care Clause to restrict standing raises a host of important questions. These include whether presidential signing of laws containing citizen suit provisions amounts to a delegation to private citizens of the president's "exclusive" authority to enforce federal legislation,[27] and whether the Court would exempt states from any restrictions on bringing citizen suits it ferreted out of the Take Care Clause as a result of federalism concerns and the "special solicitude" the Court has afforded states in the context of other standing questions.[28]

What is clear is that if the Court ever uses the Take Care Clause to impose restrictions on standing in environmental citizens suits beyond the restrictions originating in Article III, Congress' desire to create a supplemental enforcement mechanism to protect against inadequate government enforcement would be frustrated. Citizen suits play an important role currently in identifying alleged violations, which the government may then choose to litigate in lieu of citizen enforcement, and in pursuing enforcement actions that the government does not or cannot initiate because of resource limitations or other constraints. The Take Care Clause might also be used to restrict suits against agencies for violations of nondiscretionary duties on the theory that the president, not the courts, is responsible for ensuring faithful execution of the laws. If so, executive discretion would expand and Congress' ability to structure the environmental laws in ways that provide judicial checks on the exercise of that discretion would concomitantly narrow.[29] Citizen suits to enforce nondiscretionary duties have prompted the initiation or implementation of many important environmental programs, including the Clean Air Act's (CAA's)[30] prevention of

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19. *See generally* Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 Widener L. Rev. 353 (2004).
20. Fed. Election Comm'n v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting). *Cf.* Franklin v. Massachusetts, 505 U.S. 788, 827-28 (1992) (Scalia, J., concurring) (citing the Take Care Clause as a reason to preclude a declaratory judgment action against the president).
21. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4, 28 ELR 20434 (1998).
22. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 197, 30 ELR 30246 (2000) (Kennedy, J., concurring).
23. Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 n.8, 30 ELR 20622 (2000).
24. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 (1992).
25. *Id.* at 213.
26. *See* Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons From* Qui Tam *Litigation*, 72 U. Colo. L. Rev. 93, 98 (2001), arguing that

> the opinions of Justices Kennedy and Scalia in *Laidlaw* amount to a virtual invitation to defendants to challenge environmental citizen suit provisions on Article II-based separation of powers grounds. Moreover, the persistence of the separation of powers theme in these recent citizen suit cases strongly suggests that the Justices would be willing to grant certiorari to resolve the issue.

27. Justice Scalia's assertion in *Laidlaw* that "[a] Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA," *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting), rings hollow. Congress authorized such plaintiffs to act as private attorneys general when it adopted (with the president's signature) the statute's citizen suit provision.
28. Massachusetts v. EPA, 549 U.S. 497, 520, 37 ELR 20075 (2007).
29. For an endorsement of movement in this direction, see Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).
30. 42 U.S.C. §§7470-7492, ELR Stat. CAA §§160-169B.

significant deterioration program, the adoption of total maximum daily loads under the Clean Water Act (CWA),[31] and the listing of species under the ESA.[32] Important checks on agency failure to implement nondiscretionary duties under the environmental laws would disappear if this component of citizen suit enforcement were weakened or eliminated.

II. The Unitary Executive, Independent Agencies, and Executive Supervision of Agency Discretion

A. *The Unitary Executive Theory*

A second, related doctrine linked to separation-of-powers principles that is of potential importance to the operation of the nation's environmental laws is the unitary executive theory. In brief, "[t]he theory of the unitary executive posits that the Constitution vests all executive power in the executive branch; therefore any incursions by the other branches into the realm of executive power are unconstitutional."[33] Advocates of this theory read the Vesting and Take Care Clauses of Article II[34] to create a hierarchical, unified executive department under the direct control of the president.[35] Under this view, the president alone possesses all executive power, enabling him to control officers or agencies in their exercise of discretionary executive power. Under the strongest form of the theory, the president may control the executive department by supplanting discretionary executive action taken by subordinates, even if the statute in question vests such power exclusively in the subordinate.[36] One consequence of this version of the theory may be to render unconstitutional independent agencies to the extent that they exercise discretionary executive power shielded from presidential supervision. A somewhat weaker version of the theory withholds from the president the power to act in lieu of his subordinates, but endorses his ability to veto their exercises of discretionary executive power.[37] Under a third version of the theory, the president's ability to control the executive branch takes the form of unlimited power to remove at will principal officers who exercise executive power.[38]

