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The Emperor’s New Clothes: The Variety of Stakeholders in Climate Change Regulation Assuming the Mantle of Federal and International Authority

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The Emperor’s New Clothes: The Variety of Stakeholders in Climate Change Regulation Assuming the Mantle of Federal and International Authority

LINDA A. MALONE*

In June 2017, President Donald Trump announced the United States would be withdrawing from the Paris Climate Accord. President Trump believes the United States should be more focused on its economic well-being than on environmental concerns. Since being elected, President Trump has, with the help of the Environmental Protection Agency, been rolling back, or attempting to roll back, major climate change regulations. However, this Article points out that due to factors such as international law, the United States Constitution, and the Administrative Procedure Act, one cannot just simply withdraw from an international agreement, such as the Paris Accord, or take back previously created environmental regulations, such as Obama’s Clean Power Plan; Congress has also played a role in blocking some of President Trump’s objectives. According to the United Nations Framework Convention on Climate Change Paris Agreement, no party is allowed to withdraw until three years after the agreement went into force for such party; the withdraw then does not take effect for an additional year. Thus, the United States’ withdraw cannot legally take effect until November 2020. Additionally, when it comes to final regulations, various factors including the notice-and-comment rules of the Administrative Procedure Act provide blocks and strict guidelines when attempting to overturn such regulations; reversals can be a long and drawn out process.

As will be further discussed, as a result of recent attempted federal government rollbacks and changes, states, other countries, such as China, and the public in general have been stepping up and taking on the initiative to fight climate change and reduce emissions, thus altering the historical pattern of environmental regulation. There is a definite increase in state participation when it comes to climate change. Yet, despite local progress there are still federal roadblocks that must be overcome.

Keywords: Paris Climate Accord, Parexit, Administrative Procedure Act, United Nations, Environmental Protection Agency, Clean Power Plan, environmental law, constitutional law, international agreement, international law, climate change, emissions, regulations
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I. INTRODUCTION

Over the past year, there have been drastic changes in the political 
atmosphere concerning climate change and environmental law as a whole.1 
Upon being elected President of the United States, Donald Trump set forth 
pushing back environmental laws and regulations enacted 
by the Obama Administration.2 President Trump has made major changes and reversals of 
federal regulations through the use of the Congressional Review Act and 
continues to do so as his term stretches on.3 However, the restrictions set forth 
in the United States Constitution and the Administrative Procedure Act (APA)

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1See infra notes 48–52 and accompanying text.
3See infra notes 26–29, 33–35 and accompanying text.
have made it difficult for President Trump to completely overturn formal regulations, such as the Clean Power Plan.⁴

In June 2017, President Trump announced the United States’ withdrawal from the Paris Climate Accord (Paris Accord), an international agreement that established goals for countries to meet in order to combat and limit the effects of greenhouse gas emissions.⁵ Although other countries and presidential advisors resoundingly disapproved, President Trump ultimately decided that the economic well-being of the United States should come before global environmental concerns.⁶ However, despite President Trump’s withdrawal, parties may not formally withdraw from the Paris Accord until November 4, 2019, at the earliest, thus potentially rendering his withdrawal a violation of international law.⁷

States have responded to these federal changes by enacting their own regulations that are more stringent than federal regulations, thus shifting the historical pattern of environmental regulation.⁸ States have taken on the responsibility of battling these climate change issues in the face of an Administration that denies they exist.⁹ Moreover, due to the federal government rolling back climate change mitigation efforts and regulation, China has even stepped into first place in the international community for environmental efforts.¹⁰ While certain states have made efforts to reduce emissions, with such a fundamental shift in environmental protections, both constitutional and international concerns begin to arise.¹¹

II. THE EMPEROR’S NEW CLOTHES: THE VARIETY OF STAKEHOLDERS IN CLIMATE CHANGE REGULATION ASSUMING THE MANTLE OF FEDERAL AND INTERNATIONAL AUTHORITY

The United States’ foreign relations and United States–China relations in environmental law and policy, in particular, have undergone a monumental sea-change since October 2016. At that time, the possibility of a Trump Administration and its openly anti-environmental agenda seemed unlikely as a political matter. Now that the Trump Administration has tried to put that agenda into place, the entire situation and the roles played by China and the United States in environmental stewardship and leadership must be totally re-assessed.

⁴ See infra Part IV.
⁵ See infra notes 43–45 and accompanying text.
⁶ See infra notes 43–48 and accompanying text.
⁷ See infra Part V.
⁸ See infra notes Parts VI–VII.
⁹ See supra note 8 and accompanying text.
¹⁰ See infra notes 183–85 and accompanying text.
¹¹ See infra Parts IV–V.
I do so as objectively as possible, but assuming (as a matter of science) that anthropocentric climate disruption is a major environmental problem.12

President Trump is a self-proclaimed “climate change denier”13 and has put Scott Pruitt, also a self-proclaimed denier, in charge of the Environmental Protection Agency (EPA).14 Pruitt has also denied that climate change will have a detrimental effect on humanity, instead saying that rising temperatures are “not necessarily a bad thing.”15 Among other signaled actions, Pruitt has even indicated that he will seek regulatory modification of what constitutes a major “modification,”16 triggering new source review of industrial facilities and more stringent emission limitations for older coal-burning plants.17 Furthermore,


15 Lisa Friedman, How to Read Between the Lines When Scott Pruitt Talks About Climate Science, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/2018/02/08/climate/pruitt-climate-change.html [on file with Ohio State Law Journal] (discussing how Pruitt has made his opinions about climate change very clear—he does not believe that humans have caused climate change, even when presented with scientific evidence saying otherwise, and does not believe that it should be mitigated).


more recently in March 2018, President Trump nominated Mike Pompeo to be
the Secretary of State for the current Administration,18 and the Senate officially
confirmed him at the end of April.19 Not shockingly, Mike Pompeo too is a
climate skeptic.20

Just as President Obama used the full reach of his executive powers to
remedy climate disruption, President Trump is using that same authority to undo
programs, international agreements, and regulations that attempt to mitigate
human effects on climate change.21 The outcome is, for at least the next four
years, largely a matter of U.S. constitutional law, but other bodies of law and
non-legal factors may play an equally significant role.22 What has the Trump
Administration attempted so far? Page constraints limit that analysis to a very
abbreviated list:

