The Elephant Named "Climate Change": Why the Major Questions Doctrine After *Bostock* Shouldn't Prohibit Extensive Climate Action Under the Clean Air Act

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INTRODUCTION

All while scientists, environmentalists, and climate activists have urged quick action to slow the rapid effects of global warming, the Trump administration has either repealed or weakened at least 100 environmental regulations, many of which were aimed at mitigating climate change.[1] As a result of these rollbacks, greenhouse gas emissions will be higher than they would have been had the regulations remained intact and the elephant named climate change will continue to grow bigger and more daunting.[2] Notwithstanding the potential climate initiatives that President Joe Biden may take to repair the damage done after the Trump administration,[3] "[o]ur future looks like the slow, agonizing suffering and death of billions of people" because the effects of climate change will create an ecological system that is incapable of sustaining a truly habitable environment.[4]

With the ominous fate of climate change looming in the background, the Supreme Court took up a key statutory interpretation question in *Massachusetts v. EPA*.[5] Specifically, the Court held that the Environmental Protection Agency ("EPA") has the authority to regulate greenhouse gas emissions as "air pollutants" under the Clean Air Act ("CAA") given environmental changes like "the global

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[1] John C. Lamb*, We Need to Act Now on Climate Change*, GREENLEY TRIBUNE (Sept. 6, 2020), https://www.greeleytribune.com/2020/09/06/john-c-lamb-we-need-to-act-now-on-climate-change/ [hereinafter *Lamb*]; Owen Mulhern, *The Demise of the Clean Power Plan*, EARTH.ORG (Sept. 10, 2020), https://earth.org/data_visualization/the-demise-of-the-clean-power-plan/; Nadja Popovich & Brad Plumer, *What Trump's Environmental Rollbacks Mean for Global Warming*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/interactive/2020/09/17/climate/emissions-trump-rollbacks-deregulation.html; *see, e.g.,* Leslie Hook, *Wildfires, Hurricanes and Vanishing Sea Ice: The Climate Crisis Is Here*, FIN. TIMES (Sept. 17, 2020), https://www.ft.com/content/6a6bab93-21fc-4bd6-b309-86e394e3869b ("The worst wildfires in US history, Arctic sea ice trending towards a historic low, simultaneous hurricanes in the Atlantic Ocean and the hottest summer in the northern hemisphere since records began: scientists say this year's sequence of natural disasters and record temperatures have exceeded their worst fears.").

[2] Popovich & Plumer, *supra* note 1.

[3] *See* Boyd Bryan & Alex Prochaska, *Trump-era Environmental Regulations at Risk: Potential Changes Under a Biden Administration*, NAT'L L. REV. (Oct. 29, 2020), https://www.natlawreview.com/article/trump-era-environmental-regulations-risk-potential-changes-under-biden (explaining the possible actions that the President Biden administration can take to address climate change, such as undermining Trump-era regulations or "ask[ing] the court to delay the proceedings while it reconsiders its position.").

[4] Lamb, *supra* note 1 (citing Yangyang Xu & Veerabhadran Ramanathan, *Well Below 2 °C: Mitigation Strategies for Avoiding Dangerous to Catastrophic Climate Changes*, 114 PROC. NAT'L ACAD. SCI. 10315, 10319 (2017)); *see* Juliana v. United States, 947 F.3d 1159, 1164, 1166 (9th Cir. 2020); Michael Burger, Jessica Wentz, & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENVTL. L. 57, 60-62 (2020).

[5] Massachusetts v. EPA, 549 U.S. 497, 521, 528-29 (2007).

retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years."[6] As such, this decision justified using the CAA to regulate greenhouse gases.[7] Soon after, however, the Supreme Court in *Utility Air Regulatory Group v. EPA* held that there are sections of the CAA that do not authorize the EPA to regulate greenhouse gases because "air pollutant" must be understood using "context-appropriate" interpretations.[8] This back and forth over the statute's meaning and purpose is emblematic of almost a half century of Supreme Court interpretations of the CAA.[9]

As the United States transitions away from Trump-era environmental deregulation, the potential for new climate policy is likelier than ever because the Biden administration aims to "launch the boldest climate change plan of any president in history."[10] At the same time, however, remnants of the Trump administration will potentially live on, consequently obstructing major action against climate change.[11] Specifically, it may be difficult to rely on the Republican Party's support in passing major climate policy if the Republican Party embraces "Trumpism" by supporting environmental deregulation and filibustering "anything with the words 'climate change.'"[12] For example, the Republican Party

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6 42 U.S.C. § 7401 (2012); *Massachusetts*, 549 U.S. at 521, 528-29.

7 *See generally* Colin H. Cassedy, Massachusetts v. EPA: *The Causes and Effects of Creating Comprehensive Climate Change Regulations*, 7 J. INTL. BUS. & L. 145 (2008) (explaining the pre-texts to and aftermath of Massachusetts v. EPA, 549 U.S. 497 (2007)).

8 Util. Air Regul. Grp. v. EPA (*UARG*), 573 U.S. 302, 333 (2014) (holding that the EPA "may not treat greenhouse gases as a pollutant" for the purpose of determining whether a source may be subject to Title V requirements).

9 David M. Driesen, Thomas M. Keck, & Brandon T. Metroka, *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism Dynamism, and Activism,* 75 WASH. & LEE L. REV. 1781, 1785 (2018) ("Many scholars have argued that the Court has shifted from an approach to statutory interpretation that relied heavily on purposivism—the custom of giving statutory goals weight in interpreting statutes—toward one that relies more heavily on textualism during this period. At the same time, proponents of dynamic statutory interpretation have argued that courts, in many cases, do not so much excavate a statute's meaning as adapt a statute to contemporary circumstances."); *see, e.g.,* Michigan v. EPA, 576 U.S. 743, 750-54 (2015) (reviewing whether EPA must consider cost in deciding if regulating an electric utility's hazardous air pollution is appropriate when it has already considered cost in crafting the regulation); *UARG*, 573 U.S. at 331 (explaining that the text of the best available control technology provision is "far less open-ended than the text of the PSD and Title V permitting triggers"); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001) (explaining that the CAA requires EPA to establish the NAAQS to protect public health as required by the CAA); Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 65 (1975) (describing the CAA requirement that states develop state implementation plans to enforce the NAAQS).

10 Juliet Eilperin, Dino Grandoni, & Darryl Fears, *A Biden Victory Positions America for a 180-Degree Turn on Climate Change*, WASH. POST (Nov. 7, 2020), https://www.washingtonpost.com/climate-environment/2020/11/07/biden-climate-change-monuments/.

11 *See* Nathaniel Johnson, *The Foreseeable Future*, GRIST MAG. (Oct. 30, 2020), https://grist.org/politics/trump-biden-senate-climate-change-policy/ (discussing "Trumpism" and its potential to "prove an obstacle to taking action on climate change").

12 *Id.*

may continue attacking environmentally friendly and progressive policies, such as the Clean Power Plan and California's zero-emissions-vehicle program, by further chipping away the EPA's authority under the CAA to address greenhouse gas emissions.[13] Rather than reading the CAA as a call to curb air pollution, Trumpism maintains that "the EPA is directly or indirectly bound by the [CAA] to do *less* to control air pollution."[14]

In the wake of Trump's environmental deregulation, the Biden administration will have to redefine the scope of the EPA's authority to regulate greenhouse gas emissions and thus grapple with the issue of whether the CAA permits extensive climate regulation. In doing so, the Biden administration should be prepared for its environmental policies to be challenged in federal court under the major questions doctrine: a tool of statutory interpretation often invoked by the Trump administration to prohibit administrative agencies from interpreting statutes in ways that implicate major issues.[15] After the Supreme Court's monumental decision in *Bostock v. Clayton County*, the major questions doctrine could play a unique role in determining whether administrative agencies may act to achieve a statute's ulterior and perhaps "major" purpose within the confines of the statute's text.[16] Taking the Trump administration's policy of narrowing the EPA's legal authority to address "major" issues like climate change together with the reality that opposition to climate regulation will continue past the Trump administration's tenure,[17] statutory interpretation questions about the CAA pose a unique problem: when exactly can the EPA take extensive climate action under the CAA?

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[13] The Republican Party may try to chip away at environmental goals by prioritizing economic productivity over environmental goals, blocking pieces of legislation, and challenging progressive environmental regulations in court. *See generally* Joseph Goffman & Laura Bloomer, *Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda*, 70 CASE W. RES. L. REV. 929 (2020) (describing the systematic dismantling of EPA authority to regulate greenhouse gases under the CAA); David Zilberberg, *The Affordable Clean Energy Rule and the Past, Present and Future of Climate Change Regulation of the U.S. Power Industry*, 30 FORDHAM ENV'T. L. REV. 104, 111-12 (2018) ("The election of Donald J. Trump as President in 2016 presaged a dramatic shift in the federal government's approach to climate change regulation. As a candidate, Trump advocated an economic platform focused on boosting domestic fossil fuel-based industries, including coal, oil, and natural gas. A central plank in his platform was a pledge to roll back President Obama's climate change agenda.").

[14] Goffman & Bloomer, *supra* note 13, at 931 (emphasis added).

[15] *See* Eilperin et al., *supra* note 10 (discussing the challenges that the Biden administration will face in the environmental arena); Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, NOTICE & COMMENT (Feb. 28, 2020), https://www.yalejreg.com/nc/major-questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson/ (describing the major questions doctrine). The Trump administration relied on the major questions doctrine to challenge key environmental initatives like the Obama administration's Clean Power Plan. *See generally* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T. & ADMIN. L. 479 (2016) (discussing the past and present nature of the major questions doctrine).

[16] *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

[17] *Id.* at 930; *see* Eilperin et al., *supra* note 10.

This Note proceeds in three parts. First, Part I provides an overview of the CAA's regulatory scheme, as well as statutory interpretation tools and principles such as the major questions and nondelegation doctrines. Part II then argues that the CAA should be read broadly to justify the regulation of greenhouse gases given the Supreme Court's recent reliance on new purposivism as a method of statutory interpretation in *Bostock v. Clayton County*. As such, Part III contends that the major questions doctrine cannot and should not be used to bar extensive climate regulation policy under the CAA. Furthermore, to avoid invocations of the major questions doctrine to block actions by the incoming Biden administration to regulate greenhouse gases, Part III also argues that future legislators must step in the right direction by amending the CAA to broadly encompass greenhouse gas emission regulation.

I. BACKGROUND

A. *The Clean Air Act's Complex Regulatory Scheme*

The CAA of 1970 is the federal government's first comprehensive environmental policy aimed at air pollution control.[18] Requiring recurrent upgrades to pollution-control technology,[19] the purpose of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare."[20] The CAA also aims to "promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."[21] The EPA has the authority under the CAA to identify air pollutants that harm human health and the environment and regulate sources of air pollution.[22] Being the primary regulatory

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[18] Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970); *see* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 79-84 (2004) (calling the 1970s a "new era" for environmental protection and detailing numerous legal innovations that emerged during that time); Brigham Daniels, Andrew P. Follett, & Joshua Davis, *The Making of the Clean Air Act*, 71 HASTINGS L.J. 901, 903-04 (2020); Bruce M. Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH L. REV. 47, 47 (1974).

[19] *See* Goffman & Bloomer, *supra* note 13, at 932; *see, e.g.*, 42 U.S.C. § 7409(d)(1) (2012) (explaining that the EPA must determine whether the best available science compels a revision of the CAA's NAAQS standards every five years); *id.* §§ 7411(b)(1)(B), 7412(f)(2)(A) (requiring the EPA to determine whether new technology justifies stricter emission standards for new and modified stationary sources of pollution).

[20] *Id.* § 7401(b)(1).