Those who oppose the unitary executive theory claim that Congress may vest executive power in subordinate officers who are insulated from presidential control.[39] Some scholars argue that the U.S. Constitution gives Congress broad power to divest the president of control over the executive department. They claim that "Congress's power under the Necessary and Proper Clause to structure the executive department allows Congress to insulate subordinate officials from presidential control by creating independent agencies and officers."[40] Under this view, Congress may divest the president of executive power, provided the divested authority does not involve specifically enumerated powers. The president can use his veto power over legislation to protect his constitutional prerogatives.[41]

B. *Independent Agencies and Environmental Law*

Two recently decided cases provided the Supreme Court opportunities to weigh in on the validity of one or another version of the unitary executive theory and, by doing so, define the parameters of executive branch power. In particular, both cases dealt with the role of independent agencies in relation to the president's capacity as the head of the executive branch. As it turns out, neither case directly confronts the constitutionality of the existence of independent agencies. The first case involved the relevance of an agency's status as independent to the manner in which courts review the substantive merits of agency policy decisions. The second struck down restrictions on the authority to remove inferior officers of an independent agency on the ground that they were inconsistent with the separation of powers and infringed on the president's duty to oversee faithful execution of the laws. The cases nevertheless displayed a distaste for congressional incursions into the realm of executive power, as well as some discomfort with the role of administrative agencies generally in our government. Given the sometimes disparaging fashion in which some members of the Supreme Court have described the environmental laws and the role of environmental agencies in implementing them,[42] it is not hard to imagine this distaste being applied to enhance presidential control over the exercise of discretionary powers by those agencies.

1. Which Agencies Are Independent?

Independent agencies are located outside of any executive department and consist of multiple members, who serve rotating terms of years and can only be removed from office

31. 33 U.S.C. §1313(d), ELR Stat. FWPCA §303(d).
32. *See* Glicksman, *supra* note 19.
33. William P. Marshall, *Why the Assertion of a "Nationalist" Presidency Does Not Support Claims for Expansive Presidential Power*, 12 U. Pa. J. Const. L. 549, 549 n.2 (2010) (citing Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power From Washington to Bush 3 (2008)).
34. U.S. Const. art. II, §§1, 3.
35. Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165 (1992). For further discussion of the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41.
36. Calabresi & Rhodes, *supra* note 35, at 1165-66. For further discussion of the various versions of the unitary executive theory, see Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. Pa. J. Const. L. 313 (2010).
37. Calabresi & Rhodes, *supra* note 35, at 1166.
38. *Id*.
39. *See generally* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) (challenging the theory of the unitary executive).
40. Calabresi & Rhodes, *supra* note 35, at 1170. On the relationship between the Necessary and Proper Clause and the clauses vesting legislative, executive, and judicial power, see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3165-67 (2010) (Breyer, J., dissenting).
41. Calabresi & Rhodes, *supra* note 35, at 1170.
42. *See, e.g.,* Rapanos v. United States, 126 S. Ct. 2208, 2214, 36 ELR 20116 (2006) (charging that the U.S. Army Corps of Engineers (the Corps) "exercises the discretion of an enlightened despot" in carrying out the CWA's dredge and fill program); *id.* at 2231 (raising the possibility that Congress' failure to reject a broad interpretation of the scope of the CWA by the Corps was due to its "unwillingness to confront the environmental lobby"); *id.* at 2221 n.4 (calling the CWA a "prosaic, indeed downright tedious, statute").