EXECUTIVE ORDERS AND OTHER EFFORTS BY THE TRUMP
ADMINISTRATION:

1. Ordering the EPA to reverse the Obama Clean Power Plan regulation.23
2. Ordering the EPA to reconsider fuel economy standards after 2021 (by regulation those standards are locked in through 2021). 24

3. The EPA’s decision to stay the implementation of a rule on greenhouse gas and methane emissions, where owners and operators of regulated entities must conduct and submit reports and surveys on fugitive emissions (e.g., methane) and leaks. 25 In Clean Air Council v. Pruitt, the D.C. Circuit Court of Appeals held that the EPA could not indefinitely delay the effective date of a final regulation without following the notice-and-comment requirements of the APA for reconsideration of a final rule generally and, specifically in this case, the requirements of the Clean Air Act for a stay of a final rule. 26


25 40 C.F.R. § 60.5397a(f)(1) (2017) (requiring that affected facilities “conduct an initial monitoring survey within 60 days of the startup . . . for each collection of fugitive emissions components . . . or by June 3, 2017”). On March 2, 2017, the EPA also provided notice that it was withdrawing its previous requests that operators and owners of the natural gas and oil industries give information about their emissions and equipment at current gas and oil operations. Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12817, 12817 (Mar. 7, 2017).

4. Attempting to reverse a regulation, which empowered the Interior Department’s Bureau of Land Management (BLM) to address methane from fossil-fuel operations on public and tribal lands. On May 10, 2017, the Senate, with three Republican supporters, surprisingly voted to uphold the 2016 Obama-era methane regulation and block efforts to repeal, or reverse, the rule. Since then, BLM has made multiple attempts to postpone the rule and on February 22, 2018, posted a proposed rule to replace the 2016 Obama-era methane regulation (the rulemaking process is yet to be finalized).

5. A freeze on new or pending regulations for a number of eco-friendlier regulations. There have been many other such executive orders and administrative agency proposals, which are not included due to their essentially domestic impact of lesser relevance to climate change, although with international consequences. Some particularly distinct proposed budgets include severe cuts to the EPA, restriction of scientific information used in development and implementation of policies (proposing that underlying data used by the EPA for scientific studies be made available to the public), and removal of information


on climate change from the EPA site (although there has been an academic and nonprofit effort to preserve that data). Moreover, efforts to identify who in federal agencies have been involved in climate change issues have been very alarming to the scientific community and those agencies. Yet, as time has progressed, Scott Pruitt’s haste to roll back environmental regulations has led to poorly drafted legal arguments that objectors may quash in court.

Congress has made it clear that not all of President Trump’s objectives are to be a reality. For instance, President Trump proposed a 31% budget decrease for the EPA, yet Congress left the budget as it was rather than increase or decrease it. Programs for renewable energy faced a proposed 70% budget decrease, yet Congress increased the budget. Congress also increased the $64 million budget for the Land and Water Conservation Fund to $425 million.

The public hearing resulted in a plethora of oral comments, both in support and opposition of the proposed rule. Regulatory Developments: EPA Convenes Public Hearing on Proposed Rule: Strengthening Transparency in Regulatory Science, BERGESON & CAMPELL, P.C. (July 19, 2018), https://www.regulations.gov/docket?D=EPA-HQ-OA-2018-0259 [https://perma.cc/23AS-NHKL]. Ultimately, the issues presented are unable to be immediately resolved and will require further action in the months to come. See id. Additionally, the comment deadline initially had a deadline of May 30, 2018, but was extended to August 16, 2018, at which point over 500,000 comments were submitted regarding the proposed rule. Strengthening Transparency in Regulatory Science, REGULATIONS.GOV, https://www.regulations.gov/docket?D=EPA-HQ-OA-2018-0259 (last visited Aug. 26, 2018).

35 See Coral Davenport & Lisa Friedman, In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda, N.Y. TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/climate/scott-pruitt-epa-rollback.html [on file with Ohio State Law Journal] (noting that courts have already struck down six of his efforts to block President’s Obama’s regulations as a result of missing important pieces of legislation and law in arguments and how environmental policy experts have expressed their shock at the EPA’s lack of data analysis and justification in the arguments presented thus far). As a result of such actions, John F. Kelly, the White House Chief of Staff has advised President Trump to fire Pruitt. Julie Hirschfeld Davis & Lisa Friedman, Chief of Staff Advised a Resistant Trump to Fire the E.P.A. Chief, N.Y. TIMES (Apr. 6, 2018), https://www.nytimes.com/2018/04/06/us/politics/trump-kelly-pruitt-fired.html [on file with Ohio State Law Journal]. President Trump disregarded the advice, as he believes that Pruitt is handling matters at the EPA well, stating that “he’s done a fantastic job at E.P.A.” Id. However, Pruitt has since resigned amid ethical scandals. See Diamond et al., supra note 14, at 6.
37 Id.
38 Id.
STAKEHOLDERS IN CLIMATE CHANGE REGULATION

While President Trump is still able to propose such cuts, it is a promising future if Congress continues to protect the environment, even at Trump's opposition.

Although of less international importance, an anomaly of U.S. law deserves mention. A relatively obscure law, the Congressional Review Act, allows Congress within sixty legislative days to overturn any federal regulation by a majority vote. President Trump has used this law to erase rules that focus primarily on the protection and conservation of the environment (such as the rejection of the Obama-era Stream Protection Rule), as well as labor, immigration, financial protections, Internet privacy, abortion, education, and gun rights. Prior to 2017, the Congressional Review Act had only been successfully invoked once in 2001 on a regulation on workplace injuries.

