

## Delegating Climate Authorities

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*The science is clear: the United States and the world must take dramatic action to address climate change or face irreversible, catastrophic planetary harm. Within the U.S.—the world’s largest historic emitter of greenhouse gas emissions—this will require passing new legislation or turning to existing statutes and authorities to address the climate crisis. Doing so implicates existing and prospective delegations of legislative authority to a large swath of administrative agencies. Yet congressional climate decision-making delegations to any executive branch agency must not dismiss the newly resurgent nondelegation doctrine. Described by some scholars as the “most dangerous idea in American law,” the nondelegation doctrine prohibits Congress from delegating its legislative authority to the executive branch absent an intelligible principle to guide implementation. Failure to fully take into account possible nondelegation challenges could stop forward-looking climate action in its tracks. This Article addresses the contours of the nondelegation doctrine as applied to future climate action. In doing so, it argues that climate change and its associated impacts are a complex collective action problem that implicate Article II authorities independent of congressional lawmaking. These authorities may provide an avenue through which climate action can be taken irrespective of the limits imposed by the nondelegation doctrine. As prospective climate solutions emerge, the nondelegation doctrine lurks in the background. Climate action must therefore be reconciled with presidential foreign relations, national security, and emergency authorities—three areas where the President is afforded significant, but not absolute deference.*

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## Introduction

The next decade is critical for global and U.S. climate action.<sup>1</sup> President Biden has repeatedly declared climate change to be one of the four existential crises facing the United States,<sup>2</sup> and scientists have sounded the alarm on the need to take transformational action to avert catastrophic, irreversible harm.<sup>3</sup>

While standalone climate legislation has proven to be elusive, congressional leaders have nevertheless pledged a variety of ambitious climate legislative measures.<sup>4</sup> This includes Green New Deal framework legislation,<sup>5</sup> legislation to establish a National Climate Bank,<sup>6</sup> and even calls to declare climate change a national emergency.<sup>7</sup> From the White House, President Biden has included climate policies as part of the \$1.2 trillion dollar infrastructure plan,<sup>8</sup> while simultaneously pledging bold regulatory climate action under the Clean Air Act and other laws.<sup>9</sup> President Biden has also issued an executive order on climate change<sup>10</sup> and appointed key executive branch officials—such as former Secretary of State John Kerry and Environmental Protection Agency (EPA) Administrator Gina McCarthy—to combat the climate crisis. In the

1. Last year, the Intergovernmental Panel on Climate Change (IPCC) issued its Sixth Assessment Report. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT (2021) [hereinafter IPCC SIXTH ASSESSMENT REPORT]; see also U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, SUMMARY FINDINGS (2018) [hereinafter NCA4], [https://nca2018.globalchange.gov/downloads/NCA4\\_2018\\_FullReport.pdf](https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf) [<https://perma.cc/J3ME-UZUZ>]; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, (2018) [hereinafter IPCC 1.5 REPORT]; J.B. Ruhl & Robin Kundis Craig, 4°C, 106 MINN. L. REV. 191 (2021); Will Steffen et al., *Trajectories of the Earth System in the Anthropocene*, 115 PROC. NAT'L. ACAD. SCI. 8252, 8257 (2018).

2. See, e.g., Rebecca Beitsch, *Biden Calls Climate Change One of America's Four Major Crises*, HILL (Aug. 20, 2020), <https://thehill.com/policy/energy-environment/overnights/513181-overnight-energy-biden-calls-climate-change-one-of> [<https://perma.cc/RN7V-2MAQ>].

3. See WORLD METEOROLOGICAL ORGANIZATION, UNITED IN SCIENCE 2020 2 (2020) [hereinafter UNITED 2020] (calling for transformative action to address climate change). Four climate reports from the Department of Defense, Department of Homeland Security, National Security Council, and National Intelligence Council were released in October 2021, highlighting climate change's security impacts. See Mark Nevitt, *What You Need to Know About the New Climate Security Reports*, LAWFARE (Oct. 27, 2021), <https://www.lawfareblog.com/what-you-need-know-about-new-climate-security-reports> [<https://perma.cc/HL3F-M76Y>].

4. For example, last year, Congress passed a massive transportation and infrastructure package that addresses climate change. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

5. Green New Deal Resolution, H.R. Res. 109, 116th Cong. (2019).

6. S. 283, 117th Cong. (2021).

7. S. Con. Res. 22, 116th Cong. (2019). This proposed legislation specifically linked climate change with national security challenges, stating “[w]hereas the United States Department of State, Department of Defense, and intelligence community have identified climate change as a threat to national security, and the Department of Homeland Security views climate change as a top homeland security risk.” *Id.*

8. See Infrastructure Investment and Jobs Act § 11403 (“The Secretary shall establish a carbon reduction program to reduce transportation emissions.”).

9. See, e.g., Ella Nilsen, *Biden's “All of Government” Plan for Climate, Explained*, VOX.COM (Jan. 27, 2021), <https://www.vox.com/22242572/biden-climate-change-plan-explained> [<https://perma.cc/9GHC-6NA2>].

10. Tackling the Climate Crisis at Home and Abroad, Exec. Order 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

absence of new climate legislation, the EPA is looking at existing legislation—including the Clean Air Act, Emergency Policy and Conservation Act (EPCA), and other statutes—to address the mounting climate crisis.<sup>11</sup>

The prospects for standalone climate legislative action, such as a novel cap-and-trade program, carbon tax, or carbon fee, appear dismal.<sup>12</sup> Aggressive climate regulatory action will likely be challenged as soon as it takes off from the starting blocks—witness successful challenges to the Obama-era Clean Power Plan.<sup>13</sup> And the Supreme Court recently granted certiorari in *West Virginia v. EPA* on the question of whether Congress constitutionally authorized the EPA to issue “significant rules” under the Clean Air Act.<sup>14</sup>

Increasingly, any attempt to address climate change will require navigating administrative law doctrines. This includes the major questions doctrine, *Chevron* deference, and the nondelegation doctrine,<sup>15</sup> which is poised to act as a “climate spoiler” that may undercut bold legislative and regulatory climate action.

The nondelegation doctrine derives from Article I of the U.S. Constitution, which grants all legislative power to Congress.<sup>16</sup> The nondelegation doctrine forbids Congress from delegating its Article I legislative powers to executive branch administrative agencies.<sup>17</sup> The Supreme Court has struck down a federal

11. The EPA, for example, recently announced that it is regulating hydrofluorocarbons (HFCs) under its existing authority. HFCs are a greenhouse gas (GHG) that is “thousands of times more potent than carbon dioxide at warming the planet.” Lisa Friedman, *E.P.A. to Sharply Limit Powerful Greenhouse Gas Emissions*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/climate/EPA-HFCs-hydrofluorocarbons.html> [<https://perma.cc/8B8S-L7KH>]. The Infrastructure Investment and Jobs Act also devotes an entire section to climate change, delegating broad authorities to the Secretary of Transportation to reduce transportation emissions. *See supra* note 8.

12. Indeed, Congress last sought to pass comprehensive climate legislation in 2009, when the House Energy and Commerce Committee approved the American Clean Energy and Security Act of 2009, which sought to place binding controls on emissions of GHGs via a cap-and-trade system. Following compromise amendments, this attempt at comprehensive climate legislation ultimately failed in the Senate. For a discussion of these negotiations and the Senate’s failure to pass this legislation, see Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 11, 2011), <https://www.newyorker.com/magazine/2011/10/11/as-the-world-burns> [<https://perma.cc/RT4E-E7W9>]. This attempt followed earlier efforts in October 2003 (The Climate Stewardship Act, introduced by Senators John McCain (R-AZ) and Joe Lieberman (D-CT)) and June 2008 (The Lieberman-Warner Climate Security Act). These legislative efforts were defeated or otherwise languished in the Senate. *See* S. 139, 108th Cong. (2003); S. 2191, 110th Cong. (2007).

13. *See* Michael Gerrard, *Presidential Progress on Climate Change: Will the Courts Interfere with Biden on Climate Change?*, AM. CONST. SOC’Y (Feb. 2021), <https://www.acslaw.org/wp-content/uploads/2021/02/Presidential-Progress-On-Climate-Change.pdf> [<https://perma.cc/GBH4-YURY>]. The Supreme Court ruled on a nondelegation challenge to the Clean Air Act in 2001 in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 474 (2001) (holding that Congress must give “intelligible principles” to guide the EPA in its discretion and concluding that “the scope of discretion [the statute] allows is in fact well within the outer limits on nondelegation precedents”).

14. 985 F.3d 914 (D.C. Cir. 2020), *cert. granted*, 142 S. Ct. 420 (2021) (No. 20-1530).

15. *See* Gerrard, *supra* note 13.

16. U.S. CONST. art. I, § 1, cl. 1.

17. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 352-53 (6th ed. 2019); *see also* Schechter Poultry v. United States, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested.”).

statute just two times based on successful nondelegation challenges.<sup>18</sup> Under modern jurisprudence, if Congress provides an “intelligible principle” to guide the executive branch in implementing its delegation, the Court will uphold the statute and the agency’s decision making.<sup>19</sup>

But cracks are forming in this longstanding “intelligible principle” test.<sup>20</sup> In light of a newly transformed Supreme Court and the Court’s 2019 opinion in *Gundy v. United States*, a rockier road for climate efforts may lie ahead.<sup>21</sup> While the statute at issue in *Gundy* ultimately survived a nondelegation challenge, Justice Gorsuch was joined by Justice Thomas and Chief Justice Roberts in a forceful dissent that argued in favor of the nondelegation doctrine’s revival.<sup>22</sup> Since *Gundy*, two more justices—Justice Kavanaugh and Justice Barrett—have been appointed to the Court. Both appear receptive to similar nondelegation challenges.<sup>23</sup> The nondelegation doctrine’s long-dormant but awesome power to unwind agency authority is now a real possibility.<sup>24</sup> Described by Professors Julian Mortenson and Nicholas Bagley as “one of the most dangerous ideas in American law,” a renewed nondelegation doctrine may place a chilling effect on forward-looking climate regulatory action.<sup>25</sup> Following the Supreme Court’s 9-0 decision in *Whitman v. American Trucking Association* in 2001,<sup>26</sup> the nondelegation doctrine was viewed by many scholars as a New Deal-era relic,

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18. Both of these occurrences took place in 1935. See *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

19. *Whitman v. Am. Trucking Ass’n Inc.*, 531 U.S. 457, 472 (2001).

20. The intelligible principle test predates *Schechter Poultry* and *Panama Refining* and was first articulated in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

21. 139 S. Ct. 2116 (2019).

22. *Id.* at 2131 (Gorsuch, J., dissenting).

23. See *United States v. Paul*, 718 F. App’x 360 (6th Cir. 2017), *cert denied*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari) (stating that “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases”). Justice Barrett’s precise views on the nondelegation doctrine remain unknown. Then-Judge Barrett did not squarely address the nondelegation doctrine when she served on the Seventh Circuit. Writing in the *Cornell Law Review* in 2014, she critiqued the governing “intelligible principle” test for determining whether a delegation of legislative authority to an executive agency is constitutional as “notoriously lax.” Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

24. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1882 (2019); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1934 (2020); Jonathan Skinner-Thompson, *Administrative Law’s Extraordinary Cases*, 30 DUKE ENV’T L. & POL’Y F., 293, 309 (2020); Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 417 (2022); see also Mark Nevitt, *The Remaking of the Supreme Court: Implications for Climate Change Litigation & Regulation*, 42 CARDOZO L. REV. 101, 111 (2021) (discussing how the appointment of Justice Amy Coney Barrett will impact climate regulatory efforts).

25. Julian Davis Mortenson & Nicholas Bagley, *There’s No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-originalism/612013/> [<https://perma.cc/MYW8-4HPZ>]. Professors Mortenson and Bagley also recently completed a highly influential historical treatment of the nondelegation doctrine, arguing that the Constitution was originally understood to contain a nondelegation doctrine. See Mortenson & Bagley, *supra* note 24, at 280.