before the end of their term "for cause."[43] Independent agencies are relatively insulated from partisan political pressures, but they restrict presidential control and increase relative congressional power. These agencies are not normally at the forefront of federal environmental law. EPA is not a component of a cabinet-level department, but it is not an independent agency either, because it is not headed by a group of commissioners who serve for fixed terms and who are removable only for cause.[44] Instead, EPA is an independent establishment[45] whose Administrator is appointed by and serves at the will of the president.[46] The DOI (which houses the National Park Service, the Bureau of Land Management, and the Bureau of Reclamation, among other agencies with natural resource management responsibilities) and the U.S. Department of Agriculture (USDA) (which houses the U.S. Forest Service) are cabinet departments, not independent agencies. Some agencies with environmental protection responsibilities are independent agencies, however. These include the Nuclear Regulatory Commission (NRC), which is headed by five commissioners appointed by the president and confirmed by the U.S. Senate for five-year terms.[47] If concerns over climate change induce a renaissance in the nuclear power industry, the status of independent agencies could be increasingly important to federal environmental protection initiatives and energy policy. Another independent agency is the Federal Energy Regulatory Commission (FERC),[48] which, under some climate change bills introduced before Congress, would have a role in overseeing the transfer of carbon allowances or the operation of the offset market, or in promoting energy efficiency and controlling the location of transmission lines to distribute power produced through renewable energy. Other independent agencies with health, safety, or environmental protection, or natural resource management responsibilities, include the Advisory Council on Historic Preservation,[49] the Consumer Product Safety Commission (CPSC),[50] the Federal Mine Safety and Health Review Commission (FMSHRC),[51] and the Occupational Safety and Health Review Commission (OSHRC).[52] Various climate change bills pending before the 111th Congress would create new independent agencies with responsibilities such as helping to structure and oversee carbon offsets.[53]

a. *FCC v. Fox Television Stations*

The first of the two recent Supreme Court decisions with potential bearing on the status of the unitary executive theory and the constitutionality of independent agencies was *FCC v. Fox Television Stations*.[54] The case dealt with the adequacy of the Federal Communications Commission's (FCC's) explanation of its decision that the Communications Act's prohibition on the broadcasting of indecent language sometimes forbids the broadcasting of indecent expletives, even when they are not repeated. The issue was whether the agency's reversal of position on this issue rendered its explanation arbitrary and capricious under the Administrative Procedure Act. The Court held that it did not. Justice Stephen Breyer argued in dissent that the FCC's status as an independent agency made it "all the more important that courts review its decisionmaking to assure . . . that major policy decisions be based upon articulable reasons."[55] Justice John Paul Stevens, in a separate dissent, argued that the FCC is "better viewed as an agent of Congress" than as part of the executive.[56]

Justice Scalia, writing for a plurality of four, took issue with both of those positions. He characterized independent agencies as "sheltered not from politics but from the President," and asserted that "their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction."[57] Noting that legislative schemes giving the power to enforce laws to agents of Congress have been deemed unconstitutional,[58] Justice Scalia protested Justice Breyer's support for the application of heightened scrutiny to the decisions of independent agencies. That approach "magnif[ies] the separation-of-powers dilemma posed by the Headless Fourth Branch, by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested

43. *See* Robert L. Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context 4 (2010).
44. By one account, EPA's status as an executive establishment increases its accountability. *See* Robert V. Percival, *Checks Without Balance: Executive Branch Oversight of the Environmental Protection Agency*, 54 Law & Contemp. Probs. 127, 203 (1991) (arguing that "had EPA been an independent agency during the scandal that ultimately led to the resignation of EPA Administrator [Anne Gorsuch] Burford [during the Reagan Administration], the public surely would have been outraged had the president been unable to remove her").
45. An independent establishment is "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." 5 U.S.C. §104(1).
46. *See* Joshua K. Westmoreland, *Global Warming and Originalism: The Role of the EPA in the Obama Administration*, 37 B.C. Envtl. Aff. L. Rev. 225, 252 (2010) ("At the most basic level, [EPA] Administrator [Lisa] Jackson—as a principal executive officer with cabinet-level rank—serves at the pleasure of President Obama."). The Senate's role in the confirmation of EPA's Administrator may constrain the President's exercise of his removal power, however. *See* Saikrishna B. Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 45 Willamette L. Rev. 701, 708-09 (2009):

    In particular, when the President contemplates the removal of an officer, he has to decide whether he is likely to find someone else whom he prefers more and whom the Senate is likely to approve. For instance if the President contemplates the removal of an EPA Administrator whom he regards as insufficiently vigilant in protecting the environment, he has to realize that if a majority of the Senate wishes to have lax enforcement of the nation's environmental laws, that he may have to replace the incumbent Administrator with a still more lenient Administrator.

