


3-20-2013

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Wallach, P. (2013). Changing Policy without Changing Law: Addressing Climate Change under the Clean Air Act.

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Changing Policy without Changing Law: Addressing Climate Change under the Clean Air Act

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March 20, 2013

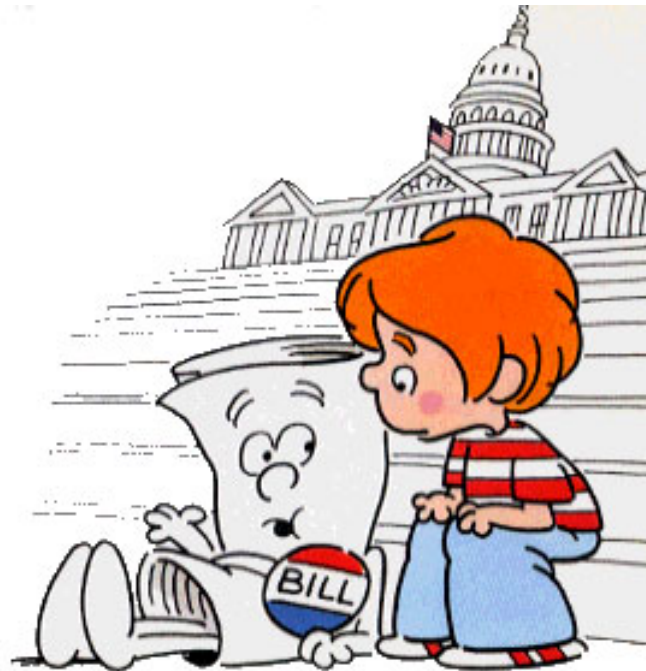


Policymaking according to High School Civics

- Legislative branch makes laws
- Executive branch carries them out
- Judicial branch interprets them, decides controversies

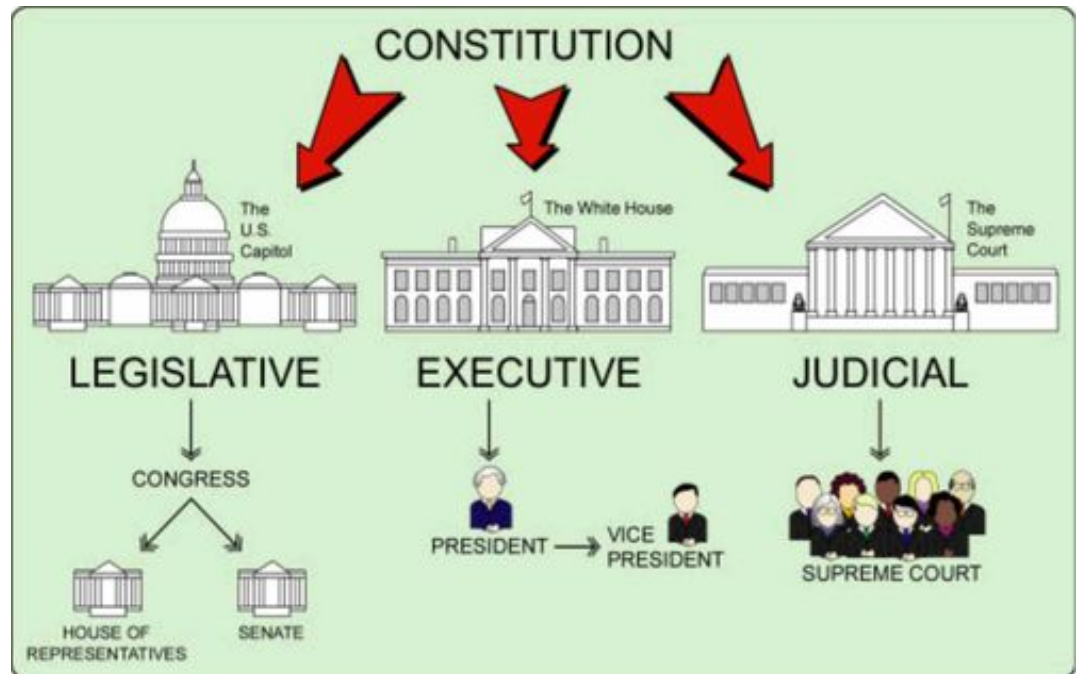
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Mysteries of High School Civics Model

- Is bureaucracy directly under President, or independent 4th branch?
- When executive branch goes to carry out law, how does it know its meaning?
- Why are there controversies requiring judicial resolution?
- Why isn't all real action in Congress?





The Anti-High School Civics Model

- Laws are just bunches of words that the executive and judiciary branches have to make something of
- The world is very complicated and doesn't neatly match words
- Laws are often vague and indeterminate, both unintentionally and intentionally



Does the U.S. have a climate change policy?