26. 531 U.S. 457 (2001).

with commentators “treating it variously as moribund or a failure.”<sup>27</sup> After *Gundy* and a transformed Supreme Court, the nondelegation doctrine must not be treated as a dead letter.<sup>28</sup>

This Article overlays the state of the nondelegation doctrine on prospective climate action. In doing so, it offers a climate “nondelegation roadmap” for Congress and administrative agencies to navigate rockier nondelegation shoals ahead. Specifically, it addresses climate-related delegations in the fields of foreign affairs, national security, and emergency law. These three areas, broadly defined, offer a possible shield against prospective nondelegation challenges and a narrow window through which climate action may be taken. Indeed, while the Roberts Court has demonstrated an increased willingness to discipline the administrative state, it has also endorsed deference to the executive branch in matters of foreign affairs,<sup>29</sup> national security,<sup>30</sup> and emergency powers.<sup>31</sup> And climate change cannot be neatly categorized as a domestic environmental issue. It also implicates foreign affairs, national security, and emergency delegations, as the President must respond to climate-induced disasters abroad and safeguard military installations from extreme weather at home.<sup>32</sup>

This Article proceeds in three parts. Part I discusses the current state of the nondelegation doctrine, beginning with *Schechter Poultry* and *Panama Refining* and continuing through Justice Gorsuch’s forceful dissent in *Gundy*. Part II analyzes the current range of climate regulatory authorities in light of the nondelegation doctrine. Part III proposes a climate roadmap, offering broad principles for lawmakers to follow in their efforts to address the climate crisis while minimizing the risk of nondelegation challenges. This roadmap connects the President’s national security, foreign relations, and emergency authorities with climate action. Tapping into these Article II authorities may provide an additional avenue for climate action that helps sidestep the nondelegation doctrine.

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27. Coglianese, *supra* note 24, at 1889.

28. This was most recently seen in a 2019 case, *Gundy v. United States*, which challenged the constitutionality of the Sex Offender Registration and Notification Act (SORNA) on nondelegation grounds. 139 S. Ct. 2116 (2019); *see also* Coglianese, *supra* note 24, at 1851 (arguing that the “nondelegation doctrine remains alive, and is more manageable and coherent” than other proposed alternatives).

29. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-22 (1936).

30. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 31 (2008) (Roberts, J.) (“We find that [the Navy’s interests], and the documented risks to national security, clearly outweigh the harm on the other side of the balance.”).

31. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2019) (Roberts, J.) (stating that congressional delegations to the President in the context of immigration “exude[d] deference”).

32. *See, e.g.*, Mark Nevitt, *On Environmental Law, Climate Change, and National Security Law*, 44 HARV. ENV’T L. REV. 321, 365 (2020); Mark Nevitt, *The Commander in Chief’s Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 441 (2015).

I. The Nondelegation Doctrine: From *Schechter Poultry* to *Gundy*

Article I of the U.S. Constitution vests “all legislative powers herein granted . . . in a Congress of the United States.”<sup>33</sup> In turn, Congress may not delegate its legislative power to the executive branch or administrative agencies.<sup>34</sup> Notwithstanding this broad prohibition, the Supreme Court has only invalidated a federal law or regulation on nondelegation grounds on two occasions, both during the New Deal era: *A.L.A. Schechter Poultry Corp. v. United States*<sup>35</sup> and *Panama Refining Co. v. Ryan*.<sup>36</sup> In what follows, I analyze the key cases that address the nondelegation doctrine, contextualizing their importance for broader climate efforts.

A. *The Modern Evolution of the Nondelegation Doctrine: From Schechter Poultry (1935) to Whitman v. American Trucking Associations, Inc. (2001)*

1. Two Successful Nondelegation Challenges: *Panama Refining* (1935) & *Schechter Poultry* (1935)

In *Panama Refining v. Ryan*, the Court struck down a statutory provision for violating the nondelegation doctrine.<sup>37</sup> The contested provision delegated authority to the President to prohibit the shipment in interstate commerce of oil produced in excess of governmental quotas.<sup>38</sup> In determining that this provision was an unconstitutional delegation of legislative authority to the President, the Court emphasized that Congress had failed to provide any standard whatsoever to limit or guide the executive branch’s decision-making.<sup>39</sup>

Shortly thereafter, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated the federal Live Poultry Code, a regulation promulgated under the National Industrial Recovery Act.<sup>40</sup> This Act authorized the President to regulate certain industries by developing codes of conduct governing business groups and boards for the purpose of promoting fair competition.<sup>41</sup> The challenged regulation addressed various employment-related issues (e.g., establishing a minimum wage and a forty-hour work week) and prohibited buyers from rejecting individual sick chickens when purchasing a large amount of poultry.<sup>42</sup> The Court faulted the congressional delegation for being

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33. U.S. CONST. art. I, § 1.

34. See Nevitt, *supra* note 32, at 353; *Schechter Poultry v. United States*, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested.”)

35. 295 U.S. 495 (1935).

36. 293 U.S. 388 (1935).

37. *Id.*

38. *Id.* at 400.

39. *Id.* at 430.

40. 295 U.S. 495, 550 (1935).

41. *Id.* at 522-23.

42. *Id.* at 523-27.

impermissibly broad, as the statute gave the President unlimited discretion to define “fair competition.”<sup>43</sup> The Court acknowledged that there exists a “host of details with which the national Legislature cannot deal directly,”<sup>44</sup> but held that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”<sup>45</sup> Congress can “leav[e] to selected instrumentalities the making of subordinate rules within prescribed limits,” but it cannot transfer responsibility for enacting overarching standards.<sup>46</sup> This decision—issued in the middle of the Great Depression and FDR’s New Deal—coincided with a massive increase in the size of the administrative state.

Of note, neither *Schechter Poultry* nor *Panama Refining* discussed the intelligible principle test for congressional delegations, a test first announced seven years earlier in *J.W. Hampton, Jr. Co. v. United States*.<sup>47</sup> Under this test, when Congress delegates decision-making authority to agencies, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”<sup>48</sup>

All nondelegation challenges since 1935 have failed. This likely reflects the Court’s judgment that broad delegations to expert agencies are necessary to meet the challenges of an increasingly complex and technical modern world. The judiciary is not well-equipped to draw meaningful lines to referee the scope of congressional delegations, and it is virtually impossible for Congress to pass statutes that address the full menu of implementation options to guide agency decision making.<sup>49</sup>

## 2. An Unsuccessful Nondelegation Challenge: *Mistretta v. United States* (1989)

In *Mistretta v. United States*, the petitioners challenged the constitutionality of the Sentencing Reform Act of 1984, arguing that Congress unlawfully delegated its legislative authority to the newly established Sentencing Commission.<sup>50</sup> Under the Act, Congress provided guidance to the Sentencing Commission on crafting sentencing guideline ranges and provided eleven factors for the Commission to consider in establishing categories of defendants.<sup>51</sup> Writing for the majority, Justice Blackmun highlighted that the nondelegation doctrine “does not prevent congress from obtaining the assistance of its

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43. *Id.* at 531-34.

44. *Id.* at 530; see generally Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 399 (2007) (describing the creation of “scores of new administrative agencies”).

45. *Schechter Poultry*, 295 U.S. at 529.

46. *Id.* at 530.

47. 276 U.S. 394, 409 (1928).

48. *Id.*

49. See CHEMERINSKY, *supra* note 17, at 354.

50. 488 U.S. 361, 371-72 (1989).

51. *Id.* at 374-76.

coordinate branches”<sup>52</sup> and reaffirmed the intelligible principle test articulated in *J.W. Hampton, Jr. Co.*<sup>53</sup> In upholding the intelligible principle test’s enduring importance, the Court distinguished *Mistretta* from both *Schechter Poultry* and *Panama Refining*, stating that in the latter two cases Congress “failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress has delegated power . . . [while] no delegation of this kind is present here.”<sup>54</sup> Justice Blackmun also highlighted the Court’s historical treatment of the nondelegation doctrine since the New Deal, which reflects a “practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>55</sup>

Justice Scalia wrote a forceful dissent in *Mistretta*, arguing that the Sentencing Commission “established significant, legally binding prescriptions governing application of governmental power against private individuals.”<sup>56</sup> Justice Scalia dismissed the technical nature of the Sentencing Commission, instead noting that the decisions made by the Commission “are heavily laden with value judgments and policy assessments.”<sup>57</sup>

### 3. The Nondelegation Doctrine’s Nadir: *Whitman v. American Trucking Associations, Inc.* (2001)

In 2001, the Supreme Court decided *Whitman v. American Trucking Associations, Inc.*, a case that challenged the Clean Air Act’s delegation of authority to the EPA.<sup>58</sup> This case has been the high-water mark for the Supreme Court’s skepticism of nondelegation doctrine challenges and represents a shift away from *Mistretta*. Justice Scalia wrote the unanimous opinion that upheld the Clean Air Act’s delegation to the EPA Administrator to promulgate national ambient air quality standards (NAAQS).<sup>59</sup> *Whitman* has taken on renewed importance as the Clean Air Act has become the main statutory tool to reduce GHG emissions.<sup>60</sup> Under the Clean Air Act, Congress delegates to the EPA Administrator the authority to protect public health and welfare through the promulgation of NAAQS. This section delegates authority to the EPA Administrator the authority to establish air quality standards based on Clean Air Act guidance and a “margin of safety...requisite to protect the public health.”<sup>61</sup>

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52. *Id.* at 373.

53. *Id.* at 372 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

54. *Id.* at 361 n.7.

55. *Id.* at 372.

56. *Id.* at 413 (Scalia, J., dissenting).

57. *Id.* at 414 (Scalia, J., dissenting).

58. 531 U.S. 457 (2001).

59. *See* 42 U.S.C. § 7409 (2018).

60. Professor Cass Sunstein has previously written about the constitutionality of the numerous delegations within the Clean Air Act. *See* Cass R. Sunstein, *Is the Clean Air Act Constitutional?*, 98 MICH. L. REV. 303, 359 (1999).

61. 42 U.S.C. § 7409 (b)(1).

Section 109(a) of the Clean Air Act requires that the EPA Administrator promulgate NAAQS for each “air pollutant” for which “air quality criteria” has been issued.<sup>62</sup> In 1997, the EPA Administrator revised ozone and particulate matter NAAQS in order to address concerns associated with a widening hole in the ozone layer in the earth’s atmosphere. Ozone depletion is a somewhat analogous collective action problem to climate change.<sup>63</sup>

Following the promulgation of these revised NAAQS, the American Trucking Associations joined with other private companies and three states (Ohio, Michigan, and West Virginia) to sue the EPA Administrator (then Administrator Christine Todd Whitman). The plaintiffs argued that this provision of the Clean Air Act lacked an intelligible principle to guide the EPA Administrator’s exercise of authority to revise these NAAQS.<sup>64</sup>

The Supreme Court unanimously rejected the D.C. Circuit’s rationale.<sup>65</sup> Justice Scalia—somewhat surprisingly—wrote for the unanimous Court and reaffirmed the intelligible principle test’s enduring importance.<sup>66</sup> In doing so, Justice Scalia specifically rejected the argument that Section 109 of the Clean Air Act provided the EPA with an unconstitutional delegation of legislative authority. The Court agreed that “[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is *requisite* to protect public health from the adverse effects of the pollutant from the ambient air.”<sup>67</sup> In doing so, Justice interpreted “requisite” as “sufficient, but not more than necessary.” This statutory language imposes a limit on EPA’s discretionary authority in establishing air quality standards<sup>68</sup> and acts as an intelligible principle guiding the agency.<sup>69</sup>

The Court rejected the American Trucking Associations’ argument that ozone and particulate matter are “nonthreshold pollutants” that inflict a continuum of adverse health effects, requiring EPA to make “judgments of degree.”<sup>70</sup> After all, “a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial actions.”<sup>71</sup> The Court concluded that the

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62. 42 U.S.C. § 7409 (a)(2).