[21] *Id.*

[22] *Id.* §§ 7401, 7411(b)(1)(A); Am. Elec. Power Co., Inc. v. Connecticut (*AEP*), 564 U.S. 410, 416 (2011); *See* 116 Cong. Rec. 32,903 (1970) (providing a statement from Senator Muskie affirming that "Congress should make . . . commitments to meaningful environmental protection; effective protection of the health of all Americans; and the early achievement of these goals"); Goffman & Bloomer, *supra* note 13, at 937 ("One of the explicit purposes of the CAA is to promote reasonable pollution-prevention strategies. Accordingly, and as appropriate, Congress explicitly instructs the EPA to consider costs and other consequences of requiring certain pollution-control technologies. In turn, the courts have interpreted certain CAA provisions as affording the Agency sufficient latitude to offer regulated sources a certain level of compliance flexibility. This expansive reading of the Agency's

statute to limit air pollution, the statute's legacy includes "demonstrably alter[ing] the chemical and material composition of American air, particularly in heavily populated urban areas," combatting acid rain, and attempting to regulate greenhouse gas emissions.[23]

More specifically, the CAA's complex regulatory structure aims to regulate mobile and stationary sources of air pollution via a "cooperative federalism" structure.[24] The federal government through the EPA sets nationwide air quality benchmarks called national ambient air quality standards ("NAAQS").[25] Then, states must create their own State Implementation Plan ("SIP") that outlines how that state intends to meet the standards outlined in the NAAQS.[26] From its SIP, the EPA must determine whether a state complies with the NAAQS, designating areas that successfully meet the standards as attainment areas and those that do not as nonattainment areas.[27] The CAA's Prevention of Significant Deterioration (PSD) program ensures that attainment areas continue their progress by requiring new and modified major stationary sources of "any air pollutant" to obtain permits and use the best available control technology to limit emissions.[28] New and

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authority in compliance matters mirrors the broad authority granted the Agency through the progressive elements of the statute."); Ryan B. Stoa, *From the Clean Power Plan to the Affordable Clean Energy Rule: How Regulated Entities Adapt to Regulatory Change and Uncertainty*, 47 HOFSTRA L. REV. 863, 864-65 (2019).

[23] *See* Daniels et al., *supra* note 18, at 903-04; Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 982 (1997). *See generally* Adam Babich, *Back to the Basics of Antipollution Law*, 32 TUL. ENV'T L.J. 1 (2018) (explaining the 1977 and 1990 CAA amendments). At the same time, however, air pollution remains as one of the greatest sources of environmental health risk today. *The United States Clean Air Act Turns 50: Is the Air Any Better Half a Century Later?*, UN ENV'T PROGRAMME (Mar. 17, 2020), https://www.unenvironment.org/news-and-stories/story/united-states-clean-air-act-turns-50-air-any-better-half-century-later.

[24] *See* Anuradha Sivaram, *Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 ECOL. L.Q. 443, 449 (2013); Teal Jordan White, *Clean Air Act Mayhem: EPA's Tailoring Rule Stitches Greenhouse Gas Emissions into the Wrong Regulatory Fitting*, 18 TEX. WESLEYAN L. REV. 407, 421 (2011) ("In fact, the complexity of the statute closely matches the perceived complexity of air pollution when it was enacted in 1970.") (citing Jay M. Zitter, Annotation, Construction and Application of § 202(a)(1) of the Clean Air Act, 13 A.L.R. Fed. 2d 703, 703 (2006) (explaining that Congress enacted the CAA after "finding that the growth in the amount and complexity of air pollution had resulted in mounting dangers to the public health and welfare.")). More generally, mobile sources include vehicles and their engines, while stationary sources typically include factories, refineries, power plants, and other structures that emit air pollutants. 42 U.S.C. § 7411 (2012); White, *supra* note 24, at 421.

[25] *See* 42 U.S.C. §§ 7407(a), 7409 (2012). *See generally* Rory Hatch, *Into Thin Air: Unconstitutional Taking by Preemption of State Common Law Under the Clean Air Act*, 33 REV. LITIG. 711, 714 (2014) (providing a comprehensive discussion regarding the CAA and its regulatory scheme).

[26] 42 U.S.C. § 7410; *see* Hatch, *supra* note 26, at 714 (explaining that SIPs then "require major polluters to obtain a government-issued permit for their emissions"). For a discussion of what happens if the EPA approves or disapproves of a SIP, see Sivaram, *supra* note 24, at 450.

[27] 42 U.S.C. § 7407(d).

[28] Zachary Hennessee, *Resurrecting A Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation After* Utility Air Regulatory Group v. EPA, 67 DUKE L.J. 1073, 1085 (2018).

modified major sources in nonattainment areas, however, must install technology that achieves the "lowest achievable emission rate" possible.[29] Title V then "requires that all other emissions requirements for major facilities be compiled into one permitting document."[30] Taken all together, the CAA has various mechanisms for regulating air pollution "depending on the nature of the pollutant itself, what type of source is emitting the pollution, the volume of pollution the source has the potential to emit, whether the source is stationary or mobile, and where the source is located."[31]

B. Principles of Statutory Interpretation

1. Traditional Purposivism: Early Twentieth Century Interpretations

Statutory interpretation generally aims to "effectuate congressional intent" and to prevent courts from "depart[ing] from the legal requirements that Congress intended to apply."[32] Throughout the past quarter-century, however, the Supreme Court's approach towards statutory interpretation has oscillated between purposivism–relying primarily on the underlying spirit of a statute–and textualism–adhering strictly to the text of a statute regardless of whether a certain interpretation produces results that do not comport with the statute's purpose.[33] The traditional purposivist approach to statutory interpretation dominated the early twentieth century.[34] Namely, *Church of the Holy Trinity v. United States* is the most influential example of the Supreme Court's purposivism in statutory interpretation, holding that when the plain meaning of a statute's text does not comport with "available evidence about the law's purposes, principles of legislative supremacy required judges to enforce the 'spirit' rather than the 'letter'

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[29] 42 U.S.C. §§ 7501-7515.

[30] *Id.* §§ 7602(j), 7661-7661(f); Hennessee, *supra* note 28, at 1086.

[31] Hennessee, *supra* note 28, at 1087 (2018).

[32] ROBIN K. CRAIG, ENVIRONMENTAL LAW IN CONTEXT: CASES AND MATERIALS 14 (4th ed. 2016); *see* 3 NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 58:5 (8th ed. 2011) (referring to using statutory construction to interpret a statute's purpose as an "ancient doctrine"); *see also* United States v. Bryan, 339 U.S. 323 (1950); United States v. Zazove, 334 U.S. 602 (1948); Church of the Holy Trinity v. United States (*Holy Trinity*), 143 U.S. 457 (1892); Stephenson v. Millers Mut. Fire Ins. Co., 236 F. Supp. 420 (D. Ariz. 1964); S.E.C. v. Myers, 285 F. Supp. 743 (D. Md. 1968); Psychas v. Trans-Canada Highway Exp., Ltd., 146 F. Supp. 11 (E.D. Mich. 1956).

[33] John F. Manning, *The New Purposivism*, 2011 S. CT. REV. 113, 113-14 (2011); *see* David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 115-17 (2013) (explaining the Supreme Court's shift away from congressional purpose when interpreting statutory meaning); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149, 183 (2001) (explaining that "interpretive doctrine appears markedly unstable, fluctuating rather dramatically over short periods" and that the Warren Court frequently "tailored general commands to their background purposes"). An argument also exists that the legislature's original intent loses its relevance as the statute ages, consequently allowing courts to adapt the statute to changed circumstances. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9-10 (1994).

[34] *See* Manning, *supra* note 33, at 113.

of the law."[35] Jonathan Molot, a Professor at Georgetown Law, explained that the Court in *Holy Trinity* "was at least aware that when it departed from the 'letter of the statute,' it might be accused of overstepping its bounds and 'substitut[ing] the will of the judge for that of the legislator.'"[36] As such, *Holy Trinity* endorsed a purposivist method of interpretation that enabled courts in the 1970's to act as "faithful agents" of Congress by first discerning Congress's legislative intent from the statute's history and purpose, and then interpreting the statute in a way that best accomplished Congress's intent.[37]

Purposivism was first used in interpreting the CAA in *Train v. Natural Resources Defense Council, Inc.* and then again in *Union Electric Co. v. EPA*.[38] *Union Electric* relied explicitly on the legislative history of the CAA's 1970 amendments, which amended the CAA to increase the federal government's role in controlling air pollution and maintaining public health, even in the face of "what seems to be [technologically] impossible at the present time."[39] Even though the text of the CAA did not explicitly require consideration of technological or economic feasibility in the development of SIPs, *Union Electric* nonetheless prioritized Congress's legislative purpose of forcing polluters to alter their standards or "be closed down."[40] As such, the Court adopted a purposivist view of the CAA, holding that the CAA's purpose was to "expressly . . . force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."[41]

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[35] *Holy Trinity*, 143 U.S. at 459; *see* Manning, *supra* note 33, at 113; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 14 (2006).

[36] Molot, *supra* note 35, at 15 (citing *Holy Trinity*, 143 U.S. at 459).

[37] *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 907 (2000) ("[T]he meaning of the *Holy Trinity Church* case and its use of legislative history remains a significant element in the vigorous contemporary debate over statutory interpretation."); Molot, *supra* note 35, at 16; Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 97 (1998) (suggesting that *Holy Trinity* "presaged a gradual change" in the Supreme Court's approach to statutory interpretation); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1836 (1998) ("Famous passages from Holy Trinity endorsed countertextual interpretive techniques that provided crucial premises for majority and dissenting opinions in many of the Burger and Rehnquist Courts' most prominent statutory cases.").

[38] Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63-64 (1975) ("[T]he response of the State to these manifestations of increasing congressional concern with air pollution was disappointing"); Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976); *see* Driesen et al., *supra* note 9, at 1802 (explaining that the Supreme Court in *Train* "recognized that the CAA had sharply increased the federal role and made state achievement of the NAAQS mandatory in response to disappointment with previous state efforts to improve air quality").

[39] *Union Electric Co.*, 427 U.S. at 256-57; 116 CONG. REC. 32901–32902 (1970) (statement of Senator Muskie); Driesen et al., *supra* note 9, at 1803.

[40] *Union Electric Co.*, 427 U.S. at 257-59.

[41] *Id.* at 257.

2. Judicial Deference Through the 1980's

Entering the 1980's, however, the Supreme Court became increasingly more reluctant to adopt purposivist interpretations, choosing instead to uphold judicial restraint in the realm of policymaking.[42] Focusing on the EPA's role in implementing the CAA, *Chevron v. Natural Resources Defense Council* evinces the Supreme Court's shift towards increased judicial deference to agencies when a statute's meaning is ambiguous.[43] Specifically, *Chevron* developed a two-step approach.[44] Assuming that the agency at issue has the authority to issue binding legal rules, courts start at *Chevron* step-one and ask whether Congress spoke directly to the issue.[45] If so, any agency construction that "give[s] effect to the unambiguously expressed intent of Congress" is a valid statutory construction.[46] If a statute is, instead, ambiguous because the statute has more than one reasonable meaning, *Chevron* step-two asks whether an agency's interpretation is a "permissible construction" of the statute.[47] As such, the only relevant question at step-two is whether the agency's interpretation is reasonable because Congress failed to resolve an underlying ambiguity in "policy choice" themselves.[48] Thus, *Chevron* deference provides that courts should defer to an agency's interpretation of a statute because "the agency's interpretation is entitled to respect, and federal courts will usually defer to the agency's interpretation if it is reasonable."[49] Moreover, relying on an agency's interpretation is uniquely important "[d]uring

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[42] *See* Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 452-54 (1989) (standing as the last time the Supreme Court cited *Holy Trinity* in a favorable light); ESKRIDGE, *supra* note 33, at 219-20 (explaining that the Burger Court revived plain meaning interpretations, but checked legislative history to understand a statute's purpose); Driesen et al., *supra* note 9, at 1810; Manning, *supra* note 33, at 114; *see, e.g.*, Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986) (explaining that reliance on a statute's purpose conflicts with Congress's textual choices to accomplish statutory purposes).

[43] Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 851 (1984) ("The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when . . . Congress itself had not commanded that definition."); *see* Manning, *supra* note 33, at 162-63 (noting that "*Chevron* treats indeterminacy as the trigger for inferring delegation").

[44] While *Chevron* directly created a two-step test, the Court later developed an initial "step-zero" that asks "whether the *Chevron* framework applies at all," ultimately creating the modern day *Chevron* three-step test. Cass Sunstein, Chevron *Step Zero*, 92 VIRGINIA L. REV. 187, 191 (2006); *see* Gonzales v. Oregon, 126 S. Ct. 904 (2006) (holding that an interpretive ruling is not entitled to *Chevron* deference).

[45] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); *see Chevron*, 467 U.S. at 842-43.

[46] *Chevron*, 467 U.S. at 842-43.