III. “PAREXIT” AND THE U.S. WITHDRAWAL EFFORTS FROM THE PARIS ACCORD

Despite campaign promises to remove the United States from the Paris Accord, President Trump did not officially announce that the United States would withdraw from the Paris Accord until June 2017. The Paris Accord is a treaty under international law, yet an agreement which is deliberately not a


44U.N. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S 180 ("[T]reaty means an international agreement concluded between States in written form and governed by international law."). One hundred ninety-five countries signed onto the Paris Accord in order to help mitigate the effects of climate change and slow the process of
treaty under U.S. law, because the Obama Administration recognized that no climate change "treaty" (as U.S. law has vaguely formulated that term) could receive Senate approval as required. As a result, world leaders carefully negotiated and phrased the agreement in terms of goals, not requirements, in recognition of the cooperation of President Obama, a former constitutional law professor. By setting goals rather than concrete requirements, the global community was ensuring under U.S. constitutional law that the Paris Accord would not require Senate approval.

Despite President Trump’s campaign promises, some of his advisors, even those against the Paris Accord, advocated staying in the Paris Accord. Staying in the Paris Accord would have been a strategic, if hypocritical, strategy. As the Paris Accord only has goals, the Trump Administration could just fail to meet those goals but stay in the Paris Accord to avoid the political blowback of withdrawing, while also maintaining a place at the table in future discussions.
negotiations. In that case, however, the United States would be running afoul of its international law obligations discussed below to act in good faith. In any event, as this Accord is an executive agreement, whatever this Administration decides, a future Administration could choose to either continue or reverse.

The United States has discussed possible renegotiations, but the precise details of the United States' involvement, or progress, with such renegotiations in regards to the Paris Accord remain unclear. During the September 2017 opening session of the United Nations General Assembly, Gary Cohn, the highest-ranking White House economic advisor, stated that the United States is "unambiguous" about withdrawing from the Paris Accord unless the U.N. negotiates new terms. What those terms would be, and whether the global community would even consider such negotiations, are even less clear. Additionally, with or without negotiations, those in the White House who oppose any involvement in the Accord have reportedly raised concerns in regards to a 213-year-old Supreme Court decision in the Murray v. The Schooner Charming Betsy case. Murray requires that U.S. law be interpreted, whenever possible, in accordance with international law obligations, and the fact that it could endanger regulatory rollbacks, or court efforts to cut back on industry regulation, brings up some questions and doubts.

51 See Davenport, supra note 49.
52 See infra notes 95, 98 and accompanying text.
53 See Davenport, supra note 28.
55 Id. However, Mr. Cohn is reported to have drafted a resignation letter after President Trump's response to racial violence in Charlottesville, Virginia, casting reasonable doubt on his relationship with the President and insight into his plans. See Kate Kelly & Maggie Haberman, Gary Cohn, Trump's Adviser, Said to Have Drafted Resignation Letter After Charlottesville, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/gary-cohn-trump-charlottesville.html [https://perma.cc/2R5S-P52J]. Mr. Cohn has since resigned from his position. See Kate Kelly & Maggie Hauberman, Gary Cohn Says He Will Resign as Trump's Top Economic Adviser, N.Y. TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/politics/gary-cohn-resigns.html?login=email&auth=login-email [on file with Ohio State Law Journal].
56 There have also been some suggestions that climate change emissions are more likely to be reduced without the Trump Administration's involvement through renegotiations, as the global response to the withdrawal has been a re-energized commitment to global and national reductions. See Ewa Krukowska, Climate Change: U.S. Exit from Paris Deal Better for World, Researcher Says, 48 ENV'T REP. 1499, 1499 (Sept. 22, 2017).
57 Murray v. Charming Betsy, 6 U.S. 64, 118 (1804) (stating, in a case involving the non-intercourse act and rights on search and seizure, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood").
IV. INTERNATIONAL AGREEMENTS AND DOMESTIC REGULATIONS UNDER U.S. LAW

As a matter of U.S. constitutional law, what can be done by executive, in this case sole Presidential, authority in international relations and the definition of a treaty that requires Senate approval is very unclear outside of trade and a few other matters. Not surprisingly, the drafters of the Constitution did not even consider the variety of processes by which international agreements are made. The brief Treaty Clause of the U.S. Constitution was intended to reserve international matters to the federal government rather than the states, without specifying the extent of authority of the federal branches of government to enter into (or out of) international agreements. Historically, the treaty/executive agreement distinction came to the forefront of constitutional issues only when questions were raised as to whether the Charter of the United Nations could be accepted by the President without Senate approval, avoiding the prior failure of the Senate to ratify the Treaty of Versailles.

With the current congressional gridlock and divisiveness even within and between the main political parties, the question of what qualifies as a binding agreement as a matter of U.S. constitutional law is critical. Falling back momentarily, for purposes of this discussion on vague U.S. constitutional standards, the difference has to do with concrete commitments and requirements versus generalized goals (my own rough characterization). Thus, there is the Paris "Accord," not the Paris "Treaty."

U.S. constitutional law is not the only legal check on sole executive agreements. Despite the political currency of the flurry of Trump executive orders, the legal reality is that final regulations of the Obama Administration are not easily reversed under the notice-and-comment rules of the APA. Most


60 Galbraith, supra note 59, at 1685 (discussing failure of U.S. Senate to ratify the Treaty of Versailles); see Treaty of Peace with Germany, Jan. 10, 1920, 2 Bevans 43 [hereinafter Treaty of Versailles].


importantly, with respect to climate change, it would include the multi-year, carefully manufactured, final EPA regulation on the Clean Power Plan. As will be explained, in addition to consequences of a non-legal nature, overturning a final regulation is often a prolonged legal process of at least a year or two, longer for controversial environmental regulations, with public notice, comments, a draft regulation, and the final regulation. In addition, sudden reversal of a final regulation promulgated over several years requires a plausible explanation as to what factual premises underlying the regulation have changed as to justify a new rule. The federal courts are already heavily involved in challenges by states and environmental organizations under the APA that address the attempted non-enforcement or indefinite delay by EPA of Obama-era regulations.

As noted earlier, the D.C. Circuit Court of Appeals in Clean Air Council v. Pruitt refused to allow the EPA to delay the effective date of a regulation for two years without going through the public notice-and-comment procedures of the APA. Decisions of the D.C. Circuit Court of Appeals (despite a multiplicity of three-judge panels) are noteworthy, as any rulemaking or decision-making of national scope must first be brought before that Court, with the possibility of en banc review and ultimately Supreme Court review. Likewise, the Tenth Circuit Court of Appeals also has a highly visible role in legal challenges to federal agency minimization of climate change consequences in agency decision-making.