- In terms of high school civics model: barely
 - National Climate Program Act of 1978
 - Global Climate Protection Act of 1987
 - Bush 41 signed, and Senate ratified, 1992 United Nations Framework Convention on Climate Change, a nonbinding agreement to mitigate
 - But Senate rejects Kyoto Protocol negotiated by Clinton administration; no binding regulation
 - Lots of bills in late 1990s, early 2000s, but no laws
 - Cap and Trade bill sought during unified Democratic control of Congress defeated



Does the U.S. have a climate change policy?

- In reality: yes, a strange and patchy one
 - Pursued outside of Congress by states
 - Federal greenhouse gas (GHG) regulations derived through judicial and executive reinterpretations of existing law, the Clean Air Act (CAA)



Brief History of Clean Air Act

- First passed in 1970, amended 1977
 - § 108 requires Administrator to regulate “each air pollutant—[...] emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare”



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Key Definitions

- § 302(g) defines “air pollutant”:
 - “The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air.”
- § 302(h) defines “welfare”:
 - Includes effects on weather and climate



Difficulties in Applying CAA to GHGs

- CAA designed to address localized pollution problems, force states to improve air quality until prescribed standards attained
- 1990 Amendments added emissions trading program to combat acid rain, implementation of Montreal Protocol to protect stratospheric ozone layer, but doesn't include anything addressing climate change



Turning the CAA on Greenhouse Gases

- Environmentalists frustrated with lack of congressional progress petition EPA to use Clean Air Act in 1999, arguing that climate change is damaging and therefore covered
- Clinton leaves office without action; finally, EPA rejects petition in 2003, saying it will wait and see
- Environmentalists (joined by states) turn to litigation



Massachusetts v. EPA

- D.C. Circuit rules EPA has discretion, and its reasonable interpretation due deference (2005)
- Supreme Court splits 5-4 (2007), with majority ruling that CAA unambiguously requires EPA to make a determination (and essentially *requiring* regulation of GHGs)
- Dissents argue that alleged harms did not merit standing, and that on merits EPA's interpretation a reasonable one

Frisbees and flatulence?





Difficulties in Applying CAA to GHGs

- Once GHGs defined as pollutant for one part, not clear how all of CAA's many parts won't apply
- Permitting requirements: § 111 for all new industrial sources; § 165 for ~40,000 sources; and Title V for ~6 million sources (!)
- Local actions not capable of directly improving local conditions or “attaining” any standard



EPA Regulations under CAA

- Advanced notice of proposed rulemaking (2008)
- Endangerment finding, triggering many requirements in statute (12/09)
- Stricter “tailpipe” emissions standards for cars, by modifying CAFE standards (5/10)
- Energy efficiency requirements for new power plants, which would effectively prevent construction of new coal plants (proposed 3/12)
- Most potentially problematic, controversial applications currently in legal limbo, probably leading to more litigation



What of Changes in the Law?

- Main reaction after *Massachusetts v. EPA* handed down was that Congress would be forced into action, one way or the other, by inefficient use of statute
- Did create pressure as cap-and-trade bill sought in 2009, but coalition fractured
- Nearly six years later, still waiting... Why?

EPA Tailoring and Timing: *Policy against Law*

- EPA issues “Timing Rule” and “Tailoring Rule” saying that it will depart from CAA requirements in some respects:
 - Will delay creation of permitting process
 - Will change applicability thresholds
 - Justified on grounds of administrative necessity, need to avoid absurdity, and EPA’s ability to