[47] *Id.* at 855-56; *see* Goffman & Bloomer, *supra* note 13, at 952; Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) ("If . . . one accepts not only that language is imprecise, but also that congressional language (in particular) is frequently indeterminate, it follows that reading [of a statute] could never be demonstrably correct, but merely reasonable if within the range of indeterminacy, or incorrect if beyond it.").

[48] *Chevron*, 467 U.S. at 855-56, 865; *see* Molot, *supra* note 35, at 18-19 ("[W]hen traditional tools of statutory interpretation allow more than one reasonable reading of a statute, an interpreter selecting among those readings does not merely carry out Congress's instructions.").

[49] CRAIG, *supra* note 32, at 15.

periods of congressional dysfunction" because "agencies must adapt aging statutory authority to new problems, shifting the locus of policymaking first to agencies and then to the courts."[50] *Chevron* specifically deferred to the EPA's plant-wide definition of "stationary source" because the CAA's text and legislative history were ambiguous, meaning that the EPA was permitted to fill interpretive gaps in the CAA where the text or legislative history did not clarify the issue.[51] As such, *Chevron* stands for the movement away from purposivism and towards policy-oriented decision making by agencies.

Today, *Chevron* is a pillar of administrative law and is one of the most cited Supreme Court cases of all time.[52] Despite this, Justice Anthony Kennedy quarreled that the Supreme Court ought to "reconsider . . . premises that underlie *Chevron*" based on the opinions of four other Justices,[53] as well as the "constitutional separation-of-powers principles and the function and province of the Judiciary."[54] While Justice Kennedy's sentiment here was initially met with concerns over the plausibility of overturning *Chevron*,[55] "the current probability of overturning *Chevron* is higher than anyone could have imagined a few years ago."[56] Scholars believe that the potential of overturning *Chevron* is even higher now given newly appointed Justice Amy Coney Barrett's support for rethinking

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[50] Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 42 (2014).

[51] *Chevron*, 467 U.S. at 851; *see* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 665 (2020).

[52] *See* Green, *supra* note 51, at 656 (citing Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399-400, 399 n.2, 400 n.4 (Peter L. Strauss ed., 2006)).

[53] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (citing City of Arlington v. FCC, 569 U.S. 290, 312-16 (2013) (Roberts, C.J., dissenting)); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting); Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment).

[54] Pereira, 138 S. Ct. at 2121 (Kennedy, J., concurring); *see also id.* at 2129 (Alito, J., dissenting) ("In recent years, several Members of this Court have questioned Chevron's foundations.").

[55] *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 31 (2016) ("[T]here is no indication whatsoever that the Court as a body has any interest in overruling Chevron. The center holds.").

[56] Green, *supra* note 51, at 656; *see* Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1096 n.1 (2016); Jeff Overley, *Chevron Deference's Future in Doubt if Barrett is Confirmed*, LAW360 (Oct. 23, 2020), https://www.law360.com/articles/1318381.

Chevron.[57] Despite calls to revisit *Chevron*,[58] a commentator has argued that litigation to restrict *Chevron* "is a very new development," and "[s]uch arguments cannot promise a restoration of past governmental practice or tradition, and they have no adequate basis in existing principles of constitutional law."[59]

3. Traditional Textualism: Late 1980's to the Early 2000's

After *Chevron* and into the early 2000's, Justice Antonin Scalia paved the way for a flavor of modern textualism that avoided injecting judicial activism into statutory interpretation by instead relying on legislative history to decipher the purposes of Congress.[60] Specifically, the Court's textualist approach during this era was borne out of purposivism's assumption that a law's "purpose" is embodied by *both* a statute's "substantive ends (its 'ulterior purposes')," as well as "Congress's specific choices about the means to carry those ends into effect (its 'implemental purposes')."[61] As such, textualism prioritizes a statute's specific terms as specialized tools to fulfill Congress's legislative intent.[62] This approach prevents interpreters from using statutory text "as simply a proxy for the law's ulterior purpose," consequently "deny[ing] legislators the capacity, through the

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[57] *See* Dino Grandoni, *The Energy 202: How Amy Coney Barrett May Make It Harder for Environmentalists to Win in Court*, WASH. POST (Sept. 28, 2020), https://www.washingtonpost.com/politics/2020/09/28/energy-202-how-amy-coney-barrett-may-make-it-harder-environmentalists-win-court/. *See generally* Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, NOTICE & COMMENT (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/ (explaining how Barrett's textualism and belief in judicial restraint may lead to *Chevron*'s demise).

[58] *See, e.g.*, E. Duncan Getchell, Jr. & Michael H. Brady, Chevron *Deference: Where Do We Go from Here?*, 30 REGENT U. L. REV. 105, 118 (2018) ("Although the Supreme Court has recently limited *Chevron* in an incremental manner, the case is so contrary to first principles that it ought to be taken up and reversed.").

[59] Green, *supra* note 51, at 732.

[60] *See* Driesen et al., *supra* note 9, at 1819, 1825 ("When the Court turned to reviewing regulatory policy as opposed to enforcement cases in the 1990s and early 2000s, it turned to textualism and often found common ground."); Molot, *supra* note 35, at 24 ("When judges base decisions on statutory purposes instead of statutory text, and when they rely on legislative history to glean those purposes, they arguably exceed their role in the constitutional structure."); *see, e.g.*, Whitman v. American Trucking Ass'ns, 531 U.S. 457, 467-68 (2001) ("We have therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.").

[61] Manning, *supra* note 33, at 115; *see* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is empty. Peer inside the heads of legislators and you find a hodgepodge.").

[62] *See* Manning, *supra* note 33, at 116 ("A precise and specific command signals an implemental purpose to leave relatively little discretion to the law's implementer. An open-ended and general one signals the opposite."); *see, e.g.*, Babbitt v. Sweet Home Chapter of Committees for a Great Oregon, 515 US 687, 726 (1995) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job . . . of reading the whole text.").

choice of words, to distinguish those statutes meant to embody specific policy choices from those meant to leave policy discretion to the law's implementers."[63]

For example, the Supreme Court in *Engine Manufacturers Associations v. South Coast Air Quality Management District* prioritized the CAA's text instead of its legislative purpose to hold that the CAA preempted state-imposed purchase and sales requirements that fleet owners purchase vehicles with low emissions.[64] More specifically, the Supreme Court found that the CAA's textual requirements to purchase cleaner vehicles preempted similar state regulations because such requirements "generally constituted standards relating to the control of emissions."[65] In Justice Souter's dissent, however, the conflict between textualism and purposivism becomes more clear. Specifically, the dissent maintained that the majority's holding was "difficult to square" with section 246 of the CAA, which mandated the exact type of regulations that the majority decision invalidated.[66] As such, *Engine Manufacturers Associations* highlights the problems that may arise when courts focus strictly on statutory text without considering the general purpose of a statute in its entirety or even its independent sections.

4. New Textualism: Early 2000's

The Supreme Court's landmark decision in *Massachusetts v. EPA* brings to light the premise that tensions between statutory text and purpose are very often resolved on ideological grounds.[67] Specifically, the majority had "little trouble" in holding that "air pollutants" in the CAA included greenhouse gases because the CAA broadly defined the term as "*any* air pollution agent or combination of

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[63] Manning, *supra* note 33, at 116, 124 (2011) ("[I]f if judges treat (unenacted) legislative history as authoritative evidence of meaning, such practice enables Congress to make an end run around the constitutional requirements of bicameralism and presentment."); *see* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (arguing that reliance on purposivism encourages judges to assume that Congress "must have meant" what judges believe and think the statutes "should have meant"); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1176 (2011) (arguing that purposivism's reliance on legislative history increases the potential for judicial activism).

[64] Engine Mfr. Ass'ns v. S. Coast Air Quality Mgmt. District, 541 U.S. 246, 255 (2004); *see* Driesen et al., *supra* note 9, at 1823 ("The case, as a whole, clearly reinforces the primacy of text over purpose and structure.").

[65] Driesen et al., *supra* note 9, at 1822 (citing *Engine Mfrs. Ass'ns*, 541 U.S. at 253-54; *see* 42 U.S.C. § 7543(a) (2012).

[66] *Engine Mfr. Ass'ns*, 541 U.S. at 260-61.

[67] *See* Massachusetts v. EPA, 549 U.S. 497, 556–58 (2007) (Scalia, J., dissenting) (explaining that the EPA's interpretation of "any air pollutant agent" in the CAA only embraces pollutants that are primarily near the Earth's surface, consequently excluding greenhouse gases that primarily occupy the upper atmosphere that is furthest away from the Earth's surface); Driesen et al., *supra* note 9, at 1824, 1829 ("The opinions and voting alignments here suggest that text sometimes creates ambiguities that get resolved on the basis of federalism philosophy.").

agents, including *any* . . . substance or matter which . . . enters the ambient air."[68] From a strictly textualist perspective, the Court emphasized the word "any" in the text of the CAA as clear evidence that greenhouse gases are "air pollutants" under the CAA. However, a commentator has argued that Justice Scalia's dissent used "an extraordinarily contrived reading of [the CAA] in an effort to escape the majority's conclusion," ultimately suggesting that "the text does not always constrain even seemingly devout textualists judges, at least in a highly charged case."[69] As such, Justice Scalia's dissent was based on ideological grounds rather than textualist grounds.

Utility Air Regulatory Group v. EPA ("*UARG*") similarly exposed an antithetical use of textualism.[70] Refusing to extend *Chevron* deference because the EPA's construction of the CAA was unreasonable, the Supreme Court held that including greenhouse gases in the CAA's definition of "any air pollutant" was "inconsisten[t] with the design and structure of the statute" in the specific context of PSD and Title V permitting.[71] Even though the CAA mandates that PSD and Title V applies to emitters of "any air pollutant,"[72] the majority opinion narrowly construed the phrase "any air pollutant" and excluded the regulation of greenhouse gases via PSD and Title V permitting.[73] Specifically, the majority explained that while *Massachusetts* interpreted "any air pollutant" broadly in the context of the entire CAA, "where the term 'air pollutant' appears in the Act's operative provisions, EPA has routinely given it a narrower, context-appropriate meaning."[74] Furthermore, the majority argued that *Massachusetts* did not "foreclose the [EPA's] use of statutory context to infer that certain of the Act's provisions use 'air pollutant' to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program."[75] As such, the majority held that the EPA properly "inferred from [the CAA's] statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition."[76]

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68 *Massachusetts*, 549 U.S. at 528-59 (citing 42 U.S.C. § 7602(g)) (finding that the CAA unambiguously is meant to regulate "all airborne compounds of whatever stripe").

69 Driesen et al., *supra* note 9, at 1829.

70 UARG v. EPA, 573 U.S. 302, 315-28 (2014); *see* William W. Buzbee, *Anti-Regulatory Skewing and Political Choice in* UARG, 39 HARV. ENV'T L. REV. 63, 73 (2015) (explaining that the Court's decision in *UARG* as being the "antithesis" of textualism); Driesen et al., *supra* note 9, at 1832; Richard J. Lazarus, *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and* UARG*'s Unanticipated Cloud over the Clean Air Act*, 39 HARV. ENV'T L. REV. 37, 44-45 (2015) (noting Justice Scalia's opinion as "un-Scalia-like" for failing to adhere to the CAA's text).

71 *UARG*, 573 U.S. at 321; *see* Getchell & Brady, *supra* note 58, at 109.

72 42 U.S.C. §§ 7401-7671(q) (2012).

73 *UARG*, 573 U.S. at 331.

74 *Id.* at 316.

75 *Id.* at 319.

76 *Id.* at 317.

The Supreme Court took a seemingly anti-textualist approach in *UARG*[77] by contradicting the CAA's apparent text and creating a carve out of the Court's sweeping holding in *Massachusetts v. EPA* that greenhouse gases were within the meaning of "air pollutant."[78] Specifically, the majority opinion relied on purposivist methods of interpretation when it explained that the "power to require permits for . . . the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[79] This declaration reflects purposivism because the majority considered the ultimate purpose of the CAA to hold that "[i]t is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances."[80] Even Justice Breyer's dissent took on a purposivist approach, arguing that the CAA should be construed to avoid obsolescence, suggesting instead that the phrase "any air pollutant" should be read broadly to apply to more pollutants as science advances and to uphold the CAA's ultimate purpose.[81] As such, *UARG* highlights a recurring tension between when and why the Supreme Court chooses to rely on statutory text or purpose in interpreting complex statutes.