In WildEarth Guardians v. U.S. Bureau of Land Management (BLM), the court of appeals sent back to the EPA a draft environmental impact statement required under the National Environmental Policy Act (NEPA) extending the BLM approval of permit extensions for two mines in Wyoming. The two mines produce nearly 20% of U.S. coal, and the Power River Basin region produces 38.5% of all U.S. coal. The BLM took the position that extension of the two leases would not increase coal emissions, as there are “multiple other
The court was not swayed by this bare assertion, referencing the requirement of NEPA that agency decisions be based on the best available scientific evidence. The broader implication of the decision is that federal agencies must reach decisions with potential climate change effects based on meaningful consideration of those consequences utilizing the best available scientific evidence under NEPA and the APA. Failure to do so risks the agency being sent back to the drawing board for the decision, as it were, with attendant costs and delays.

The Freedom of Information Act (FOIA) has also become a weapon in that it has the potential to fight against what might be described as de facto repeal through inaction. For instance, a proposed regulation to control aircraft emissions, backed by more than 190 countries in the International Civil Aviation Organization and the industry group General Aviation Manufacturers Association, was languishing in the EPA’s agenda and without fanfare, placed into a list of inactive regulations. However, after the Center for Biological Diversity filed a FOIA request seeking the EPA’s basis for moving away from the regulation on aircraft emissions and classifying it as inactive, an EPA spokesperson stated it was going to be placed on the 2018 active list again by the end of the year.

In February 2018, President Trump released information about a plan that would build and restore national infrastructure. Although the nation’s infrastructure does need improvement, the Trump Administration has not indicated that it will address the environmental concerns that go hand-in-hand with the improvements. Climate change is leaving communities vulnerable to threats such as flooding, and building roads in these vulnerable places would be detrimental. Thus far, concern has been abundant, as various academics have

71 Id. at 1228–29.
72 Cf. id. at 1236–37 (finding that the BLM did not use the best available information on climate change when analyzing carbon emissions).
73 See id. at 1237 (holding that the BLM’s failure to consider recent climate modeling technology in evaluating carbon emissions was, in part, grounds for finding the agency action invalid).
75 Air sector regulations meant to curb aircraft greenhouse gas emissions that were put into a regulatory graveyard include a regulation titled “Control of Air Pollution From Aircraft and Aircraft Engines.” 40 C.F.R. §§ 87.1-87.64 (2017); Reconsideration of Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare, 81 Fed. Reg. 96413 (Dec. 30, 2016); Dean Scott, Airline Climate Emissions Rule Not Dead Yet: EPA, 48 ENV’T REP. (BNA) 1502, 48 ENR 1502 (BL) (Sept. 22, 2017).
76 Scott, supra note 75, at 1502.
77 Scott, supra note 75.
79 Id.
offered studies to show the potential effects of climate change on infrastructure.  

Moreover, following Executive Order 13778 instructing Scott Pruitt to begin the process of rescinding or revising an Obama-era Clean Water Rule (Waters of the United States), the Trump Administration has now formally suspended the regulation with Scott Pruitt’s filing of the required documents on January 31, 2018.81 The Obama-era regulation was to be implemented within weeks, however EPA finalized the delay of the regulation six days after Pruitt filed the documents, pushing the applicability date to February 6, 2020.82 Upon the finalization of this suspension, a number of states and environmental groups filed, or threatened to file, suit against EPA, with one being a multi-state lawsuit, led by the New York attorney general (as of early June 2018, the litigation is still ongoing for the multi-state lawsuit against EPA).83 The EPA is drafting changes to the regulation, which are expected to include fewer requirements, and this new proposal for the regulation is expected to be released later in 2018.84 With that being said, the Trump Administration cannot just easily take away or overturn all Obama-era regulations whenever they want; there is a long and involved process.

Given the inevitable litigation over any attempts to overturn the Obama Administration’s regulations through neglect, delay, suspension, or formally revised regulations, it is doubtful that in one term the Trump Administration can totally undo the Clean Power Plan. Thus, the courts and U.S. laws still impose checks on sole executive authority, and the challenges to the Clean Power Plan will act as a critical case study.

80 E.g., ENVIRONMENTAL PROTECTION AGENCY, MULTI-MODEL FRAMEWORK FOR QUANTITATIVE SECTORAL IMPACTS ANALYSIS: A TECHNICAL REPORT FOR THE FOURTH NATIONAL CLIMATE ASSESSMENT 79 (2017), https://cfpub.epa.gov/si/si_public_record_Report.cfm?dirEntryId=335095 (stating that by the end of the century about $230 billion will be required in order to adapt the nation’s infrastructure to the adverse effects of the climate’s increased temperatures).


84 See ENVTL. L. HARV., supra note 82 (stating the comment period closed on August 13, 2018).
V. THE LEGAL REALITY OF PAREXIT

The legal effect under international law (and most probably U.S. law) of President Trump’s denunciation of the Paris Accord is, in a word . . . nothing. In fact, when it comes to efforts towards improving the environment, in March 2018, United Nations Secretary General António Guterres stated that Trump’s withdrawal was not very meaningful, as the American people were doing enough to combat climate change stressors. Moreover, either way, Article 28 of the Paris Accord provides that no party may withdraw from the Paris Accord until after three years from the date on which the agreement entered into force for that party. That withdrawal then only takes effect one year after the United Nations secretary general receives that notification.

The agreement went into effect for the United States on November 4, 2016. No notice of withdrawal is acceptable for three years after that date, or November 4, 2019. In accordance with the requirements in Article 28, such withdrawal notice then cannot take effect for one year. Thus, the bottom line is that the United States withdrawal cannot take effect under the agreement until November 4, 2020 . . . one day after the next United States’ next Presidential election. Parexit certainly illustrates the constraints international law imposes on sole executive attempts to withdraw from an international obligation.