47. 42 U.S.C. §5841(1).
48. 42 U.S.C. §7171.
49. 16 U.S.C. §470i(a).
50. 15 U.S.C. §2053(a).
51. 30 U.S.C.A. §823.
52. 29 U.S.C. §661
53. *See, e.g.*, The Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. §731 (2010).
54. 129 S. Ct. 1800 (2009).
55. *Id.* at 1830 (Breyer, J., dissenting). *See also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376-77 (2001) (arguing that courts should not afford full deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984), to the decisions of independent agencies).
56. *Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting).
57. *Id.* at 1815 (plurality opinion).
58. *Id.* at 1816 (citing Bowsher v. Synar, 478 U.S. 714 (1986)).

from the unitary Executive."[59] Justice Scalia had previously voiced support for the unitary executive theory in dissent in the independent counsel case.[60] Justice Anthony Kennedy, concurring in part in *Fox*, took a more equivocal position that nevertheless reflected uneasiness about the role and status of agencies in our constitutional system. According to Justice Kennedy:

> the role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and complex. The Federal Government could not perform its duties in a responsible and effective way without administrative agencies. Yet the amorphous character of the administrative agency in the constitutional system escapes simple explanation.[61]

As in *Defenders of Wildlife*, a definitive confrontation with those doubts had to await another day.

Fox thus provides a conclusory endorsement of the unitary executive theory from Justice Scalia, and an acknowledgment from Justice Kennedy that we are still searching for an adequate explanation of the constitutional status of the administrative state, and of independent agencies in particular. These expressions of sympathy and doubt, respectively, are potentially significant, particularly because they are not isolated instances among the current Justices. In previous cases, Justice Clarence Thomas signaled his receptivity to the unitary executive theory at least in certain contexts,[62] as did Justice Breyer.[63]

The impact of a more definitive judicial endorsement of the theory on environmental and natural resource management agencies is impossible to determine, partly because the theory has several versions and any endorsement may be context-specific. In theory, greater presidential control over the policy discretion of agency officials could work in favor of more, rather than less rigorous application of environmental legislation if the president were committed to a more vigorous application of those laws than officials in independent agencies with environmental responsibilities. At this juncture, however, it is hard to imagine the Supreme Court choosing as a vehicle for the enhancement of executive power a case in which the president sought tougher application of environmental legislation than officials with discretionary authority.[64]

b. *Free Enterprise Fund v. Public Company Accounting Oversight Board*

The second case addressed the separation of powers issues surrounding the creation and staffing of independent agencies more directly. The main issue in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[65] was whether Congress may restrict the president's ability to remove a principal officer to situations involving cause, when the principal officer's authority to remove inferior officers who determine policy and enforce federal laws is similarly restricted.[66] The Sarbanes-Oxley Act of 2002[67] created a new Public Company Accounting Oversight Board composed of five members appointed to five-year staggered terms by the Securities and Exchange Commission (SEC).[68] The board's responsibilities include regulating the practices of accounting firms and enforcing the securities laws against them. When the board investigated and issued a critical report on an accounting firm, the firm filed suit challenging the board's constitutionality and seeking an injunction preventing it from exercising its powers. In an opinion for a 5-4 majority, Chief Justice John Roberts held that the "double removal restrictions" (the president could only remove the members of the SEC for cause, and they in turn could only remove board members for cause) were inconsistent with Article II's vesting of the executive power in the president and the separation of powers. By preventing the president from overseeing faithful execution of the laws administered by the board, the double removal restrictions interfered with his "take Care" responsibilities.[69] The Court rejected the accounting firm's claim that the Act also violated the Appointments Clause to the Constitution.[70]

The Court distinguished previous cases upholding restrictions on the president's removal authority[71] as cases involving "only one level of protected tenure [that] separated the president from an officer exercising executive power."[72] The second layer of protection afforded by the Sarbanes-Oxley Act was critical because it changed the nature of the president's review by precluding the SEC from removing a board member at will, and thus precluding the president from holding the SEC fully accountable for the board's conduct. The upshot was that

> [n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.[73]

For similar reasons, the double removal structure impaired the president's accountability to the public in a manner inconsistent with the separation of powers.