63. See Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195, 196 (2007).

64. 531 U.S. 457, 463 (2001). The plaintiffs in *Whitman* initially found a receptive audience in the D.C. Circuit. The D.C. Circuit held that Congress had improperly delegated its lawmaking power to the EPA Administrator “in contravention of the Federal Constitution.” *Am. Trucking Ass’n., Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (holding that the statute provided no “intelligible principle” to guide the EPA’s exercise of authority). The D.C. Circuit further noted that the EPA “lack[ed] any determinate criteria for drawing lines . . . fail[ing] to state intelligibly how much is too much.” *Id.* at 1038.

65. *Whitman v. Am. Trucking Ass’n., Inc.*, 531 U.S. 457 (2001).

66. *Id.* at 474.

67. *Id.* at 473.

68. *Id.* (quoting Transcript of Oral Argument at 7, *Whitman v. Am. Trucking Ass’n., Inc.*, 531 U.S. 457 (2001) (No. 99–1257)).

69. *Id.* at 472.

70. *Id.* at 475.

71. *Id.* at 475–76 (quoting *Mistretta v. United States*, 488 U.S. 361, 378–79 (1989)).

EPA’s setting of “air quality standards at the level that is ‘requisite’—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.”<sup>72</sup> Finally, Justice Scalia placed *Whitman* in historical context, emphasizing the Court’s longstanding treatment of nondelegation challenges since 1935 and distinguishing the *Whitman* from the two New Deal era cases.<sup>73</sup> In *Panama Refining Co. v. Ryan*, Congress provided no guidance for the agency’s decision making.<sup>74</sup> In *A.L.A. Schechter Poultry Corp. v. United States*, Congress provided authority to regulate the entire economy “on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’”<sup>75</sup> In *Whitman*, by contrast, the Court found that Congress provided sufficient guidance to EPA when it limited its delegated authority to that “requisite” to protect the public health.

Following *Whitman v. American Trucking*, the Court appeared hesitant to entertain nondelegation doctrine challenges as long as Congress provided some level of guidance to the implementing agency. *Whitman*’s reasoning held strong for eighteen years, but cracks emerged in *Gundy v. United States*.<sup>76</sup>

#### *B. A Reinigorated Nondelegation Doctrine? Gundy v. United States (2019)*

##### 1. The Intelligible Principle Test (Barely) Survives

If the Court were to overturn the intelligible principle test, it would reinvigorate nondelegation doctrine challenges, making it even more difficult for the EPA and other federal agencies to rely upon existing statutory authorities to combat climate change. While it remains unclear what jurisprudential guideposts would replace the intelligible principle test, even the possibility of a successful nondelegation challenge creates a chilling effect for future climate regulatory action. The specter of a successful nondelegation challenge recently arose in *Gundy v. United States*.

In *Gundy*, plaintiff Herman Gundy challenged the Sex Offender Registration and Notification Act’s (SORNA) delegation of authority to the Attorney General to issue regulations governing pre-Act sex offenders. The challenged provision empowered the Attorney General with the authority to punish sex offenders convicted *prior to* the Act’s passage.<sup>77</sup>

Gundy argued that this provision was an unlawful delegation of Congress’s legislative authority. The Court ultimately rejected the nondelegation challenge

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72. *Id.*

73. *See id.* at 474 (noting that nondelegation challenges have been successful only twice since the nation’s founding).

74. *Id.* (referencing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

75. *Whitman v. Am. Trucking Ass’ns Inc.*, 531 U.S. 457, 474 (2001) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 504 (1935)).

76. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

77. 34 U.S.C. § 20913(d).

by a 5-3 decision (Justice Kavanaugh took no part), but the decision was closer than in either *Mistretta* or *Whitman*.<sup>78</sup> Justice Alito provided the critical fifth majority vote but refused to join the plurality's constitutional or statutory analysis, noting a willingness to overturn the intelligible principle test in a future, appropriate case.<sup>79</sup> Justice Alito stated, "[I]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support the effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."<sup>80</sup>

## 2. Justice Gorsuch's Forceful Dissent in *Gundy*

Dissenting in *Gundy*, Justice Gorsuch wrote that he would strike down the Act as an unlawful delegation of power to the Attorney General.<sup>81</sup> Chief Justice Roberts and Justice Thomas joined his dissent.<sup>82</sup> Justice Gorsuch argued that the longstanding rule articulated in *Mistretta* was wrong as it risked giving agencies "unbounded policy choices."<sup>83</sup> He emphasized that "[t]he Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."<sup>84</sup>

Justice Gorsuch singled out the longstanding intelligible principle test, arguing that "no one at the time [the test was developed] thought the phrase to effect some revolution in this Court's understanding of the Constitution."<sup>85</sup> After all, Justice Gorsuch noted, the intelligible principle test was irrelevant to the Court's analysis seven years after it was first articulated in *Schechter Poultry* and *Panama Refining*.<sup>86</sup> For Justice Gorsuch, this test had erroneously "[taken] on a life of its own . . . [t]he mutated version of the intelligible principle test has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."<sup>87</sup>

Instead, Justice Gorsuch proposed a new limit on Congress's power to delegate its legislative authority, stating that delegations to agencies must be struck down "unless Congress sets forth standards sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether

78. *Gundy*, 139 S. Ct. at 2121. Justice Kagan held that this provision "easily passes constitutional muster." *Id.*

79. *Id.* at 2130-31 (Alito, J., concurring in the judgment). Justice Gorsuch, in his dissenting opinion, stated that Justice Alito's refusal to join the plurality "indicat[es]...that he remains willing, in a future case with a full Court, to revisit these matters." *Id.* at 2131 (Gorsuch, J., dissenting).

80. *Id.* at 2130-31 (Alito, J., concurring in the judgment). Justice Alito also stated that "[b]ecause I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm." *Id.*

81. *Id.* at 2148 (Gorsuch, J., dissenting).

82. *Id.* at 2131.

83. *Id.* at 2133.

84. *Id.* at 2131.

85. *Id.* at 2139.

86. *Id.*

87. *Id.* at 2139.

Congress’s guidance has been followed.”<sup>88</sup> Signaling a continual willingness to examine the nondelegation doctrine in future cases, Justice Gorsuch wrote:

I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code. That “is delegation running riot.”<sup>89</sup>

Justice Gorsuch was particularly concerned that Congress had abdicated its legislative responsibility, delegating broad authorities to an unelected Attorney General on a difficult policy matter fraught with political implications. This delegation impacted the liberty interests of 500,000 people, similar to the deprivations of liberty at issue in the Sentencing Commission delegation addressed in *Mistretta*. In Justice Gorsuch’s eyes, in passing SORNA, Congress delegated to the Attorney General the authority to write what amounted to his or her own criminal code.<sup>90</sup> To be sure, these sex offenders “are some of the least popular among us.”<sup>91</sup> But, Justice Gorsuch noted, “if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?”<sup>92</sup> Indeed, the named plaintiff, Herman Gundy, faced an additional ten-year prison term after the Attorney General prescribed rules under SORNA.<sup>93</sup>

### 3. Gorsuch’s Three “Guiding Principles”—A New Nondelegation Test?

In their *Gundy* dissent, the conservative justices provided an alternative roadmap to guide Congress, disavowing the “intelligible principle” test in favor of a three-part “guiding principles” test. According to Justice Gorsuch, these three “important guiding principles” can be traced to the time of the Constitution’s founding and should guide today’s Court in distinguishing valid from invalid legislative delegations.<sup>94</sup>

First, when regulating private conduct, Congress may authorize another branch to “fill up the details,”<sup>95</sup> so long as Congress sets forth articulatable

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88. *Id.* at 2135-37. Some commentators have criticized Justice Gorsuch’s interpretation as vague. See IAN MILLHISER, *THE AGENDA: HOW A REPUBLICAN SUPREME COURT IS RESHAPING AMERICA* 75 (2021).

89. *Gundy*, 139 S. Ct. at 2148 (Gorsuch, J., dissenting) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

90. *Id.* at 2131-32.

91. *Id.* at 2131.

92. *Id.* at 2131.

93. *Id.* at 2133.

94. *Id.* at 2135-37. *But see* Mortenson & Bagley, *supra* note 25, at 280 (“[The] Constitution at the Founding contained no discernible legalized prohibition on delegations of legislative power . . .”); Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV’T L.J. 379, 381 (2021) (arguing that the approach taken by the conservative justices could invalidate “federal laws charging administrative agencies with tackling major problems of our day, such as climate change . . .”).

95. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard* 23 U.S. (10 Wheat) 1, 31 (1825)).

standards “‘sufficiently definite and precise to enable Congress, the courts, and the public to ascertain’ whether Congress’s guidance has been followed.”<sup>96</sup>

Second, once Congress “prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”<sup>97</sup> In citing a case from the Napoleonic Wars in the early 1800s, *Cargo of Brig Aurora v. United States*, Justice Gorsuch noted that such fact-finding powers “may prove highly consequential.”<sup>98</sup> In *Cargo of Brig Aurora*, Congress delegated authority to the President to impose a trade embargo against Great Britain or France upon a finding that the other country stopped interfering in American trade.<sup>99</sup> In upholding the law, the Court explained that the legislature lawfully exercised its discretion in authorizing the embargo “either expressly or *conditionally*, as their judgment should direct.”<sup>100</sup>

Third, Congress may lawfully delegate to the executive and judicial branches certain non-legislative responsibilities. This is because Congress’s legislative authority “sometimes overlaps with authority the Constitution separately vests with another branch.”<sup>101</sup> This third principle implicates the President’s foreign affairs and national security powers, a topic that I turn to in greater detail below.

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What does *Gundy* mean for climate regulatory actions? Addressing climate change through administrative action is unlikely to implicate the sorts of liberty concerns that served as a central animating principle in both *Gundy* and *Mistretta*. And the Court’s unanimous decision in *Whitman* affirmed existing delegations to the EPA Administrator to update ambient air quality standards. The Clean Air Act has also been a popular and successful statute that has dramatically reduced air pollutions since it was first passed in 1970. As such, the Clean Air Act would appear to be a poor candidate for a successful nondelegation challenge. However, the Court’s willingness to grant cert in *West Virginia v. EPA* suggests that this assumption is no longer safe.<sup>102</sup> And the underlying rationale and critique of the intelligible principle test articulated in the *Gundy* dissent will be relied upon by plaintiffs challenging future legislative grants of authority. Overturning the intelligible principle test would be a watershed moment for administrative law, opening the door to a wave of future nondelegation

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96. *Id.* at 2136 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

97. *Id.*

98. *Id.* (citing *Cargo of Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813)).

99. *Cargo of Brig Aurora*, 11 U.S. at 388.

100. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Cargo of Brig Aurora*, 11 U.S. at 388).

101. *Id.* at 2137.