C. Role of the Major Questions Doctrine in Statutory Interpretation

While *Chevron* deference generally provides judicial deference to agency interpretations of ambiguous statutory text unless the agency's interpretation is unreasonable or impermissible, total deference to agency interpretations of statutes is not required in certain extraordinary cases per the major questions

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[77] Note that the partial concurrence and partial dissent did, however, take a more traditional textualist approach. *See id.* at 345-46 ("With respect to the text, it is curious that the Court, having departed from a literal interpretation of the term 'pollutant' in Part II–A, turns on its heels and adopts a literal interpretation in Part II–B.").

[78] *Id.* at 320 (In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds[.]"); *see* Massachusetts v. EPA, 549 U.S. 497, 528-59 (2007); Nick Kunkel, *Changing Climate and Changing Doctrine: How Greenhouse Gases Have Polluted the EPA's Clean Air Act Authority and How to Clean It Up*, 4 LSU J. ENERGY L. & RESOURCES 369, 399 (2016) ("In fact, *Utility Air* placed so much emphasis on the need to keep the EPA's power in check that it essentially required that the EPA divorce its interpretation from the plain meaning of the statutory language."); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 448 (2016) ("The Court's subsequent decision in *Utility Air Regulatory Group v. EPA* (*UARG*) demonstrated, however, that *Massachusetts v. EPA* did not absolve the EPA of major questions inquiries regarding how the Agency implements limitations on those pollutants.").

[79] *UARG*, 573 U.S. at 324.

[80] *Id.* at 317.

[81] *Id.* at 341 (Breyer, J., concurring in part and dissenting in part) (arguing that "an implicit source-related exception" serves the CAA's statutory purpose while going no further); *see* Driesen et al., *supra* note 9, at 1833.

doctrine.[82] Rather than deferring to an agency's interpretation of a statute, the major questions doctrine provides that an agency's interpretation of a statutory provision will have little or no weight if the legal stakes are sufficiently high.[83] A question of statutory interpretation is major if it involves an issue of deep economic or political significance, or vastly increases the agency's regulatory authority.[84] The bounds of the doctrine are, however, unclear given the little guidance that the doctrine provides courts and implementing agencies in understanding their statutory mandates.[85] Furthermore, the doctrine is increasingly likely to be triggered as agencies are having to address major questions in order to counteract legislative gridlock.[86] Today's deadlocked Congress may thus embolden agencies to reinterpret the gaps and ambiguities in outdated statutes rather than relying on the legislature for change.[87]

The major questions doctrine was slowly developed by two central cases. Specifically, the doctrine was first invoked in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, which asked whether the Federal Communications Commission had the authority to "modify" filing requirements in the Communications Act of 1934.[88] In expressing that the agency's interpretation was a "radical or fundamental change" to the statute, the Supreme Court held that it was "highly unlikely" that Congress would leave an "essential characteristic" of statutory interpretation up to agency discretion.[89] As such, *MCI* shows that some questions of agency interpretation are too major to be given

[82] Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 865-66 (1984); *see* Lisa Heinzerling, *The Power Canons,* 58 WM. & MARY L. REV. 1933, 1937 (2017) (explaining that the major questions doctrines aims to take "interpretive power from an administrative agency"); Daniel Hornung, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. REG. 759, 764 (2020) ("[T]he major questions doctrine is typically viewed as one of several attempts to limit Chevron."); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 358 (2016) (explaining that the major question doctrine "claws back interpretive authority for judges in certain 'extraordinary' cases").

[83] Richardson, *supra* note 82, at 358; *see, e.g.*, Fed. Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."). *See generally* Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENVTL. L. & POL'Y FORUM 293, 307–08 (2020) (discussing *Brown & Williamson*'s history).

[84] Leske, *supra* note 15, at 480; Sunstein, *supra* note 44, at 231-34, 236-42; *see UARG*,573 U.S. at324 (explaining that courts should not defer to administrative agency interpretations of ambiguous statutes when there is a question of "vast economic and political significance").

[85] Monast, *supra* note 78, at 448.

[86] *See Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016) (quoting Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 598 (1985)) (explaining that the doctrine has only been used "where the Court's 'olfactory sense detects the odor of administrative waywardness'"); Richardson, *supra* note 82, at 359.

[87] Richardson, *supra* note 82, at 359 ("And interpretive errors by courts and agencies both are less likely to be corrected by Congress.").

[88] MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 218-21 (1994).

[89] *Id.* at 229-31 ("[T]he Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement.").

deference even when Congress has delegated an agency some authority to interpret the statute.[90]

Second, *Whitman v. American Trucking* takes *MCI* further by clearly opposing large expansions of agency authority when a statute's text impliedly delegates only limited authority to an agency.[91] In *Whitman*, the Supreme Court upheld the EPA's position that it was not required by the CAA to consider economic costs when creating NAAQS.[92] Coining the "elephants in mouseholes" principle, Justice Scalia explained that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions–it does not, one might say, *hide elephants in mouseholes*."[93] As such, the Court reasoned that Congress could not have intended an elephant-like issue such as the consideration of costs to be adequately explained with minute textual support.[94]

1. Development of the Elephants in Mouseholes Principle

Since its inception, many scholars have argued that the elephants in mouseholes principle is indistinguishable from the major questions doctrine because "[b]oth operate to shift interpretive authority from agencies to judges when the regulatory stakes are great."[95] However, the elephants in mouseholes principle functions as a corollary to the major questions doctrine in that it focuses on statutory text and asks whether Congress could have hidden such a "major" issue (i.e., healthcare coverage, climate change, etc.) in unclear text. As such, the elephants in mouseholes principle "resonates with, but does not precisely overlap with, the major questions doctrine" because it suggests that agencies "cannot find new delegations of important policy-making powers in unclear statutes."[96] For some time, however, "the elephants-in-mouseholes doctrine has not been identified or taken seriously as a doctrine."[97] Instead, "the doctrine is often applied in cases

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[90] Richardson, *supra* note 82, at 365.

[91] Whitman v. American Trucking Ass'n, Inc., 531 U.S. 457, 468 (2001); *see* Richardson, *supra* note 82, at 372.

[92] *Whitman*, 531 U.S. at 470.

[93] *Id.* at 468 (emphasis added).

[94] *Id.* ("And because § 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the CAA, 42 U.S.C. §§ 7401–7515, that textual commitment must be a clear one.").

[95] *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in* Mouseholes, 62 ADMIN. L. REV. 19, 37-45 (2010); Nathan Richardson, *The Elephant in the Room or the Elephant in the Mousehole? The Legal Risks (and Promise) of Climate Policy Under §115 of the Clean Air Act*, RES. FUTURE DISCUSSION PAPER 1, 22 (Oct. 31, 2016) (citing Richardson, *supra* note 82 ("Nevertheless, at least in some cases the 'elephants in mouseholes' principle appears to have evolved beyond that narrow role to take on a role similar (and maybe identical) to that of the major questions doctrine.")).

[96] Adam R.F. Gustafson, *The Major Questions Doctrine Outside* Chevron*'s Domain*, CTR. STUDY ADMIN. STATE 1, 10-11 (2019); *see* Loshin & Nielson, *supra* note 95, at 23 (explaining that "the elephants-in-mouseholes doctrine is an attempt to address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency").

[97] *See* Loshin & Nielson, *supra* note 95, at 21.

where many members of the Court believe a statute is ambiguous, and their dissenting arguments are not obviously misguided."[98] The doctrine has consequently been used to "impose clear meaning rather than discern it."[99] Recently, the elephants in mouseholes principle has been cited in several cases that together signal a resurgence of the doctrine and provide greater insight into how the Supreme Court may take up the issue in the future.

Specifically, *EPA v. Homer City* and *UARG* both invoked the elephants in mouseholes principle by denying *Chevron* deference to the EPA even when the CAA's text was ambiguous.[100] While the elephants in mouseholes principle was briefly cited in *Homer City*'s dissent,[101] Justice Scalia in *UARG* explained that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."[102] To avoid a transformative expansion of the EPA's regulatory authority to regulate greenhouse gases in the PSD and Title V context without clear Congressional direction, Justice Scalia maintained that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[103] Here, Justice Scalia's argument also relies strongly on the major questions doctrine in two ways. First, Justice Scalia denied *Chevron* deference partly because of the significance of the issue of climate change.[104] Second, Justice Scalia argued that the CAA's text only delegates to the EPA limited authority to regulate greenhouse gases in *UARG*'s context.[105] As such, "[t]he addition of *Whitman*'s factor regarding statutory text proves . . . that 'elephants in mouseholes' functions in *Chevron* cases as an extension of the major questions doctrine."[106]

After these two cases, the Supreme Court most notably took up *King v. Burwell* to decide the role of courts when a statute's text contains a section that does not

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[98] *Id.* at 26-27.

[99] *Id.* at 27.

[100] EPA v. Homer City Generation. L.P., 572 U.S. 489, 528 (2014) (Scalia, J., dissenting); UARG v. EPA, 573 U.S. 302, 315-28 (2014).

[101] *Homer City*, 572 U.S. at 528 (Scalia, J., dissenting) ("It would be extraordinary for Congress, by use of the single word 'significantly,' to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most efficient. We have repeatedly said that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'").

[102] *UARG*, 573 U.S. at 324; *see* Getchell & Brady, *supra* note 58, at 109 ("This amounts to a too big and too consequential exception of the notion of congressionally intended gap-filling.").

[103] *UARG*, 573 U.S. at 324 (internal quotation marks omitted); *see* Getchell & Brady, *supra* note 58, at 109.

[104] *See UARG*, 573 U.S. at 324.

[105] *See id.*; Whitman v. American Trucking Ass'n, Inc., 531 U.S. 457, 468 (2001) (describing the role of statutory text in major questions analysis).

[106] *See* Richardson, *supra* note 82, at 379.

further the statute's overall purpose.[107] As its implication could have meant that "[f]ederal climate policy shared a fateful link with that of healthcare policy throughout the Obama presidency,"[108] *King* specifically considered whether the Affordable Care Act[109] ("ACA") unambiguously permitted individuals who enrolled in an insurance plan through a Federal Exchange program in their states to receive federal tax credits.[110] The interpretation issue here revolved around the statute's mandate that limited the availability of tax credits to exchanges "established by the *state*," as opposed to exchanges via a *federal* exchange per the Internal Revenue Service's ("IRS") interpretation.[111]

Rejecting *Chevron* deference, the Court agreed to the statute's ambiguity, but instead held: "This is not a case for the IRS. It is instead our task to determine the correct reading of Section 36B."[112] Since the tax credits constituted "key reforms" to the ACA that involved "billions of dollars in spending each year and affect[ ] the price of health insurance for millions of people,"[113] the Court argued that the IRS had no expertise to dictate vital health insurance policy that involves questions of deep "economic and political significance."[114] While Justice Scalia's dissent called the majority's reasoning "[p]ure applesauce" and "absurd,"[115] the Court's majority again invoked the classic elephants in mouseholes principle, arguing that Congress couldn't have intended the elephant of national health insurance policy to be hiding in shrouded text.[116] It is important to note that *King*, however, should not be read as an "across-the-board directive" for courts to invoke *Chevron*'s step-zero and bypass *Chevron* deference when an agency has major implications.[117] Otherwise, "[i]f courts lump together *King* with the other major questions cases, and treat them . . . as Step Zero cases, the consequence will

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[107] King v. Burwell, 576 U.S. 473, 492 (2015) (citing New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 419–420, (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")); *see* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2397 (2017).

[108] Monast, *supra* note 78, at 446.

[109] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

[110] *King*, 576 U.S. at 485.

[111] *See id.* at 483 (quoting 42 U.S.C. § 18031(f)(3)(A) (2012)) (emphasis added); Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419, 1423 (2018) ("If the Agency's determination were rejected and the challengers were to prevail, the consequences would be lethal for the ACA: the insurance markets in over thirty states would collapse because federal money could no longer flow to purchasers of plans in those states.").

[112] *King*, 576 U.S. at 486; Monast, *supra* note 78, at 450 ("However, although the Court ultimately upheld the IRS interpretation, it did so without deferring to the Agency.").

[113] *King*, 576 U.S. at 485.

[114] *See id.* at 486 (quoting Federal Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[115] *Id.* at 501, 507, 514 (Scalia, J., dissenting) ("Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.").