International agreements set the terms for denunciation, notice, and withdrawal. International law governing treaties also has a number of provisions that restrict a state party’s attempts to evade an international obligation.

Looking solely to the Vienna Convention on the Law of Treaties: Article 18 provides that a state must “refrain from acts that would defeat the object and purpose of a treaty” (defined to include essentially any written international agreement) when it has signed the agreement until it has made “clear” its


87 Id.
88 Id.
89 Id.
90 Id.
93 See id. at art. 18, 44.
intention not to be a party. Under the Article 26 principle of *pacta sunt servanda*, every treaty is binding and must be performed in good faith. Significantly, Article 27 states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 27 is, however, subject to one exception under Article 46: a state may not invoke its internal law as invalidating its consent "unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Moreover, a "violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." Is the convoluted constitutional law of treaties and executive agreements not only of fundamental importance but manifest to anyone? International law understandably does not specify what processes a state must follow to express its consent, leaving that to domestic law. Article 11 says the consent of a state "may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." International law thus specifies not only when and how a state can withdraw but requires compliance with those procedures until effectively repudiated. Does U.S. constitutional law require the same compliance with agreement procedures? Or is that an inherent executive authority with an executive agreement?

Thus far, a worst case scenario, legally, for the Paris Agreement has yet come to pass. The Paris Agreement was negotiated under the umbrella of the treaty (under U.S. and international law), the United Nations Framework Convention on Climate Change (UNFCC). The United States has been a party to the UNFCC since 1994. Under Article 25 of that treaty, as in the Paris Agreement, no state may give withdrawal notification before the treaty has been in force for three years; such notification takes effect one year after being received by the United Nations Secretary General. Article 25 goes on to say that any such withdrawal from the UNFCC will also be considered a withdrawal.

94 *Id.* at art. 18. See also *id.* at art. 2. (defining the terms used for the purposes of the convention).
95 *Id.* at art. 26.
96 *Id.* at art. 27.
97 *Id.* at art. 46.
99 *Id.* at art. 2.
100 *Id.* at art. 11.
101 *Id.* at art. 11, 18, 26, 27, 46.
104 *Id.* at art. 25; Paris Agreement, *supra* note 102, at art. 28.
“from any protocol to which [the state] is a Party.” In effect, it would seem that within one year of withdrawing from the UNFCC, the United States would also be withdrawn from the Paris Agreement. Could President Trump withdraw from the UNFCC, clearly a treaty under U.S. constitutional law, without Senate ratification? If not, would the Senate ratify the withdrawal? Once again, the need for some clarification of the reach of sole executive authority to rescind treaties or even specific provisions of international agreements is sorely needed.

VI. A SHIFT IN LEADERSHIP AND STEWARDSHIP LEGALLY, POLITICALLY, AND PRACTICALLY

Aside from the legal reality that final regulations, more specifically environmental statutes, are not easily reversed or stayed under U.S. administrative law, there are other non-legal factors at play. First and foremost, fundamental changes in the energy industry are not finalized or completed overnight. As a result, most states in the United States had already been conforming to the proposed regulations of the Clean Power Plan, even before its promulgation, to be in compliance in the chance it passed. There have been states (especially coal-dependent states) that have been resistant to and been litigating against the Plan, but most have sought to comply for a variety of reasons, including economic considerations of cheaper, cleaner energy.

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105 United Nations Framework, supra note 102, at art. 25.
106 Id.
109 Id.
There is also the very significant hurdle where, in order to replace the Clean Power Plan regulation, there must be a replacement regulation of some kind, and that requires some scientific evidentiary basis for such a quick reversal of a regulation that has been many years in the making. Although the Trump Administration claims that rules regarding greenhouse emissions will be implemented, the most likely outcome is that the Clean Power Plan will not be replaced for years. With that said, many criticisms of the administration have been raised, including that “[d]elaying is the policy [of actions that concern climate change].” Moreover, it is also important to note that unlike the thus far unsuccessful “repeal and replacement” of the Affordable Care Act, requiring agreement in Congress on replacement legislation, the call for a less stringent replacement Clean Power Plan is in the D.C. Circuit Court of Appeals and then ultimately the Supreme Court.

Equally important, one especially damaging scenario for remedying climate disruption that could arise is the possibility that the EPA might withdraw the Agency finding that greenhouse gas emissions endanger the public health and welfare, this being a precondition to the regulation of greenhouse gases under the Clean Air Act and upheld by the Supreme Court in Massachusetts v. EPA. Even industry groups, such as the Chamber of Commerce and National Association of Manufacturers, have expressed some concerns that such an extreme reversal of EPA policy and regulation would lead to judicial invalidation and perhaps even stricter regulation in 2020 with a future Democratic president.

States, regions, and localities had, for a period of time before the second term of the Obama Administration, been more aggressive in addressing climate

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111 Clean Air Act, 42 U.S.C. §§ 7408(b), 7412(d) (2012).
112 Lisa Friedman, E.P.A. Says It Will Write a New Carbon Rule, but No One Can Say When, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/climate/epa-pruitt-climate-rule.html [on file with Ohio State Law Journal] (Scott Pruitt’s declaration that the “war on coal is over” and further statements that Clean Power Plan regulations had no reasoning backing them. Additionally, the EPA may not currently have enough senior officials to design a replacement rule).
113 See id.
114 West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015); Clean Air Act, 42 U.S.C. § 7609 (2012). In other words, environmental groups and pro-original Clean Power Plan states would follow the same litigation path previously pursued by the states resistant to the Plan. See also Alan Rappeport, Trump Says He Got Rid of Obamacare. The I.R.S. Doesn’t Agree., N.Y. TIMES (May 6, 2018), https://www.nytimes.com/2018/05/06/business/trump-obamacare-irs.html [on file with Ohio State Law Journal] (discussing how despite President Trump’s efforts and assertions, Congress has failed to repeal and replace Obama’s Affordable Care Act; changes have been made but many parts of the Act still remain).
disruption than the federal government.\textsuperscript{118} This reaction is not surprising due to the predicted effects of climate change becoming more recognizable on a local level. As will be discussed later, California, for example, is forging its own path to challenge any reversal on climate change control.\textsuperscript{119} Moreover, city leaders from over fifty cities nationwide met in Chicago on December 5, 2017, to further state action in reducing emissions in an effort to drive the climate policies without federal involvement.\textsuperscript{120} Additionally, on June 7, 2018, about two dozen mayors and city leaders came together at the international summit on climate change in Boston to discuss greenhouse gas emissions, ways to potentially cut the cost of renewable energy, and how to prepare for the challenges produced by climate change.\textsuperscript{121} There is, however, a definite schism between the coal states and other states\textsuperscript{122} but, in my opinion, in that struggling economic sector there is little or no future in coal for future energy development.