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59. *Id*. at 1817.
60. Morrison v. Olson, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting).
61. *Fox*, 129 S. Ct. at 1823 (Kennedy, J., concurring in part and concurring in the judgment).
62. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (foreign affairs and national security).
63. Clinton v. Jones, 520 U.S. 681 (1997) (suit against President Clinton for alleged sexual advances before he became president).
64. *Cf*. Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 Hous. L. Rev. 565, 569 (2005) (noting an "erosive trend in environmental law—one in which the Court, or at least certain of its members—are subverting the current system of environmental regulation").
65. 130 S. Ct. 3138 (2010).
66. *Id*. at 3147.
67. Pub. L. No. 107-204, 116 Stat. 745.
68. 15 U.S.C. §7211.
69. *Free Enter. Fund*, 130 S. Ct. at 3147.
70. *Id*. at 3162-64. The Court held that the board's members were inferior officers, that the SEC is a department for purposes of the Appointments Clause, and that the full SEC constitutes the "Head" of that department.
71. *E.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); United States v. Perkins, 116 U.S. 483 (1886).
72. *Free Enter. Fund*, 130 S. Ct. at 3153.
73. *Id*. at 3154.

The majority did not deny "Congress's power to create a vast and varied federal bureaucracy."[74] But its suspicion about (and perhaps even disdain for) the administrative state was unmistakable, as Chief Justice Roberts remarked:

> [o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. . . . The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."[75]

Thus, the separation of powers and the provisions of Article II set limits on the degree to which Congress can insulate agency decisionmakers from presidential direction and control.

The Court carefully narrowed the reach of its holding, denying that it was taking issue with for-cause limitations in general.[76] It described the structure of the removal provisions that governed SEC and board members as unique, and insisted it was not deciding the status of any other government employees (including that of "lesser functionaries subordinate to officers of the United States").[77] Finally, the Court refused to provide the broad relief sought by the accounting firm. Instead of holding that all of the board's power was unconstitutional, it severed the improper restrictions on removal by the SEC of board members, leaving board members removable at will by the SEC, because the remaining statutory provisions were capable of functioning independently.[78] The Court did not take the opportunity to endorse any version of the unitary executive theory by name and did not come close to declaring the mere existence of independent agencies to be inconsistent with the Take Care Clause or the separation of powers.[79] Nor did the majority overrule any of its separation-of-powers precedents.

That restraint may have been due, however, to the fact that none of the parties asked it to do so.[80] Justice Breyer, who wrote a dissenting opinion joined by Justices Stevens, Ruth Bader Ginsburg, and Sonia Sotomayor, clearly was troubled by the formalistic[81] (as opposed to functional) analysis the Court used to strike down the double removal provision, finding the potential consequences of the majority's holding to be "worrying."[82] In this respect, his opinion echoed Justice Blackmun's criticism of the Court's formalistic reasoning in *Defenders of Wildlife*.[83] Justice Breyer's reading of the Constitution is more accommodating of the administrative state than that of the majority,[84] and he found nothing illegitimate about using restrictions on removal powers to protect agency independence, shield agency officials from removal for purely political reasons, and allocate decisionmaking authority to those with relevant technical expertise.[85] The majority did not refer to the unitary executive theory in striking down the double removal mechanism. It reasoned, however, that the Sarbanes-Oxley Act's removal restrictions were "contrary to Article II's vesting of the executive power in the President" because the president's inability to ensure that the laws are faithfully executed and his nonaccountability for a board member's breach of faith "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'"[86] The references to "ultimate responsibility" and a "single President" are evocative of the conception of a unitary executive.