[116] *See generally* Heinzerling, *supra* note 82 (explaining that *King* stands for the Supreme Court not tolerating statutory ambiguity).

[117] Sohoni, *supra* note 111, at 1432.

be to skip the other major questions cases forward—to Step Zero—and thereby unnecessarily erode *Chevron*'s domain."[118] *King* should instead be read as a category of major questions cases that "carved out of *Chevron*'s domain agency interpretations of ambiguous statutory authority that cause large amounts of federal spending" as opposed to regulating private parties.[119]

2. Bostock's Modernization of the Elephants in Mouseholes Principle

The Supreme Court issued a "pathbreaking" LGBTQ+ rights decision in *Bostock v. Clayton County*.[120] Title VII of the Civil Rights Act of 1964 prohibits discrimination based on an "individual's race, color, religion, sex, or national origin" in hiring and employment decisions.[121] Before *Bostock*, lower courts struggled to agree on whether "sex" in Title VII encompassed sexual orientation.[122] As such, Title VII did not explicitly cover sexual orientation to prevent discrimination against the LGBTQ+ community in the workplace. Ultimately, however, *Bostock* found that Title VII in fact protects against discrimination "because of" sexual orientation since the language and purpose of the statute provides that Title VII protects employees from discrimination on the basis of sex, which includes LGBTQ+ people.[123] The majority opinion by Justice Neil Gorsuch declared: "Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them."[124] In other words, Congress's original ban on workplace discrimination on the basis of race, color, religion, sex, or national origin may have been intended to cover a relatively small imagined set of issues, such as focusing on discrimination against *individuals* as

[118] *Id.* at 1433.

[119] *Id.* at 1432.

[120] Bostock v. Clayton County, 140 S. Ct. 1731 (2020); Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 734 (2020). *See generally* Jay Michaelson, *In Historic Win with Shock Majority, Supreme Court Rules It's Illegal to Fire Employees for Being Gay or Trans*, DAILY BEAST (June 15, 2020), https://www.thedailybeast.com/supreme-court-rules-employers-who-fire-lgbtq-workers-violate-title-vii (explaining *Bostock*'s historic implications).

[121] 42 U.S.C. § 2000e-2(a)(1).

[122] *Compare* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)) (holding that Title VII did not protect against employment discrimination on the basis of sexual orientation), *with* Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes Inc., 884 F.3d 560 (6th Cir. 2018) (holding that Title VII covered transgender employment discrimination); Hively v. Ivy Tech Community College, 853 F.3d 339, 341 (7th Cir. 2017) (holding the employment discrimination on the basis of sexual orientation violated Title VII).

[123] *Bostock*, 140 S. Ct. at 1754 (citing University of Tex. Southwestern Medical Center v. Nassar, 570 U. S. 338, 350 (2013)) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."); *see* 42 U.S.C. § 2000e–2(a)(1).

[124] *Bostock*, 140 S. Ct. at 1737.

opposed to groups of people.[125] Yet perhaps contrary to Congress's original intent, Title VII — as a major initiative with "starkly broad terms" — "unexpectedly" encompasses workplace protections for mothers, males experiencing workplace harassment, and—today—individuals from the LGBTQ+ community.[126] As such, *Bostock* distinguished between a statutory interpretation approach that is focused on intent (i.e., realizing that Congress did not necessarily intend to include LGBTQ+ protections under Title VII) versus an approach focused more broadly on purpose, where the very spirit of Title VII was to address workplace discrimination as a whole.

Outlining the unintended consequences of the statute, Justice Gorsuch opined that "the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest."[127] The decision continued by first taking the perspective of Congress in 1964 when the Civil Rights Act was originally adopted, then examining the key terms of the statute to assess "their impact on the cases as hand."[128] Focusing on the statute's general prohibition on employers discriminating "because of such individual's . . . sex,"[129] the Court relied on the "ordinary public meaning of the statute's language at the time of the law's adoption" to find that an individual's sex cannot have any bearing on an employer's workplace decisions.[130]

Bostock thus presents an interesting shift in the Supreme Court's major questions approach by modernizing the elephants in mouseholes principle. Specifically, Justice Gorsuch declared: "Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. *This elephant has never hidden in a mousehole; it has been standing before us all along*."[131] Here, instead of striking down a statutory interpretation if it has major

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[125] *Id.* at 1753 (explaining that Congress made the drafting choice "to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries").

[126] *See id.* at 1737 ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.").

[127] *Id.*

[128] *Id.* at 1739.

[129] 42 U.S.C. § 2000e–2(a)(1); *see* Mark Tushnet, *Bostock and Originalism*, YALE UNIV. PRESS BLOG (July 15, 2020), http://blog.yalebooks.com/2020/07/15/bostock-and-originalism/ ("In *Bostock* Justice Gorsuch says that 'because of sex' is a general term. He argues that, as of 1964, people would have understood the term to mean that a decision that would be made one way if the employee were male and another were the employee female would have been made 'because of sex.' Justice Alito would have compared the employer's action when an employee was gay (defined as a category including only men) to its action when the employee was a lesbian (only women): The employer would fire both, and so, for Justice Alito, the action was not 'because of sex.'").

[130] *Bostock*, 140 S. Ct. at 1740-41.

[131] *Id.* at 1753 (emphasis added).

economic and political consequences, *Bostock* rejected the elephants in mouseholes principle to proclaim that, in the Civil Rights Act context, Congress's clear intent of preventing sex-based discrimination over time is unmistakably clear. Based on Congress's meticulous drafting choices, Congress intended discrimination based on one's sexual orientation to one day be barred. As such, *Bostock* rejected the applicability of the elephants in mouseholes principle to proclaim that major issues can be embodied by the spirit of a statute even if the text itself does not explicitly proclaim that purpose.

II. RESOLVING CLIMATE REGULATION CASES POST-*BOSTOCK*

The Trump administration's slow and steady narrowing of the EPA's legal authority has consistently undermined scientific research and subsequent climate regulation, thus damaging the role of scientific data available in future climate litigation.[132] While the new Biden administration promises to take swift action to fight clime change, the major questions doctrine is still a ripe concern because industry opponents and climate deniers will continue to rely on it to limit the EPA's authority under the CAA.

A. The Expansive Reaches of the Clean Air Act to Regulate Greenhouse Gases

In chipping away at the EPA's authority to regulate greenhouse gas emissions, the Trump administration relied on the argument that using the CAA to regulate climate change was an unauthorized exceedance of executive power under the major questions doctrine.[133] Specifically, there are three general arguments for why climate regulation policy invokes the major questions doctrine. First, there must be a clear statement from Congress to regulate greenhouse gases via the CAA because of both the expansive scope of the climate change problem, as well as its economic ramifications. Following a similar argument advanced in *Federal Drug Administration v. Brown & Williamson*,[134] climate regulation via the CAA arguably triggers the major questions doctrine because Congress did not make a

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[132] *See* Romany Webb, Lauren Kurtz, & Susan Rosenthal, *When Politics Trump Science: The Erosion of Science-Based Regulation*, 50 ENV'T L. REP. 10708, 10708-09 (2020) (detailing how the Trump administration engaged in censorship of scientists and the reshuffling of federal government scientists).

[133] *See, e.g.,* Brief for U.S. Environmental Protection Agency, and EPA Administrator Andrew Wheeler at 1, Am. Lung Ass'n v. EPA, No. 19-1140 (D.C. Cir. June 16, 2020) ("In the simplest terms, the Clean Power Plan . . . exceeded the authority Congress granted to EPA. This required its repeal. Its replacement, the Affordable Clean Energy rule . . . is consistent with the statute.").

[134] Federal Drug Administration v. Brown & Williamson, 529 U.S. 120 (2000); *see* Lisa Heinzerling, *Thrower Keynote Address: The Role of Science in Massachusetts v. EPA*, 58 EMORY L.J. 411, 416-17 (2008) ("In this way, EPA's decision not to regulate greenhouse gases relied on a kind of 'climate clear statement rule' consistent with climate exceptionalism; Congress must, EPA suggested, speak more clearly if it wants to regulate climate than if it wants to regulate some more ordinary pollution problem. When it comes to climate, therefore, different rules should apply.").

clear statement that the EPA had the authority to use the complex regulatory scheme of the CAA to regulate climate change.[135]

However, Supreme Court precedent indicates that there is no "climate clear statement rule" requiring Congress to clearly authorize the EPA to address climate change if it really intended the EPA to address it.[136] For example, the *Massachusetts v. EPA* majority ultimately rejected the EPA's clear statement argument (based on *Brown & Williamson*), ruling that whether a clear statement is required to authorize greenhouse gas regulation depends on the facts.[137] Since the EPA took the position in 1998 that it in fact had the authority to regulate greenhouse gases via the CAA, the Court in *Massachusetts* refused to apply the major questions doctrine and explained that there was "no reason . . . to accept EPA's invitation to read ambiguity into a clear statute."[138] Thus, even if a clear statement authorizing climate regulation in the CAA were required, that clear statement already exists per the Court's holding in *Massachusetts*. Furthermore, the complex nature of the CAA means that "the *only* way to prevent a potentially harmful [greenhouse gas]-centric rule from being upheld is to take into consideration factors beyond the mere words and numbers set forth in the CAA."[139]

Second, proponents of using the major questions doctrine to prohibit climate change regulation via the CAA would argue that the doctrine applies because climate change is itself an issue of political significance that requires major questions analysis.[140] Specifically, *UARG*'s "political significance" factor may

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[135] *See* 68 Fed. Reg. 52922-02 (Sept. 8, 2003) ("Only the research and development provision of the CAA—section 103—specifically mentions CO2, and the legislative history of that section indicates that Congress was focused on seeking a sound scientific basis on which to make *future* decisions on global climate change, not regulation under the CAA as it was being amended."); *see, e.g.*, Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations, 84 Fed. Reg. 32,520, 32,529 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60) (noting that, although EPA's interpretation was the only permissible reading of the CAA, even without reference to the "major questions" doctrine, that doctrine further supported its conclusion).

[136] *See* Heinzerling, *supra* note 134, at 417-19.

[137] *See* Massachusetts v. EPA, 549 U.S. 497, 530-31(2007) (discussing Federal Drug Administration v. Brown & Williamson, 529 U.S. 120 (2000)).

[138] *Id.* at 1461; *see* Monast, *supra* note 78, at 465. For an example of when the EPA acknowledged the reality and science of climate change, see California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12163-68 (Mar. 6, 2008).

[139] Kunkel, *supra* note 78, at 404 (citing Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2087-89 (1990) (explaining that "[s]ometimes regulation is made more difficult because of the pervasive problem of changed circumstances," and "Congress is unable to amend every statute to account for those who must apply the statute" precisely because "Congress cannot possibly foresee all of the problems to be dealt with under broad statutory terms").

[140] *See* UARG v. EPA, 573 U.S. 302, 324 (2014) (describing the importance of "political significance" per the major questions doctrine); Kunkel, *supra* note 78, at 385 ("The *Utility Air* Court seemingly endorsed *Brown & Williamson*'s modified approach to Chevron by emphasizing the notion that agency interpretations are subject to enhanced scrutiny when they potentially implicate profound

support evaluating the greenhouse gas regulation via the CAA through the major questions doctrine.[141] However, reliance on *UARG* to bar extensive climate regulation is unfounded. Justice Scalia argued that the EPA could regulate greenhouse gases from "anyway" sources[142] under PSD permitting if such regulation would not "be of a significantly different character from those traditionally associated with PSD review."[143] Nothing in the CAA established that the statute was "incapable of being sensibly applied to greenhouse gases."[144] Just because climate change regulation carries political significance in America does not mean that *UARG* precludes such action. Instead, *UARG* tells us that whether the CAA permits greenhouse gas regulation depends on the statute's traditional character and whether such an application would go beyond a moderate increase in the demands that the EPA can make of its regulated entities.[145]

Even if this authority to regulate greenhouse gas emissions across America invokes major issues of political significance, an abundance of Supreme Court precedent suggests that Congress clearly delegated such authority to the EPA.[146] According to *American Electric Power Co. v. Connecticut* ("*AEP*"), the CAA "entrusts" in the EPA the authority to balance the national environmental benefits, possible economic disruptions, and the country's energy needs when implementing a plan to combat greenhouse gas emissions.[147] *AEP* further stated, "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."[148] Since the EPA was delegated authority to regulate greenhouse gases "of whatever stripe" and *Massachusetts* acknowledged that "[t]he harms associated with climate change are serious and well recognized,"[149] the EPA's authority over

real-world impacts."); Ann Carlson, Amelia Keyes, Ben Harris, & Dallas Burtraw, *Climate Policymaking in the Shadow of the Supreme Court*, LEGAL PLANET (Oct. 27, 2020), https://legal-planet.org/2020/10/27/climate-policymaking-in-the-shadow-of-the-supreme-court/ (discussing individuals who would use the major questions doctrine to bar agency action of issues of political and economic significance).