102. The question presented in *West Virginia v. EPA* in its entirety reads:

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation’s electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

Petition for Writ of Certiorari at I, *West Virginia v. EPA*, No. 20-1530 (Apr. 29, 2021).

challenges. The U.S. Code contains thousands of delegations from Congress to agencies. These delegations would be subject to renewed scrutiny and could fail a newly devised test.<sup>103</sup>

At least three justices are prepared to revisit the intelligible principle test, and Justice Alito is prepared to join the majority on a future case.<sup>104</sup> Since *Gundy* was decided, Justice Barrett replaced Justice Ginsburg, and Justice Kavanaugh replaced Justice Kennedy. Shortly after *Gundy*, the Supreme Court declined to grant certiorari in another nondelegation case, *Paul v. United States*.<sup>105</sup> But this cert denial was accompanied by an unusual statement by Justice Kavanaugh, who stated, “Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant future consideration in future cases.”<sup>106</sup> While Justice Barrett’s precise views on the nondelegation doctrine remain a bit murkier, she has critiqued the intelligible principle test in earlier scholarly writing as “notoriously lax.”<sup>107</sup>

## II. Climate Solutions and the Non-Delegation Doctrine

Climate change is a multifaceted, complex collective action problem that implicates foreign relations, national security, and emergency authorities.<sup>108</sup> Tackling the climate crisis involves both domestic and international legal instruments to reduce GHG emissions. In what follows, I analyze how a revived nondelegation doctrine would affect the availability of future climate solutions. I first focus on the Clean Air Act’s traditional delegated authorities to the EPA, with a particular focus on Section 111(d) and ongoing challenges to the Clean Power Plan. Second, I address delegated authorities that enmesh the President’s foreign affairs, national security, and emergency powers. These authorities deserve careful examination, particularly after the National Intelligence Estimate’s recent report linking climate change to a host of international, national

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103. This is not unlike the Supreme Court’s decision in *INS v. Chadha*, which negated hundreds of statutory legislative veto provisions. 462 U.S. 919 (1983). A revival of the nondelegation doctrine stands in stark contrast to earlier pronouncements that the doctrine was “dead” or moribund.” See, e.g., *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 352-54 (1974) (Marshall, J., dissenting) (labeling the nondelegation doctrine “as moribund as the substantive due process approach of the [New Deal] era”).

104. *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment).

105. *Paul v. United States*, cert. denied, 140 S. Ct. 342 (2019).

106. *Id.* Justice Kavanaugh stated in full, “The opinion of Justice Rehnquist and Justice Gorsuch would not allow that second category—congressional delegation to agencies of authority. Under that approach, Congress could delegate to agencies the authority to decide less-major or fill-up-the details decisions . . . like Justice Rehnquist’s opinion 40 years ago, Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant future consideration in future cases.” *Id.* (statement of Kavanaugh, J., respecting the denial of certiorari).

107. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014). Professor Kristin Hickman has predicted that “we will not need to wait another twenty years for the next case raising the nondelegation doctrine.” Kristin Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (July 18, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation/> [<https://perma.cc/HT7Z-XKQJ>].

108. See Nevitt, *supra* note 32, at 323.

security, and geopolitical threats.<sup>109</sup> Climate change is not simply an environmental problem. It involves Article II national security and foreign relations authorities that complicate a traditional nondelegation doctrine analysis. While the precise scope of these authorities is unclear, they nevertheless offer an additional avenue through which climate action can be pursued—irrespective of where the nondelegation doctrine ends up.

### A. *The Clean Air Act's Traditional Delegated Authorities*

As Professor Richard Revesz has noted, the Clean Air Act's legislative history is replete with mentions of climate change and global warming.<sup>110</sup> The Clean Air Act defines “air pollutant” broadly, and in 2009 the EPA made an endangerment finding for greenhouse gases, opening the door to regulate GHG emissions under the Clean Air Act.<sup>111</sup> Under Section 108 of the Act, the EPA Administrator issues air quality criteria that “reflect[] the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare.”<sup>112</sup>

#### 1. Making Sense of *Whitman* in Light of Climate Science Advances

The delegations of authority in *Mistretta* and *Gundy* (to the Sentencing Commission and Attorney General, respectively) empowered non-elected officials to restrict the liberty interests of a wide swath of individuals through sentencing and incarceration. In contrast, *Whitman* addressed the scope of the EPA Administrator's authority to establish NAAQS under the Clean Air Act. This authority is designed to protect public health, not constrain individuals.<sup>113</sup> *Whitman* addressed the EPA's authority to protect the public's health and well-being while *Mistretta* and *Gundy* addressed the imposition of restrictions that harmed individuals' freedom of movement.

Climate science has only continued to evolve and improve since *Whitman*, strengthening the chain between human activity and climate change and linking

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109. NAT'L INTEL. COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO U.S. NATIONAL SECURITY THROUGH 2040 (2021), [https://www.dni.gov/files/ODNI/documents/assessments/NIE\\_Climate\\_Change\\_and\\_National\\_Security.pdf](https://www.dni.gov/files/ODNI/documents/assessments/NIE_Climate_Change_and_National_Security.pdf) [<https://perma.cc/L69F-NZ27>]; see also Mark Nevitt, *What You Need to Know About the New Climate Security Reports*, LAWFARE (Oct. 26, 2021, 3:47 PM), <https://www.lawfareblog.com/what-you-need-know-about-new-climate-security-reports> [<https://perma.cc/86S8-K7S4>]. While it is beyond the scope of this Article to fully analyze this, the ongoing Russia-Ukraine conflict has highlighted the geopolitical risks of over-reliance on fossil fuels.

110. Richard L. Revesz, *Bostock and the End of the Climate Change Double Standard*, 46 COLUM. J. ENV'T L. 1, 37 (2021). For a summary of the Clean Air Act's historical use to address climate policy, see Nathan Richardson, *The Rise and Fall of Clean Air Act Policy*, 10 MICH. J. INT'L & ENV'T L. 69, 87 (2021).

111. 42 U.S.C. § 7602(g) (2018). “The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” *Id.*

112. 42 U.S.C. § 7408(a)(2). Within the Clean Air Act “all language referring to effects on welfare includes effects on climate.” 42 U.S.C. § 7602(h).

113. *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 473-75 (2001).

climate change to extreme weather and food insecurity.<sup>114</sup> The Intergovernmental Panel on Climate Change (IPCC), National Climate Assessment (NCA), and other peer-reviewed climate science reports all validate the connection between human activity, GHG emissions, and their public health impacts.<sup>115</sup> In upholding EPA’s authority, *Whitman* emphasized the importance of using published air quality criteria that reflect the *latest scientific knowledge*. EPA, in turn, has the requisite authority to employ the latest scientific knowledge to protect public health from the adverse effects of pollutants in the ambient air.<sup>116</sup> Given the increasingly robust scientific evidence for human-caused climate change, *Whitman* provides strong support for EPA’s ongoing authority to regulate GHG emissions.

*Whitman* may well come under closer scrutiny as climate legislation languishes and the EPA turns to Clean Air Act delegations to regulate GHG emissions.<sup>117</sup> NAAQS are updated at five-year intervals, and the EPA Administrator may make “such revisions as may be appropriate.”<sup>118</sup> Similar to the ozone particulates at issue in *Whitman*, GHG emissions are nonthreshold pollutants that accumulate in the atmosphere over time, thus “inflict[ing] a continuum of adverse health effects.”<sup>119</sup> EPA will increasingly be under pressure to revise NAAQS to lower GHG emissions. If the Court were to follow the rationale set forth in *Whitman*, the Court would have to find that the EPA Administrator possesses a certain degree of lawmaking discretion to “protect the public with an adequate margin of safety . . . that fits comfortably within the scope of discretion permitted by our precedent.”<sup>120</sup>

## 2. Climate Litigation: Creating Further Uncertainty

The EPA Administrator clearly possesses delegated authorities under the Clean Air Act to mitigate GHG emissions, but the outer scope of this authority

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114. See IPCC SIXTH ASSESSMENT REPORT, *supra* note 1, at SPM-11 (“Human influence has likely increased the chance of compound extreme events since the 1950s. This includes increase in the frequency of concurrent heatwaves and droughts on the global scale (high confidence); fire weather in some regions of all inhabited continents (medium confidence); and compound flooding in some locations (medium confidence).”); see also Stephanie C. Herring, Nikolaos Christidis, Andrew Hoell, Martin P. Hoerling, & Peter A. Stott, *Explaining Extreme Events of 2017 from a Climate Perspective*, 100 BULLETIN AM. METEOROLOGICAL SOC. S1, S2 (2019), <https://www.ametsoc.org/ams/index.cfm/publications/bulletin-of-the-american-meteorological-society-bams/explaining-extreme-events-from-a-climate-perspective/> [<https://perma.cc/7QMH-PC5L>] (finding that sixteen of seventeen extreme weather events were made more likely by human caused climate change).

115. NCA4, *supra* note 1; IPCC 1.5 REPORT, *supra* note 1.

116. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001).

117. President Obama and his EPA Administrator, Gina McCarthy, turned to the Clean Air Act as the legal basis for the Clean Power Plan following the failure to pass climate legislation. See Chris Mooney, *What You Need to Know About Obama’s Biggest Global Warming Move Yet—The Clean Power Plan*, WASH. POST (Aug. 1, 2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/08/01/what-you-need-to-know-about-obamas-biggest-global-warming-move-yet-the-clean-power-plan/> [<https://perma.cc/39P3-HTUM>].

118. 42 U.S.C. § 7409(d) (2018).

119. *Whitman*, 531 U.S. at 475.

120. *Id.* at 476.

remains more uncertain than ever.<sup>121</sup> In particular, the Supreme Court has recently created uncertainty around Section 111(d) of the Clean Air Act, which addresses standards of performance for existing sources of air pollution (e.g. power plants). Section 111(d) empowers the EPA Administrator to

prescribe regulations . . . where each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have been issued . . . but (ii) to which a standard of performance . . . would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance . . . .<sup>122</sup>

President Obama and his EPA Administrator, Gina McCarthy, turned to Section 111(d) to promulgate the Clean Power Plan with the goal of reducing emissions at new and existing coal-fired power plants. Shortly thereafter, the Supreme Court issued a stay order for the Clean Power Plan, which rested on a broad interpretation of EPA’s power under 42 U.S.C. § 7411(d). Following a successful challenge to President Trump’s Affordable Clean Energy Rule, the new EPA Administrator, Michael Regan, did not reinstate the Clean Power Plan.<sup>123</sup> Nor was it repealed, so it entered into a zombie-like regulatory state between action and inaction.

Additional uncertainty around the scope of authorities under the Clean Air Act comes from a more recent development. The Supreme Court is poised to strike a blow to EPA’s ability to address climate change under the Clean Air Act.<sup>124</sup> The Court recently granted certiorari seeking review of the D.C. Circuit’s ruling that EPA has broad authority to regulate GHGs from existing power plants.<sup>125</sup> In their amicus brief to the Court, the state of Kentucky stated that it is

121. See Ian Milhiser, *The Supreme Court’s Coming War with Joe Biden, Explained*, VOX, (Mar. 27, 2021), <https://www.vox.com/22276279/supreme-court-war-joe-biden-agency-regulation-administrative-neil-gorsuch-epa-nondelegation> [<https://perma.cc/E63N-DYDC>].

122. 42 U.S.C. § 7411(d) (2018).

123. The D.C. Circuit had held that the Trump Administration’s rescission of the Obama-era Clean Power Plan violated the Administrative Procedure Act. *American Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

124. *West Virginia v. EPA*, 985 F.3d 914 (D.C. Cir. 2020), *cert. granted*, 142 S. Ct. 420 (2021) (No. 20-1530).

125. Cert was granted on three questions from three related petitions: (1) In *West Virginia v. EPA*: “In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation’s electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?” Petition for Writ of Certiorari, *West Virginia v. EPA*, No. 20-1530 (2021); (2) In *Westmoreland Mining Holdings LLC v. EPA*: “Whether 42 U.S.C. § 7411 (d) clearly authorizes EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation’s energy system,” Petition for Writ of Certiorari, *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (2021); and (3) In *North Dakota v. EPA*: “Can EPA promulgate regulations for existing stationary sources that require States to apply binding nationwide ‘performance standards’ at a generation-sector-wide level, instead of at the individual source level, and can those regulations deprive states of all implementation and decision making power in creating their Section 111 (d) plans?” Petition for Writ of Certiorari, *North Dakota v. EPA*, No. 20-1780 (2021).

“Congress that must make the ‘critical policy decisions.’”<sup>126</sup> Kentucky further argued:

Agency rulemaking cannot be a substitute for Congressional legislative action; that Congress has been unable or unwilling to pass climate-change legislation does not mean the EPA may make climate-change policy in its stead. The significance of climate-change policy indicates it falls within the purview of Congress’ power, and unless Congress delegates the authority to the EPA, the EPA may not act.<sup>127</sup>

The Court’s cert grant in *West Virginia v. EPA* surprised many. After all, President Biden had not signaled that his administration would reinstate the Clean Power Plan, instead focusing on legislative provisions in his Build Back Better plan. Regardless of how the Court decides these questions, *West Virginia v. EPA* pauses Clean Air Act-based regulatory efforts that rely upon these Section 111(d) authorities.