Along with increased state and local action and recognition of climate effects, a promising sign for environmental regulation arose in March 2018 when United Nations Secretary General, António Guterres, appointed former New York City Mayor Michael Bloomberg to be a special envoy for climate change action.\textsuperscript{123} Bloomberg is a major critic of Trump's approach to climate


\textsuperscript{120} Stephen Joyce, \textit{International Climate: Cities Vow to Fill U.S. Void on Climate Change}, 48 ENV’T REP. (BNA), No. 48 at 1816 (Dec. 8, 2017).


change and hopes to assist the United Nations with reducing global greenhouse gas emissions. Bloomberg said he plans to take action by working with local actors in order to help decrease overall emissions as well as build reliance to climate change.

What also has to be assessed, as best it can be, is the invigorated public embrace of environmental protection. There have been significant public marches in support of climate change recognition, and more generally of science itself. Universities and colleges have also pursued carbon emission initiatives in response to pressure from students, academics, and other stakeholders in academic institutions. For instance, Yale University became the first university in the world to impose a campus-wide carbon control program that carries financial obligations; buildings exceeding Yale’s historical average are compelled to pay a carbon fine into a fund, from which buildings coming in below the average may receive a rebate.

VII. STATE’S RIGHTS ENVIRONMENTALISM AND THE SHIFT IN FEDERALISM

The vacuum of non-regulation and inactivity at the federal level in the U.S. has led to a reversal in authority over environmental regulation, with many environmental groups and states now challenging the Administration’s actions, particularly when it comes to the Obama-era regulation on carbon emissions. Nowhere is this reversal more apparent than in California’s aggressive pursuit of greenhouse gas regulation, both globally and in-state, more generally. In a


124 Sengupta, supra note 123.
125 Id.

127 Id.


larger sense, this shift completes a cycle of state/federal authority in environmental regulation, ironically occurring in the context of the most significant global threat to the environment in the modern era. In the late 1960s, the rise of environmentalism in public awareness led to a flurry of federal environmental regulation, from the National Environmental Policy Act (NEPA) to the Clean Air Act and Clean Water Acts.

For decades, regulation of transboundary environmental problems (that is environmental problems crossing state boundaries) was assumed to be the necessary province of the federal government. This assumption eventually led to increased federal assumption of authority over that most quintessential element of state and local regulation: land use regulation. Politically, this perceived expansion of federal authority encountered resistance from advocates of state rights, objecting to the intrusion on state and local authority through “big government.”

With climate change, the cycle has come back full circle to state and local governments. Although states and cities have various reasons to regulate in

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133 National Environmental Policy Act § 102, 83 Stat. at 852.


137 Id. at 1.

138 Id. at 4.

139 See Mitch Smith, 4 Takeaways From a Gathering of Mayors on Climate Change, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/us/climate-change-mayors-chicago.html (on file with Ohio State Law Journal) (discussing a gathering of over forty-five mayors and former President Barack Obama, in which the mayors committed their cities to follow the standards set forth in the Paris Agreement with foreign mayors from
the absence of federal action, one common incentive sticks out and prevails: economics. Renewable, alternative sources of energy are becoming cheaper than coal.\textsuperscript{140} Even as red conservative states formally repealed their emissions laws and regulations, those same states also actively shifted towards the use of clean energy (some of the furthest progress on clean energy is taking place in states with Republican legislators and governors, and those who supported Trump during the presidential election).\textsuperscript{141} The five states who harness the highest percentage of their energy from wind all supported and voted for Trump, as did Texas which produces the most wind power quantitatively.\textsuperscript{142} Most states are set to meet their emission control targets or to exceed them.\textsuperscript{143} Accordingly, in the context of climate change regulation, state initiatives defy the traditional categorization of red conservative and blue progressive states.\textsuperscript{144}

California has stepped up and implemented regulations more stringent than federal regulations in an effort to do its part to combat climate change.\textsuperscript{145} The state’s goal is to curb greenhouse gas emissions more than any other state, while continuing to enjoy benefits of economic growth.\textsuperscript{146} In California, two counties and a city have sued thirty-seven fossil fuel companies for polluting and, thus, majorly contributing to climate change.\textsuperscript{147} California officials recognize that overstepping the boundaries of federal regulation may open them up to challenges from the federal government, such as federal preemption of electric vehicle mandates, yet they have not let that deter them in their emission controls.\textsuperscript{148}

countries such as Mexico, France, Canada, and other countries who joined in the Paris Agreement).


\textsuperscript{142} Id.

\textsuperscript{143} Id.

\textsuperscript{144} See id.


\textsuperscript{146} See id.


In fact, in April 2018, President Trump’s Administration attempted to roll back California’s auto emissions reduction program and sanctuary laws that would make it harder for the federal government to drill offshore.\textsuperscript{149} The emissions reductions in place require automakers to meet both emissions and mileage standards by 2025 (authority from the Clean Air Act of 1970 gives the state the power to determine its own air pollution regulations).\textsuperscript{150} President Trump has stated that California is “out of control,”\textsuperscript{151} and he has effectively waged war on the state.\textsuperscript{152} Although the federal administration has made its intentions of subduing California’s environmental activism known, state officials are still determined to fight to uphold their standards.\textsuperscript{153} Just recently, in May 2018, a coalition led by California filed a lawsuit in the U.S. Court of Appeals for the District of Columbia in an attempt to fight against the administration’s efforts to reduce current auto emission rules, and to retain the right to set their own emissions regulations.\textsuperscript{154}

In 2009, even before California launched its ambitious programs, nine northeastern states established the first regional carbon trading system, the Regional Greenhouse Gas Initiative, known as R.G.G.I. (“Reggie”).\textsuperscript{155} Having California’s air pollution rules if more lenient standards are enacted by the federal government).