[141] *See, e.g.*, EPA Brief, at 104 (citing *UARG*, 573 U.S. at 324 (explaining how the Affordable Clean Energy Rule, as an example of greenhouse gas regulation under the CAA, carries a great deal of political significance in terms of addressing climate change).

[142] "Anyway" sources are "those that would need permits based on their emissions of more conventional pollutants (such as particulate matter)." *See UARG*, 573 U.S. at 329.

[143] *Id.* at 332.

[144] *Id.*

[145] *Id.* at 332 ("We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation.").

[146] *See, e.g.,* Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410, 427 (2011) (declaring that the EPA is the only agency equipped to regulate greenhouse gas regulation at all); Massachusetts v. EPA, 549 U.S. 497, 528-59 (2007) (finding that the CAA unambiguously is meant to regulate "all airborne compounds of whatever stripe").

[147] *AEP*, 564 U.S. at 427.

[148] *Id.* at 428 ("The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.").

[149] *Massachusetts*, 549 U.S. at 521, 529.

emitters of pollutants—which are "entities already subject to its regulation" — explicitly permits the EPA to regulate consequent greenhouse gas emissions *even though* climate change is a major issue of vast economic and political significance.[150] If it is clear that the CAA was meant to address all forms of air pollution, then greenhouse gases should be covered. Thus, the elephant of climate change was placed in the EPA's regulatory grasp by Congress.

Last, proponents of the major questions doctrine argue that regulating climate change under the CAA has the potential to be "transformative" of domestic policies and the efficient functioning of sources subject to regulation under the CAA.[151] This argument invokes *Whitman*'s elephants in mouseholes principle to contend that Congress could not have hidden the elephant of greenhouse gas regulation in the CAA's text.[152] Any section of the CAA that is used to regulate greenhouse gases is arguably a legal "mousehole" on the premise that Congress could not have intended to hide an "elephant" like climate change behind ancillary provisions.

Just as in *Bostock*, however, the elephant of climate change has made itself more and more known since the inception of the CAA. Even if the CAA was originally narrower in its coverage, the Supreme Court's reasoning in *Bostock* explains that "small gestures" taken by "major initiatives" can have "unexpected consequences."[153] As such, the originally "small" CAA has "unexpectedly" become crucial to regulating the very greenhouse gases that triggered climate change impacts. Therefore, the limitations of Congress's original knowledge of the effects of greenhouse gases on climate change should not justify ignoring the CAA's demands: to regulate air emissions from stationary and mobile sources in the interest of protecting public health, welfare, and the environment.[154]

Furthermore, Congress made the key drafting choice to focus on air quality and regulate air pollutants that it determined endangered public health. Specifically, Congress contemplated the reality that "[a]ir pollution alters climate and may produce global changes in temperature" and that "the addition of particulates and carbon dioxide in the atmosphere could have dramatic and long-term effects on world climate."[155] The current expansive definition of "air pollutant" in the CAA was specifically passed "out of concern that the original definition could be narrowly construed to exempt certain environmental threats."[156] By leaving the door wide open for the EPA to make decisions about what pollutants endanger

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[150] *See UARG*, 573 U.S. at 324, 329, 332.

[151] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[152] *See* EPA Brief, at 113 (citing *id.* at 468).

[153] Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

[154] *See* 42 U.S.C. §7401 et seq. (1970); *Bostock*, 140 S. Ct. at 1737.

[155] 116 CONG. REC. 32,914, 32,916 (1970).

[156] Joel D. Smith, *Massachusetts v. EPA: A Change of Climate at EPA Clouds the D.C. Circuit's Review of Risk-Based Policy Decisions,* 33 ECOL. L.Q. 653, 659 (2006) (citing H.R. Rep. No. 95-294, at 42 (1977) ("In the committee's view, it is not appropriate to exempt certain pollutants or certain sources from the comprehensive protections afforded by the Clean Air Act.")).

public health and the environment, Congress intended for the EPA to be in charge of interpreting science to regulate air pollutants in a way that did not construe certain environmental threats to be exempt from regulation.[157] Just as *Bostock* expounded that Congress focused broadly on workplace discrimination in the Civil Rights Act of 1964, Congress here focused broadly on air pollution knowing that the EPA was best equipped to deal with any "unexpected application [that] would emerge over time."[158] As such, the "elephant" of climate change "has never hidden in a mousehole; it has been standing before us all along."[159]

Given the lack of concrete science supporting the existence of climate change when the CAA was drafted and amended, one may argue that Congress really could not have understood the gravity of the EPA's role in combating climate change today. However, it is possible that Congress *did* have a clear intent to authorize the EPA to regulate all air pollution problems that could arise even if it did not comprehend all such problems when it enacted the CAA. As such, the CAA's complex legislative history "reflects the inability of competing legislators to negotiate through the political process a consistent, uniform expression of legislative intent."[160] Without a truly clear grasp of Congress's intent, it is the court's role to determine the effect that the language of the CAA should have.[161] After *Bostock*, the CAA should be read broadly as a tool to combat the somewhat "unexpected" consequences of climate change.

B. Bostock's Move Towards New Purposivism and Away from Nondelegation

1. Bostock's Illustration of New Purposivism

In addition to its potential implications for major questions cases, *Bostock* may also signal a change in the Court's reliance on certain statutory interpretation principles. Rather than adhering strictly to the original meaning of a statute's text as hailed by Justice Scalia,[162] the Supreme Court interpreted the issues in *Bostock* using "new purposivism."[163] According to John Manning, the Dean of Harvard

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[157] Eli Kintisch, *Was the Clean Air Act Intended to Cover CO2?*, SCIENCE (Feb. 7, 2011), https://www.sciencemag.org/news/2011/02/was-clean-air-act-intended-cover-co2 (quoting that "'Congress said to the EPA: We want you to be watching the science. You're supposed to be on guard. When the science shows there's a danger, then you need to act. Don't come to us for instructions'").

[158] *See Bostock*, 140 S. Ct. at 1753.

[159] *See id.* at 1753; *Whitman*, 531 U.S. at 468.

[160] Smith, *supra* note 156, at 659.

[161] *See, e.g.,* North Dakota v. United States, 460 U.S. 300, 312 (1983) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.") (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

[162] *See* discussion *infra* Section I.B.

[163] *See* Robert L. Clinton, *Textual Literalism and Legal Positivism: On* Bostock *and the Western Legal Tradition*, PUBLIC DISCOURSE (July 5, 2020), https://www.thepublicdiscourse.com/2020/07/66630/ ("The "textualism" employed by Justice Gorsuch in Bostock is not merely wrong (as Justice Kavanaugh effectively demonstrates), but a blatant circumvention of time-honored rules of statutory interpretation in the Western legal tradition. Mere analysis of the words in a legal text is

Law School and a statutory interpretation scholar, new purposivism "relies on Congress's choice of words to determine how and to what extent an interpreter may account for the policy rationale or ulterior purpose of a statute."[164] Under this method of statutory interpretation, a statute's text determines the outer limits of how far Congress authorized the statute and its implementers to go to achieve its original purpose.[165] Prioritizing achieving a statute's ulterior purpose within the confines of what Congress exactly authorized, new purposivism thus carries out Justice Scalia's belief that "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means."[166] If, however, a statute's text is open-ended as to how the statute was intended to be implemented, the judiciary has discretion to determine how best to achieve the statute's ulterior goals.[167] As such, Manning argues that "all that distinguishes new purposivists from textualists is the new purposivists' willingness to invoke legislative history in cases of genuine semantic ambiguity."[168]

Bostock highlights these principles of new purposivism because the Court considered the Civil Rights Act's underlying purpose—to protect employees from workplace discrimination—after scrupulously evaluating the generality of the statute's text to accommodate Congress's intent.[169] For example, *Bostock* started with the statute's "ordinary public meaning . . . at the time of the law's adoption," and then evaluated the meaning of the statute's open-ended reference to "sex" in light of "Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups."[170] Here, the Court employed new purposivism by using Congress's choice of words to determine whether the Civil Rights Act should extend to an extratextual application of the statute. Moreover,

not—and has never been—an end in itself for courts."); Jane S. Schacter, Bostock *and Changes of the Guard at the Supreme Court*, STAN. L. BLOGS (June 15, 2020), https://law.stanford.edu/2020/06/15/bostock-and-changes-of-the-guard-at-the-supreme-court/.

See generally Manning, *supra* note 33 (discussing the genesis of new purposivism).

[164] Manning, *supra* note 33, at 116.

[165] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1288 (2020).

[166] Dir. of Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 136 (1995).

[167] *See* Krishnakumar, *supra* note 165, at 1289 (citing Manning, *supra* note 33, at 137-40 (discussing how Fox v. Vice, 563 U.S. 826 (2011), read open-ended language into the statute "almost entirely in light of the Court's perception of the statute's ulterior purposes")).

[168] Manning, *supra* note 33, at 117.

[169] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020); *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010); Manning, *supra* note 33, at 117 ("Given this textually-structured approach to purposivism, all that distinguishes new purposivists from textualists is the new purposivists' willingness to invoke legislative history in cases of genuine semantic ambiguity.").

[170] *Bostock*, 140 S. Ct. at 1740-41, 1753.

several decisions have cited *Bostock*'s approach to statutory interpretation.[171] The Fifth Circuit even explained:

> [T]he *Bostock* majority focused on the "broad language" that Congress adopted, not on the ripple effects, however unforeseen, that flowed from it five decades later. The Court thus gave no interpretive weight to the fact that not a single drafter of Title VII in 1964 intended, noticed, or anticipated that "because of . . . sex" would cover discrimination against homosexual or transgender persons. The court remarked that resorting to "expected applications" or only those "foreseen at the time of enactment . . . seeks to displace plain meaning of the law in favor of something lying beyond it." Text is paramount — "only the words on the page constitute the law" — and if those words lead to "unexpected consequences," so be it.[172]

As such, *Bostock* illustrates that traditional textualist approaches to statutory interpretation may be shifting in favor of interpretive methods that consider the ultimate purpose of a statute.[173] This approach would support extensive climate regulation under the CAA. More specifically, whereas the Court often relied on traditional textualism to interpret the regulatory reaches of the CAA, *Bostock* illustrates how the Court can and should look at the CAA's ultimate purpose of regulating all air pollutants generally under new purposivism. Such an expansive approach to air pollution regulation would in turn permit greenhouse gas regulation under the CAA.

2. Bostock's Conflicting Effect on the Nondelegation Doctrine

Bostock's approach to statutory interpretation, however, has been described as having the potential to "lead to unintended destinations" such as "*Chevron*'s

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[171] *See, e.g.,* Allan v. Pennsylvania Higher Educ. Assistance Agency, 968 F.3d 567, 579 (6th Cir. 2020) (holding that legislative history when taken into account to interpret a statute is meant to clear up ambiguity); United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020) (beginning with the text to determine a statutory interpretation question per *Bostock*); United States v. Jabateh, 974 F.3d 281, 297 (3d Cir. 2020) (holding that statutory interpretation "turns on the best reading of 'the particular statutory language at issue, as well as the language and design of the statute as a whole.'").

[172] Thomas v. Reeves, 961 F.3d 800, 824 (5th Cir. 2020) (Willett, J., concurring) (quoting Bostock v. Clayton County, 140 S. Ct. 1731 (2020)) ("A time traveler from 1964 would doubtless express astonishment that Congress had . . . equated sex discrimination with sexual orientation discrimination . . . and that it had done so by adopting a one-word amendment (inserting "sex") from a representative who was cynically trying to scuttle the entire Civil Rights Act.").