Interestingly, the majority in *Free Enterprise Fund* did not always clearly distinguish between the roles of the Vesting and Take Care Clauses, holding that the Sarbanes-Oxley Act's multilevel protection from removal "is contrary to Article II's vesting of the executive power in the president. The president cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."[87] But the Take Care Clause and the Vesting Clause upon which the unitary executive theory largely rests may raise different concerns. Statutory provisions requiring for cause removal by the president generally do not seem to interfere with the president's responsibilities under the Take Care Clause to ensure faithful execution of the laws because the failure to faithfully execute the laws provides cause for removal. For cause removal restrictions may interfere with the president's ability to control the policy decisions of independent agencies, which is at the core of the unitary executive theory. What seemed to make the double-layer removal restrictions in *Free Enterprise Fund* objectionable to the majority was their interference with the president's ability to remove (or force the SEC to remove) board members who are not faithfully executing the law.[88]

As for the practical implications of the Court's decision, and notwithstanding the majority's description of the narrow confines of its holding, Justice Breyer expressed concern over the job security of "hundreds, perhaps thousands of high level government officials" and over the possibility that courts

74. *Id.* at 3155.
75. *Id.* at 3156.
76. *Id.* at 3157.
77. *Id.* at 3160.
78. *Id.* at 3161-62.
79. The Court stressed that "[n]othing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service within independent agencies." *Id.* at 3160. It also indicated that it was not ruling on the status of administrative law judges. *Id.* at 3160 n.10.
80. *Id.* at 3147.
81. *See id.* at 3169 (Breyer, J., dissenting) ("Neither is power always susceptible to the equations of elementary arithmetic."); *id.* at 3176-77 ("Once one goes beyond the Court's elementary arithmetical logic, (i.e., 'one plus one is greater than one') our precedent virtually dictates a holding that the challenged 'for cause' provision is constitutional.").
82. *Id.* at 3182.
83. *See supra* note 17 and accompanying text.
84. *Free Enter. Fund*, 130 S. Ct. at 3168 (Breyer, J., dissenting) (stating that "the 'powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role' over time" (quoting New York v. United States, 505 U.S. 144, 157, 22 ELR 21082 (1992)).
85. *Id.* at 3174.
86. *Id.* at 3154 (majority opinion) (quoting Clinton v. Jones, 520 U. S. 681, 712-13 (1997) (Breyer, J., concurring in the judgment)).
87. *Id.* at 3147.
88. I thank Richard E. Levy for the distinctions between the Vesting and Take Care Clauses discussed here.

might deem their decisions unconstitutional.[89] He listed 48 agencies with heads removable only for cause, including some with the responsibility to take actions to protect health, safety, the environment, or natural resources—the NRC, FERC, the Chemical Safety Board, the FMSHRC, the CPSC, the OSHRC, the Regional Fishery Management Councils, and the Surface Transportation Board (STB). Another list identified 573 career appointees in upper management positions in the independent agencies who are inferior officers subject to two layers of for-cause removal, including various officials in the NRC, FERC, the CPSC, the STB, the FMSHRC, and the Chemical Safety and Hazards Investigation Board. According to Justice Breyer, nearly 1,600 administrative law judges are inferior officers subject to two layers of for-cause removal, including judges who adjudicate cases within the USDA and the DOI, EPA, FERC, the FMSHRC, and the OSHRC. Justice Breyer expressed concern that all of these officials and the decisions they make are at risk.[90] The potential for disruption of agency decisionmaking concerning environmental matters under this scenario is significant, even if *Free Enterprise Fund* does not threaten the core functions of executive agencies such as the DOI and the USDA or executive establishments such as EPA.

The *Free Enterprise Fund* case does not immediately threaten the constitutional status of independent agencies across the board. The issue in the case was narrowly framed and the Court emphasized that it was not overruling any of its separation-of-powers precedents. Nevertheless, the Court's commitment to protecting presidential prerogatives under the rubric of the Vesting and Take Care Clauses is clear. In addition, it does not take much reading between the lines to discern the majority's concerns about the scope and power of independent agencies. A more direct assault on those agencies is not out of the question, even if it does not appear imminent. Finally, the long list of independent agencies and officials who may (or may not) be affected by the case's holding cautions against dismissing the relevance of *Free Enterprise Fund* to the administration of the nation's environmental laws. The case may presage greater presidential authority to remove agency officials within independent agencies with environmentally related responsibilities. Whether that enhanced authority strengthens or weakens federal environmental law will depend on many factors, including the president's own commitment to the environmental protection goals set forth in the nation's landmark environmental legislation.