\textsuperscript{152} Governor Brown of California explicitly stated that “Washington was ‘basically going to war against the State of California.’” Nagourney, supra note 149.

\textsuperscript{153} Tabuchi, supra note 148.


\textsuperscript{155} The Regional Greenhouse Gas Initiative includes the following nine northeastern states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. THE REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org/ [https://perma.cc/M3MU-BSEF]; see also The Editorial Bd., supra note 116.
already reduced their emissions by 40% since 2009 under R.G.G.I.'s cap-and-trade system, the member states agreed to an additional 30% reduction by 2030.156 Additionally, at the local level, over 130 cities have joined the Global Covenant of Mayors for Climate and Energy, in order to fight climate change and advance towards the goals of the Paris Accord.157 In an op-ed piece, former New York Mayor Michael Bloomberg even went on to highlight some of the ways in which local governments can go beyond the statewide energy grid to initiate reductions; these include increasing mass transit, energy efficiency in buildings, landscaping, and bike paths.158 He emphasizes that state and local governments have the potential to make the United States meet its pledge under the Paris Accord without the federal government.159 These types of measures at the local level are significant given that the more difficult sectors of transportation and industrial (that is, non-power plants) are more complex to decarbonize.

Although California and R.G.G.I. have been the highlighted celebrities in this state movement, a new alliance of states has emerged with a shared economic interest in energy; an alliance encompassing a broad political spectrum in voter identity, with a majority of the states’ governors being Democrats.160 Started by Governor Jay Inslee of Washington, Governor Andrew Como of New York, and Governor Jerry Brown of California,161 the United States Climate Alliance currently consists of sixteen states (originally twelve to fourteen) and Puerto Rico, all of whom have pledged to meet their obligations under the Paris Accord.162 They are on schedule to lower emissions

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156 The Editorial Bd., supra note 118.
158 Id.
159 Id.
160 See Plumer, supra note 148 (noting that California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Puerto Rico are all involved in the alliance).
by 24%–29%, in keeping with the Paris Accord’s goal of 26%–28% percent below 2005 levels by 2025.\textsuperscript{163} In Washington, for example, Governor Inslee is pursuing implementation of a carbon tax.\textsuperscript{164} If successful, this tax would be the first straight carbon tax in the nation.\textsuperscript{165} This reflects a growing trend in state participation within the climate change arena.

With that being said, the new state and local leadership has not gone unnoticed internationally. For example, while Canada continues its efforts to negotiate with the Trump Administration, it is also directly reaching out to the states and localities to work toward achieving the Paris Accord’s goals.\textsuperscript{166} Canadian Prime Minister Justin Trudeau also endorses the idea of a carbon tax and is trying to implement such a tax in Canada within 2018.\textsuperscript{167} Ironically, this most global of environmental problems has resurrected and invigorated environmental authority at the grass-roots level.

However, there are dark clouds in this promising horizon of state, local, industrial, and business alliances and pledges. Objective scientific reports of our own government continue to paint an alarming picture of environmental degradation.\textsuperscript{168} Research and innovation in new clean technologies is largely dependent upon federal funding, which is not forthcoming under current budget proposals and EPA research programs.\textsuperscript{169} Federal inaction may be overcome, but aggressive federal roadblocks and litigation against state initiatives in particular, could delay and thus block emissions reduction measures.

In October 2017, the EPA’s 2017 “Tiering List” set an agenda priority repealing the Clean Power Plan, despite considerable industry lobbying to

\textsuperscript{163}The Editorial Bd., supra note 118.
\textsuperscript{165}Ibid.
\textsuperscript{167}Davenport, supra note 162.
abandon the repeal-and-replace approach for a narrower revision of the Clean Power Plan more likely to withstand judicial challenges.\textsuperscript{170} Additionally, the Trump Administration terminated the Community Resilience Panel for Buildings and Infrastructure Systems, a group that was created by former President Obama in 2015 to assist local officials in protecting their communities from weather-related natural disasters.\textsuperscript{171}

In December 2017, President Trump also authorized the reduction of national monuments in Utah, including lands that have been open to protection via legislation signed in 1906.\textsuperscript{172} President Obama created the Bears Ears National Monument in 2016, consisting of 110,000 acres of land.\textsuperscript{173} However, President Trump reduced the monument to approximately 22,000 acres and removed the land’s protected status, thereby opening it up to oil and gas exploitation.\textsuperscript{174} Patagonia, an outdoor retailer, filed suit against President Trump in December 2017 to protect Bears Ears National Monument.\textsuperscript{175} As of the end of spring 2018, the area is still available for drilling and mining, while the lawsuit remains tied up in court and awaiting a decision.\textsuperscript{176}

If the frontal attacks on state and local initiatives and protected areas are to occur, the reality of this new environmental democracy may ultimately depend on the most basic of democratic building blocks: the individual voter and public political pressure. Most recently, on February 12, 2018, the Trump Administration even moved to repeal methane emissions regulations because the oil and gas industry emphasized that it would be too costly to implement.\textsuperscript{177}

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\footnote{\textsuperscript{171} Christopher Flavelle, \textit{Trump Disbands Group Meant to Prepare Cities for Climate Shocks}, 48 ENV’T REP. (BNA) No. 48, at 1819–20 (Dec. 8, 2017).}
\footnote{\textsuperscript{173} Lipton & Friedman, \textit{supra} note 172.}
\footnote{\textsuperscript{174} Id.}
\footnote{\textsuperscript{176} Id.}
\end{footnotes}
On February 22, 2018, the Northern District of California “overturned BLM’s suspension of the rule” and held that BLM was required to enforce the rule to its full effect.\(^{178}\) However, on April 4, 2018, the U.S. District Court of Wyoming granted a suspension of key components of the rule (the U.S. District Court of Wyoming decision was then appealed to the 10th U.S. Circuit Court of Appeals and has yet to be decided).\(^{179}\) The question is: what happens next?