[173] *See* Matt Ford, *Neil Gorsuch Just Upended the Conservative Legal Project*, NEW REPUBLIC (June 15, 2020), https://newrepublic.com/article/157418/neil-gorsuch-lgbtq-rights-conservatives ("Monday's ruling suggests that the reliably conservative Supreme Court majority sought for so long by right-wing legal activists may not be quite as reliable as it seems—and that their moral and ethical sacrifices to pursue it may have been in vain."). *But see* Steve Sanders, Bostock*: A Textualist Trump Appointee Delivers a Landmark Victory for LGBT Equality*, AM. CONST. SOC'Y (June 15, 2020), https://www.acslaw.org/expertforum/bostock-a-textualist-trump-appointee-delivers-a-landmark-victory-for-lgbt-equality/ ("Instead, the opinion is an exercise in pure, academic textual analysis.").

potential demise."[174] This argument rests on the premise that *Bostock*'s focus on statutory text and rejection of the major questions doctrine undermines reliance on *Chevron* deference to determine the meaning of a statute. Instead, advocates of abandoning *Chevron* argue that—when taken together with other recent Supreme Court decisions—*Bostock* signals a potential step towards a reversion to the nondelegation doctrine, which is aimed at preventing administrative agencies within the executive branch from shouldering too much of Congress's legislative power.[175] The nondelegation doctrine suggests that courts, not administrative agencies under the executive branch, are responsible for resolving statutory ambiguity because the Constitution vests the power to make laws in Congress.[176] This argument is rooted in *Marbury v. Madison*, holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[177] As such, proponents of nondelegation believe that *Chevron* unconstitutionally delegated too much power to regulatory agencies to interpret legislation.[178] While

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[174] Charlton C. Copeland, *Another Explanation of Justice Gorsuch's* Bostock *Vote*, REG. REV. (July 22, 2020), https://www.theregreview.org/2020/07/22/copeland-another-explanation-gorsuch-bostock-vote/; *see, e.g.,* Valerie C. Brannon & Jared P. Cole, LSB10204, *Deference and its Discontents: Will the Supreme Court Overrule* Chevron?, CRS LEGAL SIDEBAR (Oct. 11, 2018) (predicting that Chevron will be overturned); Jeremy P. Jacobs & Pamela King, *What a Kavanaugh Court Means For Environmental Law*, E&E NEWS (Sept. 22, 2020), https://www.eenews.net/stories/1063714385 ("Gorsuch has shown a commitment to reining in agency authority absent explicit permission from Congress."); Joe Patrice, *Neil Gorsuch Lays Landmines Throughout LGBTQ Discrimination Opinion*, ABOVE THE LAW (June 15, 2020), https://abovethelaw.com/2020/06/neil-gorsuch-lays-landmines-throughout-lgbtq-discrimination-opinion/ (arguing that *Bostock* may "be the vehicle for the next assault on basic tenets of statutory interpretation and *Chevron* deference").

[175] *See* Jacobs & King, *supra* note 174; *see also* Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076-77 (2019) ("But under both nondelegation and the major questions doctrine, the Court claims to restrict the power of an administrative agency and relocate lawmaking power, as required under separation of powers, to the legislative branch."). *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241-42 (2000) (offering nondelegation as a rationale for the major questions doctrine by arguing that "enforcement of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion. Without a reliable metric (other than an I-know-it-when-I-see-it test), the Court has long doubted its capacity to make principled judgments about such questions of degree").

[176] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle
universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("Congress generally cannot delegate its legislative power to another Branch."); Tortorice, *supra* note 175, at 1077 ("But under both nondelegation and the major questions doctrine, the Court claims to restrict the power of an administrative agency and relocate lawmaking power, as required under separation of powers, to the legislative branch.").

[177] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[178] *See, e.g.,* William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. R. 211, 212 (2019) ("At the very least, the prospect of even possibly reopening the non-delegation issue will surely prompt litigators to test the Court's new interest."); Julian D. Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the*

nondelegation arguments in Supreme Court jurisprudence have been largely dormant for almost 90 years, such arguments instead have manifested predominantly in applications of the major questions doctrine, which rejects *Chevron* deference on major issues that Congress could not have conceivably delegated to agencies.[179]

Recently, however, members of the Court have hinted at the revival of the nondelegation doctrine. Justice Gorsuch suggested in *Gundy v. United States* that there should be stringent limits on Congress's ability to delegate authority to address major issues to administrative agencies.[180] Moreover, permitting broad agency discretion to interpret statues may be "an 'evasive standard'" that "threaten[s] the separation of powers if it allowed the agency to make the 'important policy choices' that belong to Congress while frustrating 'meaningful judicial review.'"[181] Relying on this opinion, Justice Brett Kavanaugh also showed a willingness to revive the nondelegation doctrine in *Paul v. United States*, stating that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine . . . may warrant further consideration in future cases."[182] Justice Kavanaugh thus previewed how he and other similarly situated justices will analyze the major questions doctrine in the future, perhaps using a

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Most Dangerous Ideas in American Law, ATLANTIC (May 26, 2020), https://www.theatlantic.com /ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/ ("Relying on a so-called nondelegation doctrine, conservative originalists insist that the Founders never intended for government to work this way.").

[179] *See* Tortorice, *supra* note 175, at 1077; Daniel Farber, *Justice Gorsuch Versus the Administrative State*, CENTER FOR PROGRESSIVE REFORM (June 27, 2019), http://www.progressivereform.org/cpr-blog/justice-gorsuch-versus-the-administrative-state/; Asher Steinberg, *Judge Gorsuch and Chevron Doctrine Part III: The* Gutierrez-Brizuela *Concurring Opinion*, NOTICE & COMMENT (Mar. 29, 2017), http://yalejreg.com/ nc/judge-gorsuch-and-chevron-doctrine-part-ii-the-gutierrezbrizuela-concurring-opinion-by-asher-steinberg/. Instead of the nondelegation doctrine, the 1930's saw a shift towards the intelligible principle doctrine, which accommodated legislative delegations if the legislation had an intelligible need for governing agencies to be in charge of certain decisions. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Tortorice, *supra* note 175, at 1077 ("[T]he intelligible principle argument, in contrast to the nondelegation argument, is grounded more in something akin to constitutional realism rather than legal formalism, recognizing the realities of the traditional nondelegation doctrine."). Under both the major questions and nondelegation doctrines, "the Court claims to restrict the power of an administrative agency and relocate lawmaking power, as required under separation of powers, to the legislative branch." Tortorice, *supra* note 175, at 1077. As such, nondelegation arguments manifest behind traditional major questions doctrine applications because the Court uses the major questions doctrine to conclude that Congress couldn't have delegated an issue of major significance to an agency. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-54 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that *Chevron* was "an abdication of judicial duty" and that "[m]aybe the time has come to face the behemoth" of whether Congress can in fact delegate its authority to determine the law).

[180] *See* Gundy v. United States, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissent); Farber, *supra* note 179.

[181] *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissent) (quoting Industrial Union Dept., AFL–CIO v. American Petroleum Institute, 448 U.S. 607, 676, 685–686 (1980) (Rehnquist, J., concurring in judgment)).

[182] Paul v. United States, 140 S. Ct. 342 (2019); *see Gundy*, 139 S. Ct. 2131-48 (Gorsuch, J., dissent).

combination of the major questions doctrine and the nondelegation doctrine to strike down EPA regulations of greenhouse gases.[183]

However, *Bostock*'s holding that the major questions doctrine should not prohibit agencies from taking on "major initiatives" with "unexpected consequences" may hedge against nondelegation arguments.[184] If agencies can make major interpretations within the confines of a statute's text per *Bostock*, the nondelegation doctrine's apparent revival in *Gundy* could be drastically limited. In other words, *Bostock* suggests that we should be especially leery of an agency's asserted right to interpret the scope of its own authority, as opposed to reasonable agency interpretations of other aspects of a statute. This hedge against the nondelegation doctrine is important because "a reinvigorated nondelegation doctrine could pose risks to any grant of broad discretion to an administrative agency."[185] However, given that "[f]or every *Bostock* there might be, there's going to be a *Gundy*," there is likely a toss-up regarding which case a court will choose to side with.[186] Thus, *Bostock*'s conflict with recent nondelegation arguments may jeopardize future attempts to regulate greenhouse gases.

C. Why This Elephant Needs Attention

Since the Supreme Court now holds a 6-3 conservative majority with a desire to rethink *Chevron*,[187] it is possible that the Court may use future iterations of the

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183 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)) (arguing that "the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command.") (internal quotations omitted); *see* Paul v. U.S., 140 S. Ct. 342 (2019); Tortorice, *supra* note 175, at 1130 ("[T]he Court is now substituting one doctrine (the major questions doctrine) for another (traditional nondelegation doctrine) to deal with what it believes are excessive delegations by Congress. In doing so, the Court is increasing its own interpretive authority at the cost of agency deference."); *see also* Monast, *supra* note 78, at 462-63 ("[A]gencies have an incentive to expand the scope of their jurisdiction, potentially reaching beyond the authority delegated by statute and therefore running afoul of the separation of powers by encroaching on Congress's lawmaking powers."); Carlson et al., *supra* note 140; Farber, *supra* note 179 ("But only four Justices endorsed that test in Gundy. Three others, led by Justice Gorsuch, called for jettisoning the test. Justice Alito seemed sympathetic, though he did not join them, and Justice Kavanaugh did not participate. Thus, the future of the delegation doctrine seems to rest with Kavanaugh."). As Justice Kavanaugh tends to vote with the conservative block of the Court, his statements in *Paul* may reflect how other conservative members of the Court will see the issue. *See generally* LAWRENCE BAUM & NEAL DEVINS, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019) (discussing increased partisanship in voting in the federal judiciary).

184 *Bostock*, 140 S. Ct. at 1737.

185 *See* Lisa Heinzerling, *Agency Regulation and Interpretive Deference*, AM. CONST. SOC'Y 9 (Oct. 14, 2020), https://willamette.edu/law/pdf/acsscholarsexplain.pdf.

186 Jacobs & King, *supra* note 174.

187 *See* Richard Wolf & David Jackson, *Amy Coney Barrett Takes Oath as Supreme Court Justice, as GOP Celebrates 6-3 Conservative Majority*, USA TODAY (Oct. 26, 2020), https://www.usatoday.com/story/news/politics/2020/10/26/amy-coney-barrett-takes-oath-supreme-court-justice/6041415002/.

major questions doctrine to not only attack *Chevron*, but also to take yet another shot against regulating science-backed global warming.[188] If and when new climate legislation and regulations are brought by Congress or the EPA, the composition of the Supreme Court makes it more likely than ever that the major questions and nondelegation doctrines could still be used either together or separately to overturn such attempts to tackle climate change.[189] The major questions doctrine alongside a revitalized nondelegation doctrine can thus place the Supreme Court in a powerful position–one much more powerful than originally intended by Congress in dictating climate policy. If these doctrines are invoked by the Supreme Court to bar stringent climate regulation via the CAA, this would solidify precedent to use the major questions doctrine to hamper agency deference and increase the court's interpretive powers.[190] Specifically, the CAA is known for its complex technical, scientific, and structural character.[191] Given "[t]he inherent relationship between agency authority and judicial deference," resolving whether the EPA can regulate greenhouse gases under the CAA "will directly impact both the present *and* future of the EPA's ability to regulate effectively under the CAA."[192] As such, "the future of United States climate policy may be determined by the Supreme Court's reading (not the EPA's)" of the CAA's complex regulatory scheme.[193]

Using the major questions doctrine to bar climate regulation under the CAA thus ignores the fundamental demands of the CAA—to ensure clean air and reduced emissions—and risks breaking down the power of the administrative state and cementing the irreversible reality of global warming. Instead, the CAA should be interpreted in light of its plain meaning and the present circumstances surrounding its effective implementation. Such a reading prevents static interpretations of the CAA that chip away at the statute's comprehensive pollution reduction strategy.[194] Thus, the CAA must be read to grant the EPA authority to broadly regulate greenhouse gas emissions, rather than placing seemingly arbitrary limits on such authority.

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[188] *See* Webb, et al., *supra* note 132, at 10708-09; Carlson et al., *supra* note 140; *supra* Section II.A.

[189] Carlson et al., *supra* note 140 ("Nevertheless, several justices have discussed the doctrines recently, suggesting they may impose greater oversight over the regulatory authority of administrative agencies and limit Congress's ability to delegate authority to those agencies in the first place.").

[190] Tortorice, *supra* note 175, at 1114, 1130.