### *B. Deferential Delegations and Climate Change: Foreign Relations, National Security, and Emergency Powers*

As Professor Harlan Cohen has noted, the Court’s conservative justices increasingly favor reviving the nondelegation doctrine to discipline the administrative state but disfavor such an approach to reign in delegated national security powers.<sup>128</sup> Congress has not explicitly delegated “climate security” decision making to the President, but it is difficult to disentangle broader climate mitigation efforts from climate impacts on national security.<sup>129</sup>

Future climate solutions may involve looking at traditional, domestic administrative law authorities such as the promulgation of new NAAQS for GHG emissions. However, as GHG emissions continue to accumulate in the atmosphere, pressure may build on the executive branch to address climate change through foreign relations, national security, and emergency powers. These three areas offer additional paths for climate action.<sup>130</sup> “Deferential delegations” in these areas are more likely to survive nondelegation challenges. I turn to three examples below.

#### 1. International Air Pollution Authorities & the Clean Air Act: A Climate Delegation Hiding in Plain Sight?

Six years after *Whitman* was decided, the Supreme Court issued its landmark climate decision in *Massachusetts v. EPA*, which opened the door for

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126. Brief of Amicus Curiae Commonwealth of Kentucky at 4, *West Virginia v. EPA*, No. 20-1530 (June 3, 2021).

127. *Id.* at 3.

128. Harlan Cohen, *The National Security Conundrum*, JUST SECURITY (July 17, 2019), <https://www.justsecurity.org/64946/the-national-security-delegation-conundrum/> [<https://perma.cc/Y7TZ-85CJ>].

129. Further, the Administrative Procedure Act exempts “military or foreign affairs functions” from rulemaking. 5 U.S.C. § 553(a)(1) (2018).

130. The Paris Climate Agreement was signed by President Obama as a sole executive agreement, bypassing Senate advice and consent.

EPA to use the Clean Air Act to regulate GHG emissions.<sup>131</sup> In *Massachusetts v. EPA*, the Court held that the Clean Air Act authorizes the EPA Administrator to regulate GHG emissions from new motor vehicles if it forms a “judgment” that such emissions contribute to climate change.<sup>132</sup> Shortly after *Massachusetts v. EPA* was decided, EPA scientists issued an endangerment finding, and EPA soon began exercising its authority to regulate carbon dioxide as an air pollutant under the Clean Air Act.<sup>133</sup>

Justice Stevens’s majority opinion in *Massachusetts v. EPA* emphasized the unique global nature of climate change, highlighting international efforts to mitigate GHG emissions and recent scientific advances that have aided in our understanding of climate change’s impacts.<sup>134</sup> Justice Stevens also highlighted the President’s “broad authority in foreign affairs,” an authority that is particularly relevant for addressing climate change, a complex international collective action problem.<sup>135</sup> According to Justice Stevens, the comingling of foreign and domestic authorities in addressing climate change was reinforced in the Global Climate Protection Act of 1987, where Congress authorized the State Department—not the EPA—“to formulate United States foreign policy with reference to environmental matters relating to climate.”<sup>136</sup>

Indeed, it is increasingly clear that climate change is a complex global collective action problem that implicates the President’s broader national security and foreign relations authorities. International climate instruments such as the 2015 Paris Climate Agreement have reinforced this reality. The Paris Agreement requires each party to report on their “nationally determined contributions,” which are implemented via domestic regulatory efforts.<sup>137</sup> In the absence of new climate legislation, rulemaking and enforcement under the Clean Air Act serve as the central vehicle to meet these international commitments. And the President’s foreign relations authorities shape our understanding of Section 115 of the Clean Air Act, titled “International Air Pollution,” which authorizes the EPA to require states to address emissions that contribute to air pollution in other countries.<sup>138</sup>

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131. 549 U.S. 497, 528 (2007).

132. *Id.*; see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 333-34 (2014).

133. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,327-28 (May 7, 2010) (codified as 40 C.F.R. pts. 85, 600; 49 C.F.R. pts. 531, 533, 536).

134. *Massachusetts v. EPA*, 549 U.S. 497, 508-10 (2007).

135. *Id.* at 534.

136. *Id.*

137. U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter *Paris Agreement*].

138. 42 U.S.C. § 7415 (2018); see also Michael Burger, Ann E. Carlson, Michael B. Gerrard, Jayni Foley Hein, Jason A. Schwartz & Keith J. Benes, *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. J. ENV’T L. 359, 375 (2016).

Congress first addressed global warming in 1965 when it delegated broad authorities to the executive branch to address international air pollution.<sup>139</sup> President Lyndon Johnson called for legislation to address “air pollution . . . [that] has altered the composition of the atmosphere at a global scale.”<sup>140</sup> Before the House committee in support of this law, a member of Congress testified that “air pollution . . . includes carbon dioxide” and that climate change is “[a]n effect of pollution” that “may in time melt the polar icecaps . . . thus dangerously shrinking the earth’s land surface area.”<sup>141</sup> This legislation was remarkably forward-looking, as it sought to mitigate GHG emissions in response to global warming.

This law, titled “International Air Pollution,” is currently nested in Section 115 of the Clean Air Act.<sup>142</sup> Section 115 addresses the endangerment of public health or welfare outside the United States, in foreign countries, from pollution originating from within the United States. Section 115 serves as a key to unlock the domestic door to revise individual State Implementation Plans (SIP) under Section 110 of the Clean Air Act.<sup>143</sup> Under this Section, Congress delegates broad authorities to the EPA Administrator to override an individual SIP when two conditions are met.

First, the EPA Administrator must either be in receipt of credible information from “any duly constituted international agency” that U.S. air pollutants are endangering the public health or welfare of another nation, or must receive a request to that effect from the Secretary of State.<sup>144</sup> While “duly constituted international agency” is not defined, the United Nations Framework Convention on Climate Change (UNFCCC)—the key international climate governance agreement and body—would seem to meet the statute’s plain language.

Second, once the EPA Administrator is in receipt of information that U.S. air pollution is endangering other nations, the EPA must make a separate reciprocity finding under Section 115(c) of the Clean Air Act.<sup>145</sup> Under Section 115(c) the Administrator must determine that a foreign country “has given the

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139. This pre-dated the Clean Air Act. For a brief summary of these early efforts, see Michael Burger, *The Second Circuit Takes on the Clean Air Act’s International Air Pollution Provision and Climate Change*, SABIN CTR. CLIMATE LAW BLOG (Apr. 23, 2021), <http://blogs.law.columbia.edu/climatechange/2021/04/23/the-second-circuit-takes-on-the-clean-air-acts-international-air-pollution-provision-and-climate-change/> [<https://perma.cc/56T5-QJE6>]; and *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). For an outstanding analysis of *Bostock* as it applies to climate change, see Revesz, *supra* note 110.

140. Burger, *supra* note 139.

141. *See id.*

142. 42 U.S.C. § 7415 (2018).

143. *Id.*

144. For an outstanding discussion of Section 115, see generally COMBATING CLIMATE CHANGE WITH SECTION 115 OF THE CLEAN AIR ACT: LAW AND POLICY RATIONALES (Michael Burger ed., 2020).

145. 42 U.S.C. § 7415(c).

United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country” as are established in Section 115.<sup>146</sup>

Once these two conditions are met, the EPA Administrator notifies the affected state governor that its SIP is “inadequate to prevent the endangerment.”<sup>147</sup> The state must then revise its SIP to satisfy this Section 115 requirement.<sup>148</sup> If the state does not follow through with a revised SIP, or it is deemed to be inadequate, the EPA will promulgate a federal implementation plan (FIP).<sup>149</sup>

Section 115(a)’s language is similar to the language in Section 202(a) of the Clean Air Act that governs motor vehicle emissions.<sup>150</sup> The EPA relied upon Section 202(a) to issue an endangerment finding in the aftermath of *Massachusetts v. EPA*.<sup>151</sup> Under Section 202(a), if the EPA Administrator determines that air pollutants from new motor vehicle engines “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” then the EPA Administrator shall prescribe standards to govern air pollutants from new motor vehicles.<sup>152</sup>

Scholars have begun to take notice of Section 115’s potential role in addressing climate change.<sup>153</sup> While the endangerment requirement in Section 115 mirrors the language found in Section 202(a), Section 115’s endangerment language is far broader in that it applies to all GHG emissions.<sup>154</sup> Further, Section

146. 42 U.S.C. § 7415(c).

147. 42 U.S.C. § 7415(b).

148. This includes “economic incentives, . . . marketable permits, and auctions of emissions rights.” 42 U.S.C. § 7410(a)(2)(A).

149. 42 U.S.C. § 7410(c)(1).

150. For example, Section 202(a) reads:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . .

42 U.S.C. § 7521 (a). Section 115 (a) reads:

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

42 U.S.C. § 7415(a).

151. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, ENV’T PROT. AGENCY (2009), <https://www.epa.gov/climate-change/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a> [<https://perma.cc/N8FB-VNAD>].

152. 42 U.S.C. § 7521(a) (2018).

153. See Burger et al., *supra* note 138.

154. The EPA has already made an endangerment determination under Section 202(a). See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, *supra* note 151.

115 can play an important role in synchronizing the nation’s domestic emission mitigation efforts with its international climate commitments.<sup>155</sup>

If the EPA were to use Section 115 aggressively to combat climate change, a nondelegation challenge would likely follow. But there are several reasons to believe that Section 115 offers broader protections to withstand prospective nondelegation challenges.<sup>156</sup>

Most importantly, Section 115 authorities are inextricably linked to presidential foreign relations authorities. While it remains unclear how, exactly, nondelegation challenges would apply to foreign affairs delegations in the climate context, courts have shunned the intelligible principle test in the context of explicit foreign affairs delegations.<sup>157</sup> As Professor Michael Burger has noted, Congress “clearly knows how to . . . delegate authority to the executive branch to forge international arrangements and to determine the adequacy of the reciprocal benefits they provide in order to address [foreign affairs].”<sup>158</sup>

When it comes to statutorily delegated national security and foreign relations powers, the Court has exhibited far more deference to the executive branch.<sup>159</sup> Consider how congressional delegation to the President in the context of foreign relations was treated in *United States v. Curtiss Wright*, a case decided just one year after *Schechter Poultry* and *Panama Refining*. In *Curtiss-Wright*, the Court upheld a congressional authorization permitting the President to restrict arms sales to two nations in South America during the Chaco War.<sup>160</sup> Shortly after this Joint Resolution passed, President Roosevelt prohibited the sale of arms and munitions to Paraguay and Bolivia. *Curtiss-Wright*, a U.S. arms manufacturer, was charged with violating President Roosevelt’s prohibition on arms sales.

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155. See generally Burger et al., *supra* note 138.

156. Other administrative law doctrines would be implicated in such a challenge—*Chevron* deference and the major questions doctrine come to mind—but Section 115 is likely to be comparably more secure from a nondelegation challenge.

157. See *id.*

158. Burger, *supra* note 139.

159. See, e.g., Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018).

160. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 311 (1936). The full Joint Resolution stated:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding \$10,000 or by imprisonment not exceeding two years, or both.

*Id.* at 311-12.