C. The Unitary Executive Theory and Presidential Control Over Agency Discretion

Under the strong version of the unitary executive theory, the president can supplant discretionary executive action taken by a subordinate, notwithstanding any statute that attempts to vest discretionary executive power only in the subordinate. But how far would that authority extend if the Court were to endorse some version of the theory? Under current law, whatever the scope of the president's authority to directly control officers of the United States, he may not direct them to violate the law. The issue has arisen in the context of review of agency rulemaking activities by the White House. One district court recognized that a certain degree of deference must be given to the authority of the president to control and supervise executive policymaking.[91] It noted, however, that the Office of Management and Budget's (OMB's) review under Executive Order No. 12291 of EPA regulations adopted under the Resource Conservation and Recovery Act (RCRA)[92] raised constitutional concerns. In particular, if used improperly (such as by delaying the issuance of EPA regulations past statutory deadlines), such review could result in an encroachment by the OMB on the independence and expertise of EPA. In addition, lobbyists who were unable to convince Congress on a point could achieve their goals by getting the OMB to delay or weaken EPA regulations. The court held that delaying regulations beyond statutory deadlines "is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers."[93] Ten years later, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit invalidated an Executive Order issued by President William J. Clinton that authorized the Secretary of Labor to disqualify from federal contracts any employer who hired permanent replacement workers during a lawful strike.[94] It concluded that the order conflicted with the National Labor Relations Act and was therefore invalid. The same court later upheld an Executive Order concerning government procurement practices because, by its own terms, the order applied only "to the extent permitted by law."[95] More recently, the U.S. Court of Appeals for the Second Circuit found it unnecessary to reach the issue of the legality of the OMB's participation in EPA's adoption of regulations under the CWA because it remanded the regulations as arbitrary and capricious for other reasons.[96]

Executive Orders like those requiring agencies to engage in cost-benefit analysis of major rules to date have not applied to independent agencies.[97] President Ronald Reagan, whose cost-benefit Executive Order has been continued with some modifications by every succeeding president, chose not to subject independent agencies to executive branch review under the order, apparently due to concern that he lacked the legal authority to do so.[98] Both executive branch officials and

89. *Free Enter. Fund*, 130 S. Ct. at 3179 (Breyer, J., dissenting).
90. *Id.* at 3184-3214, apps. A-C.

91. Envtl. Def. Fund v. Thomas, 627 F. Supp. 566, 16 ELR 20250 (D.D.C. 1986).
92. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
93. *Thomas*, 627 F. Supp. at 570.
94. Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).
95. Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002).
96. Riverkeeper, Inc. v. EPA, 475 F.3d 83, 105 n.18, 37 ELR 20022 (2d Cir. 2007), *rev'd & remanded sub nom.* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 39 ELR 20067 (2009).
97. *See, e.g.*, Exec. Order No. 12866, §3(b), 58 Fed. Reg. 51735 (Sept. 30, 1993) (defining "agencies" whose regulations are subject to review by the OMB's Office of Information and Regulatory Affairs to exclude "independent regulatory agencies, as defined in 44 U.S.C. 3502(10)").
98. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 620 (2010) (citing Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1506 (2002)).

some legal scholars have since argued that the president may subject independent agencies to an Executive Order requiring centralized executive branch review of agency regulations, but no president has yet attempted to do so.[99] Judicial acceptance of some version of the unitary executive theory could prompt revisions to the Executive Orders governing centralized White House regulatory review to make them applicable to independent agencies.