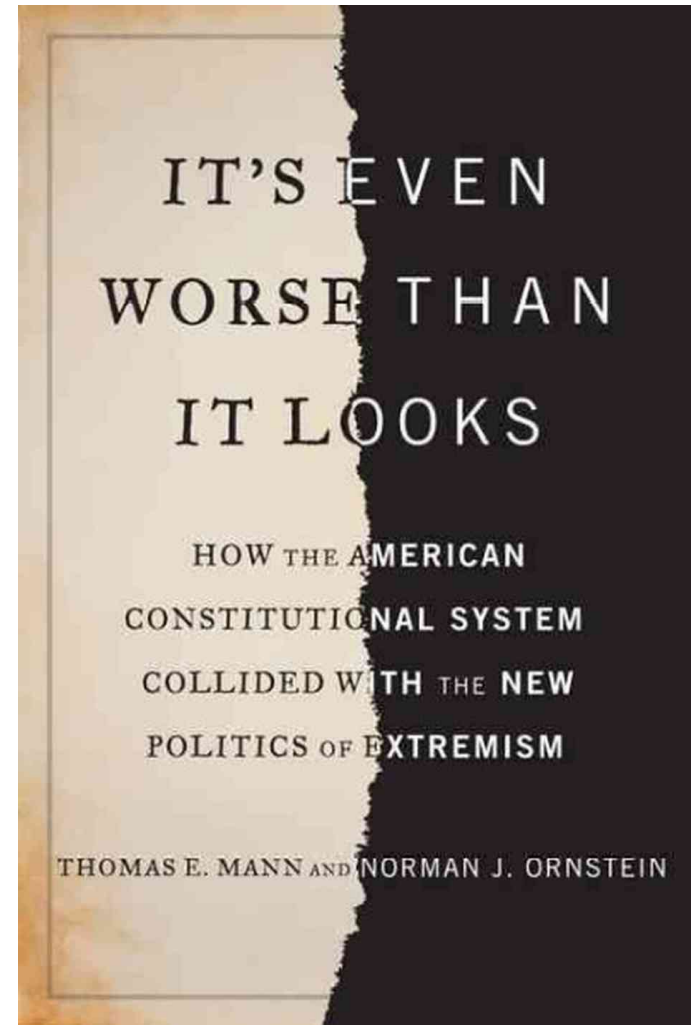
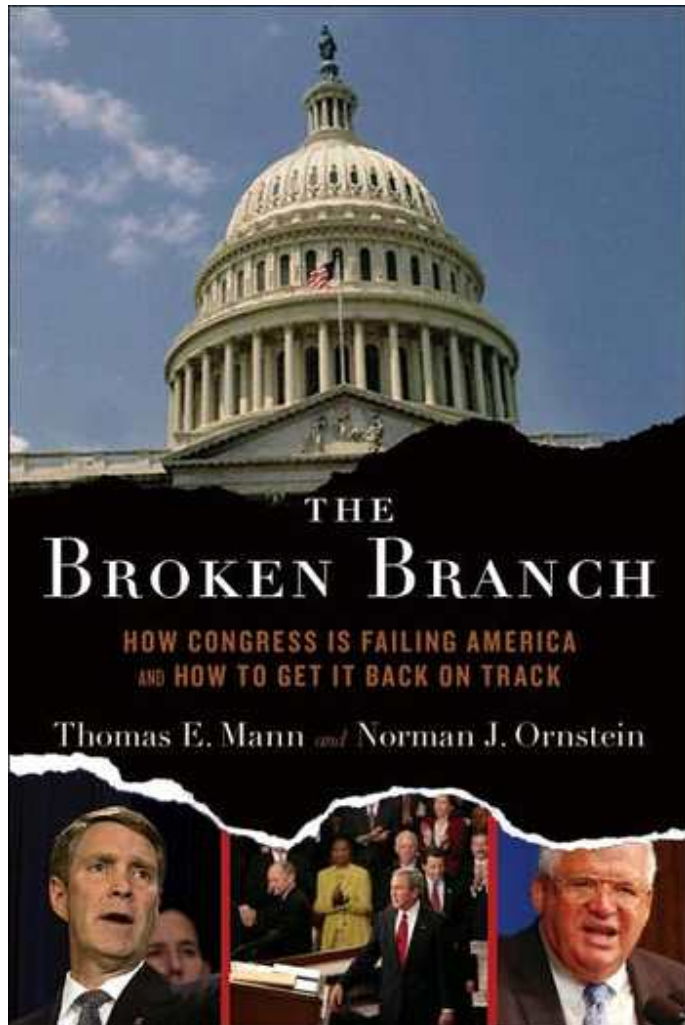


If policies don't come from laws, how can lawmakers be convinced to act?

- Petitioners challenging EPA regulations say that by ignoring the law, the agency destroys motivation for Congress to fix it
- D.C. Circuit rejects this argument, citing Schoolhouse Rock to say that harm is entirely speculative



Well, that's what happens when you have a dysfunctional Congress





Coping with a dysfunctional Congress... by cutting it out of the loop?

- As naïve and optimistic as high school civics model was about Congress, story of GHG regulation as it stands today goes to opposite extreme
- Executive prerogative: bureaucrats do the best they can with legislative tools they have, rather than being first and foremost agents carrying out congressional will

Other Policy Areas where Executive Creativity Leads

- No Child Left Behind
 - Law's requirements (designed to become increasingly strict) often waived by agreements between Secretary of Education and states
- BP Oil Spill
 - Negotiated huge settlement and distributed funds
 - Instituted drilling moratorium
- Immigration Reform
 - DREAM Act goals effectively pursued through changes in enforcement policy



Hyperventilating Generalizations

- Are we in a new era of administrative government, in which policy is generated of its own accord?
- Whither democracy?
- Whither the rule of law?

Can it work?

- How far can existing laws really go in solving problems?
- Do inefficiencies of jerry-rigged regime discredit regulatory objectives?
- Will there be a revenge of the voters?

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