While *Curtiss-Wright* is most famous for the Court's expansive view of the executive branch as the "sole organ" in foreign affairs, it also offers valuable insights into the nondelegation doctrine in the context of foreign affairs powers. The same justices that struck down FDR's New Deal legislation in *Schechter Poultry* and *Panama Refining* upheld Congress's delegation of authority in foreign affairs. In upholding Congress's delegation of authority, Justice Sutherland distinguished domestic congressional delegations of authority from foreign affairs delegations:

The two classes of power [domestic and foreign] are different, both in respect to their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.<sup>161</sup>

Justice Sutherland further noted that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>162</sup>

Justice Gorsuch, in his dissenting opinion in *Gundy*, cited the reasoning in *Curtiss-Wright*. Justice Gorsuch highlighted specific guiding principles that can be gleaned from the framers. For example, Congress may assign to the executive branch certain non-legislative responsibilities when those responsibilities overlap with authority vested in the executive branch.<sup>163</sup> In articulating instances of such overlap, Justice Gorsuch turned to the Court's ruling in *Curtiss-Wright* and noted instances where some delegations have implicated the President's inherent Article II authority.<sup>164</sup> Justice Gorsuch's acknowledgement of overlapping constitutional authorities suggests that even nondelegation skeptics on the Court will view delegations of authority that implicate foreign affairs and Article II powers differently.

In addition, the Court's reasoning in *Bostock v. Clayton* may support the potential application of Section 115 authorities to climate change. This case involved the modern interpretation of the Civil Rights Act, and whether it prohibits discrimination in employment based on applying "sex" to sexual orientation and gender status.<sup>165</sup> Justice Gorsuch, writing for the majority in *Bostock v. Clayton County*, stated that a statute "should be interpreted in accord with the public meaning of its terms at the time of enactment" and not according to "the limits of the drafters' imagination."<sup>166</sup> As Professor Revesz has written, the Clean Air Act's history is replete with concerns about global warming dating

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161. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (Sutherland, J.).

162. *Id.* at 320.

163. *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

164. *Id.*

165. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737-38 (2020).

166. *Id.* at 1737.

to its inception.<sup>167</sup> Professor Revesz has argued that regulating GHG has been exceedingly difficult due to a “double standard” that ignores the Clean Air Act’s text and legislative materials surrounding its enactment.<sup>168</sup> In *Bostock*, Justice Gorsuch found that “discrimination . . . because of sex” extends to discrimination on the basis of sexual orientation and gender identity.<sup>169</sup> For Justice Gorsuch, it did not matter that Congress did not focus on this type of discrimination at the time of enactment because the Civil Rights Act provisions “is written in starkly broad terms . . . [which] guaranteed that new applications would emerge over time.”<sup>170</sup> Similarly, the Clean Air Act explicitly references “effects on climate” which GHG clearly “endanger.”<sup>171</sup> And Section 115 is written in remarkably broad terms, applying to “any air pollutant[s]” that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country.”<sup>172</sup> This provision was passed in 1965, just one year after the Civil Rights Act was passed—the statute at issue in *Bostock*. Following *Bostock*, there is more support for the proposition that the Clean Air Act’s broad terms provide a sound basis for regulating GHG emissions.<sup>173</sup>

## 2. Delegated Climate-Security Authorities

Climate change is typically understood as an environmental issue, but its impacts also extend to national security.<sup>174</sup> National security experts are increasingly sounding the alarm on climate change’s role as a “threat accelerant” and “catalyst for conflict.”<sup>175</sup> For example, climate change and extreme weather patterns threaten military installations, accelerate cross-border migration, and set the conditions for instability and conflict.<sup>176</sup> This affects current and forthcoming climate-security delegations to the State Department, Department of Defense (DoD), Department of Homeland Security (DHS), and the intelligence community.

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167. See Revesz, *supra* note 110.

168. *Id.* at 3-5.

169. *Bostock*, 140 S. Ct. at 1737, 1739.

170. *Id.* at 1753.

171. Revesz, *supra* note 110, at 4. Professor Revesz also finds statutory interpretative support in the dissenting opinions. *Id.* at 65-70.

172. 42 U.S.C. § 7415(a).

173. *Id.*

174. See Nevitt, *supra* note 32.

175. The Center for Naval Analysis has characterized climate change as a “threat multiplier” and “catalyst for conflict.” CNA Mil. Advisory Bd., *National Security and the Accelerating Risks of Climate Change*, CNA (May 2014), [https://www.cna.org/CNA\\_files/pdf/MAB\\_5-8-14.pdf](https://www.cna.org/CNA_files/pdf/MAB_5-8-14.pdf) [<https://perma.cc/WT94-L3HD>]; see National Defense Authorization Act for Fiscal Year 2018, Pub L. No. 115-91, § 335, 131 Stat. 1283, 1357 (2017) (Langevin Amendment); DANIEL R. COATS, OFF. OF DIR. OF NAT’L INTEL. (ODNI), STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY 21 (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR-SSCI.pdf> [<https://perma.cc/GA3S-BKYL>].

176. See *National Security and the Accelerating Risks of Climate Change*, *supra* note 175.

Remarkably, despite the Trump Administration's general hostility to climate efforts at home and abroad,<sup>177</sup> several climate-security provisions were signed into law throughout his tenure.<sup>178</sup> The annual defense authorization bill—the National Defense Authorization Act (NDAA)—remains one of the few “must pass” pieces of congressional legislation, offering a ready-made legislative vehicle to address climate security measures.

Consider some of the most recent climate-related defense spending provisions, which evidence the growing relevance of the nexus between national security and climate change. In the 2018 NDAA, Congress required the Secretary of Defense to report on the effects of climate change on the military. The relevant provision provides that “[i]t is the sense of Congress that . . . climate change is a direct threat to the national security of the United States and is impacting stability in areas of the world both where the United States Armed Forces are operating today, and where strategic implications for future conflict exist.”<sup>179</sup> In its 2019 spending bill, Congress updated its flood risk disclosure process at military installations and required the Secretary of Defense to update its Unified Facilities Criteria (UFC) to anticipate changing environmental considerations.<sup>180</sup>

Several climate-security provisions were included in the 2020 NDAA, ranging from changes in flood disclosures to increased climate adaptation measures in the face of extreme weather.<sup>181</sup> These climate-security provisions offer an additional avenue for climate progress that taps into the President's Commander in Chief and national security authorities—this offers an additional layer of armor to shield itself from nondelegation challenges. The 2020 bill also amended the National Security Act of 1947 by establishing the Climate Security Advisory Council, which has the goal of assisting intelligence analysts on climate security matters and “ensuring that the intelligence community is adequately prioritizing climate change in carrying out its activities.”<sup>182</sup> In the 2021 NDAA, Congress established the National Academies Climate Security Roundtable, required the Secretary of Defense to update the DoD Climate Adaptation Roadmap, and required the Secretary of Defense to issue a report on

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177. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 11:15 AM), <https://perma.cc/2QPD-SSMW> (“The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”).

178. See, e.g., National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 335, 131 Stat. 1283, 1357 (2017) (Langevin Amendment) (requiring DoD to issue a report on military installations vulnerable to climate change).

179. *Id.* § 335(b)(1).

180. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 2805, 132 Stat. 1636, 2262 (2018).

181. See Shana Udvardy, *New Defense Bill Strengthens the Militaries Flood & Energy Readiness and Saves Taxpayer Dollars—All While Addressing Climate Change*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Aug. 7, 2018), <https://blog.ucsusa.org/shana-udvardy/new-defense-bill-strengthens-the-militaries-flood-readiness-and-saves-taxpayer-dollars-all-while-addressing-climate-change/> [<https://perma.cc/WY6N-5S9W>].

182. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 5321, 133 Stat. 1198, 2126 (2019).

the agency’s contribution to GHG emissions.<sup>183</sup> While the 2022 NDAA is not yet finalized, the Secretary of Defense has already highlighted “combating the effects of climate change” as a budgetary priority, and the budget includes \$617 million for “preparing for, adapting to and mitigating climate change.”<sup>184</sup>

To be sure, these recent provisions do not run expressly afoul of the intelligible principle test, nor do they contravene the guidelines articulated by Justice Gorsuch in his *Gundy* dissent. Rather, they demonstrate how defense spending bills have become increasingly relied upon as the de facto legislative vehicle for congressional climate action. This pattern is likely to accelerate as climate impacts (e.g., extreme heat, weather, wildfires) are increasingly felt at military installations and Congress takes action on climate-related natural disasters.

### 3. Delegated Climate Emergency Authorities

Finally, the President possesses broad, delegated emergency authorities under the National Emergencies Act (NEA).<sup>185</sup> Congress passed the NEA in 1976, delegating sweeping powers to the President over a wide swath of domestic issues in the event of an undefined “national emergency.”<sup>186</sup> While the NEA sought to circumscribe the President’s emergency authorities in the aftermath of Watergate and Vietnam, it has largely failed to discipline the President’s exercise of these delegated authorities.<sup>187</sup> As Congress does not define “emergency” within the NEA, the President has considerable discretion in making this determination.<sup>188</sup> There have been renewed calls from activists and lawmakers urging the President to declare climate change a national emergency using his delegated authorities under the NEA.<sup>189</sup> Further, in light of recent scientific

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183. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub L. No. 116-283, §§ 327, 328, 1622, 134 Stat. 3388, 3525, 3527, 4054 (2020).

184. See *The Department of Defense Releases the President’s Fiscal Year 2022 Defense Budget*, U.S. DEP’T OF DEF. (May 28, 2021), <https://www.defense.gov/News/Releases/Release/Article/2638711/the-department-of-defense-releases-the-presidents-fiscal-year-2022-defense-budg/> [https://perma.cc/H7WS-3GMY].

185. National Emergencies Act of 1976, Pub L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601-1651).

186. See generally L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 8-12 (2021) (describing the history and use of the NEA since its passage and congressional acquiescence).

187. See *id.* at 12-14 (listing the various national emergencies in place and continually renewed since 1979).

188. In addition, the NEA provides a mechanism for Congress to invalidate an emergency declaration via the passage of a joint resolution. The Supreme Court invalidated legislative vetoes in 1983, neutering this provision. See *Immigr. and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

189. See Mark Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591 (2021); Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L. J. 1143, 1169 (2020); Bruce Lindsay, *Climate of Exception: What Might a Climate Emergency Mean in Law*, 38 FED. L. REV. 255, 263 (2010).

reports, members of Congress have called on President Biden to use his delegated authority to declare climate change a national emergency.<sup>190</sup>

Recall that nondelegation doctrine jurisprudence has focused on delegations to administrative agencies under the direction of the President (e.g., to the EPA Administrator). The NEA, in contrast, delegates sweeping authorities directly to the President, omitting administrative agencies.<sup>191</sup> The President possesses independent authorities under the Commander in Chief Clause,<sup>192</sup> Take Care Clause,<sup>193</sup> and Vesting Clause<sup>194</sup> that do not derive from Congress's legislative powers. As climate impacts intensify and affect national security infrastructure and the military's disaster response efforts at home and abroad, these authorities are implicated.<sup>195</sup> This suggests that the President could potentially exercise his authority under the NEA to respond to climate impacts without running afoul of the nondelegation doctrine. As GHG emissions clearly cause rising temperatures and extreme weather, the President can even point to his independent Article II authorities to bolster his authority to reduce GHG emissions. While the outer scope of this authority remains unclear, these independent authorities nevertheless provide a legal basis to tackle climate change at its root cause.

Still, the NEA's broad emergency delegations are somewhat analogous to the delegations that were struck down in *Schechter Poultry*. In *Schechter Poultry*, the Court unanimously invalidated congressional delegation of authority to the President to create codes of fair competition for a wide swath of industries.<sup>196</sup> Because "fair competition" was not defined by Congress, there were "no standards" to guide approval of these codes, leaving the President's discretion "virtually unfettered."<sup>197</sup> One could imagine similar logic being used against the NEA if one were to replace "fair competition" in the National Industrial Recovery Act with "emergency" in the National Emergencies Act: these key definitional terms are both undefined. After all, the NEA delegates broad powers to the President without defining what constitutes a "national emergency" or providing any other guideline or articulable intelligible principle.