The result would be to enhance presidential control over the implementation by these agencies of statutes with environmental protection implications. This step would be significant, given the controversial history of the application of presidential cost-benefit Executive Orders to executive branch environmental regulatory agencies such as EPA.[100] A likely result of the required application of cost-benefit analysis to the activities of independent agencies with environmental protection responsibilities would be a greater focus on quantifiable factors, such as cost of compliance, and a reduced emphasis on the achievement of environmental protection and health and safety benefits that tend to be harder to quantify.[101] Neither the *Fox* nor the *Free Enterprise Fund* case provides unequivocal signals that such an expansion of regulatory review would clearly be permissible. If future cases more clearly endorse the unitary executive theory, any doubts about the propriety of including independent agencies in executive branch regulatory review could diminish, and another mechanism for shielding the exercise of delegated discretionary power by independent agencies from presidential control could disappear.

III. Conclusion

In recent years, the Supreme Court had the opportunity to revise constitutional law doctrine in ways that could have profoundly affected the scope and operation of the nation's environmental laws. When the Court 15 years ago struck down federal legislation on the ground that it exceeded the scope of the commerce power for the first time in decades,[102] there was concern in some circles that important environmental legislation (such as the ESA) was at risk.[103] The Court has yet to strike down any environmental legislation as violative of the Commerce Clause, although it has narrowly interpreted the scope of the CWA's dredge and fill permit program to avoid having to address constitutional questions about the validity of certain applications of that program.[104] When the D.C. Circuit struck down national ambient air quality standards adopted by EPA under the CAA as a violation of the nondelegation doctrine,[105] the future of much of the federal administrative state seemed to hang in the balance. The Court, however, soundly rejected the nondelegation challenge and put to bed any real question about whether it put environmental statutes such as the CAA at risk.[106] These, then, were two constitutional revolutions with enormous potential consequences for environmental law that never developed as anticipated (or feared).

The appearance of Article II considerations in Supreme Court cases involving standing, judicial review of agency decisionmaking discretion, and statutory restrictions on the removal of agency officials also has raised the possibility of profound changes in the ways that administrative law, and some aspects of environmental law, operate. *Free Enterprise Fund* was the first case in nearly 85 years to strike down a statute on the ground that it unduly limited the president's authority to remove an executive branch official.[107] The Court's references to the Vesting and Take Care Clauses in both environmental and nonenvironmental cases may thus facilitate the removal or loosening of some forms of judicial supervision of agencies with environmental responsibilities and handcuff Congress in its efforts to insulate those agencies from presidential control. So far, the use of Article II to force a restructuring of federal regulatory programs, including those relevant to environmental protection, represents another incipient revolution that has not materialized. The Court has incrementally enhanced presidential control of the executive branch without impairing core components of environmental legislation such as citizen suits or striking down independent agencies writ large. Whether that continues to be so remains to be seen.

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99. *Id.* at 620 & n.108. *See also* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 54 Fed. Reg. 5207 (Feb. 2, 1989) (urging that regulatory review process apply to independent agencies in the same fashion it applies to executive agencies).
100. *See, e.g.*, Glicksman & Levy, *supra* note 43, at 408-11, 425; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260 (2006); Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 Fordham Urb. L.J. 1257 (2006); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 Duke L.J. 963 (2001); Percival, *supra* note 44; Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 136-37 (2003); *see also* David J. Barron, *From Takeover to Merger: Administrative Law in an Age of Agency Politicization*, 76 Geo. Wash. L. Rev. 1095, 1108 (2008); Roger G. Noll, *The Economic Significance of Executive Order 13,422*, 25 Yale J. on Reg. 113, 113 (2008).
101. *See, e.g.*, Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7, 63 (1998). *Cf.* Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 Colum. J. Envtl. L. 191 (2004) (criticizing the indeterminacy of cost-benefit analysis).
102. *See* United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000).
103. *See, e.g.,* J. Blanding Holman IV, *After* United States v. Lopez: *Can the Endangered Species Act and the Clean Water Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139 (1995); Bradford C. Mank, *After* Gonzales v. Raich: *Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 376-77 (2007).
104. *See* Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001).
105. Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 29 ELR 21071 (D.C. Cir. 1999), *modified on reh'g*, 195 F.3d 4, 30 ELR 20119 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 31 ELR 20512 (2001).
106. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 31 ELR 20512 (2001).
107. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3166-67 (2010) (Breyer, J., dissenting).