**VIII. THE LOSERS AND WINNERS POLITICALLY IN CLIMATE CHANGE IN THE UNITED STATES AND GLOBALLY**

Quite clearly, the United States’ failure to support measures to reduce climate disruption has prompted widespread criticism from the global community.\(^{180}\) Given the United States’ contribution to the global carbon pollution and the scientific assessments of its effects, any backtracking from a major contributor is a significant setback in global reductions.\(^{181}\) The United States’ failure to honor its financial commitments under the Paris Agreement is a more quantifiable and immediate detriment. In a fifteen-to-four decision, the Senate Appropriations Committee defeated a proposal to provide funding for the Green Climate Fund for developing countries, restoring only a much more

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\(^{178}\) California v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018) (holding that BLM did not provide enough evidence to contradict the reasons for implementing the Waste Prevention Rule and did not justify decision to suspend rule).


limited amount to fund the Intergovernmental Panel on Climate Change (IPCC) under the Framework Convention.\textsuperscript{182}

Since the announced withdrawal, other countries have increased their involvement with regard to climate change leadership.\textsuperscript{183} French President, Emmanuel Macron and German Chancellor Angela Merkel have pledged to honor and fulfill the terms of the Paris Agreement.\textsuperscript{184} Canadian Prime Minister Justin Trudeau has also declared its commitment to fighting climate change and has even increased contributions to climate change science.\textsuperscript{185} However, the biggest "winner" politically is China.\textsuperscript{186}

With the United States’ resistance and plans to withdraw from the Paris Accord, in terms of climate change China, who is often viewed as an environmental outlier, has now been handed the leadership position in remedying climate disruption.\textsuperscript{187} As you come to this conference in a sandstorm, the reality is that climate change is affecting a significant portion of China’s population, who cannot be ignored.\textsuperscript{188} China cannot ignore the increasingly vocal domestic criticism of the country’s air pollution,\textsuperscript{189} much less the loss of international trade and business unwilling or unable to be exposed to the


\textsuperscript{184} Id.

\textsuperscript{185} Id.


\textsuperscript{187} See Wong, \textit{Can China Take the Lead}, supra note 183; Wong, \textit{China Poised}, supra note 183.


\textsuperscript{189} See id. (discussing how environmental damage in China has caused social unrest “ranging from peaceful protest to rioting”).
frequent hazardous pollution levels. In that sense, there has been something of a "trickle-up" concern from the perceived impacts of climate change.

Nevertheless, although China has limited its use of coal plants and other environmentally destructive activities, it has, however, increased its outsourcing of coal plants. China has outsourced hundreds of coal plants, rather than making the whole-hearted move toward renewable energy, or other environmentally friendly decisions. China has focused its attention towards financing and building coal-fired plants in countries that have never before seen such plants on their soil, such as Mongolia and Kenya. Additionally, China's emissions are higher than the emissions from the United States and Europe combined.

The head of the United Nations Environmental Program, among other United Nations and national leaders, has called upon the Trump Administration to acknowledge the disastrous consequences of climate change, especially with hurricanes Harvey, Irma, and Jose devastating large swaths of U.S. territory. The 2017 United Nations Environment Assembly met from December 4 through December 6 to discuss international structures in which pollution could be addressed. Places such as Puerto Rico have even invested into electric grids.
in response to climate-related natural disasters, such as Hurricane Maria, which nearly destroyed the territory's power on September 20, 2017.\footnote{Rebecca Kern, Microgrids, Storage Could Make Puerto Rico Grid More Resilient, 48 ENV'T REP. (BNA) No. 48, at 1815–16 (Dec. 8, 2017) (noting that the Department of Energy and the Army Corps are looking into installing solar and wind facilities in Puerto Rico that may better withstand the intense effects of climate-related events).}

\section*{IX. Conclusion}

State policies, local policies, market forces, and technological advances have reduced emission roughly 12\% below 2005 levels.\footnote{The Editorial Bd., Mr. Trump Nails Shut the Coffin on Climate Relief, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/opinion/trump-coal-climate-emissions.html [on file with Ohio State Law Journal].} That said, without the Clean Power Plan, even assuming a much laxer regulation is put in its place or there are no requirements in the next three years, it has been estimated that twenty-five states are still likely to beat their state targets, ten states may do so, and twelve states may miss their targets.\footnote{Brad Plumer & Nadja Popovich, How Will the Clean Power Plan Repeal Change Carbon Emissions for Your State?, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com /interactive/2017/10/10/climate/clean-power-plan-emissions-your-state.html [on file with Ohio State Law Journal]. See generally John Larsen & Whitney Herndon, What the Clean Power Plan Would Have Done, RHO DIUM GROUP, https://rhg.com/research/what-the-cpp-would-have-done/ (Oct. 9, 2017) [https://perma.cc/CZ2S-NX8R].} However accepting or skeptical these estimates are, for purposes of the role of the federal government in environmental regulation, there has been a fundamental shift in authority and responsibility for climate change regulation, and perhaps more generally for environmental regulation.

In our democratic system, whatever the many political hurdles, is there an underlying power in our constitutional system of checks and balances to address the greatest environmental challenges not even remotely considered by our Framers? If so, climate change regulation may be that litmus test. Whatever the political affiliation of the Presidency or the Congress, or even the judiciary, is it possible that the diversity of state and local governments, and even public choice not adequately represented in one of the most democratic societies, might prevail to protect those insufficiently represented and disproportionately affected?

The effects and disastrous consequences of climate change, outside of the United States, have posed these life-determinate questions for some time. Those questions have now come to the United States on par with less developed countries, and developed countries which have experienced the consequences presumably before the United States relative national wealth and geographical isolation is no protection to a global consequence. The so-called "War on Coal"\footnote{The Editorial Bd., supra note 198.} ignores the much more immediate and intense war against these same states in extreme weather and flooding with loss of life and incalculable effect
in dollars on lives already living on the edge of economic survival. In the absence of federal recognition of the actual threat of climate disruption, it has fallen upon the states, local governments, courts, and the public to do so in a system never visualizing such a crisis but capable of doing so.