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190. Senator Schumer (D-N.Y.) has also invited President Biden to declare a climate emergency, stating "[i]f there ever was an emergency, climate is one." Coral Davenport & Lisa Friedman, *The Battle Lines Are Forming in Biden's Climate Push*, N.Y. TIMES, (Feb. 2, 2021), <https://www.nytimes.com/2021/01/26/climate/biden-climate-change.html> [<https://perma.cc/Y3J2-ZE77>].

191. See National Emergencies Act of 1976, Pub L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601-1651). For a guide to emergency powers, see A GUIDE TO EMERGENCY POWERS AND THEIR USE, BRENNAN CENTER FOR JUSTICE 3-43 (Sept. 4, 2018), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [<https://perma.cc/MG3B-7QYC>] [hereinafter BRENNAN CENTER].

192. U.S. CONST. art. II, § 2, cl. 1.

193. U.S. CONST. art. II, § 3.

194. U.S. CONST. art. II, § 1, cl. 1.

195. For a discussion of the Commander in Chief's authority as applied to climate change, see Mark P. Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437 (2015).

196. A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

197. *Id.* at 541-42.

If the President were to determine that climate change or one of its corresponding impacts constitute a national emergency, this would almost certainly be challenged in court. Yet the NEA has withstood challenges to a wide swath of national emergency declarations in the past.<sup>198</sup> In deferring to the President’s authority to determine what constitutes a “national emergency,” the Court has ignored the intelligible principle test.<sup>199</sup> Unlike in *Schechter Poultry*, the NEA would likely survive a nondelegation challenge, particularly if the President were to activate emergency authorities that implicate his foreign relations powers.<sup>200</sup>

One way in which the President could exercise his emergency authorities in conjunction with his foreign affairs powers would be to rely upon the International Economic Emergency Powers Act (IEEPA). The IEEPA is, by far, the most relied upon emergency authority. Some climate experts have sounded the alarm on international climate destruction, arguing that the Administration should harmonize U.S. trade policy with climate policy.<sup>201</sup> The IEEPA could theoretically be used to punish nations engaging in egregious climate practices, such as in the Amazon.<sup>202</sup> The President could use the IEEPA to address climate efforts and synchronize U.S. trade policies with climate policies by sanctioning climate rogue states or other nations engaging in particularly harmful climate behavior. For example, several former diplomats have introduced the Amazon Protection Plan in an effort to protect the Amazon rain forest.<sup>203</sup> This plan includes measures to address ongoing ecological destruction in the Amazon rainforest via a national emergency declaration.<sup>204</sup> Beyond the signaling effect of such an action, the IEEPA could be used to limit the trade of products from Brazil that are produced through deforestation methods. More broadly, the IEEPA could be used to limit international trade of nitrous oxide, methane, or single-use plastic containers. Nitrous oxide is a particularly pernicious climate product that has an outsized impact on GHG emissions.<sup>205</sup>

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198. See, e.g., *Sierra Club v. Trump*, 977 F.3d. 853, 901 n.12 (9th Cir. 2020) (“We therefore have no occasion in this case to address the issues raised . . . as to whether the President was correct in concluding that the situation at the southern border properly qualifies as a ‘national emergency.’ We likewise are not presented with any issue concerning the availability of any other emergency authority under any other statute, nor do we have before us any possible constitutional limitations on the use of any such other authorities.”).

199. *Id.*

200. See discussion *supra* Section II.B.1.

201. See *Amazon Protection Plan Final: Policy Recommendations for U.S. Action for Amazon Forests*, CLIMATE PRINCIPALS (Jan. 15, 2021), [https://climateprincipals.org/wp-content/uploads/2021/01/Amazon-Protection-Plan-Final\\_Climate-Principals.pdf](https://climateprincipals.org/wp-content/uploads/2021/01/Amazon-Protection-Plan-Final_Climate-Principals.pdf) [<https://perma.cc/9V8D-68A2>].

202. See BRENNAN CENTER, *supra* note 191.

203. *Amazon Protection Plan Final*, *supra* note 201.

204. *Id.*

205. One ton of nitrous oxide is equivalent to nearly 300 tons of carbon dioxide, and it stays in the atmosphere for over 100 years. See *Overview of Greenhouse Gas Emissions: Nitrous Oxide*, ENV’T PROT. AGENCY, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases#nitrous-oxide> [<https://perma.cc/9RTH-9ZT3>].

Outside the climate context, there are numerous existing emergencies that have been declared under the IEEPA in order to shape policy.<sup>206</sup> As the most heavily used delegated emergency authority, the IEEPA seems to be a plausible candidate for presidential action if a climate emergency is ultimately declared. And it is one that marries emergency delegations with foreign affairs delegations, two areas where the courts are more likely to afford the President deference.

### III. Possible Agency Actions to Address Climate Change

Right now, there are certainly more questions than answers concerning how the nondelegation doctrine squares with national security authorities—what Professor Cohen calls “The National Security Delegation Conundrum.”<sup>207</sup> The newly transformed Supreme Court generally views traditional congressional delegations of authority skeptically, as in *Gundy*,<sup>208</sup> while largely deferring to the executive branch on national security-based delegations, as in *Trump v. Hawaii*.<sup>209</sup>

How much deference should be afforded to administrative agencies and the President in implementing broad delegations of authority to combat climate change? Does combatting climate change require a traditional, congressional delegation subject to Justice Gorsuch’s more stringent test articulated in *Gundy*? Or can it involve a national security, emergency, or foreign affairs delegation, where the Court is likely to afford a greater degree of deference?

In light of this jurisprudential uncertainty and the growing threat of climate change, the current Administration should embrace regulatory diversity in its pursuit of meaningful climate action, with a particular focus on national security agencies and rulemaking under Section 115 of the Clean Air Act. In what follows, I highlight several substantive areas that offer particular promise to successfully navigate nondelegation doctrine challenges.

#### *A. Sections 108 and 109 of the Clean Air Act: Tapping Into Traditional Delegations*

First, as a matter of stare decisis, the Administration should continue to rely on Clean Air Act authorities under Sections 108 and 109. Both *Whitman* and *Massachusetts v. EPA* enshrine these authorities; it seems highly unlikely that either of these provisions would serve as the test case for the first successful nondelegation challenge since 1935. Indeed, the Court unanimously rejected a nondelegation challenge to EPA’s establishment of the Clean Air Act’s NAAQs in *Whitman*.<sup>210</sup> While it is difficult to imagine that the first successful

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206. See Nevitt, *supra* note 189, at 629-34 (describing IEEPA’s role in a climate emergency).

207. Cohen, *supra* note 128.

208. 139 S. Ct. 2116 (2019).

209. 138 S. Ct. 2392, 2408 (2018).

210. 531 U.S. 457 (2001).

nondelegation challenge since 1935 would originate from a Clean Air Act delegation, this thesis will be tested in *West Virginia v. EPA*.<sup>211</sup>

*B. Section 115: Tapping into Foreign Relations Delegations*

Second, the President should consider using the Clean Air Act’s Section 115 authorities,<sup>212</sup> particularly if the Supreme Court strikes a blow to Clean Air Act Section 111(d) delegations in *West Virginia v. EPA*.<sup>213</sup>

Under Section 115, EPA must first make an endangerment finding that domestic emissions contribute to air pollution, and that these emissions endanger public health or welfare in another country. In 2009, EPA made an analogous endangerment finding under Section 202—a separate provision addressing new motor vehicle emissions.<sup>214</sup> The United States shares a massive land border with both Canada and Mexico, where emissions drift back and forth across these international borders. A Section 115 endangerment finding would build off EPA’s earlier 2009 endangerment finding while taking into account transboundary health effects. Following an endangerment finding, the EPA would next have to make a reciprocity determination. This would require that the other country “provides the same rights with respect to the prevention or control of air pollution in that country” as those that are established in Section 115.<sup>215</sup>

Consider how this might apply in practice. Domestically, Section 115(b) provides a procedural right for foreign nations affected by harmful U.S. emissions to appear at state public hearings that discuss state implementation plan revisions.<sup>216</sup> Internationally, the UNFCCC and the Paris Climate Agreement provide “procedural reciprocity” to state parties. Under the Paris Climate Agreement, each state party participates in a “facilitative, multilateral consideration of progress”, which allows the United States to comment on and review other nations’ nationally determined contributions.”<sup>217</sup> This provision will allow the United States (and others) to evaluate, review, and comment on each nation’s nationally determined contributions and emissions reductions progress. Domestically, foreign nations are afforded a procedural right under the Clean Air Act to appear at state hearings. While the scope of this right is unclear, it likely includes the ability to comment on the state implementation plan

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211. *West Virginia v. EPA*, No. 20-1530 (Apr. 29, 2021).

212. 42 U.S.C. § 7415 (2018).

213. The Supreme Court recently granted certiorari on appeal from states challenging the EPA’s authority under 42 U.S.C. § 7411 of the Clean Air Act. *See supra* note 125.

214. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,536-40 (Dec. 15, 2009).

215. 42 U.S.C. § 7415. Alternatively, the Secretary of State may request that the Administrator make an endangerment finding “with respect to such pollution which the Secretary alleges is of such a nature.” 42 U.S.C. § 7415(a).

216. 42 U.S.C. § 7415(b).

217. *Paris Agreement*, *supra* note 137, art. 13, 11. This includes an expert technical review and participating in the review of each nation’s implementation and achievement of nationally determined contributions. *Id.*

revision.<sup>218</sup> While these may not be the same rights, they are analogous rights and authorize foreign involvement in U.S. climate decision-making—a unique and undertheorized dimension of the Clean Air Act.

The Paris Climate Accord is a sole executive agreement, negotiated and signed by the President’s State Department without the Senate’s advice and consent. The precise scope of Section 115 remains untested. Still, the Paris Accord’s emphasis on transparency and reciprocal rights provides the United States with “essentially the same rights with respect to the prevention and control of air pollution” as other nations.<sup>219</sup> This provides support for the procedural reciprocity theory.

Once the endangerment and reciprocity findings are made, EPA can order states to revise their State Implementation Plans to establish lower GHG emission reduction targets for those states.<sup>220</sup> To be sure, Section 115 has never been operationalized to lower GHG emissions. Still, there is some historic support for doing so: President Carter’s EPA Administrator stated that U.S. air pollution contributed to acid rain that endangered the public health and welfare of Canada, and Canada’s environmental laws “provided the United States with essentially the same rights that Section 115 provided to Canada.”<sup>221</sup>

Since the 1970s, Section 115 has laid largely dormant.<sup>222</sup> President Bush did seek comment on an Advance Notice of Proposed Rulemaking that listed Section 115 as one of several Clean Air Act authorities to regulate GHGs.<sup>223</sup> But President Obama’s EPA did not use Section 115 to regulate GHGs, instead turning to Clean Air Act authorities in Section 111 and Section 202 to regulate stationary authorities and motor vehicles, respectively.<sup>224</sup>

Considering the Court’s general deference to presidential national security and foreign affairs authorities, Section 115 offers a potential avenue through which to pursue substantive climate action.<sup>225</sup> It holds promise for weathering nondelegation challenges as it draws upon the President’s foreign relations authorities. This delegated authority also “overlaps with authority the Constitution separately vests with another branch,” one of the guidelines outlined

218. For a similar argument, see Burger, *supra* note 139.

219. 42 U.S.C. § 7415(a) (2018).

220. If a state refuses to revise its SIPs, EPA can promulgate a federal implementation plan that achieves the same goal. *See* 42 U.S.C. § 7410(c).

221. *See* COMBATING CLIMATE CHANGE WITH SECTION 115 OF THE CLEAN AIR ACT: LAW AND POLICY RATIONALES, *supra* note 144.

222. And the D.C. Circuit held that use of Section 115’s authorities must follow the APA’s rulemaking process. *Thomas v. New York*, 802 F.2d 1443, 1447 (D.C. Cir. 1986).

223. Advanced Notice of Proposed Rulemaking for Greenhouse Gases Under the Clean Air Act, 73 Fed. Reg. 44,482 (July 30, 2008).