[191] Kunkel, *supra* note 78, at 376 (citing 73 Fed. Reg. 44,354, 44,366 (July 30, 2008)); *see* UARG v. EPA, 573 U.S. 302, 325 (2014) (discussing the interplay of the CAA's "triggering" provisions).

[192] Kunkel, *supra* note 78, at 376-77 ("And given the importance of the underlying objective at stake— combating climate change—the EPA's ability to regulate is perhaps more important now than ever.").

[193] *See* Richardson, *supra* note 82, at 358.

[194] *See, e.g.,* Goffman & Bloomer, *supra* note 13, at 931 ("[T]he Trump EPA defeats the comprehensive nature of the CAA's pollution- abatement programs by disaggregating pollution sources and pollution reductions and sub-categorizing benefits when the Agency must determine whether to regulate.").

Raising the stakes even higher, judicial intervention via the major questions doctrine may halt environmental policy altogether. Congress already struggles to pass *any* major piece of legislation, much less an environmental policy.[195] Such Congressional deadlock creates a political climate where agencies are cornered into making bold reinterpretations of statutes to facilitate their own administrative goals rather than waiting for legislative change first.[196] Thus, whether the major questions doctrine is successfully invoked to bar extensive climate regulation is important because any decision on this issue can and will have lasting consequences on an agency's ability to carry out its statutory mandates. Specifically, "[i]f the [CAA] can't get at that pollution because of a very narrow interpretation of the act, then that ties the hand of the next administration."[197]

III. SOLUTION

A legal argument opposing climate regulation via the CAA should not stand given the expansive precedent under *Massachusetts* that greenhouse gases are air pollutants subject to CAA regulation, as well as *Bostock*'s sharp declaration that "major initiatives" by Congress can have "unexpected consequences" that require statutory protection.[198] Thus, invocations of the major questions doctrine limiting administrative power to regulate climate change should be rejected by the

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[195] *See* Jo Marie Rios, *The Rollback of Environment Justice: Executive Orders, Rulemaking, and the Administrative Process Under the Trump Administration*, 13 ENVTL. JUSTICE 91, 91 (2020) ("However, with a divided Congress, amendments to these two landmark pieces of legislation have become increasingly difficult to broker and negotiate solutions to the most salient environmental problems in today's society, specifically compromised local ambient air quality (point source pollution) and, more generally, climate change (nonpoint source pollution)."); Dan Farber, *Short and Simple Climate Legislation*, LEGAL PLANET (Oct. 29. 2020), https://legal-planet.org/2020/10/29/short-and-simple-climate-legislation/ ("The last time Congress tried to pass climate change legislation, the bill was about 800 pages long. That bill, the Waxman-Markey Act, tried to adopt a comprehensive set of emissions reduction measures, which is a complicated business.") [hereinafter *Simple Climate Legislation*]; Emma Foehringer Merchant, *Can US Lawmakers Agree on Big Climate and Clean Energy Legislation?*, GREENTECH MEDIA (Oct. 21, 2019), https://www.greentechmedia.com/articles/read/can-u.s-lawmakers-agree-on-big-climate-and-clean-energy-legislation; Johnson, *supra* note 11; Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS INST. (Sept. 23, 2019), https://www.brookings.edu/research/the-challenging-politics-of-climate-change/ ("As the climate crisis becomes more serious and more obvious, Americans remain resistant to decisive and comprehensive action on climate change. . . . Complexity is the death knell of many modern public policy problems and solutions. And complexity is inherent in climate change."); Elvina Nawaguna, *Democrats Appear Stymied on a Top Priority: Climate Legislation*, ROLL CALL (July 18, 2019), https://www.rollcall.com/2019/07/18/democrats-appear-stymied-on-a-top-priority-climate-legislation/.

[196] *See, e.g.,* Richardson, *supra* note 82, at 358 (using the Clean Power Plan as an example of the EPA taking advantage of the opportunity to reinterpret gaps or irregularities in section 111(d) to facilitate the Obama administration's climate goals).

[197] Ellen M. Gilmer, *EPA Authority Over Power Sector's Climate Impacts Heads to Court*, BLOOMBERG LAW (Oct. 7, 2020), https://news.bloomberglaw.com/product-liability-and-toxics-law/epa-authority-over-power-sectors-climate-impacts-heads-to-court.

[198] *See supra notes* 153-159 and accompanying text.

courts.[199] However, *Bostock*'s holding, while perhaps representing a shift towards new purposivism, may arguably be restricted solely to the Civil Rights Act context, meaning that *Bostock* cannot be read broadly to justify greenhouse gas regulation under the CAA. However, *Bostock*'s interpretive approach forecloses this argument by clearly allowing expansive readings of statutes like the CAA in light of today's "unexpected" reality. Thus, the specific context of *Bostock* has no bearing when the Court's decision relied so heavily on new purposivist principles of statutory interpretation, and the major questions doctrine should thus not foreclose extensive climate regulation under the CAA. The alternative risks discouraging deference to the EPA on complex and technical issues and thus exacerbates the rapid effects of global warming.[200]

On the legislative front, Congress should ideally amend the CAA and explicitly authorize the EPA to broadly regulate greenhouse gases as air pollutants.[201] Such an amendment is essential because only "something beyond pure textual analysis" will clarify the EPA's role in climate regulation.[202] Since the major questions doctrine assumes that Congress must speak directly to issues of vast economic and political significance, amending the CAA would clearly and explicitly put climate change regulation within the EPA's authority. For example, Congress can amend the CAA's Congressional findings in section 101 to explicitly recognize "that the emission of greenhouse gases gravely endangers human health and welfare."[203] Making this direct recognition of greenhouse gases under the congressional findings section of the CAA would clearly place greenhouse gas regulation in the hands of the EPA. Other possible amendments include adding a specific greenhouse gas emissions reductions goal in the CAA's text "depending on Congress's level of ambition," or explicitly providing the EPA the authority to regulate greenhouse gases by defining "air pollutant" as including substances that cause or contribute to global warming.[204] These amendments would thus clarify

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[199] *See supra* Section II.A.

[200] Kunkel, *supra* note 78, at 397-98 ("While the CAA's complexity amplifies the need for judicial review by expanding the range of possible interpretations of ambiguities, it simultaneously increases the importance of technical and scientific expertise in their interpretation, paradoxically encouraging heightened deference to the EPA.").

[201] Note that this argument does not assume that the Court will necessarily ever throw out the prior precedent set in *Massachusetts v. EPA* authorizing such a broad interpretation. Instead, this argument assumes that there is a potential for opponents of greenhouse gas regulation to rely on textualist arguments that would preclude reading the CAA in a way that directly permits greenhouse gas regulation.

[202] *See* Ellen M. Gilmer, *Environmentalists Relieved as Critics Slam 'Muddled' SCOTUS Term*, BLOOMBERG LAW (June 22, 2020), https://news.bloomberglaw.com/environment-and-energy/environmentalists-relieved-as-critics-slam-muddled-scotus-term (*quoting* Jonathan H. Adler of Case Western Reserve University). *See generally* Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 460 (D.C. Cir. 2017) (holding that "Congress's failure to enact general climate change legislation does not authorize EPA to act").

[203] *Simple Climate Legislation*, *supra* note 195.

[204] *Id.* ("And add the following to subsection (d), relating to the purposes of the Clean Air Act: '(5) to reduce net U.S. emissions of greenhouse gases by at least 40% by 2030 and 80% by 2050.'").

the CAA's central role in addressing climate change. Absent amending the CAA, "the competing interests underlying administrative law as a whole—deferring to agency expertise while preserving the judiciary's authority to check agency—make finding a *complete* solution to the issue . . . implausible."[205]

While relying on such Congressional action is typically unrealistic, the new Biden administration may be a gamechanger in creating long-lasting environmental policy changes through the legislature.[206] Specifically, Biden's election increases the likelihood of passing environmental legislation given that the Democrats now control the White House, Senate, and House for the first time since 2008.[207] As such, "Biden will have the advantage . . . of being able to leverage the positive trends, such as the declining cost of renewables and storage."[208] Even if such Congressional action proves difficult for Biden, his administration will likely rely on administrative action to stretch the limits of EPA authority and act more broadly than any previous president to curb planet-warming emissions.[209] In doing so, the Biden administration should act to undermine Trump-era regulations by promulgating more stringent environmental regulations through the EPA to reverse the damage taken by the Trump administration.[210] If the Biden administration relies on regulatory action to ensure climate regulation, the holdings of *Bostock* should be broadly construed in light

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205 Kunkel, *supra* note 78, at 406.

206 *See* Matthew Daly & Christina Larson, *Summit Shows Biden's Big Vision on Fighting Climate Change*, ASSOC. PRESS NEWS (Apr. 23, 2021), https://apnews.com/article/government-and-politics-technology-business-climate-summits-949962c299ab8792d82d0d0fef57b046; Matt McGrath, *Joe Biden: How the President-Elect Plans to Tackle Climate Change*, BBC NEWS (Nov. 10, 2020), https://www.bbc.com/news/science-environment-54858638.

207 *See* Clare Malaone, *What Would Democrats Do If They Controlled Congress And The White House?*, FIVETHIRTYEIGHT (Oct. 22, 2020), https://fivethirtyeight.com/features/what-would-democrats-do-if-they-controlled-congress-and-the-white-house/.

208 Dan Farber, *What Next for Climate Policy?*, LEGAL PLANET (Nov. 4, 2020), https://legal-planet.org/2020/11/04/what-next-for-climate-policy/ (also noting that state governments will also be more willing to work with Biden than Trump).

209 *Id.*; *see* Eilperin et al., *supra* note 10; Tim McDonnell, *How Biden Can Fix America's Climate Credibility*, QUARTZ (Nov. 7, 2020), https://qz.com/1927494/how-bidens-climate-plan-will-work-without-a-democratic-senate/; Anna Phillips, *Five Things Joe Biden Can Do to Fight Climate Change — Without Congress' Help*, L.A. TIMES (Nov. 8, 2020), https://www.latimes.com/politics/story/2020-11-08/five-things-joe-biden-can-do-to-fight-climate-change-without-congress-help.

210 *See* Bryan & Prochaska, *supra* note 3. Note that the Trump administration's Affordable Clean Energy rule was already struck down because it "hinged on a fundamental misconstruction of Section 7411(d) of the Clean Air Act." Am. Lung Ass'n & Am. Pub. Health Ass'n v. Epa, Nos. 19 -1140, 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188, 2021 U.S. App. LEXIS 1333, at *23 (D.C. Cir. Jan. 19, 2021) ("The question in this case is whether the Environmental Protection Agency (EPA) acted lawfully in adopting the 2019 Affordable Clean Energy Rule . . . as a means of regulating power plants' emissions of greenhouse gases. It did not."). This holding is a "resounding blow to EPA's efforts to more strictly limit its authority to regulate greenhouse gas emissions under the Clean Air Act, a key goal of the Trump administration's deregulatory agenda." Niina H. Farah, *Court Strikes Fatal Blow to Trump Carbon Rule*, E&E NEWS (Jan. 19, 2021), https://www.eenews.net/stories/1063722839?utm_medium=email&utm_source=eenews%3Aeepubs&utm_campaign=news_alert&ee_data=.

of ample Supreme Court precedent justifying greenhouse gas regulation to ultimately bar the major questions doctrine.

CONCLUSION

After the Trump administration's steady takedown of environmental protections and consistent legal challenges to the EPA's authority to regulate greenhouse gas emissions, future litigation surrounding the EPA's authority to regulate climate change will very likely involve decisions about the major questions and nondelegation doctrine. While the "major questions doctrine arguably serves no normative purpose by itself" in that it doesn't "lead to better or more efficient regulation,"[211] the doctrine has the firepower of the nondelegation doctrine behind it to substantially limit agency action in the face of major problems like climate change.[212] The Supreme Court's decision in *Bostock*, however, levels the playing field by forwarding a method of statutory interpretation that contextualizes seemingly outdated statutes in their present-day contexts. If statutory interpretation jurisprudence continues to trend in favor of a *Bostock* approach to statutory interpretation, it is likely that handling the elephant of climate change may finally be left up to the discretion of the EPA's scientific expertise in handling major environmental problems. Thus, the path towards extensive climate change regulation requires going down a road that is more willing to defer to agency expertise in light of the impending threat of major problems like climate change.

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[211] Richardson, *supra* note 82, at 27.

[212] *See* Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 NYU J.L. & LIBERTY 280, 301-02, 325 (2020).