224. *See* Burger et al., *supra* note 138, at 393.

225. The Court recently upheld the President’s foreign affairs recognition power in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015). To be sure, this occurred before Justice Gorsuch, Justice Kavanaugh, and Justice Barrett were appointed to the Court. *See also* Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117, 1117 (2021) (“[A] national security exception defeats the nondelegation doctrine’s goals of preserving the separation of powers and individual liberty.”).

by Justice Gorsuch in his *Gundy* dissent.<sup>226</sup> Further, Section 115 is bolstered by Justice Jackson’s discussion of national security powers in *Youngstown*: “When the President acts pursuant to express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses and all that Congress can delegate.”<sup>227</sup> The EPA has never used this authority before to address climate change.<sup>228</sup> Yet, Justice Jackson’s discussion of existing delegated powers in *Youngstown* should bolster the President’s confidence that Section 115-stylized actions will be afforded a healthy dose of deference.

### C. Applying Nondelegation Challenges to Executive Factfinding Principles

Third, Justice Gorsuch’s emphasis in his *Gundy* dissent on executive factfinding as a guiding principle in evaluating delegations is particularly relevant for prospective climate action. In *Gundy*, Justice Gorsuch referenced the decision by Congress to authorize the construction of the Brooklyn Bridge.<sup>229</sup> This authorization was dependent on the Secretary of War making a determination that the bridge would not interfere with navigation on the East River.<sup>230</sup> The Court upheld this conditional authorization finding “that Congress did not abdicate any of its authority.”<sup>231</sup>

Congress may not have the appetite for bold legislative action today but may be more willing to condition prospective climate authorities on future scientific findings, climate progress, or executive factfinding in general. This could occur in any number of scenarios. Congress could amend Clean Air Act legislation that provides broad authority to EPA to reduce GHG emissions conditioned on a finding that doing so will not inflict outsized economic harm. Another possible scenario: Congress could condition delegated authorities on specific metrics outlined in the National Climate Assessment, IPCC, or another scientific body. Alternatively, it could condition authorities on the amount of GHG emissions in the atmosphere. The Mauna Loa Observatory in Hawaii has been recording monthly mean carbon dioxide levels in the atmosphere since 1958, with a recent reading of approximately 414 parts per million of CO<sub>2</sub> in the atmosphere.<sup>232</sup> Congress could set a threshold—such as 450 parts per million—at which specific Clean Air Act authorities are activated. There is an increasing body of evidence that the physical environment will suffer physical and

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226. *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

227. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J. concurring).

228. For an outstanding summary of the history and role that Section 115 could play in addressing climate change, see COMBATING CLIMATE CHANGE WITH SECTION 115 OF THE CLEAN AIR ACT, *supra* note 144.

229. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

230. *Id.*

231. *Id.* (quoting *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)).

232. UNITED 2020, *supra* note 3, at 4.

catastrophic harm at or near a 1.5 degree Celsius warming.<sup>233</sup> Might Congress choose to trigger supplemental climate authorities when the executive branch determines that a specific GHG concentration or temperature threshold has been met?

Consider another example: Congress could delegate special climate funding or resources to DHS or the State Department upon a finding by the Secretary or other expert body that climate change is significantly contributing to forced migration from Central America to the United States.

To be sure, the scope of this executive fact-finding principle is not unlimited, but it nevertheless provides some flexibility in crafting climate delegations that balance sufficient authority upon meeting certain conditions. And any guidance provided by Congress that depends on executive fact-finding must “still be sufficiently precise and definite to enable Congress, the courts, and the public to ascertain whether Congress’s guidance has been followed”—a test outlined in Justice Gorsuch’s first principle.<sup>234</sup> Nevertheless, this executive fact-finding principle provides some level of flexibility to a Congress temporally restrained from taking immediate action to address climate change.

#### *D. Embrace Climate-Security Delegations*

Fourth, the Biden Administration should emphasize administrative rulemaking efforts via foreign affairs and national security powers outside the Clean Air Act. Given the Supreme Court’s deference to national security delegations, agencies with a foreign relations and national security component (such as State, DoD, and DHS) would be afforded greater deference in climate-security implementation and decision-making. The prospect of a reinvigorated nondelegation doctrine, together with the Court’s traditional deference to executive branch actions in the foreign affairs and national security sphere, could widen a divide in the administrative state. National security-oriented agencies will likely continue to be afforded broader discretion to use existing, delegated powers, while domestic-facing agencies may face more constraints. Congress and the President should consider exploiting this divide when it comes to tackling climate change’s security impacts.<sup>235</sup>

In particular, DHS could take advantage of this divide. Scientists and policy experts increasingly are sounding the alarm on the linkage between climate change, food insecurity, and migration patterns. This is a particular issue in the Northern Triangle area of Central America (comprising Honduras, Guatemala, and El Salvador), which has resulted in record migrants at the United States-

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233. IPCC 1.5 Report, *supra* note 1; *see* Steffen et al., *supra* note 1, at 8257 (stating that current targets to reduce GHG emissions are off-track to “achieve the [s]tabilized [e]arth pathway . . . requiring a fundamental reorientation and restructuring of national and international institutions toward more effective governance at the [e]arth system level”).

234. *Id.*

235. *See* Mark Nevitt, *The Climate Security Reports: What You Need to Know*, LAWFARE (Oct. 26, 2021, 3:47 PM), <https://www.lawfareblog.com/what-you-need-know-about-new-climate-security-reports> [<https://perma.cc/W25D-B6ES>].

Mexico border. For this reason, DHS has published a Climate Action Plan.<sup>236</sup> Further, the Court has eschewed the intelligible principle test in the context of immigration policy. In *Trump v. Hawaii*, the Court addressed a nondelegation question as applied to immigration, and the majority set aside the intelligible principle test. This suggests that DHS could have comparably broader authorities to address climate-induced migration and could use the newly published Climate Action Plan to set the groundwork to link climate change with broader migration patterns at the United States-Mexico border.

In addition, climate security is an area where Congress has shown a willingness to address climate change—witness the recent climate progress via recent defense spending bills.<sup>237</sup> What if Congress, for example, “climatized” the Base Realignment Closure (BRAC) process, delegating broad authorities to the Secretary of Defense—or an unelected panel of national security experts—to make climate-based decisions on military base closures? Such a delegation would implicate both the President’s “power of the sword” as Commander in Chief—which cannot be delegated away—and Congress’s “power of the purse.”<sup>238</sup> This would add an additional layer of complexity to the nondelegation analysis. Alternatively, what if Congress delegated to the Secretary of Defense authorities to drastically reduce the military’s GHG emissions?<sup>239</sup> The DoD is an enormous consumer of fossil fuels.<sup>240</sup> As the DoD moves away from fossil fuels under existing authorities, the Secretary of Defense may be afforded national security deference, particularly if the link can be made between mitigation efforts and operational and mission success.<sup>241</sup> This could encompass the military using renewable energy sources at military installations vulnerable to blackouts and shifting to renewable energy sources for operational deployments around the world. Relatedly, it is increasingly clear that over-reliance on fossil fuels from Russia and other petro-states is itself a national security issue with geopolitical implications.<sup>242</sup>

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236. DEP’T OF HOMELAND SEC., INTEGRATING CLIMATE ADAPTATION INTO THE DEPARTMENT TO STRENGTHEN MISSION OPERATIONS AND INFRASTRUCTURE (Sept. 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_1007\\_opa\\_climate-action-plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_1007_opa_climate-action-plan.pdf) [<https://perma.cc/D8BE-PNGP>].

237. See discussion *supra* Section II.B.2.

238. The Constitution grants Congress the enumerated powers both “to raise and support Armies” and to “provide and maintain a Navy.” U.S. CONST. art. 1, § 8, cls. 12-13.

239. The Watson Institute at Brown University estimates that if the DoD were ranked against other nations of the world, it would be ranked fifty-fifth. See Neta C. Crawford, *Pentagon Fuel Use, Climate Change, and the Costs of War*, BROWN WATSON INST. FOR INT’L AND PUB. AFFS. 2 (Jun. 12, 2019), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2019/Pentagon%20Fuel%20Use%20Climate%20Change%20and%20the%20Costs%20of%20War%20Final.pdf> [<https://perma.cc/PLX2-9JMX>].

240. *Id.*

241. This is known as the concept of “operational energy.” See Sarah E. Light, *Valuing National Security: Climate Change, the Military and Society*, 61 UCLA L. REV. 1772, 1801 n.138 (2014).

242. See U.S. NAT’L INTEL. COUNCIL, NAT’L INTEL. ESTIMATE: CLIMATE CHANGE AND INTERNATIONAL RESPONSES INCREASING CHALLENGES TO U.S. NATIONAL SECURITY THROUGH 2040 (2021); DANIEL YERGIN, *THE NEW MAP: ENERGY, CLIMATE AND THE CLASH OF NATIONS* (2020).

*E. Nondelegation and Framework Legislative Proposals: Whither the Green New Deal?*

Finally, the Court’s conservative shift does not bode well for implementing climate framework legislation such as the Green New Deal, a particularly ambitious climate framework proposal introduced by Representative Ocasio-Cortez (D-NY) and Senator Markey (D-MA).<sup>243</sup> The Green New Deal goes far beyond climate mitigation measures. It states that it is the duty of the federal government “to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States.”<sup>244</sup> To achieve the Green New Deal’s stated goals would require “providing all people of the United States with high quality health care, affordable, safe, and adequate housing, and economic security.”<sup>245</sup> This includes the “creation of high quality union jobs” and the guarantee of a job with a family-sustaining wage, . . . paid vacations, and retirement security to all people of the United States.”<sup>246</sup> Implementation would undoubtedly involve legislative delegations to EPA and other expert agencies. This is uncharted nondelegation authority. Any Green New Deal-stylized legislation will have to navigate a post-*Gundy* world, in which the Court will closely scrutinize broad delegations to expert agencies when important liberty interests are implicated.

Conclusion

In her opinion in *Gundy*, Justice Kagan exclaimed that if the provision in SORNA is unconstitutional, “most of government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”<sup>247</sup> As such, any federal climate statute that empowers the President, EPA Administrator, the Secretary of Transportation, or other administrative agency with broad authorities must be wary of running afoul of the nondelegation doctrine. The nondelegation doctrine acts as a constitutional Sword of Damocles that could nullify innovative climate legislation or regulatory solutions based on interpretations of existing law. Bold climate legislation—whether it is the Green New Deal (or some variant), a carbon tax on fossil fuels, or a GHG cap-and-trade system—would likely require broad delegations to administrative agencies in its day-to-day implementation.

The nondelegation doctrine is always lurking in the background, and it cannot be easily avoided or sidestepped. As Professor Ann Carlson of UCLA and her colleagues have written, “It is impossible for Congress to specify every policy detail within a law, and the expectation that Congress do so is particularly unrealistic for environmental laws which require scientific expertise,

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243. Green New Deal Resolution, H.R. Res. 109, 116th Cong. (2019).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (Kagan, J.).

technological judgment, and risk assessment, all of which change over time based on new developments and understandings.”<sup>248</sup>

Finally, regulatory climate action must still undergo the administrative rulemaking process that will delay many agency actions. By the time the Court hears such a challenge, climate science and public perceptions about the need for climate action will have continued to evolve. The IPCC will have likely issued its final Sixth Climate Assessment report, and the United States will have issued another National Climate Assessment, making the need for climate action even clearer to the American people (and the justices).

In sum, the Court’s view on the nondelegation doctrine will increasingly shape future climate regulations, policy decisions, and lawmaking efforts. It acts as an ever-present livewire that could potentially usurp climate legislation or bold climate regulatory action premised on existing laws. Yet this jurisprudential livewire may well be avoided if the President can tie climate action into Article II authorities in the fields of foreign relations, national security, and emergency power.

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248. 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/> [<https://perma.cc/5PHH-ESXS>].